

We need to be working hard to craft a comprehensive rural development plan that will spur investment in agribusiness and promote economic activity in the agriculture center. This bill, the Fuels Security Act of 2003, is an important part of such a rural development plan.

It is clear that use of ethanol, as part of a renewable fuels standard is a win-win-win situation: a win for farmers, a win for consumers, and a win for the environment. That is why I rise as an original cosponsor and strong supporter of this renewable fuels legislation.

If passed, the Fuels Security Act will establish a 2.3-billion-gallon renewable fuels standard in 2004, growing every year until it reaches 5 billion gallons by 2012. There are many benefits to this legislation.

It will dispute 1.6 billion barrels of oil over the next decade; reduce our trade deficit by \$34.1 billion; increase new investment in rural communities by more than \$5.3 billion; boost the demand for feed grains and soybeans by more than 1.5 billion bushels over the next decade; create more than 214,000 new jobs throughout the U.S. economy; and expand household income by an additional \$51.7 billion over the next decade.

It is quite apparent that increased use of ethanol will do much to boost a struggling U.S. agriculture economy and will help establish a more sound national energy policy.

The greater production of ethanol will also be beneficial to the environment. Studies show ethanol reduces emissions of carbon monoxide and hydrocarbons by 20 percent and particulates by 40 percent in 1990 and newer vehicles. In 2001 ethanol reduced greenhouse gas emissions by 3.6 million tons, the equivalent of removing more than 520,000 vehicles from the road.

A choice for ethanol is a choice for America, and its energy consumers, its farmers and its environment.

Enactment of the Fuel Security Act—along with other provisions in this bill that emphasize new sources of energy production from renewables like wind power, as well as conservation to further reduce our dependence upon foreign sources of energy—will help us to reverse our 100-year-old reliance on fossil fuels a more pressing concern than ever given the possibility of military conflict in the Mideast and the continuing economic turmoil in Venezuela.

I am unabashedly proud of what my home State has accomplished in this area. Within the State of Nebraska, during the period from 1991 to 2001, seven ethanol plants were constructed and several of these facilities were expanded more than once during the decade. Specific benefits of the ethanol program in Nebraska include: \$11.15 billion in new capital investment in ethanol processing plants; 1,005 permanent jobs at the ethanol facilities and 5,115 induced jobs directly related to plant construction, operation, and maintenance—

the permanent jobs alone generate an annual payroll of \$44 million—and more than 210 million bushels of corn and grain sorghum is processed at the plants annually. These economic benefits and others have increased each year during the past decade due to plant expansion, employment increases, and additional capital investment.

If each State produces 10 percent of its own domestic, renewable fuel, as Nebraska does, America will have turned the corner away from dependence on foreign sources of energy.

When you take a hard look at the facts, you will see that this legislation is nothing but beneficial for America. The Fuels Security Act is balanced, comprehensive, and is the result of the dedication of so many, especially Senator DASCHLE and Senator LUGAR.

Now I ask my colleagues to join me in promoting new opportunities for the technologies that will put our Nation and the world's transportation fuels on solid, sustainable, and environmentally enhancing ground. We owe it to our country now—and to future generations—in pass this legislation.

#### FOREIGN INTELLIGENCE SURVEILLANCE ACT

The PRESIDING OFFICER. Under the previous order, the hour of 11:30 having arrived, S. 113 is referred to the Committee on Intelligence, and the committee is discharged from further consideration of the measure, and the Senate will now proceed to consider the measure, which the clerk will report.

The legislative clerk read as follows:

A bill (S. 113) to exclude United States persons from the definition of foreign power under the Foreign Intelligence Surveillance Act of 1978 relating to international terrorism.

The Senate proceeded to consider the bill, which had been reported from the Committee on the Judiciary, with an amendment to the title and an amendment to strike all after the enacting clause and inserting in lieu thereof the following:

[Strike the part shown in black brackets and insert the part shown in italic.]

S. 113

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

#### **SECTION 1. EXCLUSION OF UNITED STATES PERSONS FROM DEFINITION OF FOREIGN POWER IN FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978 RELATING TO INTERNATIONAL TERRORISM.**

[Paragraph (4) of section 101(a) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801(a)) is amended to read as follows:

["(4) a person, other than a United States person, or group that is engaged in international terrorism or activities in preparation therefor;"]

#### **SECTION 1. TREATMENT AS AGENT OF A FOREIGN POWER UNDER FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978 OF NON-UNITED STATES PERSONS WHO ENGAGE IN INTERNATIONAL TERRORISM WITHOUT AFFILIATION WITH INTERNATIONAL TERRORIST GROUPS.**

(a) IN GENERAL.—Section 101(b)(1) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801(b)(1)) is amended by adding at the end the following new subparagraph:

“(C) engages in international terrorism or activities in preparation therefor; or”

(b) SUNSET.—The amendment made by subsection (a) shall be subject to the sunset provision in section 224 of the USA PATRIOT Act of 2001 (Public Law 107-56; 115 Stat. 295), including the exception provided in subsection (b) of such section 224.

The PRESIDING OFFICER. The Senator from Arizona is recognized.

Mr. KYL. Mr. President, I appreciate the opportunity to take up this bill. It is under a unanimous consent agreement. Pursuant to that agreement, we are going to have some opening statements. I will take about 15 minutes and then Senator SCHUMER, the cosponsor of the amendment, will be presenting his remarks. After that, anyone who would like to speak for or against this bill can do so.

There will be two amendments in order. One will be an accepted amendment offered by the Senator from Wisconsin, Mr. FEINGOLD, and another will be offered by Senator FEINSTEIN of California on which there is, I believe, a total of 4 hours authorized for debate. I do not think we will need that much time, but when the time comes, I urge my colleagues to oppose and defeat the Feinstein amendment so we can go to final passage of this legislation.

I will briefly describe what the bill does and why we need it. Then I will get into some of the procedure involved. It is actually very simple. It involves an existing law that we passed in 1978 called the Foreign Intelligence Surveillance Act, known by the acronym FISA. FISA allows us to get warrants, among other things, and allows us to surveil people we suspect of committing acts of terrorism against us; for example, to get a warrant to search their computer or their home.

There are two instances where the law currently applies. The underlying predicate is that there has to be probable cause that somebody is committing, about to commit, or planning to commit some kind of criminal act, a terrorism kind of act. It applies to two kinds of people: somebody who is either working for a foreign government or somebody who is working for a foreign terrorist organization.

That leaves a little loophole because there are some terrorists who are not on the membership list, shall we say, or who are not card-carrying members of a foreign terrorist organization or a foreign government; people such as Zacarias Moussaoui, for example, whom we now believe to have been loosely involved in the al-Qaida attack of September 11.

At the time, it was not possible to prove that he was involved with a foreign intelligence organization. It may

well be that at the end of the day he was, in fact, a lone wolf, operating on his own, but very loosely affiliated with the radical Islamic movement which has underpinned a lot of the terrorism which threatens the United States and the rest of the world today.

The law as written in 1978 was intended to apply to a very specific group of people, the Soviet spies, for example, or the Baader-Meinhof gang or the Red Brigade or the Red Army. There were a lot of these organizations back then, and they were very tightly knit organizations. If somebody was involved in one of these groups, they were involved. But today's radical Islamic movement around the world that associates itself with terrorism is much more amorphous. As I factitiously said, these people do not have cards identifying themselves as members of these organizations. They are people who hate the West and the United States. They move in and out of the different countries of the world. They will take training in a certain place. They will affiliate a little while with a group and then move on to support some other group.

