

GEORGE BUSH'S "PERFECT CRIME"

You guys are chatty, so I thought I'd put up some of the Feingold speech you've been talking about.

The telephone companies and the government have been operating under this simple framework for 30 years. The companies have experienced, highly trained, and highly compensated lawyers who know this law inside and out.

In view of this history, it is inconceivable that any telephone companies that allegedly cooperated with the administration's warrantless wiretapping program did not know what their obligations were. And it is just as implausible that those companies believed they were entitled to simply assume the lawfulness of a government request for assistance. This whole effort to obtain retroactive immunity is based on an assumption that doesn't hold water.

And quite frankly, the claim that any telephone company that cooperates with a government request for assistance is simply acting out of a sense of patriotic duty doesn't fare much better. Just recently, we learned that telecommunications companies have cut off wiretaps when the government failed to promptly pay its bills. The Department of Justice's Office of the Inspector General released a report last month finding that, quote, "late payments have resulted in telecommunications carriers actually disconnecting phone lines established to deliver surveillance to the FBI, resulting in lost evidence." Since when

does patriotic duty come with a price tag? Evidently, assisting the government's criminal and intelligence investigation efforts fell somewhere below collecting a paycheck on the companies' list of priorities.

Mr. President, some of my colleagues have argued that the telephone companies alleged to have cooperated with the program had a good faith belief that their actions were in accordance with the law. But there is an entirely separate statute, in addition to the certification provision, that already provides telephone companies with a precisely defined good faith defense. Under this provision, which is found in section 2520 of title 18, if the companies rely in good faith on a court order or other statutory or legislative authorization, they have a complete defense to liability. This is a generous defense, Mr. President. But as generous as it is, it is not unlimited. A court must find that the telephone company determined, in good faith, that there was a judicial, legislative, or statutory authorization for the requested assistance.

Mr. President, I also want to address the argument that retroactive immunity is necessary because the telephone companies can't defend themselves in court. When I hear this argument, I can't help thinking that this administration has staged the perfect crime. Enlist private companies to allegedly provide assistance in an illegal government program, then prevent any judicial inquiry into the program by claiming a privilege – the so-called "state secrets" privilege – that not only shields your own actions from scrutiny, but enables the companies to evade judicial scrutiny as well by

claiming that they are defenseless. All the administration needs to get away with it is Congress's blessing.

And that is exactly why immunity is the wrong solution. Think about what we'd be doing. We'd be saying that in matters of national security, you can break the law with impunity because the courts can't handle national security materials. That is outrageous. Do we really want to create a law-free zone for crimes that involve national security matters? If the government's use of the state secrets privilege is interfering with holding companies accountable for alleged violations of the law, the solution isn't to shrug and give up on accountability. The solution is to address the privilege head-on and make sure it doesn't become a license to evade the laws that we've passed.

In any event, this notion that federal courts can't handle national security matters is insulting to the judges that this body has seen fit to confirm – and it's contrary to the facts. Mr. President, cases involving classified information are decided routinely by the federal courts. That's why we have a statute, the Classified Information Procedures Act, to govern how courts handle classified materials. Pursuant to that statute, courts have in place procedures that have successfully protected classified information for many years. There's no need to create a "classified materials" exception to our justice system.