

the legal status of the military commissions at issue in Hamdan. That is the precise question that the Supreme Court will decide in the next months. Right now, the military commissions are legal under a decision of the DC Circuit, and this amendment reflects but in no way endorses that present status. It would be a grave mistake for our allies around the world to think that we are endorsing this system at Guantanamo Bay—a system that has produced not a single conviction in the 4 years since the horrible attacks of September 11, 2001.

This provision attempts to address problems that have occurred in the determinations of the status of people detained by the military at Guantanamo Bay and elsewhere. It recognizes that the Combatant Status Review Tribunal, CSRT, procedures applied in the past were inadequate and must be changed going forward. As the former chief judge of the U.S. Foreign Intelligence Surveillance Court found, in *In Re Guantanamo Detainee Cases*, the past CSRT procedures “deprive[d] the detainees of sufficient notice of the factual bases for their detention and deny[ed] them a fair opportunity to challenge their incarceration,” and allowed “reliance on statements possibly obtained through torture or other coercion.” Her review “call[ed] into serious question the nature and thoroughness” of the past CSRT process. The former CSRT procedures were not issued by the Secretary of Defense, were not reported to or approved by Congress, did not provide for final determinations by a civilian official answerable to Congress, did not provide for the consideration of new evidence, and did not address the use of statements possibly obtained through coercion.

To address these problems, this provision requires the Secretary of Defense to issue new CSRT procedures and report those procedures to the appropriate committees of Congress; it requires that going forward, the determinations be made by a Designated Civilian Official who is answerable to Congress; it provides for the periodic review of new evidence; it provides for future CSRTs to assess whether statements were derived from coercion and their probative value; and it provides for review in the DC Circuit Court of Appeals for these future CSRT determinations.

Mr. REID. In a statement on November 15 of this year, I explained my vote on amendments offered by Senators GRAHAM, LEVIN, and BINGAMAN regarding access to the Federal courts for detainees at Guantanamo Bay. Now that a conference report containing a revised version of these provisions is before us, I want to reiterate a few points.

I voted in favor of the Graham-Levin amendment because I believed it was better than the original Graham amendment. Similarly, I will vote in favor of this conference report because I favor the bill as a whole. But I have

mixed views on the detainee provisions of the conference report, now in title X as the “Detainee Treatment Act of 2005.”

On the one hand, I oppose stripping the courts of jurisdiction to hear habeas corpus petitions. The writ of habeas corpus is one of the pillars of the Anglo-American legal system, and limiting the Great Writ interferes with the independence of the judiciary and violates principles of separation of powers. The action we take today fails to address adequately the Bush administration’s flawed policy of detaining suspects indefinitely, in secret, and without access to meaningful judicial oversight.

On the other hand, I support provisions in this bill that require improvements in the procedures and oversight of the Combatant Status Review Tribunals. It is important to ensure that status determinations of those detained at Guantanamo Bay and elsewhere are conducted in accordance with basic requirements of due process and fairness. The Defense Department must address the serious problems identified earlier this year by Judge Green, the former chief judge of the U.S. Foreign Intelligence Surveillance Court.

I am also pleased that the final law would allow courts to consider whether the standards and procedures used by the Combatant Status Review Tribunals are consistent with the Constitution and U.S. laws, that it does not apply retroactively to pending habeas claims that challenge past enemy combatant determinations reached without the safeguards this amendment requires, and that it would allow for court review of the actions of military commissions. I commend Senator LEVIN for his work on these issues.

On balance, I support the final detainee provisions with the following understandings:

First, I am pleased that Senator Graham’s original language was altered so that the Supreme Court would not be divested of jurisdiction to hear the pending case of *Hamdan v. Rumsfeld*. In fact, subsection (h) of section 1005 makes clear that the DC Circuit and other courts will maintain jurisdiction to hear all pending habeas cases, in accordance with the Supreme Court’s decision in *Lindh v. Murphy*.

Second, on a related but distinct point, I believe this act has no impact on the Supreme Court’s ability to consider Hamdan’s challenge at this pre-conviction stage of the military commission proceedings. As the DC Circuit held in Hamdan earlier this year, *Ex Parte Quirin* is a compelling historical precedent for the power of civilian courts to entertain challenges that are raised during a military commission process. Nothing in these sections requires the courts to abstain at this point in the litigation. Paragraph 3 of subsection 1005(e) governs challenges to “final decisions” of the military commissions and does not impact challenges like Hamdan’s other cases not brought under that paragraph.

Third, this legislation does not represent congressional acquiescence in or authorization of the military commissions unilaterally established by the executive branch at Guantanamo Bay. Whether these commissions are legal is precisely the question the Supreme Court will soon decide in the Hamdan case. Rather, this legislation reflects the fact that the military commissions are currently legal under the DC Circuit’s decision in Hamdan. We legislate against this backdrop in setting up a procedure to challenge the commissions, but we do not necessarily endorse the use of such commissions in this manner.

I hope that the Judiciary Committee soon considers legislation to define the rights of the detainees at Guantanamo with greater care and to develop sensible procedures for enforcing those rights. Congress should be guided by principles of human rights and the rule of law upon which this Nation was founded.

The PRESIDING OFFICER. The question is on agreeing to the conference report.

The conference report was agreed to.

Mr. WARNER. Mr. President, I move to reconsider the vote.

Mr. LEVIN. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

EXTENSION OF THE USA PATRIOT ACT

The PRESIDING OFFICER. Under the previous order, the Senate will proceed to a bill at the desk relating to the extension of the PATRIOT Act which the clerk will report by title.

