



September 5, 2007

[address]

Dear [Senator or Representative] [name],

I am writing to urge you to oppose proposed grants of immunity to telecommunications companies who have collaborated with National Security Agency (NSA) to illegally collect phone records of Americans and invade our privacy. I was disappointed that you voted in favor of allowing warrantless surveillance, including surveillance of American citizens, via the so-called Protect America Act. Nonetheless, I hope I can count on your future efforts to ensure accountability for past surveillance undertaken in violation of law. At a minimum, no action should be taken until both Congress and local regulators have the opportunity to complete investigations of this program. Recent admissions by the Director of National Intelligence have confirmed the program and reinforced the need for continued investigation.

As you know, USA Today revealed last year that since shortly after 9/11 at least two major phone companies—AT&T and Verizon—have been voluntarily granting the NSA direct, mass access to their customers' calling records, and that the NSA had compiled a giant database of those records. Subsequently confirmed by 19 lawmakers, this program extends to all Americans, not just those suspected of terrorist or criminal activity. Leslie Cauley, "NSA Has Massive Database of Americans' Phone Calls," *USA Today*, May 11, 2006; Susan Page, "Lawmakers: NSA Database Incomplete," *USA Today*, June 30, 2006.

Those revelations of telecommunications spying led to a flurry of activity and investigations at the state level. In Washington State, the Utilities and Transportation Commission (UTC) has opened an investigation docket (no. UT-060856), and ordered preservation of relevant documents, although it has deferred active investigation until resolution of federal legal issues—especially the state secrets privilege—in federal courts. Washington is not alone; the Attorney General in New Jersey, and Public Utility Commissions in Maine, Vermont, Connecticut and Missouri commenced formal investigations, which have now been consolidated in the Northern District of California as part of a number of lawsuits against the telecommunications companies. All of these states are concerned that this program not only violates federal law, including the Electronic Communications Privacy Act (ECPA), but also numerous state laws. 18 U.S.C. §2703.

Throughout the entire course of the UTC hearings to decide whether to open an investigation—and throughout the course of investigations conducted by regulators across the country—the telecommunications companies and the NSA have maintained that their program is so secret that any investigation or even discussion of it would

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jeopardize national security. They have further claimed that they are precluded by law from even confirming or denying that any records have been provided to the NSA. And they have asserted that the state secrets privilege, which shields matters of national security from being used as evidence in court, would pose an insurmountable barrier to investigation and inevitably lead to dismissal of any lawsuit.

Despite these alleged insurmountable barriers to obtaining any information about the spying program, the Director of National Intelligence, Mike McConnell, recently officially confirmed the substance of the allegations. In a wide ranging interview with the El Paso Times, McConnell described the Bush Administration's rationale for changes to the Foreign Intelligence Surveillance Act (FISA), including an alleged difficulty in securing FISA warrants and the need to seek immunity for telecommunications companies. He stated, "[n]ow the second part of the issue was under the president's program, the terrorist surveillance program, the private sector had assisted us. Because if you're going to get access you've got to have a partner and they were being sued." Chris Roberts, "Transcript: Debate on the foreign intelligence surveillance act," *El Paso Times*, August 22, 2007 (link: http://www.elpasotimes.com/news/ci_6685679).

With this interview Director McConnell has cast serious doubt on the supposed barriers to further investigation. After all, utility regulators would only investigate whether telecommunications companies have cooperated to share information with the NSA, and if so, whether there is a legal basis for that cooperation. Director McConnell has confirmed that cooperation and hence any investigation can do no more harm than his interview. Further, the state secrets privilege only applies to government activities and programs that are maintained in secrecy. By granting this interview, Director McConnell lifted the veil of that official secrecy and increased the likelihood that court cases—both those brought by regulators and by private parties—will go forward.

Now it is up to Congress. You must ensure that no immunity is granted to these companies, at least until full investigations—either by local regulators, Congress, or both—are complete. All indications are that the National Security Agency is making widespread use of Americans' personal information, in direct opposition to the Congressional intent as manifested by ECPA. The American public deserves to know whether or not this is true, and be assured that this unlawful spying has ceased. And both telecommunications companies and the NSA must be held accountable for what may be the largest scale spying scandal in American history.

Sincerely,

Kathleen Taylor
Executive Director