The bottom line is that it is very difficult, sometimes impossible, to prove that they are affiliated with a specific group. In some cases, they are not. They are simply acting on their own. But they are still terrorists. They are still foreign terrorists. They still mean to do us harm on the international stage and should be covered by the Foreign Intelligence Surveillance Act.

We close this loophole by providing that not only does it cover the person working for a foreign government, or who we can prove at that point is working for a foreign terrorist organization, it also includes the so-called lone wolf terrorist, or the individual we cannot yet prove is directly affiliated with one of these amorphous groups. That is really all the bill does.

I will give a specific example. I mentioned Zacarias Moussaoui. Remember all of the criticism. He was a person who was taking flying lessons. It was under very suspicious circumstances. We understood this prior to September 11. There were people who wanted to get a Foreign Intelligence Surveillance Act warrant to search his computer. It went to the FBI, and somebody in the FBI concluded that, yes, all of this information looked good in the warrant except that they could not specifically tie him to a specific international group. Quite a bit of time was used following up leads that led to some group of Chechen rebels, but that ended up to be kind of a dry hole. Meanwhile, the attack of September 11 occurred.

Immediately after that attack, we were able to get the warrant. His case is pending in Northern Virginia at this time. He was not able to hook up with the attackers of September 11, but clearly his is an example of a case to which this kind of provision should apply.

I will quote something from some of the testimony that we had with regard

to the need for this legislation. Spike Bowman, who is the Deputy General Counsel of the FBI, testified at a Senate Select Committee on Intelligence hearing on the predecessor bill to the one that is before us right now. I will quote at length from his testimony. He said:

When FISA was enacted, terrorism was very different from what we see today. In the 1970s, terrorism more often targeted individuals, often carefully selected. This was the usual pattern of the Japanese Red Army, the Red Brigades and similar organizations listed by name in the legislative history of FISA. Today we see terrorism far more lethal and far more indiscriminate than could have been imagined in 1978. It takes only the events of the September 11, 2001, to fully comprehend the difference of a couple of decades. But there is another difference as well. Where we once saw terrorism formed solely around organized groups, today we often see individuals willing to commit indiscriminate acts of terror. It may be that these individuals are affiliated with groups that we do not see, but it may be that they are simply radicals who desire to bring about destruction.

We are increasingly seeing terrorist suspects who appear to operate at a distance from these organizations. In perhaps an oversimplification, but illustrative nevertheless, what we see today are (1) agents of foreign powers in the traditional sense who are associated with some organization or discernible group, (2) individuals who appear to have connections with multiple terrorist organizations but who do not appear to owe any allegiance to any one of them, but rather owe allegiance to the International Jihad movement, and (3) individuals who appear to be personally oriented toward terrorism but with whom there is no known connection to a foreign power.

This phenomenon which we have seen . . . growing for the past two or three years, appears to stem from a social movement that began some imprecise time, but certainly more than a decade ago. It is a global phenomenon which the FBI refers to as the International Jihad Movement. By way of background we believe we can see the contemporary development of this movement, and its focus on terrorism, rooted in the Soviet invasion of Afghanistan.

During the decade-long Soviet/Afghan conflict, anywhere from 10,000 to 25,000 Muslim fighters representing some forty-three countries put aside substantial cultural differences to fight alongside each other in Afghanistan. The force drawing them together was the Islamic concept of "umma" or Muslim community. In this concept, nationalism is secondary to the Muslim community as a whole. As a result, Muslims from disparate cultures trained together, formed relationships, sometimes assembled in groups and otherwise would have been at odds with one another.] and acquired common ideologies.

Following the withdrawal of the Soviet forces in Afghanistan, many of these fighters returned to their homelands, but they returned with new skills and dangerous ideas. They now had newly acquired terrorist training as guerilla warfare [had been] the only way they could combat the more advanced Soviet forces.

Information from a variety of sources repeatedly carries the theme from Islamic radicals that expresses the opinion that we just don't get it. Terrorists world-wide speak of jihad and wonder why the western world is focused on groups rather than on concepts that make them a community.

The lesson to be taken from how [Islamic terrorists share information] is that al-Qaida

is far less a large organization than a facilitator, sometimes orchestrator of Islamic militants around the globe. These militants are linked by ideas and goals, not by organizational structure.

The United States and its allies, to include law enforcement and intelligence components worldwide[,] have had an impact on the terrorists, but [the terrorists] are adapting to changing circumstances. Speaking solely from an operational perspective, investigation of these individuals who have no clear connection to organized terrorism, or tenuous ties to multiple organizations, is becoming increasingly difficult. The current FISA statute has served the Nation well, but the international Jihad movement demonstrates the need to consider whether a different formulation is needed to address the contemporary terrorist problem.

Of course, the different way we are approaching it is by adding a third element to the FISA statute. If you are a non-United States person and otherwise we have probable cause to believe you are planning an act of or executing an act of terrorism, we have the right to seek a warrant in the FISA court to search you, surveil you, whatever the warrant might request.

That is the essence of this legislation. As I said, when FISA was enacted in 1978, this international movement around an idea had not yet evolved and we were focused on organizations. Now we need to add to the statute, in addition to nations and specific organizations, non-United States persons—in other words, foreign persons—who we believe are carrying out some terrorist plan with international roots, directed at the United States, sufficient to bring it under the aegis of the FISA statute.

It is the responsibility of Congress to adapt our laws to these changes. It is this challenge that Senator SCHUMER and I are attempting to address by this amendment.

I introduced this bill with Senator SCHUMER in the 107th Congress on June 5, 2002, so it has been around almost a full year. The current bill is the identical bill introduced in the previous Congress. We held a Select Committee on Interrogation hearing July 2002, the testimony from which I just quoted, and we heard testimony from six witnesses.

There was no Judiciary markup in the previous Congress, but in the 108th Congress, when we reintroduced the bill January 9, the Senate Judiciary Committee held a markup. This bill, by the way, was cosponsored by Chairman HATCH, Senators DEWINE, SCHUMER, myself, CHAMBLISS, SESSIONS, and there may be others of whom I am not aware.

March 6, the Judiciary Committee marked up the bill at an executive session and adopted a substitute amendment, which is the bill we have before the Senate now, rejected a Feingold amendment by a vote of 11 to 4, and voted to report the bill unanimously by a vote of 19 to 0 to the Senate. That is where we are today.

We hope to call anyone who has an interest in this to the floor to express their ideas. As I say, we are going to

accept one amendment and we will be debating a second amendment, which I hope we defeat. There will be a break in our consideration here for some other business in the middle of the day. We will return in midafternoon to complete the work on the bill. It should be done by the late afternoon.

Until Senator SCHUMER arrives, I make another point. There has been a worry on the part of some that this expands the Foreign Intelligence Surveillance Act to private American citizens. I make it crystal clear that is not true.

By definition, we could not do that. This is a law that is only justified because it relates to international terrorism. So if you come here from a foreign country, you are a non-U.S. person, you come from a foreign country, intending to do harm to Americans, as part of this international movement, whether you are a member of some specific organization or not, the act will be allowed to be used to determine whether we should take further action against you. It is not pertaining to U.S. citizens; it is only to non-U.S. citizens and only in this particular context.

Second, you cannot just do this willy-nilly, like every other warrant. Whether under FISA or not, we have to have probable cause. That requirement is not changed one iota. If anyone suggests there is anything improper, certainly it is not unconstitutional, but to the extent anyone suggests that we are ready to recite the reasons why, that is not true.

