

Freeze: Congress Can and Should Take Time to Consider the Complex Issues Arising from the Carriers' Demand for Amnesty

As Sen. Specter recently noted, **the question of amnesty for the telecommunications carriers is “a very complex issue.”** It is also one that implicates the Constitutional and statutory rights of tens of millions of ordinary Americans to privacy in their everyday communications. Yet, the Senate Judiciary Committee's consideration of amnesty — and with it the only opportunity for a process open to the public — has been compressed into just the last few weeks, barely time for a single public hearing and not nearly enough time to build a factual record as detailed as the enormous importance of the issue demands.

Fortunately, there is no statutory or public policy reason for the amnesty debate to be rushed. Unlike the other changes to FISA at issue, retroactive amnesty is not part of existing law and thus not subject to expiration of the Protect America Act. Taking time now is not only possible, but desirable. It would:

- Give Congress time to develop a **meaningful legislative** record about the constitutional and practical problems created by full retroactive immunity and to carefully compare the advantages and disadvantages of compromises such as **indemnification, damage caps, or substitution.**
- Prevent the complex question of fashioning alternatives to full retroactive immunity from clouding or overshadowing **the larger FISA reform policy debate.**
- Address all concerns, real or imagined, about **burdens of litigation on the telephone companies, the consequences and scope of their potential liability, or alleged effects on national security.**

EFF does not believe that amnesty need or should be awarded to telcos, or that plaintiffs in the current cases should have their rights reduced. However, if Congress is concerned that neither party be prejudiced by the time taken to carefully consider the amnesty issue, it could “freeze” the litigation where it stands at this moment. This procedural “time out” could be achieved by allowing the United States (which has intervened in the suits against the telephone companies) to move for a stay of one year in any “covered civil action.” The law would specify that that motion itself would operate as a “stay” stopping the clock on the litigation and all related filing and other deadlines.

Congress has adopted this kind of a “freeze” before and the Supreme Court found it constitutional. In the Prison Litigation Reform Act of 1995 (PLRA) Congress changed the legal standards for prisoner litigation aimed at correcting unconstitutional prison conditions, relying on a stay mechanism like the one suggested here to achieve its objective. [See 18 U.S.C. § 3626(e)(2).]

In *Miller v. French*, the Supreme Court upheld the Congressional stay mechanism, ruling very recently that it did not violate the separation of powers. [See *Miller v. French*, 530 U.S. 327 (2000)] Significantly, the Court upheld Congress' stay procedure even though the cases affected there already had been fully decided and the only remaining issues were enforcement of equitable relief. The pending litigation against telephone companies for massive breach of their statutory duties to protect their customers' privacy has barely begun and will, in most cases, not be resolved for years even if the cases proceeded on their current schedules. Accordingly, because the potential for prejudicing the parties is lower, **a Congressional freeze in these cases is even more likely than the one in *Miller v. French* to be found constitutional if challenged.**

Amnesty for telephone companies is complicated. The right way to study the issue is simple. Congress can and should take the time to do it right, the time to hold public hearings with respected scholars, the time needed to protect the Constitution.