The legislative clerk read as follows:

A bill (S. 2167) to amend the USA PATRIOT Act, and for other purposes.

The Senate proceeded to consider the bill.

Mr. LEAHY. Mr. President, those of us working constructively to extend the USA PATRIOT Act have repeatedly offered to enter into a short-term extension while we work out the differences and improve this reauthorization legislation. The extension we are passing for 6 months is a commonsense solution that allows us to take a few more weeks to get this right for all Americans.

A majority of Senators—Republicans, Democrats, those Senators who voted for cloture, those who voted against cloture on the conference report that failed to pass the Senate—have joined on a letter urging the Republican leader to act on this commonsense offer by calling up a short-term extension bill.

As soon as it became apparent that the conference report filed by the Republican leadership would be unacceptable to the Senate, I joined on Thursday, December 8, in urging a 3-month extension to work out a better bill. On the first day the Senate was in session, Monday, December 12, Senator SUNUNU and I introduced such a bill, S. 2082. We

sent out a Dear Colleague letter to other Senators on December 13 and that bipartisan bill now has 47 cosponsors.

We offered this solution before the vote on the Senate floor last Friday. Contrary to the false claims and misrepresentations by some, there is no effort to do away with the PATRIOT Act. That is just not true. Along with others here in the Senate, I am seeking to mend and extend the PATRIOT Act, not to end it. There is no reason why the American people cannot have a PATRIOT Act that is both effective and that adequately protects their rights and their privacy.

Republican and Democratic Senators joined together last week to say we can do better to protect Americans' liberties while ensuring our national security is as strong as it can be.

Every single Senator—Republican and Democratic—voted in July to mend and extend the PATRIOT Act. I have joined with Senators of both parties in an effort to enact a short-term extension so that we can keep working to improve the bill. This is standard operating procedure in the Congress where we pass extensions in the nature of continuing resolutions regularly. The Sununu-Leahy bill to provide a 6-month extension, S. 2167, accomplishes this purpose. I thank the majority leader and Democratic leader for their leadership in passing this measure.

A clear majority of the Senate, Republican and Democrats, have come together and requested a short-term extension. These are Senators who voted for cloture and Senators who voted against cloture in an effort to improve the long-term extension of the PATRIOT Act. These are Republicans and Democrats.

No Democratic Senator opposes extending the PATRIOT Act. All of the 52 Senators who signed the letter to the majority leader urged its extension.

Our Nation is a democracy, founded on the principles of balanced government. We need to restore checks and balances in this country to protect us all and all that we hold dear. Our Congress and our courts provide checks on the abuse of executive authority and should protect our liberties.

We need to write the law so that Congress has provided its check in the law and so that courts can play their role, as well. All Americans need to take notice and need to demand that their liberties be maintained. We can do better and must do better for the American people.

Just this week, we celebrated the 214th anniversary of the passage of the Bill of Rights, the first 10 amendments to the Constitution of the United States. These amendments ensure some of our most vital freedoms, including the freedom of speech, religion and press in the first amendment. Within these amendments is also the right "to be secure in our persons, houses, papers, and effects, against unreasonable searches and seizures." The Bill of

Rights made clear not only the rights of the American people, but also the limitations on the power of government.

Just as we cannot allow ourselves to be lulled into a sense of false security when it comes to our national security, we cannot allow ourselves to be lulled into a blind trust regarding our freedoms and rights. We must remain vigilant on both counts or we stand to lose much that we hold dear.

In arguing for reauthorization of the USA PATRIOT Act, Attorney General Alberto Gonzales sought to assure us that "concerns raised about the act's impact on civil liberties, while sincere, were unfounded." I am not reassured, however.

We need only pick up a morning newspaper to see how the overreaching of the Bush administration plagues our efforts to uphold democracy at home and throughout the world. We have seen secret arrests and secret hearings of hundreds of people for the first time in U.S. history; the abuse of detainees in U.S. custody; detentions without charges and denial of access to counsel; and the misapplication of the material witness statute as a sort of general preventive detention law. Such abuses harm our national security as well as our civil liberties because they serve as recruiting tools for terrorists, intimidate American communities from cooperating with law enforcement, and, by misusing limited antiterrorism resources, make it more likely that real terrorists will escape detection.

We have learned that the Pentagon maintains a secret database containing information on a wide cross-section of ordinary Americans. It keeps track of people like those in Vermont who planned peaceful protests of military recruiters, including one organized by Veterans for Peace. It monitored the activities of an antiwar group that met at the Quaker Meeting House in Lake Worth, FL, a year ago to plan a protest against military recruiting at local high schools.

Similarly, the FBI also engages in monitoring other ordinary, law-abiding citizens. Records show that the FBI kept information on Greenpeace, the American-Arab Anti-Discrimination Committee, and on students and peace activists who attended a conference at Stanford University in 2002. In a similar story, a student at the University of Massachusetts/Dartmouth reportedly was visited by Federal agents in October, after he requested a copy of Mao Tse-Tung's tome on Communism called, "The Little Red Book" through the University's interlibrary loan program. If the FBI is investigating what book a college senior is borrowing, what is it that they are not investigating that they should be?

The New York Times reports that after September 11, 2001, when former Attorney General John Ashcroft loosened restrictions on the FBI to permit it to monitor Web sites, mosques, and other public entities, "the FBI has

used that authority to investigate not only groups with suspected ties to foreign terrorists, but also protest groups suspected of having links to violent or disruptive activities." For example, recently disclosed agency records show that FBI counterterrorism agents have conducted surveillance and intelligence-gathering operations on groups concerning the environment, animal cruelty, and poverty relief.