I note the Department of Justice has sent a letter announcing its support for this legislation. Among those testifying in favor of it, the U.S. Attorney General, the Director of the Bureau of Investigation, former CIA Director, and any number of officials in our intelligence and law enforcement community have endorsed the bill.

I direct Members' attention to a letter I will later put into the RECORD, dated July 31, 2002, which presented the Department of Justice's views on the bill and announced its support for the legislation. It provides a detailed analysis of this question about the fourth amendment and whether or not there would be any constitutional issues.

The Department concluded that the bill would satisfy constitutional requirements specifically related to the fourth amendment. In particular, the Department emphasized that anyone monitored pursuant to the bill would be someone who had at the very least been involved in terrorist acts that transcends national boundaries in term of the means they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which the perpetrators operate or seek asylum.

As a result, it would still be limited to collecting foreign intelligence for the international responsibilities of the United States and the duties of the Federal Government to the States in matters involving foreign terrorism, to wit, protecting the American citizens

from people who come here to do us harm.

Let me conclude these remarks by noting that I have enjoyed the cooperation, as usual, of my colleague who serves on the Judiciary Committee, the Senator from New York, Mr. SCHUMER, who has been a strong advocate of this kind of provision for a long time and whose assistance in this matter has been extraordinarily helpful.

I yield the floor.

The PRESIDING OFFICER. The Senator from New York.

Mr. SCHUMER. Mr. President, first, I thank my colleague, Senator KYL from Arizona, for his great work on this and many other issues.

We live in a new world. It is a post-September 11 world. We have to adjust to those realities. I believe we can do both, have security and liberty, the great concern of our Founding Fathers. I think this bill, in a careful and thoughtful way, readjusts that balance.

My colleague from Arizona has been a leader on these issues. We do not always agree, but we often do. It is a pleasure to work with him. His persistence and dedication to making this country secure and maintaining its freedom at the same time is something I share and I respect.

As I mentioned, the age-old debate between security and freedom is at the nub of the Constitution. It was probably debated more by the Founding Fathers than any other issue. They realized that in times of crisis, in times of war, in times of attack, the pendulum could swing more to the security side and at other times to the freedom side. They realized, as Benjamin Franklin said, that giving up even an ounce of precious freedom is a very serious thing to do.

FISA is a debate about that. While I certainly believe, as I think most of my colleagues do, given the fact that what we have learned since September 11, that terrorists can strike in our heartland, that small groups of people empowered by technology can do the kind of damage we have never seen before, which my city suffered on September 11. We remember the losses every day. We do have to reexamine this, particularly when there has been one law for people overseas and one law for people in this country because the walls have changed.

That is a general debate on FISA. I know some of my colleagues have wanted to do that today. My colleague from Wisconsin says the law has shifted too far one way. My colleague from Utah thinks it has shifted the other way. Senator KYL and I are not debating that. We do not give up any liberty in this bill. The very standards that are now in the law with FISA remain, standards of what must be done to get a FISA warrant. Those do not change. The only change is our recognition that in these new post-9/11 years, technology has allowed small groups unknown before, or even lone wolf individuals, to commit terrorism, and if

they are doing the same thing as established terrorist groups or established terrorist nations, there seems to be no reason why they shouldn't be susceptible to the same type of surveillance of other groups. That is at the nub of this issue.

We are informed by history. Again, those who say don't do anything to change don't look at history, in my judgment. We learned from the disclosures regarding Zacarias Moussaoui, the so-called 20th hijacker, that the FBI had abundant reason to be suspicious of him before 9/11, but they did not act, they did not do what Agent Rowley wanted them to do. She, of course, has been heralded as a great leader and a great American for what she has done, and I join in that. But they didn't want to do what she wanted, which was pursue a warrant to dig up evidence that may have been the thread which, if pulled, would have unraveled the terrorists' plans.

The anguish she felt then, and so many of us feel afterwards, that this might have been stopped but wasn't because of a provision in the FISA law that quickly became archaic as terrorists advanced and we learned that small groups could do such damage, is what motivates this legislation.

One reason we have been given—and Agent Rowley agrees with this, I believe—why the FBI did not seek the warrant is the bar for getting those warrants when it came to those not affiliated with known terrorist groups or known terrorist countries was set too high.

That is why Senator KYL and I introduced this amendment to FISA. We intend to make it easier for law enforcement to get warrants against non-U.S. citizens—this does not affect a single U.S. citizen—who are suspected of preparing to commit acts of terrorism.

As I mentioned, we leave two of the standards in place, the ones that measure the bar. Right now, the FBI is required to show three things before they can get a warrant: They must show the target is engaging in or preparing to engage in international terrorism. We keep that requirement. It does not change. They must show a significant purpose of the surveillance is foreign-intelligence gathering. We are keeping that requirement, too, that foreign-intelligence gathering is a significant purpose.

Here is the problem. They also must show under present law that the target is an agent of a foreign power, such as Iraq, or a known foreign terrorist group, such as Hamas or al-Qaida. That is the hurdle we are removing. If that requirement had not been in place, there is no question the FBI could have gotten a warrant to do electronic surveillance on Zacarias Moussaoui and, who knows, not certainly but perhaps, 9/11 might not have occurred.

That is the anguish we all face. Right now we know there may be terrorists plotting on American soil. We may have all kinds of reasons to believe

they are preparing to commit acts of terrorism. But we cannot do the surveillance we need if we cannot tie them to a foreign power or an international terrorist group. It is a catch-22. We need the surveillance to get the information we need to be able to do the surveillance. It makes no sense. The simple fact is, it should not matter whether we can tie someone to a foreign power. Whether our intelligence is just not good enough or whether the terrorist is acting as a lone wolf or it is a new group of 10 people who have not been affiliated with any known terrorist group, should not affect whether we can do surveillance, should not affect whether they are a danger to the United States, should not affect whether they are preparing to do terrorism. Engaging in international terrorism should be enough for our intelligence experts to start surveillance.

It is important to note if we remove this last requirement now it will immeasurably aid law enforcement without exposing American citizens or those who hold green cards to the slightest additional surveillance. Let me repeat, because I know we get some who write that this is the unraveling of the Constitution and it befuddles me because it is not, it does not affect a single American citizen or those who have green cards.

It is fair. It is reasonable. It is a smart fix to a serious problem. It passed out of the Judiciary Committee with unanimous support. It is supported by the administration as well.

One final word. This is about an amendment from my good friend, a colleague from California, Senator FEINSTEIN, which we will debate. She is introducing an amendment that would allow some gray into the law, rather than making it black or white. Her amendment would leave the decision whether or not to grant the FBI a FISA warrant against a lone wolf, she would leave that up to a particular judge.

I do not believe we can afford any more uncertainty. We saw what uncertainty did when the Zacarias Moussaoui case occurred. The FBI, so worried that they might overstep, said no. We need clarity in the law when it comes to fighting terrorism.

Therefore, I urge my colleagues to oppose the Feinstein amendment and support the bipartisan bill which is before us today.

Mr. President, I yield the floor and I suggest the absence of a quorum.

The PRESIDING OFFICER (Mr. FITZGERALD). The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. INHOFE. Mr. President, I ask unanimous consent the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

#### ORDER OF PROCEDURE

The PRESIDING OFFICER. The Senator from Arizona.

