Partners In the War On Terror
Telecommunications Firms And the Senate's FISA Bill

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In the immediate aftermath of Sept. 11, the Bush administration had a choice:
Aggressively pursue potential terrorists using existing laws or devise new, secret
intelligence programs in uncharted legal waters.

Unfortunately, President Bush often chose the latter, and the legitimacy and effectiveness
of our efforts to fight terrorism were dramatically undermined.

The president's warrantless surveillance program and
his decision to go it alone -- without input from
Congress or the courts -- have had devastating
consequences. One is that private companies, which
would normally comply with legitimate national
security requests, now have incentive to say no.

Here's why. Within weeks of the 2001 attacks,
communications companies received written requests
and directives for assistance with intelligence
activities authorized by the president. These
companies were assured that their cooperation was not
only legal but also necessary because of their unique
technical capabilities. They were also told it was their
patriotic duty to help protect the country after the
devastating attacks on our homeland.

Today there is significant debate about whether the
underlying program -- the president's warrantless
surveillance plan -- was legal or violated
constitutional rights. That is an important debate, and
those questions must be answered.

In the meantime, however, these companies are being sued, which is unfair and unwise.
As the operational details of the program remain highly classified, the companies are
prevented from defending themselves in court. And if we require them to face a
mountain of lawsuits, we risk losing their support in the future.

Over the past year, the Senate intelligence committee has examined this issue, along with
the need to bring the warrantless surveillance program within the law. We closely studied
the facts, the documents and the alternatives to liability for the companies. Ultimately, we
concluded that if we subject companies to lawsuits when doing so is patently unfair, we
will forfeit industry as a crucial tool in our national defense. So we crafted legislation to
do two important things: modernize the Foreign Intelligence Surveillance Act so the
do two important things: modernize the Foreign Intelligence Surveillance Act so the program is monitored by the courts with proper checks and balances, and keep the focus over legality where it belongs -- on the government.

Unfortunately, immunity for telecommunications companies has become a cause celebre for opponents of the surveillance program as a whole, and that has led to widespread confusion.

Let's be clear. First, there is no automatic amnesty. All Americans, including corporate citizens, must follow the law and be held accountable for their actions. The bill authorizes case-by-case review in the courts only when the attorney general certifies that a company's actions were based on assurances of legality, and the court is specifically required to determine whether the attorney general abused his discretion before immunity can be granted.

Second, lawsuits against the government can go forward. There is little doubt that the government was operating in, at best, a legal gray area. If administration officials abused their power or improperly violated the privacy of innocent people, they must be held accountable. That is exactly why we rejected the White House's year-long push for blanket immunity covering government officials.

Third, immunity is the only procedural mechanism that works. We decided against "substitution" (putting the government in the shoes of the companies) and "indemnification" (making the government cover all costs) because both still mistakenly place the onus on the companies rather than on the government. And we recognized that this could expose too much about our intelligence capabilities, jeopardizing collection that targets foreign threats.

The fact is, private industry must remain an essential partner in law enforcement and national security. We face an enemy that uses every tool and technology of 21st-century life, and we must do the same.

If American business -- airlines, banks, utilities and many others -- were to decide that it would be too risky to comply with legally certified requests, or to insist on verifying every request in court, our intelligence collection could come to a screeching halt. The impact would be devastating to the intelligence community, the Justice Department and military officials who are hunting down our enemies.

The passions stirred by this case are understandable. The president's secret programs have generated intense anger and resentment, and, as someone who has challenged this misuse of power from the beginning, I share those sentiments.

But this president is only going to be in office for another year or so, while the fight against terrorism will go on, perhaps for decades. Even as we hold government officials accountable for mistakes or wrongdoing -- through the courts, congressional investigations and the electoral process -- we must preserve the cooperation of private industry for the next president, and for every one who follows.

The writer, a Democrat from West Virginia, is chairman of the Senate Select Committee on Intelligence.