Now we are learning that President Bush has, for more than 4 years, been secretly authorizing warrantless surveillance of Americans inside the United States. In fact, he acknowledges issuing secret Presidential orders to authorize such warrantless surveillance more than 30 times since September 11, 2001.

The U.S. Supreme Court has consistently held for nearly 40 years that the monitoring and recording of private conversations constitutes a "search and seizure" within the meaning of the fourth amendment, extending as far back as the 1967 case, *Katz v. United States*. It was because of concerns over unconstitutional surveillance of Americans in the 1960s and 1970s that Congress enacted the Foreign Intelligence Surveillance Act in 1978 to provide a legal mechanism for the Government to engage in searches of Americans in connection with intelligence gathering. Unless pursuant to a criminal search warrant issued by a judge on a showing of probable cause, FISA warrants are the exclusive means by which electronic surveillance and the interception of electronic communications may be undertaken pursuant to the rule of law.

The Foreign Intelligence Surveillance Act has been amended over time, and it has been adjusted several times since 9/11. Indeed, much of the PATRIOT Act includes FISA amendments. The law has been further amended since the PATRIOT Act, as well.

Congress allows the FISA Court to operate in secret and authorizes the Government to begin immediate surveillance in an emergency situation, so long as it seeks a warrant from the FISA Court within 72 hours. In addition, Congress has provided that following a declaration of war, the President may authorize electronic surveillance without a court order for a period not to exceed 15 days.

There has never been a leak reported out of the FISA Court. Furthermore, it has never been alleged that FISA's emergency procedures are inadequate or that FISA ties the hands of law enforcement. If the Bush administration believed that FISA was inadequate, it should have alerted Congress to these flaws. It did not. Instead, it worked with me and with others in the days following 9/11 to amend FISA. I chaired the Senate Judiciary Committee at that time, apparently the same time that the Bush administration began surveillance outside FISA. I was not informed of the President's secret

eavesdropping program while I chaired the Judiciary Committee in 2001 and 2002. I read about it for the first time in the press last week. Spying on Americans without safeguards to protect against the abuse of government power is unnecessary, and it is wrong.

Over the last week, we have learned of long-term, widespread eavesdropping on Americans by the Bush administration without compliance to the law, without court oversight, and without congressional authorization. Compounding that already troubling discovery were new, disturbing reports that the FBI has been monitoring U.S. advocacy groups working on behalf of the environment and civil rights issues, Quaker meetings and students checking out books to write school papers. This is all too reminiscent of the dark days when a Republican President compiled "enemies lists" and eavesdropped on political opponents and broke into doctors' offices and used the vast power of the executive branch to violate the constitutional rights of Americans.

I was elected to the Senate in the aftermath of Watergate and the White House plumbers and the secret wars that led to the impeachment articles being considered against President Nixon. The Foreign Intelligence Surveillance Act was passed in 1978 as part of the reform and reaction to those abuses. As I have noted, this law has been extensively updated in accordance with the Bush administration's requests in the aftermath of 9/11 and has been modified further in the last 4 years with respect to so-called lone wolf terrorists. Neither in the first year of his Presidency or in the aftermath of 9/11 or in the 4 years since enactment of the PATRIOT Act has President Bush come to Congress and asked us for authority to engage in the kind of extensive surveillance on Americans by the National Security Agency that *The New York Times* reported and the President has now confirmed that he secretly ordered and has reaffirmed more than 30 times.

We are a nation of laws, and the fact that no person is above the law is a bedrock principle upon which this Nation was founded and one we are defending and fighting for abroad. This type of covert spying on American citizens and targeted groups on American soil betrays that principle.

The chairman of the Judiciary Committee has the right instinct and was right to announce that we need hearings and an explanation, and the American people deserve an accounting for this troubling revelation. Earlier this week, I joined with Senators REID and ROCKEFELLER in requesting specific information from the Bush administration on its covert spying operations domestically. I cannot emphasize strongly enough how important it is for the Bush administration to cooperate with Congress on this matter. No one should be able to conduct secret, illegal spying programs on our soil with no ac-

countability to Congress or the American people.

Congress has passed laws that established a legal way to eavesdrop on al-Qaida and other potential terrorist organizations. Internationally that monitoring should have been done more effectively before 9/11 by this administration. We have established legal authority in emergency circumstances for the Attorney General to proceed first so long as he promptly seeks court approval thereafter. We even provided a 15-day window after a declaration of war. This program has apparently been going on for not 4 days or 14 days but for more than 4 years. That is not pursuant to or consistent with FISA. In the PATRIOT Act and other actions since 9/11, Congress has created additional authorities. But it is Congress that passes laws. The President cannot simply declare when he wishes to follow the law and when he chooses not to.

What happens to the rule of law if those in power abuse it and only adhere to it selectively? What happens to our liberties when the Government decides it would rather not follow the rules designed to protect them?

The Bush administration, in secret legal justifications for a secret eavesdropping program, apparently argues that when the Congress authorized the use of force in September 2001 to attack al-Qaida in Afghanistan, it authorized warrantless searches and eavesdropping on Americans. I voted for that authorization. This program is not what I voted for. Congress did not sign a blank check. The power to eavesdrop on Americans is not even authority that the Bush administration asked for from Congress.

I was chairman of the Judiciary Committee when the President's program was undertaken, and I was never informed of the program or its purported legal justification. In this, as with its detention and interrogation practices, this administration has chosen to go it alone. That is wrong, and it is corrosive to our system of checks and balances.