Mr. KYL. Mr. President, I ask unanimous consent that Senator DEWINE be

recognized at 1 p.m. for 15 minutes of morning business.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. KYL. Mr. President, I ask unanimous consent that in the debate on the pending business involving the Foreign Intelligence Surveillance Act, a letter from the Department of Justice dated July 31, 2002, be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

U.S. DEPARTMENT OF JUSTICE,  
OFFICE OF LEGISLATIVE AFFAIRS,  
Washington, DC, July 31, 2002.

Hon. BOB GRAHAM,  
Chairman, Select Committee on Intelligence,  
U.S. Senate, Washington, DC.

Hon. RICHARD C. SHELBY,  
Vice-Chairman, Select Committee on Intelligence,  
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN AND MR. VICE CHAIRMAN: The letter presents the views of the Justice Department on S. 2586, a bill "[t]o exclude United States persons from the definition of 'foreign power' under the Foreign Intelligence Surveillance Act of 1978 relating to international terrorism." The bill would extend the coverage of the Foreign Intelligence Surveillance Act ("FISA") to individuals who engage in international terrorism or activities in preparation therefor without a showing of membership in or affiliation with an international terrorist group. The bill would limit this type of coverage to non-United States persons. The Department of Justice supports S. 2586.

We note that the proposed title of the bill is potentially misleading. The current title is "To exclude United States persons from the definition of 'foreign power' under the Foreign Intelligence Surveillance Act of 1978 relating to international terrorism." A better title, in keeping with the function of the bill, would be something along the following lines: "To expand the Foreign Intelligence Surveillance Act of 1978 ('FISA') to reach individuals other than United States persons who engage in international terrorism without affiliation with an international terrorist group."

Additionally, we understand that a question has arisen as to whether S. 2586 would satisfy constitutional requirements. We believe that it would.

FISA allows a specially designated court to issue an order approving an electronic surveillance or physical search, where a significant purpose of the surveillance or search is "to obtain foreign intelligence information." *Id.* §§1804(a)(7)(B), 1805(a). Given this purpose, the court makes a determination about probable cause that differs in some respects from the determination ordinarily underlying a search warrant. The court need not find that there is probable cause to believe that the surveillance or search, in fact, will lead to foreign intelligence information, let alone evidence of a crime, and in many instances need not find probable cause to believe that the target has committed a criminal act. The court instead determines, in the cause of electronic surveillance, whether there is probable cause to believe that "the target of the electronic surveillance is a foreign power or an agent of a foreign power," *id.* §1805(a)(3)(A), and that each of the places at which the surveillance is directed "is being used, or about to be used, by a foreign power or an agent of a foreign power," *id.* §1805(a)(3)(B). The court makes parallel determinations in the case of a physical search. *Id.* §1824(a)(3)(A). (B).

The terms "foreign power" and "agent of a foreign power" are defined at some length,

*Id.* §1801(a), (b), and specific parts of the definitions are especially applicable to surveillances or searches aimed at collecting intelligence about terrorism. As currently defined, "foreign power" includes "a group engaged in international terrorism or activities in preparation therefor," *Id.* §1801(a)(4) (emphasis added), and an "agent of a foreign power" includes any person who "knowingly engages in sabotage or international terrorism or activities that are in preparation therefor, for or on behalf of a foreign power," *Id.* §1801(b)(2)(C). "International terrorism" is defined to mean activities that: (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State; (2) appear to be intended—(A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion, or (C) to affect the conduct of a government by assassination or kidnapping; and (3) occurs totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

S. 2586 would expand the definition of "foreign power" to reach persons who are involved in activities defined as "international terrorism," even if these persons cannot be shown to be agents of a "group" engaged in international terrorism. To achieve this expansion, the bill would add the following italicized words to the current definition of "foreign power": "*any person other than a United States person who is, or a group that is, engaged in international terrorism or activities in preparation therefor.*"

The courts repeatedly have upheld the constitutionality, under the Fourth Amendment, of the FISA provisions that permit issuance of an order based on probable cause to believe that the target of a surveillance or search is a foreign power or agent of a foreign power. The question posed by S. 2586 would be whether the reasoning of those cases precludes expansion of the term "foreign power" to include individual international terrorists who are unconnected to a terrorist group.

The Second Circuit's decision in *United States versus Duggan*, 743 F.2d 59 (2d Cir. 1984), sets out the fullest explanation of the "governmental concerns" that had led to the enactment of the procedures in FISA. To identify these concerns, the court first quoted from the Supreme Court's decision in *United States versus United States District Court*, 407 U.S. 297, 308 (1972) ("*Keith*"), which addressed "domestic national security surveillance" rather than surveillance of foreign powers and their agents, but which specified the particular difficulties in gathering "security intelligence" that might justify departures from the usual standards for warrants: "[Such intelligence gathering] is often long range and involves the interrelation of various sources and types of information. The exact targets of such surveillance may be more difficult to identify than in surveillance operations against many types of crime specified in Title III [dealing with electronic surveillance in ordinary criminal cases]. Often, too, the emphasis of domestic intelligence gathering is on the prevention of unlawful activity or the enhancement of the government's preparedness for some possible future crisis or emergency. Thus the focus of domestic surveillance may be less precise than that directed against more conventional types of crime." *Duggan*, 743 F.2d

at 72 (quoting *Keith*, 407 U.S. at 322). The Second Circuit then quoted a portion of the Senate Committee Report on FISA: “[The] reasonableness [of FISA procedures] depends, in part, upon an assessment of the difficulties of investigating activities planned, directed, and supported from abroad by foreign intelligence services and foreign-based terrorist groups. . . . Other factors include the international responsibilities of the United States, the duties of the Federal Government to the States in matters involving foreign terrorism, and the need to maintain the secrecy of lawful counterintelligence sources and methods.” Id. at 73 (quoting S. Rep. No. 95-701, at 14-15, reprinted in 1978 U.S.C.C.A.N. 3973, 3983) (“Senate Report”). The court concluded:

Against this background, [FISA] requires that the FISA Judge find probable cause to believe that the target is a foreign power or an agent of a foreign power, and that the place at which the surveillance is to be directed is being used or is about to be used by a foreign power or an agent of a foreign power; and it requires him to find that the application meets the requirements of [FISA]. These requirements make it reasonable to dispense with a requirement that the FISA Judge find probable cause to believe that surveillance will in fact lead to the gathering of foreign intelligence information.

Id. at 73. The court added that, a fortiori, it “reject[ed] defendants’ argument that a FISA order may not be issued consistent with the requirements of the Fourth Amendment unless there is a showing of probable cause to believe the target has committed a crime.” Id. at n.5. See also, e.g., *United States versus Pelton*, 835 F.2d 1067, 1075 (4th Cir. 1987); *United States versus Cavanagh*, 807 F.2d 787, 790-91 (9th Cir. 1987) (per then-Circuit Judge Kennedy); *United States versus Nicholson*, 955 F. Supp. 588, 590-91 (E.D. Va. 1997).

We can conceive of a possible argument for distinguishing, under the Fourth Amendment, the proposed definition of “foreign power” from the definition approved by the courts as the basis for a determination of probable cause under FISA as now written. According to this argument, because the proposed definition would require no tie to a terrorist group, it would improperly allow the use of FISA where an ordinary probable cause determination would be feasible and appropriate—where a court could look at the activities of a single individual without having to access “the interrelation of various sources and types of information,” see *Keith*, 407 U.S. at 322, or relationships with foreign-based groups, see *Duggan*, 743 F.2d at 73; where there need be no inexactitude in the target or focus of the surveillance, see *Keith*, 407 U.S. at 322; and where the international activities of the United States are less likely to be implicated, see *Duggan*, 743 F.2d at 73. However, we believe that this argument would not be well-founded.

