

The Truth about (Telecom) Immunity

by [Greg Nojeim](#) [1]

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Administration officials are complaining about House Democrats stalling legislation that would grant immunity to any telecommunications carrier that assisted with its domestic spying program. Without that immunity cloak, the White House says, telecoms will hesitate to cooperate with such programs in the future. It's true that telecom assistance is crucial to successful electronic surveillance. But what's getting lost in all the heated rhetoric is that telecoms, under current law, already have immunity when they assist in *lawful* electronic surveillance. Congress specifically gave telecoms that legal cover in the Foreign Intelligence Surveillance Act. In the now-expired Protect America Act, which amended FISA, Congress also provided for telecom immunity in the course of lawful surveillance. Further, *every* major piece of legislation now pending in Congress to amend FISA also provides for telecom immunity; all major players in the debate around amending FISA agree on this point. What Administration officials tend to obscure is that what they seek is not immunity for future cooperation with *lawful* surveillance, but rather telecom immunity for assisting with *unlawful surveillance* conducted from October 2001 through January 17, 2007, as part of the warrantless wiretap program initiated by the White House. FISA carries a big stick to deter telecom assistance with illegal spying: each person aggrieved by illegal spying can sue for up to \$10,000. That's a powerful deterrent because at \$10,000 per customer, a large telecom provider has billions of dollars of exposure. The Administration claims that the telecoms won't cooperate with future government surveillance activities unless retroactive immunity is granted, thus putting the nation at risk. The White House has it backwards. Without the cloak of immunity, it's telecom assistance with unlawful surveillance activities that would suffer, and rightly so, because they would fear being hauled into court. If telecom providers would refuse to assist in illegal spying programs, it sets up classic Washington showdown. The Administration would be forced to ask Congress to change the law and make legally questionable surveillance lawful. Congress might agree to change the law and if it did, immunity for assistance would no doubt be extended. Or, it might decide to leave the law alone, in which case there would be no immunity, and, in all likelihood, no *illegal surveillance* either. Retroactive telecom immunity for assistance with past illegal spying programs merely begets assistance with unlawful surveillance in the future. In doing so, it undermines the financial penalties currently in FISA. The Senate has voted to grant nearly total retroactive immunity; the House rejected that position. Negotiators now search for a compromise. A cap on damages is the best compromise approach. It would preclude ruinous liability for telecoms that assisted with illegal surveillance at the request of intelligence officials, while maintaining FISA's financial disincentive for helping government officials break the law.

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