This is a Government with three co-equal branches. As Justice O'Connor reminded the Bush administration, even wartime does not give the President a blank check with regard to power. As I said last week, the same lawyers who advised the President that he was above the law when it came to torture, in a memorandum the Bush administration has had to disavow and withdraw when it was brought to light, have apparently advised the Bush administration that this President has authority to conduct warrantless surveillance of Americans. That is wrong. Accountability is sacrificed when there is rampant unilateralism.

No one can just ignore the law or the constitutional limits on Executive authority that protect Americans' liberties. Accordingly, I urge the Bush administration to make public its purported legal justification for what I

view as an illegal program of spying on Americans without court approval. I urge them not just to recite bumper sticker slogans or conclusory statements that they view their actions as consistent with the self-serving rewriting of the law they have secretly made amongst themselves, but to provide that legal justification in the light of day so that Congress and Americans can consider it. Provide and post the legal memoranda.

Al-Qaida knows that we eavesdrop and wiretap. Whether we do so legally, whether we protect the liberties of Americans by respecting the constitutional requirements for court-issued warrants, these aspects are of little concern to terrorists but matter greatly to Americans. I expect that when the supposed legal underpinnings for the President's eavesdropping program are examined, they, too, will be withdrawn and disavowed by this administration. I also expect that they will be rejected by an honest review in Congress, in the courts, and certainly by the American people. I ask that a copy of a letter to the President of which I referred be printed in the RECORD.

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

U.S. SENATE,

Washington, DC, December 20, 2005.

THE PRESIDENT,
The White House,
Washington, DC.

DEAR MR. PRESIDENT: Your recent acknowledgement of the existence of a highly-classified program to conduct electronic surveillance on U.S. citizens and permanent residents without obtaining a court order as required by law has raised a number of troubling issues in the minds of the American people. That is why Democrats and Republicans have called for prompt and thorough congressional investigation of this program. We write to ask that you immediately provide Congress with additional details on the extent and scope of this program, your legal justification for your actions, and your efforts to inform Congress about this program.

The relevant law governing surveillances, the Foreign Intelligence Surveillance Act of 1978 ("FISA"), could not be clearer on the need to obtain a court order for such surveillance. It also provides for emergency procedures and for authorization of electronic surveillance during a time of war, with reasonable time limits beyond which a court order must be obtained. We are deeply troubled by your assertions that the Constitution and the Authorization for Use of Military Force passed by Congress following the 9/11 attacks provide you justification for contravening a statute's clear language. In your public statements to date, you have not made a convincing legal argument for the authority to do so.

In addition, public statements by several of the handful of Members of Congress who were provided a briefing on this program indicate that insufficient information was provided to them under ground rules that did not enable Congress to conduct satisfactory oversight. There are questions whether your Administration has properly complied with the National Security Act of 1947 requirement to keep the appropriate committees of jurisdiction "fully and currently informed of the intelligence activities of the United States."

It is important for Congress to review these matters. We respectfully ask that you cooperate fully to provide all necessary information on all relevant aspects of this program, including presidential orders, supporting legal opinions, complete descriptions of actions taken under the program, and other information, to the appropriate oversight committees.

As Congress begins to examine this program in greater detail, it is clear Congress and the American people need immediately to understand at least four issues:

(1) Under what specific legal authorities did you authorize warrantless electronic surveillance of American citizens and permanent residents inside the United States?

(2) Given your assertion that the FISA is insufficient in providing appropriate authority and procedures to protect Americans from terrorism, what specific powers or authorities are insufficient and why, in the four years since the 9/11 attacks, has your Administration not proposed correcting modifications?

(3) You have stated that you authorized the NSA to intercept the international communications of people with known links to al Qaeda and related terrorist organizations. Have you ever authorized the interception, without a warrant, of purely domestic communications, or communications of people without known links to al Qaeda and related terrorist organizations?

(4) Could you please provide additional information on the legal and other justifications for limiting briefings on these matters to a handful of Members of Congress, as well as information on the dates, attendance, and issues discussed at these briefings, so it can be determined whether you complied with the letter and spirit of the National Security Act of 1947?

Sincerely,

HARRY REID,
Democratic Leader.
JOHN D. ROCKEFELLER IV,
*Vice Chairman, Select
Committee on Intel-
ligence.*
PATRICK LEAHY,
*Ranking Democrat,
Committee on the Ju-
diciary.*

Mr. BIDEN. Mr. President, according to the Book of Mark, Jesus asked this question: "For what shall it profit a man, if he shall gain the whole world, and lose his own soul?" Mark 8:36.

I would ask the President of the United States a similar question—what good is it to expand the power of the President, if in the process you erode the fundamental freedoms guaranteed by the U.S. Constitution?

Last week, we learned—from a New York Times report and then from President Bush himself—that since September 11, 2001, the President of the United States has authorized the National Security Agency to conduct electronic surveillance of American citizens on American soil without resort to the procedures of the Foreign Intelligence Surveillance Act.

Today we learn, contrary to assurances by administration officials, that the NSA has also conducted warrantless surveillance of purely domestic phone calls because of the technical difficulties of determining the physical location of a particular telephone.

There is still much that we do not know about this secret program and

much that we do not know about the purported legal basis for it. In briefing the press on Tuesday, the Attorney General noted that people criticizing the administration are proffering opinions based on "very limited information," and that such critics "probably don't have the information about our legal analysis."

But we do know this: for the past 4 years, the Bush administration has aggressively sought to expand the power of the President beyond recognition. In the face of this campaign, a Republican Congress has largely stood idle, reluctant to exercise its constitutional duty of oversight.

The Framers provided for a system of checks and balances in the Constitution for one simple reason: to protect against abuse of power by any branch of government in order to protect our personal freedoms.