The expanded definition still would be limited to collecting foreign intelligence for the “international responsibilities of the United States, [and] the duties of the Federal Government to the States in matters involving foreign terrorism.” Id. at 73 (quoting Senate Report at 14). The individuals covered by S. 2586 would not be United States persons, and the “international terrorism” in which they would be involved would continue to “occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.” 50 U.S.C. §1801(c)(3). These circumstances would implicate the “difficulties of investigating activities planned, directed, and supported from

abroad,” just as current law implicates such difficulties in the case of foreign intelligence services and foreign-based terrorist groups. *Duggan*, 743 F.2d at 73 (quoting Senate Report at 14). To overcome those difficulties, a foreign intelligence investigation “often [will be] long range and involve[] the interrelation of various sources and types of information.” Id. at 72 (quoting *Keith*, 407 U.S. at 322). This information frequently will require special handling, as under the procedures of the FISA court, because of “the need to maintain the secrecy of lawful counterintelligence sources and methods.” Id. at 73 (quoting *Keith*, 407 U.S. at 322). Furthermore, because in foreign intelligence investigations under the expanded definition “[o]ften . . . the emphasis . . . [will be] on the prevention of unlawful activity or the enhancement of the government’s preparedness for some possible future crisis or emergency,” the “focus of . . . surveillance may be less precise than that directed against more conventional types of crime.” Id. at 73 (quoting *Keith*, 407 U.S. at 322). Therefore, the same interests and considerations that support the constitutionality of FISA as it now stands would provide the constitutional justification for the S. 2586.

Indeed, S. 2586 would add only a modest increment to the existing coverage of the statute. As the House Committee Report on FISA suggested, a “group” of terrorists covered by current law might be as small as two or three persons. H.R. Rep. No. 95-1283, at pt. 1, 74 and n.38 (1978). The interests that the courts have found to justify the procedures of FISA are not likely to differ appreciably as between a case involving such a group of two or three persons and a case involving a single terrorist.

The events of the past few months point to one other consideration on which courts have not relied previously in upholding FISA procedures—the extraordinary level of harm that an international terrorist can do to our Nation. The touchstone for the constitutionality of searches under the Fourth Amendment is whether they are “reasonable.” As the Supreme Court has discussed in the context of “special needs cases,” whether a search is reasonable depends on whether the government’s interests outweigh any intrusion into individual privacy interests. In light of the efforts of international terrorists to obtain weapons of mass destruction, it does not seem debatable that we could suffer terrible injury at the hands of a terrorist whose ties to an identified “group” remained obscure. Even in the criminal context, the Court has recognized the need for flexibility in cases of terrorism. See *Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000) (“the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack”). Congress could legitimately judge that even a single international terrorist, who intends “to intimidate or coerce a civilian population” or “to influence the policy of a government by intimidation or coercion” or “to affect the conduct of a government by assassination or kidnapping,” 50 U.S.C. §1801(c)(2), acts with the power of a full terrorist group or foreign nation and should be treated as a “foreign power” subject to the procedures of FISA rather than those applicable to warrants in criminal cases.

Thank you for the opportunity to present our views. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that from the perspective of the Administration’s program, there is no objection to submission of this letter.

Sincerely,

DANIEL J. BRYANT,  
Assistant Attorney General.

Mr. KYL. Mr. President, I would like to advise Members that under the unanimous consent agreement for the consideration of this bill there is a period of 2 hours general debate and 4 hours equally divided on the Feinstein amendment. We would like to ask Members who have comments to make about this legislation to come to the floor and express themselves so that we can conclude this bill today under the unanimous consent. I will continue to discuss the bill. But if other Members would like to come, I will yield the floor to them. I would ask that those who have amendments that are authorized by the unanimous consent agreement to lay those amendments down so Members who wish to speak to those amendments could also address that.

In the meantime, let me continue some of the conversation Senator SCHUMER and I had before. We are talking about a bill which would plug a loophole in the existing law—the Foreign Intelligence Surveillance Act—which currently authorizes warrants to be obtained in two specific situations. We make it clear that there is a third situation as well. The two specific situations are where you either have somebody you suspect is involved in international terrorism because they work for a foreign government—that is a situation like the old Soviet spy—or they work for some international terrorist organization. Remember that this law was created at the time when we had organized groups such as the Red Brigade and the Meinhof gang, and those types of groups. That is why those two definitions in the statute were included in the way they were. What was not anticipated is that we would also have people coming from abroad to the United States to commit acts of terrorism against American citizens as part of this rather amorphous Islamic Jihad movement rather than an organization of people affiliated around a culture or an idea or a movement.

As a result, the statute needs to include that third group of people, as we know, after September 11. We have specific cases of people in which warrants were sought but were not obtained because we couldn’t make that connection to either a specific country or a very specific terrorist organization. Instead, the individual had relationships with various people and organizations involved in terrorism but certainly we couldn’t say he was a card-carrying member in the sense that the statute was originally drafted. So the same requirements, as Senator SCHUMER said, would pertain. It doesn’t apply to U.S. citizens. It only applies to foreign terrorism. But it would include a person coming here from another country—not a U.S. citizen—and we have probable cause to believe is engaged in or about to engage in an act of terrorism.

In that case, the law enforcement authorities can go to the court and seek a warrant just as they do in any other criminal court. But the difference here is the Foreign Intelligence Surveillance Act. One of the reasons a special

court is set up for that is because the information which the Justice Department frequently presents is highly classified. Clearly, here you are dealing with foreign threats—either an international spy spying on us from another country or some kind of terrorist like Zacarias Moussaoui, and the information you have that enables the warrant to be sought was obtained obviously through intelligence work. You don't want to compromise either the sources or the methods of intelligence. As a result, you can't just file publicly in the regular court system for a warrant.

That is why the Foreign Intelligence Surveillance Act court was established. These are judges just like any other judge, but they have special intelligence clearances. They have been cleared to handle classified material. By the rules of the court, that material is kept in the court. Once allegations have been filed against people, then the matter can be debated in camera, which is to say in private—not in public hearings. Proceedings remain classified, at least until the matter is included; perhaps thereafter as well.

This is the way in which these highly sensitive intelligence matters are handled. It takes a special procedure and a special court to do that. But there is nothing antithetical to a constitutional right simply because we have to handle it that way.

There are other situations, as well, in which in our court system can handle things nonpublicly. There are sometimes sensitive matters between litigants that have to be handled in camera; that is to say, in effect in the judge's chambers and not out in public. Certainly, I think everybody can recognize that in some of the big spy cases and international terrorism cases you just can't take the evidence you gathered by the intelligence mechanism which we have and produce all of that information in open court. That is why you have these special procedures. But the underlying legal requirements to obtain the warrant remain essentially the same. They are slightly different in the classified court than in a regular court.

In all candor, they are a little bit easier to obtain. But the basic element of probable cause and belief that a crime is being committed or is about to be committed or is planned remains. Nothing is changed.

As Senator SCHUMER pointed out, our legislation doesn't change anything relating to the standard of proof, the burden of proof, or anything of that sort in the existing law that works so well. What we do is ensure that the warrant can be obtained not just against the spy for a specific country, or the terrorist whom you can identify as a member of a particular terrorist organization—sort of an anachronistic concept in today's terrorist situation—but also pertains to the non-U.S. citizen, a foreign person who comes here from abroad with the intent to commit some act of terrorism against U.S. citizens.

