

across the battlefields of the Pacific Theater and served in every Marine division from 1942 to the end of the war. Though the Japanese were able to break many American codes during the war, they were never able to decipher the system used by the Code Talkers. Their contribution to victory cannot be underestimated. There is no doubt that their efforts saved countless American lives, and it has even been said that without the Code Talkers the battle of Iwo Jima could not have been won.

I would also like to talk about the soldiers of the 200th and 515th Coastal Artillery units of the New Mexico National Guard, also known as the New Mexico Brigade, who soon after the attack on Pearl Harbor played a prominent and heroic role in the fierce fighting in the Philippines. For 4 months the men of the New Mexico Brigade helped hold off the Japanese only to be defeated by disease, starvation and a lack of ammunition. Sadly, the survivors of the Battle of Bataan from the New Mexico Brigade were subjected to the horrors and atrocities of the 65 mile "Death March," as well as years of hardship and forced labor in Japanese prisoner of war camps. Tragically, of the 1,800 men of the New Mexico Brigade more than 900 never returned home.

In closing, I hope New Mexicans will take a moment to honor the individuals who fought so gallantly 66 years ago today as well as all those who served throughout the Second World War, and remember those who paid the ultimate price for our Nation.

The ACTING PRESIDENT pro tempore. The Senator from Rhode Island.

#### MORNING BUSINESS

Mr. WHITEHOUSE. Mr. President, I ask unanimous consent that there now be a period for the transaction of morning business, with Senators permitted to speak for up to 10 minutes each, and that I recognized for 15 minutes.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

The Senator is recognized for 15 minutes.

#### FOREIGN INTELLIGENCE SURVEILLANCE ACT

Mr. WHITEHOUSE. Mr. President, let me first say how moved I am to be on the Senate floor after the remarks of the very distinguished Senator from Hawaii commemorating this day. But I rise to discuss a different question, a question that involves the Foreign Intelligence Surveillance Act.

We will shortly consider making right the things that are wrong with the so-called Protect America Act, a second-rate piece of legislation passed in a stampede in August at the behest of the Bush administration. It is worth for a moment considering why making this right is so important.

President Bush pressed this legislation not only to establish how our Government can spy on foreign agents but how his administration can spy on Americans. Make no mistake, the legislation we passed in August is significantly about spying on Americans—a business this administration should not be allowed to get into except under the closest supervision.

We have a plain and tested device for keeping tabs on Americans. It is our Constitution. Our Constitution has as its most elemental provision the separation of governmental powers into three separate branches. When the Government feels it is necessary to spy on its own citizens, each branch has a role. The executive branch executes the laws and conducts surveillance. The legislative branch sets the boundaries that protect Americans from improper Government surveillance. The judicial branch oversees whether the Government has followed the Constitution and the laws that protect U.S. citizens from violations of their privacy and their civil rights.

It sounds basic, but even an elementary understanding of this balance of powers eludes the Bush administration. So now we have to repair this flawed and shoddy Protect America Act.

Why are we in Congress so concerned about this legislation? Why is it so vital that we energetically insert the role of Congress and the courts when the Bush administration seeks to determine the rules under which it will spy on Americans? Because look what the Bush administration does behind our backs when they think no one is looking.

For years, under the Bush administration, the Office of Legal Counsel within the Department of Justice has issued highly classified, secret legal opinions related to surveillance. This is an administration that hates answering to an American court, that wants to grade its own exams, and OLC is the inside place the administration goes to get legal support for its spying program.

As a member of the Senate Intelligence Committee, I was given access to those secret opinions and spent hours poring over them. Sitting in that secure room, as a lawyer, as a former U.S. attorney, legal counsel to Rhode Island's Governor, and State attorney general, I was increasingly dismayed and amazed as I read on.

To give an example of what I read, I have gotten three legal propositions from these secret OLC opinions declassified. Here they are, as accurately as my note-taking could reproduce them from the classified documents. Listen for yourself, Mr. President; I will read all three and then discuss each one.

One:

An Executive order cannot limit a President. There is no constitutional requirement for a President to issue a new Executive order whenever he wishes to depart from the terms of a previous Executive order. Rather than violate an Executive order, the President has instead modified or waived it.