In its zeal to expand the power of the President, the Bush administration's actions have threatened the fabric of the Constitution. These are hardly the actions of a self-described conservative who professes to want to reduce the power of the National Government.

It would be one thing if the President's actions to expand Presidential power reflected sound judgment and wisdom. But again and again, the President's overreaching in the name of security has been profoundly misguided, and has undermined support for the war against al-Qaida at home and abroad; in his decision to create special military tribunals for al-Qaida suspects held in Guantanamo Bay, a system that has yet to produce a complete trial, in his decision to authorize secret prisons abroad holding terrorist suspects—including, apparently, using facilities once operated by Soviet Intelligence agencies; in his decision to play fast and loose with time-tested standards against torture; and now in his decision to unilaterally authorize secret wiretaps of Americans without a court order.

Without more information from the Executive, it is difficult to judge the legality of the President's secret spying program. I call on the Attorney General, therefore, to provide the necessary information by promptly releasing the legal opinions governing this program—so that the Congress and the American people can assess the propriety of the President's actions. And I call on the Director of National Intelligence to promptly provide full and complete briefings to the appropriate congressional committees on the scope and operation of this program.

What is clear today is that the President of the United States decided to create a new system outside the framework of the Foreign Intelligence Surveillance Act of 1978—a framework that Congress designed to be comprehensive for electronic surveillance of foreign powers and agents of foreign powers. It is this framework on which I will focus my remarks today.

The Foreign Intelligence Surveillance Act, or FISA, was enacted in 1978 after a 3-year effort to do so.

As stated in the report of the Senate Select Committee on Intelligence, the purpose of the law was to provide regulation for "all electronic surveillance conducted within the United States for foreign intelligence purposes" in order to provide a check against abuses that had been revealed by the investigation of the Church Committee.

The bill was a bipartisan product; in the Senate, the original version introduced in 1977 that served as the basis of the 1978 law was sponsored by Senators across the ideological spectrum—including Birch Bayh, TED KENNEDY, Mac Mathias, James Eastland, and Strom Thurmond. The Senate ultimately adopted the bill on April 20, 1978, by a strong, bipartisan vote of 95 to 1. At the time the bill was approved in the Senate, I stated that it "was a reaffirmation of the principle that it is possible to protect national security and at the same time the Bill of Rights." I was also a member of the conference committee that produced the final version of the law that was enacted with broad support in October 1978.

Here is what we did in 1978. FISA was designed to govern our collection of "foreign intelligence." Typically, in the criminal context, search warrants can only be issued if the Government can demonstrate to a neutral judge that probable cause exists to believe a crime has been committed.

Under FISA, surveillance orders are issued so long as probable cause exists that someone is an "agent of a foreign power." That term has been expanded in the last year to even include a lone wolf terrorist; in other words, someone not affiliated with a known terrorist organization.

Not only is the standard different under FISA, but the FISA process is done in secret, with a special court known as the Foreign Intelligence Surveillance Court. This is a court made up of Federal judges who sit on U.S. district courts. I should parenthetically note that we learned today that one of the 11 judges on this court just resigned in reaction to President Bush's unilateral domestic spying program.

When we wrote FISA, we knew there could be times when the President would have to act quickly. We knew there would be times when probable cause would have to be demonstrated to the FISA court after the surveillance began. We contemplated emergencies and wrote the law so that it could deal with them.

First, we addressed emergency situations in section 105(f) of the act, which provides that if the Attorney General reasonably determines that an emergency situation exists—and that his investigators need to target a wiretap against an agent before an application can be made to the FISA Court—he may do so for 72 hours. The original act provided for only a 24-hour emergency

period, but Congress expanded that period to 72 hours in December 2001—after the attacks on 9/11. Similarly, in enacting the Patriot Act in 2001, Congress provided other changes to FISA.

It is therefore difficult to accept the contention of the Attorney General that Congress has been unwilling to help the President meet the challenges we now face.

The law is clear on the steps the Attorney General needs to take to wiretap suspects without first obtaining a warrant: he must tell a FISA Court judge at the time of the authorization that he has taken such emergency measures, and he has to apply for post-hoc approval as soon as is practicable but not later than 72 hours after the surveillance has commenced.

We envisioned another emergency that could authorize warrantless intelligence searches: a declaration of war. Section 111 lets the Attorney General authorize electronic surveillance without a court order to acquire foreign intelligence information for up to 15 calendar days following a declaration of war by Congress. Although the “Authorization for the Use of Military Force” approved just after 9/11 was not, technically speaking, a declaration of war, it was the constitutional equivalent under the war clause to permit the use of force in Afghanistan, and the President would have been justified to exercise these extraordinary surveillance powers in the first 2 weeks after enactment of the joint resolution.

It is also important to note that FISA, on its own terms, set up a comprehensive and exclusive system for domestic wiretapping. Section 2511(2)(f) of Title 18, United States Code, states that FISA, when combined with wiretap authority for domestic criminal investigations, is the “exclusive means by which . . . the interception of domestic wire, oral and electronic communications may be conducted.”

That is why George Will recently had this to say about the administration’s tortured legal reasoning, “The President’s authorization of domestic surveillance by the National Security Agency contravened a statute’s clear language.”

It is also worth looking at how the FISA system has operated throughout its 27 years of existence. I would submit that it has served us well.

To those who would say it is too restrictive on our ability to gain intelligence, I would respond that the FISA Court has only rejected 5 applications out of approximately 19,000.

To those who would say that the system is too lenient, I would respond that the important piece of the equation with FISA is that it has some independent review of the executive branch—in this instance, by an independent Article III judge.