When you have those elements, you have the same foreign terrorist nexus to the law that our Constitution permits included within the Foreign Intelligence Surveillance Act for purposes of obtaining warrants or obtaining other surveillance of the individuals. That is all we do. That is all that is done by this legislation.

So those of us—including I think every one of us on the Judiciary Committee—who consider ourselves civil libertarians need not be concerned that this statute or that this legislation, in any way, would impact on our constitutional rights, nor that it would diminish the constitutional rights of non-U.S. persons who are not engaged in terrorism. But if we have probable cause to believe you are engaged in an act of terrorism, then, yes, you would be subject to provisions of this law.

This legislation has an interesting history, as I alluded to earlier, because it was assigned to the Intelligence Committee, and it was almost included as a part of the Intelligence Authorization Act of last year. And the chairman of the Intelligence Committee this year was kind enough to offer to include it in this year's legislation as well.

Since we were able to also have the bill marked up in the Judiciary Committee and brought to the floor as a result of that markup, that was not deemed necessary. That is why the bill is here—actually as a result of action by the Judiciary Committee.

So both the Intelligence Committee and the Judiciary Committee have been involved in this legislation, the former having a hearing and the latter having marked up the bill. Having been a member of the Intelligence Committee and sitting, as I do, on the Judiciary Committee, I can tell you it was also the subject of additional comments and hearings that were held for broader purposes of examining the terrorism issue. That is why I mentioned the fact that the legislation had actually been supported publicly by various Government officials who testified before either the full Judiciary Committee or the subcommittee I chair on terrorism and technology. They had testified before our committee on terrorism issues generally, and I specifically asked whether they supported the legislation in question; the response to the questions, of course, was that they did.

Another interesting hearing, which was a joint hearing, as I recall, between the Judiciary and the Intelligence Committees had testimony from Coleen Rowley, referred to by Senator SCHUMER earlier. You will recall, she was the agent from Indianapolis who was very exercised about the fact that she could not get a warrant against Zacarias Moussaoui and complained bitterly that the FBI headquarters had prevented her from doing that. She thought the conditions warranted the issuance of the warrant.

It is a debatable point. But it would not have been debatable if our proposal

had been law. It would have been very clear. We had the probable cause. The only question was, Can we tie this person to some international terrorist organization? As I said before, we spent a lot of time and a lot of effort trying to run around tracing his contacts with Chechen rebels, and at the end of the day it just was not specific enough to be able to use the statute to get the warrant against him.

Right after 9/11, when essentially the same warrant was sent forward, then we had additional information of contacts this individual had, as a result of which the warrant was obtained. But that would not have occurred had September 11 not occurred—or at least it is doubtful it would have occurred. Let me put it that way.

Would that have prevented the September 11 attacks? No one knows for sure. I suspect not, but at least a plausible case can be made that we would have known a lot more about the planning of September 11 had we been able to get into Moussaoui's computers and questioned him and ascertained what he was up to and, furthermore, traced the contacts we were later able to trace from Moussaoui to others involved in the al-Qaida movement that would have painted a much clearer picture of what was being planned prior to September 11 than the information that we had.

The point is, we do not want to be in that position again. So whether it would have prevented 9/11 is really beside the point. We had the ability to get information which can protect the American people against acts of international terrorism. Why wouldn't we want to take advantage of that opportunity?

As I said, the Judiciary Committee unanimously voted this bill out of committee to send it to the floor so we could deal with that precise issue. I am certain my colleagues will agree that this is important to do and that we will do it a little bit later on this day. When we do, I think we can be very proud of the fact that this is another in a series of things we will have done to help prepare our country against the international terrorist threat.

We know that in the whole matter of homeland security you can only provide so much defense, that it really is about taking the fight to the enemy. Because our country is so big, it is so open, we have such broad freedoms in this country—and thankfully so—it is virtually impossible to absolutely protect us from a terrorist who would come here to do us harm. One of the ways we can help to protect against that is by getting good intelligence on people who come here from abroad and who we find out mean us ill. This provision today is a way to help us do that.

So this is a tool in the war on terror that will really help us ensure that we deal with as many of these threats as we possibly can. Are we always going to find out enough to even get a warrant? Not necessarily so. That is why

the efforts of the administration to go after these terrorists all around the world are so important.

But what has helped us in that regard is that we have had cooperation from other governments. And as much as we have been critical of some of our allies for not supporting us as we would like to have had them do—such as the situation in Iraq—I will tell you, virtually every country in the world has been supportive in one way or another in supplying us with information about terrorists in their countries or terrorists of whom they are aware who might be affiliated in some way in this international movement that threatens us all.

One of the things we discovered, however, in talking to legislators and parliamentarians from these other countries, and intelligence officials, and law enforcement officials, is that they have legal inhibitions just like the United States does. Their laws only permit them to go so far in tracking down these terrorists in their country.

In the case of Germany, for example, which has been very helpful to the United States, they were able to change one of their laws to make it easier for them to go after these terrorists. There was another law they also needed to change, and at last count I do not recall whether they were able to get that done.

But the point is, if we are able to change our law, as we did with the Border Security Act and the USA Patriot Act, we can demonstrate a seriousness of purpose to these other countries to convince them that all of us need to make these kinds of changes in our laws so that we can go after these terrorists.

The analogy is, we won the war in Iraq in a most amazing way. We sent our troops with the best equipment and the best training ever in the history of the world. And I wish I could share some of that, the information about that equipment publicly. But I think we have all, through the embedded reporters, come to appreciate how just one American soldier, with all of the technology at his disposal, can make a tremendous difference.

We also have helped protect them. They have special flak vests, bullet-proof vests that protect them against a lot of incoming. We try to protect them with the special chemical gear in the event of a chemical attack, and so on.

We want to send our troops into battle protected in the very best way and with the very best means of accomplishing their mission. Why would we deny our law enforcement and intelligence officials the very same kinds of weapons in the battle that we send them out to win?

I guarantee you that the next time there is a case like Zacarias Moussaoui or some other terrorist about whom we have some information but we don't go after strongly enough, and he does something to us, the recrimination will

be great. Oh, the accusations will fly: Why didn't we do something about that when we could have?

So our response today is going to be: We did. We came together as a Senate and we enacted another law, another piece—it is a small piece, but it is an important piece—to help us fight this war on terror. We did not shirk our responsibility. When we became aware of the loophole in the law, we acted to fill it.

Now, we have to do that in order to be able to take this credit, obviously, but I believe strongly that the House of Representatives will act similarly and that we will be able to get this to the President's desk in very short order, so at the end of the day today we can say we have done something very important to advance our ability to fight the war on terror and protect the American people.

Again, I urge my colleagues, if there is no opposition—and I hope there isn't—that is fine. But anybody, either in opposition or in favor of the legislation, come forward so that we can have whatever debate is necessary. And I especially ask the proponents of amendments to come forward so that we can begin to debate them.

I will take this moment to press some of the comments that will be made about the two amendments.

Senator FEINGOLD has proposed an amendment that we will accept and the Senate should accept which requires that the warrants obtained under this law generally—not just the provision we are talking about today, but if we obtain a warrant under either of the other provisions as well, that the information be compiled and shared with the Senate; specifically, that the information be sent to the Intelligence Committee—it is classified information, obviously—and that the cleared people on the Judiciary Committee who are appropriate to view the information have full access to that so we can evaluate whether these provisions are being used, abused, how often they are being used, how effectively, and so on. I believe his amendment calls for an annual report which we could examine. That is very useful information for us to have.