No. 2:

The President, exercising his constitutional authority under article II, can determine whether an action is a lawful exercise of the President's authority under article II.

And 3:

The Department of Justice is bound by the President's legal determinations.

Let's start with No. 1. Bear in mind that the so-called Protect America Act that was stamped through this great body in August provides no—zero—statutory protections for Americans traveling abroad from Government wiretapping—none if you are a businesswoman traveling on business overseas; none if you are a father taking the kids on vacation to the Caribbean; none if you are visiting your aunts or uncles in Italy or Ireland; none even if you are a soldier of the United States of America in uniform serving overseas.

The Bush administration provided in that hastily passed law no statutory restrictions on their ability to wiretap you at will, to tap your cell phone, your e-mail—whatever—once you are outside the borders of the United States. The only restriction is an Executive order called 12333 which limits executive branch surveillance to Americans whom the Attorney General determines to be agents of a foreign power. That is what the Executive order says.

But what does this administration say about Executive orders?

An Executive order cannot limit a President. There is no constitutional requirement for a President to issue a new Executive order whenever he wishes to depart from the terms of a previous Executive order. Rather than violate an Executive order, the President has instead modified or waived it.

"Whenever [the President] wishes to depart from the terms of a previous Executive order," he may do so because "an Executive order cannot limit a President." And he does not even have to change the Executive order or give notice that he is violating it because by "depart[ing] from the Executive order," the President "has instead modified or waived it."

So unless Congress acts, here is what legally prevents this President from wiretapping Americans traveling abroad at will: nothing. Nothing. That was among the most egregious flaws in the bill passed during the August stampede orchestrated by the Bush administration, and this OLC opinion shows why we need to correct it.

Here is No. 2:

The President, exercising his constitutional authority under article II, can determine whether an action is a lawful exercise of the President's authority under article II.

That is right, the President, according to the George W. Bush Office of Legal Counsel, has article II power to determine the scope of his article II power. Never mind a little decision called *Marbury v. Madison* written by Chief Justice John Marshall in 1803 establishing the proposition that it is emphatically the province and the duty

of the judicial department to say what the law is.

Does this administration agree that it is emphatically the province and the duty of the judicial department to say what the President's authority is under article II of the Constitution? No. It is the President, according to this Office of Legal Counsel, who decides the limits of his own article II power. The question "whether an action is a lawful exercise of the President's authority under article II" is to be determined by the President's own minions "exercising his constitutional authority under article II." It really makes one wonder: Where do they get these people? You have to be smart, you have to be really bright to get a job within the Office of Legal Counsel. How can people who are so smart be so misguided?

And then it gets worse. Remember point 3:

The Department of Justice is bound by the President's legal determinations.

Let that sink in a minute. "The Department of Justice is bound by the President's legal determinations." We are a nation of laws, not of men. This Nation was founded in rejection of the royalist principle that "the king can do no wrong." Our Attorney General swears an oath to defend the Constitution and the laws of the United States. We are not some banana republic in which the officials all have to kowtow to a supreme leader.

Imagine this in another context. Imagine a general counsel to a major U.S. corporation telling his board of directors: In this company, the counsel's office is bound by the legal determinations of the CEO.

The board ought to throw that lawyer out. That is malpractice and probably even unethical.

Wherever you are, if you are watching this, do me a favor: The next time you are in Washington, DC, take a taxi some evening to the U.S. Department of Justice. Stand outside. Look up at that building shining against the starry night. Look at the sign outside: The United States Department of Justice. Think of the heroes who have served there. Think of the battles fought. Think of the late nights, the brave decisions, the hard work of advancing and protecting our democracy that has been done in those halls. Think about how all that makes you feel.

Then think about this statement:

The Department of Justice is bound by the President's legal determinations.

If you don't feel a difference from what you were feeling a moment ago, well, I guess congratulations because there is probably a job for you somewhere in the Bush administration. Consider the sad irony that this theory was crafted in that very building by the George W. Bush Office of Legal Counsel.