And yet, even with a history of a FISA court that approves the overwhelming majority of applications, and even with the two emergency exceptions, there are some who still argue

that the administration needs additional flexibility.

For example, there are some who would say that FISA wouldn’t allow us to tap the phone numbers found in the cell phone of a top al-Qaida target. With all due respect, a phone number found in a top al-Qaida operative’s cell phone would seem to me to comfortably satisfy the “probable cause” standard outlined above. And if there were an urgent need to tap these phone numbers promptly—as I am sure there would be—no one has explained why this couldn’t be done under the 72-hour emergency exception.

Rather, we have the disturbing spectacle of the Deputy Director of National Intelligence, General Hayden, complaining that “FISA involves marshaling arguments . . . FISA involves looping paperwork around.”

Exactly right. FISA isn’t a high hurdle—but it does require the executive branch to justify the extraordinary surveillance of American citizens to a judicial officer. Isn’t this the rule of law that we are fighting to defend? And when FISA has needed updating over its 27-year existence, Congress has, time and time again, stepped up to the plate.

When we first enacted FISA, its scope was limited to wiretapping and other electronic eavesdropping. It has since been amended to authorize pen/trap orders and business record orders; in reaction to the Zacarias Moussaoui case, Congress created the so-called “lone wolf” provision; after 9/11, we extended the emergency period from 24 to 72 hours; and the list goes on and on.

If additional changes need to be made to FISA, this Senator stands ready and willing to engage in that exercise.

The alternative is the course on which the President has embarked, directly contravening a specific statute and relying on a dangerously expansive view of his Commander in Chief authority—a view that would potentially expose thousands of Americans who make a phone call abroad to surveillance of this sort. This is a course that we tried to avoid when we drafted the FISA Act in the first place. As I said in 1978 when FISA was originally passed, “it is not necessary to compromise civil liberties in the name of national security.” I hope the lessons from 1978 and the real story about what FISA allows can inform the debate going on today.

This debate is just beginning. Congress must stand up to this Presidential overreaching, examine what occurred, and provide corrective action. Senator SPECTER, the Chairman of the Judiciary Committee, has promised to hold hearings on this matter. I commend him for that.

But we will need the full cooperation of the Executive in this undertaking, and the administration can start by coming clean with the full legal reasoning for the President’s domestic spying program.

There will be much more to say—and learn—in the second session of the

109th Congress. The executive branch’s program must be subjected to close scrutiny by this Congress to ensure that in pursuit of terrorists or suspected terrorists, we are not sacrificing essential freedoms that we hold dear.

Mr. LEVIN. Mr. President, more than 50 years ago, Justice Robert Jackson said:

With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.

I am deeply troubled by recent revelations that the President of the United States has apparently personally authorized spying on the private phone conversations of Americans without court approval, as is required by law. The President’s decision to ignore the law Congress wrote and bypass the special court we created raises profound concerns that deserve our immediate attention.

Yesterday, I joined several of my colleagues in requesting a joint inquiry into the President’s actions by the Senate Intelligence and Judiciary Committees.

Checks and balances are the bedrock of our system of government. In 1978, when Congress passed the Foreign Intelligence Surveillance Act to permit the Government to seek court orders to tap the phones of people in the United States, Congress put in the law a check—the FISA Court—on the executive branch’s authority.

Since 1979 the FISA Court has approved nearly 19,000 applications for FISA wiretaps. The Court has rejected only a handful.

Last year, at a speech in Buffalo, NY, the President explicitly cited the need for a court order as a reason why Americans should have confidence that their civil liberties are being protected. He said:

Any time you hear the United States government talking about wiretap, it requires—a wiretap requires a court order. Nothing has changed, by the way. When we’re talking about chasing down terrorists, we’re talking about getting a court order before we do so. It’s important for our fellow citizens to understand . . . constitutional guarantees are in place when it comes to doing what is necessary to protect our homeland, because we value the Constitution.

But now the President acknowledges that 4 years ago, he authorized wiretaps on Americans without court review. Now he asserts that he has the authority—without court approval—to order the wiretaps himself and we now know that the Government was conducting warrantless wiretaps when the President made the statement in Buffalo.

If the court isn’t consulted, where is the check on executive power?

The President has said that he consults with executive branch lawyers and has briefed Congressional leaders about the domestic spying program. But to suggest that consulting with executive branch lawyers is a check on

Executive Branch authority demonstrates a fundamental misunderstanding of the concept of checks and balances. And notifying a few members of Congress—if that is in fact what the administration did—is not the check provided by law. That check is the court.

In the conference report that accompanied the FISA law, Congress made the Supreme Court the only body that could authorize electronic surveillance by the executive branch not explicitly authorized by the FISA law. The conference report said:

The conferees agree that the establishment by this act of exclusive means by which the President may conduct electronic surveillance does not foreclose a different decision by the Supreme Court . . .

Executive Order 12333, issued by President Reagan in 1981, recognizes FISA as the governing law for foreign intelligence wiretaps. It provides that:

Electronic surveillance, as defined in the Foreign Intelligence Surveillance Act of 1978, shall be conducted in accordance with that Act, as well as this Order.

And, under FISA itself, a person is actually guilty of a crime if he engages in electronic surveillance except as authorized by statute.

A person is guilty of an offense if he intentionally—(1) engages in electronic surveillance under color of law except as authorized by statute.

The President has not provided any legal opinion that supports his claim of authority.