One thing we found was that prior to 9/11, this statute had not been used very often. It is not a particularly easy statute with which to comply. You do really have to have your information together before you seek the warrant because you don't ever want to be turned down. I don't believe the Justice Department ever was turned down. That is evidence of the fact that they were careful. Since 9/11, there have been a lot more cases in which this has been used. That information will be available to us, and therefore I will support Senator FEINGOLD in offering the amendment.

The other amendment that is in order under the unanimous consent agreement, with all due respect to my great friend and colleague Senator

FEINSTEIN, would gut the bill and would be bad. It would really undermine the whole FISA process. We should reject it. I know she offers this amendment not for that purpose. Of all the people in the Senate with whom I have worked who share my strong conviction that we need to do everything we can to support our intelligence and law enforcement communities, Senator FEINSTEIN is equaled by none. She is the ranking member of the Terrorism Subcommittee, and she and I have co-sponsored numerous bills or amendments designed to enhance law enforcement and intelligence capabilities. She is a very strong advocate of giving our intelligence and law enforcement communities the very best tools possible.

She just has a different point of view about how this FISA warrant process should work. I will let her describe it. I will offer my view that it has no place in the FISA situation. What her amendment purports to do really might have some applicability in a court setting because it talks about a presumption. As lawyers know, presumptions arise when you have two parties to litigation and one party comes forward with a particular piece of evidence or allegation which then changes the burden of going forward with the evidence or the burden of proof in the case. A presumption is established, and then the other side has to overcome it. That has no place in an ex parte hearing where the Government is seeking a warrant against a party who is not even aware that the warrant is being sought. Obviously, you don't get a search warrant by notifying him that you are about to do that.

What her amendment pertains to does not really have application to the situation presented in an application for a FISA warrant and would seriously undermine the Government's ability to obtain it. You could either read it one of two ways. Either it would be totally meaningless—and I know that that is not intended—or else it would be very pernicious because it would create the suggestion in court that the material presented to it is not, is no more than a presumption, that it is not to be accepted on its face.

Specifically, the Government would be asserting that the person against whom the warrant is sought is a non-U.S. citizen, a foreign person under the definition of the statute. If that information is presented in sufficient form for a court to issue the warrant, it makes no sense at all to have the information merely a presumption that the individual is a foreign person. How does that advance the ball? How does it help the court? How does it protect anybody? The court is still going to have to answer the very same question: Do I believe the information the Government is presenting to me that this is a non-U.S. citizen? Either he is or he isn't. It is not a matter of a presumption.

If the court is not convinced that the Government's information is correct,

then the court is not going to issue the warrant. It would be improper to do so. If the court is convinced that the person is a non-U.S. citizen, then the court can issue the warrant if the other requirements are met. I don't believe Senator FEINSTEIN attacks the other requirements.

Either you are a foreign-born person, or a non-U.S. person, or you are not. The court has to make that decision. And creating a presumption about it is really irrelevant to this particular process. If it is more than irrelevant, there is some kind of a problem. Obviously, you don't want the court to have to somehow independently verify the information that is presented to it by the Justice Department. That is not a part of; that is not the way the court works. The court does not do this sua sponte, or on its own. The court has the information before it, and it either has to accept the information or not. It doesn't have to accept the Justice Department's word for it. The Justice Department cannot simply make the assertion. It has to offer the proof. If the proof is not satisfactory, the warrant will not issue. Later, if it is found that the evidence was not satisfactory, then there is always some question about whether the evidence obtained, of course, could be used, say, in a later prosecution.

The bottom line is that that amendment does not help. It could seriously hurt the application of the entire FISA statute. It is not just limited to the amendment we are offering today. I urge my colleagues, when the time comes, to reject the Feinstein amendment, not because it is not well intended—I am confident that it is—but, rather, that its effects are ill understood at best and, at worst, would be pernicious to the application of the statute.

I have said all I need to say at this point on the legislation. I would note that time will run against the time allotted under the bill. Since both Senator SCHUMER and I control the time, anyone who wishes to come to speak to the legislation either for or against, I ask unanimous consent that if neither Senator SCHUMER nor I are here, they should be permitted to do so without specific acquiescence by Senator SCHUMER or myself.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. KYL. Unless there is someone else who wishes to speak at this time, I ask unanimous consent that the time consumed in the quorum call be equally divided.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. KYL. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. REID. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

ORDER OF PROCEDURE

Mr. REID. Mr. President, shortly the distinguished Senator from Ohio is going to speak for 15 minutes as in morning business. I ask unanimous consent that the time, even though in morning business, be charged against the underlying bill.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. REID. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. DEWINE. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. DEWINE. Mr. President, I ask unanimous consent that at 1:25 p.m. today there be 20 minutes for debate equally divided between the chairman and ranking member of the Judiciary Committee prior to the cloture vote at 1:45 p.m.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. DEWINE. Mr. President, today—on the 58th Anniversary of the unconditional surrender of Germany and the end of World War II in Europe—a flag will be flown over this Capitol building here in Washington, DC, to honor the men who served in Company K, the most decorated company in the 409th Regiment of the 103rd Infantry Division, 6th Corps of the 7th Army. The members of the Company will display this flag at their reunion later this year in Green Bay, Wisconsin, and at all future reunions, in memory of the men from K Company who fell on the field of battle, the men who did not return home.

Though it has been 58 years nearly 6 decades, since these men served and fought and lived and died together, the men of K Company, now in their late 70s and 80s, continue to remember and honor their brothers who died in battle.

The members of K Company—the men who did return home—the men who were able to lead their lives and have families and grow old and spend time with their children and grandchildren and now even great-grandchildren—these men have great reverence for those who died. As Bill Gleason, who was a Private in Company K, so eloquently once wrote in the *Southtown Economist* in May 1988:

Some in our Company were denied the chance to reach old age. They didn't make it to adulthood. They never were old enough to vote in an election. They died then—there in France or Germany. . . . They are frozen in time as they were—forever youthful.

I would like to take a moment to read the names of those men of K Company, the men who perished during battle, the men who remain, as Mr. Gleason so fittingly wrote, forever youth-

ful: Wilson F. Rogers from Tacoma, WA.; James Rosenbarger from Corydon, IN; Rosco Fry from Spickard, MO; Stanley Berdinski from Muskegon, MI; Bruno Pashisky from Chicago, IL; Sherman Sprague from Clinton, IA; Alex Hurtiz from El Paso, TX; Charles Frakes from Kokomo, IN; Abe Umansky from San Diego, CA; Edwin Byron from Akron, OH; and Albert Strang.

K Company was no ordinary company. It was recognized as the Most Decorated Company in the 409th Regiment. The soldiers of K Company fought valiantly in France, Germany, and Austria. They saw combat in the Rhineland from September 15, 1944 to March 12, 1945 and in Central Europe from March 22, 1945 to May 11, 1945.

Two books have been written about the Company—one by Bill Gleason, called *Task Force Kommando: Camp Howze, Texas to Jenbach Austria; and A Combat Infantryman in World War II*, by Otis Cannon, who also served in the Company. Both books provide an excellent perspective of an Infantry company in combat during World War II. They describe the reality of the War that these brave, young Infantrymen on the frontlines faced. They paint us a picture of what life was really like for these men—how they struggled and endured fierce fighting, rugged terrain, and miserable conditions until they helped secure the ultimate victory 58 years ago today.