In a nutshell, these three Bush administration legal propositions boil down to this: One, I don't have to follow my own rules, and if I break them, I don't have to tell you that I am

breaking them; two, I get to determine what my own powers are; and three, the Department of Justice doesn't tell me what the law is, I tell the Department of Justice what the law is.

When the Congress of the United States is willing to roll over for an unprincipled President, this is where you end up. We should not even be having this discussion, but here we are. I implore my colleagues on both sides of the aisle: Reject these feverish legal theories. I understand political loyalty; trust me, I do. But let's also be loyal to this great institution we serve in the legislative branch of Government. Let us also be loyal to the Constitution we took an oath to defend from enemies foreign and domestic. And let us be loyal to the American people who live each day under that Constitution's principles and protections.

We simply cannot put the authority to wiretap Americans whenever they step outside America's boundaries under the exclusive control and supervision of the executive branch. We do not allow it when Americans are at home; we should not allow it when they travel abroad.

The principles of congressional legislation and oversight and of judicial approval and review are simple and longstanding, and Americans deserve their protection wherever on God's green Earth they may travel.

I yield the floor.

The ACTING PRESIDENT pro tempore. The Senator from Ohio is recognized.

#### TEFAP EMERGENCY FUNDING

Mr. BROWN. Mr. President, yesterday, I stood on the Senate floor and asked for emergency funding for the Nation's food banks. I asked for that funding because there are massive shortages of food bank supplies, empty shelves, and those shortages place at risk children, the elderly, and working families, people who have lost jobs, people who have had a string of bad luck, and families across this Nation.

I spoke yesterday of Norm, an elderly man in Cleveland, who, after spending his few dollars on rent, on utilities, and medicine, has \$19 left. He needs the Cleveland Food Bank. The Cleveland Food Bank, I would add, was awarded the best food bank in the country last year, but it is running short, as are food banks everywhere in this country.

I spoke yesterday of Christian, who has trained to be a nurse's assistant, and who just gave birth. She is unable to find a job as a nurse's assistant, even though she is well trained to do that. She runs short of food, and she relies on, as does Norm, neighborhood food programs, such as the Cleveland Food Bank and other church groups in greater Cleveland.

In too many cases there is no dinner on the table. In too many cases there is no food at Christmas time. In too many cases there is just not enough food. We are the wealthiest Nation in the world.

Yet we cannot feed our own people. This is an emergency. This is an outrage.

Yesterday, I talked about emergency funding to overcome that shortage. We asked for \$40 million until we pass the farm bill, which will have some dollars in it to provide some supply for these food banks. We found out that food banks are projecting they will run out of food in February, when originally they thought it would last until July.

In case after case, food banks in Cleveland, in Columbus, in Toledo, and Cincinnati, food banks in the Chair's city of Baltimore, and food banks all over this country are running out of food. Grocery stores are contributing a little less this year, and the Government has not done its part.

Yesterday, I talked about some \$40 million in funding to overcome that shortage, and today I want to talk about how to pay for it. We can pay for it through shared sacrifice. The budget for Congress includes firewood for fireplaces in the Capitol, fireplaces, in most cases, that don't get used. When children are hungry, we can give up fireplaces. We can give up some travel and some new technology. We can make easy sacrifices to address a tragic need.

The budget for Federal agencies includes annual buying sprees to exhaust whatever is left in departmental budgets. When children are hungry, buying sprees are offensive. We can sacrifice. We can pay for emergency funding for food banks by putting our heads together and shaving some less necessary spending from our own budgets and that of Federal agencies whose oversight is our responsibility. I am asking that we do that. Food banks need resources. We don't need firewood, we don't need buying sprees, and we can do without some other things. We need to help hungry people.

I am going to propose a package of cuts to pay for an emergency increase in food bank funding. I hope every Member of this body supports me.

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

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The bill clerk proceeded to call the roll.

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

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

#### UNANIMOUS-CONSENT AGREEMENT—H.R. 6

Mr. HARKIN. Mr. President, for the benefit of all Senators and those at their desks, right now we are going to try to get back on the farm bill. As you know, an agreement was reached last night between the majority leader and the Republican leader on the process we will be following, so I am going to