On Monday, the President said that the targets of the spying are “those that are known al Qaeda ties and/or affiliates.” But the FISA law says that wiretap orders may be issued by the court if there is probable cause to believe that the target of the wiretap is a foreign power or an agent of a foreign power. If the targets of the spying have known al Qaeda ties, why didn’t he get a FISA court order?

The President has also tried to justify the warrantless spying by saying “Sometimes we have to move very, very quickly.” That is true. In some cases we do have to move quickly. But the FISA law addresses such occasions. It explicitly allows the Attorney General, to issue emergency wiretap orders without first obtaining court approval. His wiretap application need only be filed with the FISA court within 72 hours after surveillance is authorized.

The President claims that he has authority under the Constitution to authorize wiretaps without court approval as required by law. Yet he refuses to provide any legal opinions justifying that view.

The Attorney General is quoted in the Washington Post as saying “This is not a backdoor approach . . . We believe Congress has authorized this kind of surveillance” and he points to the Authorization for Use of Military Force passed by Congress in September 2001 as a source of Congressional authorization.

That Resolution states:

That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

The assertion that “necessary and appropriate force” includes the authority to wiretap American citizens in the United States, is, on its face, without merit. And again, the President has not provided any legal opinion that would support that interpretation.

The Attorney General undermined his own statement that the Congress authorized warrantless wiretaps by telling the Post that the President had contemplated asking Congress to pass legislation granting him that authority but decided against it because it “would be difficult, if not impossible” to pass. Taken together, the two statements of the Attorney General make no sense. He asserts both that Congress authorized the wiretapping and that it never would. The Attorney General is trying to have it both ways. We need some straight answers.

So, why wasn’t the FISA law followed?

Just this morning, the Washington Post reported that General Michael Hayden the head of the National Security Agency—the agency the President has charged with carrying out the spying—suggested that getting retroactive court approval is inefficient because it “involves marshaling arguments” and “looping paperwork around.”

I would remind General Hayden—and the President for that matter—of something else Justice Jackson said. He said:

The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power.

Just as troubling as General Hayden’s reason for bypassing FISA is the Post’s report that the decision to tap a phone without a warrant “requires only the approval of a shift supervisor.”

That is outrageous. We don’t let shift supervisors at the airport decide to stop screening passengers for explosives. And we shouldn’t let shift supervisors at the NSA decide whether to abide by the law or not.

The President says that this is a different era and a different type of war. And he is right. But this is the same country, with the same Constitution, and the same system of checks and balances that have served us so well for more than 200 years. And even Presidents are not above the law.

Mr. DODD. Mr. President, I rise to speak on the PATRIOT Act Reauthorization conference report.

I voted for the original legislation in 2001. Along with 98 of my colleagues, I supported that bill because I decided that on balance, the PATRIOT Act it would enhance our Nation’s ability to

fight terrorism without substantially encroaching on our citizens’ civil liberties. At the same time, I and many of our colleagues understood that aspects of the law should be revisited. For that reason, a number of provisions were set to sunset on December 31, 2005. After careful, bipartisan review of these provisions, it became evidence to many of us that certain improvements are necessary to maintain the balance between fighting terrorism and protecting civil liberties. For that reason, I joined with a bipartisan group of Senators to cosponsor the SAFE Act, which would have modestly reformed the 2001 PATRIOT Act to provide procedural safeguards and increase judicial review.

In July of this year, the Senate unanimously passed a PATRIOT Act reauthorization bill. While that bill was not perfect, it took significant steps to fix shortcomings in the current law and strengthen our Nation’s ability to fight terrorism while still protecting the civil liberties that are the cornerstone of a free and secure democratic society. The House also passed a reauthorization bill, which did not come as close to reaching this goal. Conferees were appointed to work out a compromise.

Prior to the Thanksgiving recess, a draft PATRIOT Act reauthorization conference report was circulated by conferees. At the urging of several Senators, Senator SPECTER and others took the conference report back to the conferees to try to negotiate additional modifications. They are to be commended for their efforts to reach a compromise that would earn broad bipartisan support.

When the conference was concluded, a number of our colleagues, including Senators LEAHY, KENNEDY, ROCKEFELLER, and LEVIN declined to sign the conference report due to their exclusion from key negotiations and their conclusion that the conference report failed to sufficiently meet the dual objective of combating terrorism and defending freedoms.

While I believe that the conference report is an improvement over current law, the provisions related to section 215, national security letters, and roving wiretaps have still given me pause. First, under section 215, also called the business records provision, current law allows the Justice Department to obtain medical records, business records, library records, or other tangible items of individuals by merely showing that the items are relevant to a terrorism investigation. The unanimously agreed upon Senate bill requires that the Government show that a person whose records are sought have some connection to a suspected terrorist or spy organization. Unfortunately, the conference report differs from the Senate version as it maintains the minimal standard of relevance without a requirement of fact connecting the

records sought, or the individual, suspected of terrorist activity. Additionally, the conference report does not impose any limit on the breadth of the records that can be requested or how long those records can be kept by the Government.

Under the current PATRIOT Act, an individual who receives a section 215 order to turn over business records is prohibited from telling anyone about the order. This is referred to as a "gag order." The conference report is an improvement over current law as it explicitly grants the right for a suspect to consult with an attorney regarding this "gag order" but unlike the Senate version, the conference report also requires an individual who receives a Section 215 order to notify the FBI if he consults with an attorney and to identify the attorney.

Second, under current law, the FBI can issue a national security letter—"NSL"—without the approval of a judge, grand jury, or prosecutor, to obtain certain types of sensitive information about innocent individuals. Similar to a 215 order, the targeted individual is restricted by a gag order. While the conference report does provide the right to challenge the NSL demand, it also requires the court to accept as conclusive the Government's assertion that a gag order should not be lifted, unless the court determines the Government is acting in bad faith.