I had the opportunity to read both of these books this past weekend. Both of them provide insightful understanding of what life was like for these men during that period of time.

The one book, "Task Force Kommando," by Private Gleason, was written shortly after the end of World War II. Both books were written by the men who engaged in the combat. It goes almost in a day-by-day chronicle describing that combat. It gives us an understanding of what the combat was like.

K Company's commander was Captain Joseph Bell, who hailed from Topeka, KS. By all accounts, Captain Bell was a man among men. He was fearless. He was a brilliant tactician. And, he was respected and admired by those who served under him.

I was quite taken by a description of Captain Bell that I read from a recent e-mail exchange between two former K Company soldiers. In this e-mail, one of the men recalled his first impressions of Captain Bell and how this man and how this Company have had a lasting impact on his life. I think that this depiction captures a very colorful image of Captain Bell and how he was looked up to and admired by his men. I'd like to take a few moments to read from that e-mail. It begins as a young, World War II Army Private, who has recently arrived in Europe, awaits his company assignment:

We were told that the next morning, we would be assigned to some infantry company. That night, we went into a bar and

were bought some beer by some GI's who knew we were (for want of a better word) very uptight. All they talked about was Captain Bell and his K Company. They told us that if we wanted to do a lot of fighting that would be the company to be assigned to. That was really not what [my buddy, Ernie Desecker] and I had in mind!

A little before dark, someone on the other side of the room yelled that Captain Bell was walking down the street and every single soldier in that bar got up and crammed the windows to get a look at him. He had a couple of other officers on both sides of him, but he was walking a step or two ahead. It was a dirt muddy street, but he looked like he was walking on a parade ground. After he went by, you could hear Captain Bell stories all over the bar.

The next day, we were loaded on a truck and at each town, it would stop and some names were called to get off. When Dess and I were told to get off, the first thing we asked was, "What company is this?" When told it was Company K, we both wished we could climb back on that truck and head for the rear echelon! Of course, in a very short time, we were so very proud to be part of Captain Bell's Company K, and that pride continues to this day.

I was assigned to John Miller's squad in the second platoon with Sergeant Hart and Lieutenant Monk as platoon leaders. They were very kind and excellent leaders. I learned a lot from them that has stayed with me all these years.

Mr. President, leaders like Captain Bell and John Miller and Sergeant Hart and Lieutenant Monk were tough soldiers, but they had to be, and all the men who served under them came to understand that.

As Bill Gleason wrote about Captain Bell:

We understood . . . that if we made it through the war, we would owe our lives to him. And, we do. . . . [H]e kept us alive simply because he insisted we stay alive.

Leaders, like Captain Bell, made all the difference.

As Memorial Day approaches, I ask my colleagues to think about Captain Bell and the men of K Company. I ask my colleagues to think about and remember all the men and women who served our Nation during World War II—and to think about and remember all the men and women who have defended our Nation since that time. Memorial Day is a time to honor and remember these individuals. They fought, and therefore all of us now know peace and freedom—our children and our grandchildren know peace and freedom. We owe them our respect and, we give them our thanks.

I am grateful for the men of Company K.

I am grateful that they fought so that I can be here today in a free country—that I can stand here today on the Floor of the United States Senate in the world's greatest Democracy.

And, I am grateful that we can continue to enjoy Life, Liberty, and the Pursuit of Happiness because of their efforts nearly 60 years ago.

I thank them.

I thank all the men of K Company and especially one man who served in the Company—the author of the e-mail I quoted just a moment ago—a Private

named Richard DeWine. To him, I will simply say:

Thanks, Dad.

Mr. President, I yield the floor. I suggest the absence of a quorum.

The PRESIDING OFFICER (Mr. BUNNING). The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. LEAHY. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

#### EXECUTIVE SESSION

NOMINATION OF MIGUEL A. ESTRADA, OF VIRGINIA, TO BE UNITED STATES CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT—Resumed

NOMINATION OF PRISCILLA RICHMAN OWEN, OF TEXAS, TO BE UNITED STATES CIRCUIT JUDGE FOR THE FIFTH CIRCUIT—Resumed

Mr. LEAHY. Mr. President, what is the parliamentary situation?

The PRESIDING OFFICER. There will be a cloture vote on the Estrada nomination at 1:45.

Mr. LEAHY. I thank the distinguished occupant of the Chair.

Mr. President, it is unfortunate, I believe—and I say this as one who has been here with six different Presidential administrations of both parties—that rather than work with the Senate and Senators from both parties to identify consensus nominees who would get the overwhelming bipartisan support of the Senate for prompt confirmation, the administration seems to insist only on partisanship and strong-arm tactics.

Rather than ideological court packing and political intimidation on which the other side is insistent, I continue to urge the administration to work with us to take the appointment of Federal judges out of politics. If we do that, we can ensure the independence and fairness of the Federal judiciary.

Everybody, whether they are Republican or Democrat, has a stake in having an independent Federal judiciary. None of us want this country—which is rightly praised for having the most independent Federal judiciary in the world—none of us want to see it become a partisan judiciary.

Now, today we are going to be asked to vote on two cloture motions—one on the Estrada nomination and one on the Owen nomination. I think the last time the Senate was called upon to vote on two cloture motions for nominations on the same day was when Republicans were filibustering the nominations of Richard Paez and Marsha Berzon in the year 2000. Three years ago, numerous Republicans voted against cloture on those nominees, even though Judge

Paez had been pending for more than 4 years.

I worry that the Republicans spend all this time talking about how we are blocking judges. As a matter of fact, we are not. Out of 125 judicial nominees the Senate has considered, we have confirmed 123 of them. We have held up two. Two out of 125 is not bad. In fact, President Clinton would have loved to have had that kind of a record when he was President, but the Republicans stopped more than 50 of his judges—not merely two as we are asking to be reconsidered. They blocked 50.

Under Republican control, there were not a whole lot of votes on the floor. Basically, they had a routine that if one Republican Senator objected, then the nominee never got a hearing and never got a vote. The Republicans never faced having to debate the nominees on the floor. The nominees were just never given a hearing in committee. They were never given a vote on the floor.

We had several Senators, many serving now, who just refused to return their blue slips. In fact, we had a definite rule by the chairman of the Judiciary Committee at the time that said that if you had a Senator, for example, from the home State who objected, that person would not go forward.

We had this once where the Senator from North Carolina objected to a circuit court judge, so, of course, we never had a hearing or a vote on that nominee. The Senator from Texas objected to several courts of appeals nominees. Distinguished Hispanic nominees were never given a hearing and never given a vote, because, as the chairman said, if both Senators from the State objected, of course, you could not go forward.

I know the Republicans now intend to go forward with at least one judge where both Senators from that State object—apparently it makes a difference who is President. When they blocked 50 or 60, some by a one-person objection, that was considered following the constitutional responsibility of advice and consent. When we ask to hold up two of the most controversial, divisive nominees—2 out of 125 nominations—we are suddenly obstructionists. But 50 or 60 on the other side is "good government."

Now, a lot of us have worked hard to repair the damage done during that time, from 1995 through the early part of 2001. But again, I find, unlike the other administrations I have served with here—President Ford, President Carter, President Reagan, former President Bush, President Clinton; all Presidents who would work with Senators of both parties to try to get a consensus on their nominees—this White House shows no interest in that.

There has been little acknowledgment of our efforts. The current administration continues down the strident path of confrontation and court packing rather than working with Senators. Well, court packing and politicizing of