I also find it troubling that the conference report would give the Government the authority to keep all evidence secret from an individual who is challenging a 215 order or an NSL order. For example, if an attorney wants to challenge an order to turn over the business records of a client on the grounds of attorney/client privilege, they would not be allowed to see the evidence the Government had requested or the reasoning behind the request. It is also important to note that the recipient of a Section 215 "business records" order or an NSL order is usually not the subject of investigation. For example, a doctor could receive a Section 215 order from law enforcement to reveal the medical records of a patient. Under this conference report, that patient would not even receive notice that the Government had obtained his personal information and would never have the opportunity to challenge the use of that information in a trial.

Third, I would like to address "roving wiretaps." A "roving wiretap" is a tap on any telephone that a suspect uses, moving from one telephone to another, with no particular locational target. Under the PATRIOT Act, the FBI is authorized to engage in roving wiretaps without court approval. The Senate bill mandated that a roving wiretap include sufficient information to describe the specific person to be wiretapped with "particularity." "Particularity" is a legal term of art describing the place or places to be searched, the person or persons, thing

or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. The conference report does not include that requirement and it does not require the Government to determine whether the target of a roving intelligence wiretap is present before beginning surveillance. Without this level of specification it is easy to see how roving wiretaps could be abused to secretly record the conversations of Americans without their knowledge or consent.

However, I would also like to note that the conference report is an improvement over current law as it includes a number of comprehensive public reporting and auditing requirements which would help prevent abuse of section 215 orders and to help preserve civil liberties. Additionally, the conference report also maintains provisions from the Senate bill that address the shortcomings of current law, including expressly permitting the recipient of the national security letter or a section 215 order to consult with an attorney, requiring the Government to notify a target of a warrantless search within a set number of days, and limiting the use of roving wiretaps to those cases in which the FBI includes a "specific" description of the target and "specific facts in the application" that show the target's actions may thwart conventional surveillance efforts.

The PATRIOT Act Reauthorization conference report passed the House by a vote to 251-174 on December 14 and was brought to the Senate floor for debate. On December 16, Senator FRIST attempted to invoke cloture to bring this body to a vote on the conference report. Cloture was not invoked. I was necessarily absent from the Senate for health reasons.

Since then I have joined 47 of my colleagues in cosponsoring S. 2082. The bipartisan legislation, introduced by Senators SUNUNU and LEAHY, would provide a 3-month extension of the expiring provisions of the PATRIOT Act. Unfortunately, Senator FRIST has said he will not permit a vote on it; the House leadership has said they will not bring it to the floor for a vote; and the Bush administration has stated that, even if the extension were to pass both the House and the Senate, President Bush would refuse to sign it. My fellow colleagues have asked this body more than a half dozen times to allow this 3-month extension to come to the floor. They have been denied this opportunity. This is playing politics with an extremely important law that protects our citizens from terrorism.

Earlier this week, the President, in speaking of the PATRIOT Act, said, "in a war on terror, we cannot afford to be without this law for a single moment." I agree with his statement. That is why there is no reason why the President and those on the other side of the aisle should refuse to extend this important law. This is why I remain hopeful that the majority leader will

set aside politics and allow this extension to occur. Law enforcement officials should not be without these important tools to fight terrorism for even a single moment. We would then have the opportunity to return after the holidays to address these areas of concern and hopefully pass a bipartisan bill that would enhance our ability to fight terrorism without substantially encroaching on our civil liberties.

The PRESIDING OFFICER. Under the previous order, the bill is read a third time and passed, and the motion to reconsider is laid upon the table.

The bill (S. 2167) was read a third time and passed, as follows:

S. 2167

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

SECTION 1. EXTENSION OF SUNSET OF CERTAIN PROVISIONS OF THE USA PATRIOT ACT AND THE LONE WOLF PROVISION OF THE INTELLIGENCE REFORM AND TERRORISM PREVENTION ACT OF 2004.

Section 224(a) of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001 (18 U.S.C. 2510 note) is amended by striking "December 31, 2005" and inserting "July 1, 2006".

MAKING APPROPRIATIONS FOR THE DEPARTMENTS OF LABOR, HEALTH AND HUMAN SERVICES, AND EDUCATION—CONFERENCE REPORT—Resumed

Mr. McCONNELL. Mr. President, notwithstanding the previous order, I ask unanimous consent that the Senate proceed to the consideration of the conference report to accompany H.R. 3010, that the conference report be agreed to, and the motion to reconsider be laid upon the table.

The PRESIDING OFFICER. The clerk will report the conference report by title.

The legislative clerk read as follows:

A conference report to accompany H.R. 3010 making appropriations for Departments of Labor, Health and Human Services and Education, and for other purposes.

There being no objection, the Senate proceeded to consider the conference report.

Mr. KYL. Mr. President, I rise today to call attention to a provision contained in the conference report to H.R. 3010, the fiscal year 2006 appropriations bill for Departments of Labor, HHS, and Education. I am pleased to see that House and Senate conferees were able to provide \$100 million for the Teacher Incentive Fund. The Teacher Incentive Fund was first proposed in the President's fiscal year 2006 budget, and will offer an appropriate incentive to States and local education agencies to advance the goals of the No Child Left Behind Act.

The No Child Left Behind Act, enacted 4 years ago, raised expectations for students and teachers. Students are expected to raise their achievement level, and teachers are accountable for reaching the specific goals. The Teacher Incentive Fund is an appropriate follow up to the No Child Left Behind