HONORING OUR ARMED FORCES

CHIEF PETTY OFFICER GREGORY J. BILLITER

Mr. McCONNELL. Madam President, I rise today to pay tribute to a 15-year veteran of the U.S. Navy who was lost in service to his country. That man is CPO Gregory J. Billiter of Villa Hills, KY. He was 36 years old.

Chief Billiter was serving near Kirkuk, Iraq, as part of a Navy Explosive Ordnance disposal unit charged with defusing the many improvised explosives and booby traps that terrorists have set in Iraq. He was the tactical commander of the third vehicle in a five-vehicle convoy patrolling the area. On April 6, 2007, his vehicle was struck by explosives, tragically taking Chief Billiter's life.

Assigned to Explosive Ordnance Disposal Unit 11, based out of Whidbey Island, WA, this was Chief Billiter's third tour of duty in Iraq. For bravery and valor while wearing the uniform, he received numerous medals and awards, including the Bronze Star Medal with Combat Distinguishing Device for Valor and the Purple Heart.

To recount Chief Billiter's life and career is to recount one achievement after another, because Greg was no stranger to success. ''The driving force in all those things was competition,'' says Barry Billiter, his father. ''He was very competitive.''

Growing up, Greg led his friends in whiffleball games, racing Big Wheels, or swinging over the creek on a vine, Tarzan-style. He played basketball and soccer in high school, and whatever they played, Greg often declared himself the winner or demanded a rematch. He was a ''dyed-in-the-wool'' Cincinnati Bengals fan.

He was a good kid—the police only had to visit Greg's parents once. That was the time Greg, his brother Jeff, and some neighborhood friends sat on a rock in the woods and refused to budge for the bulldozers that had come to clear the way for a new shopping center.

''Greg was all of 6 years old at the time,'' the Billiter family writes in a letter about Greg sent to family and friends that they have generously shared with me. ''How was he ever able to get security clearance with that on his record?''

Greg attended St. Pius X and St. Joseph Elementary Schools. As a fourth-grader, one of his teachers told him he would never make it at Covington Latin School, a competitive private high school in northern Kentucky. If anything could motivate Greg, it was a challenge. He graduated from Covington Latin in 1987 at the age of 16.

Greg went to the University of Dayton and graduated with a bachelor's degree in marketing at age 19. After college, Greg worked for a while at the Levi Strauss Company but was unfulfilled. So one day he came home to his parents and announced he had joined the Navy, just like his father, Barry, a Navy veteran. Greg entered basic training in January 1992 in Orlando, FL, and graduated as the Honor Recruit.

He served aboard many ships, including the USS *Durham*, USS *Duluth*, USS *Carl Vinson*, USS *Ronald Reagan*, and USS *Nimitz*. In 1994, he qualified for and finished Navy Seal training. After a knee injury, he could no longer continue as a Seal but qualified as a surface warfare specialist. Chief Billiter kept busy. He also qualified as a Naval parachutist, a scuba and MK–16 mixed gas diving supervisor, a demolitions operations supervisor, and a helicopter rope suspension tactics specialist.

From 1997 to 2001, Greg served in Canton, OH, as a Naval recruiter. Then he transferred to specialize in explosive ordnance disposal and found that defusing explosives was the job he had been looking for.

''When he talked about it, his eyes would light up,'' says Greg's aunt, Paula Snow. ''He loved the science of it.'' Explosive ordnance disposal specialists are trained to deal with explosive threats on land or underwater, including anything chemical, biological, and even nuclear. Greg conducted numerous EOD missions throughout the world and trained the foreign special operation units of France, Uruguay, Chile, Peru, and Qatar.

During his third tour in Iraq, Greg's team contributed to the collection and destruction of over 2,500 ordnance items, totaling over 5,800 pounds of net explosives weight. When he was off duty, he organized sports games, such as an Ultimate Frisbee competition of the older sailors versus the younger ones. He competed in the Navy's Ironman competition.

In 1994, while serving on board a ship home-ported in San Diego, Greg met April, a middle-school science teacher in that city. She understood a sailor's life well, having grown up the daughter of a Navy chief corpsman.

Greg and April married in November 1996 at St. Joseph Church in Crescent Springs, KY. Together they had a son, Cooper John Billiter. Greg hoped little Cooper would grow up to play sports.

Greg will be forever loved and remembered by his family and loved ones who are in my prayers now as I relate Greg's story to the Senate. Those family members include his wife, April; his son, Cooper; his mother, Pat; his father, Barry; his brothers Jeff, Kevin, and David Billiter; his sisters Beth Billiter and Jill New; his aunts Paula Snow and Barbara Horton; and his grandmothers Virginia Billiter and Clara Bosch.

When Greg was a senior in high school, he attended a Senior Christian Awakening Retreat. For the first time, he told his parents: Thank you for being such a good Mom and Dad and thank you for all the sacrifices you have made for me.

This young man who learned the meaning of sacrifice at an early age grew up to become a beloved husband and father himself who made the ultimate sacrifice for his country. I want the Billiter family to know that America and the U.S. Senate will always remember that sacrifice, and we salute CPO Gregory J. Billiter and his service to our country.

I yield the floor.

RESERVATION OF LEADER TIME

The ACTING PRESIDENT pro tempore. Under the previous order, the leadership time is reserved.

FISA AMENDMENTS ACT OF 2007

The ACTING PRESIDENT pro tempore. Under the previous order, the Senate will resume consideration of S. 2248, which the clerk will report.

The legislative clerk read as follows:

A bill (S. 2248) to amend the Foreign Intelligence Surveillance Act of 1978, to modify and streamline the provisions of that Act, and for other purposes.

The ACTING PRESIDENT pro tempore. The Senator from West Virginia is recognized.

Mr. ROCKEFELLER. Madam President, the Senate now returns to the consideration of S. 2248, the FISA Amendments Act.

As I said in December when we debated the motion to proceed to this bill, I believe this legislation is critical to our Nation's security. That phrase is thrown around a lot—''our Nation's security.'' It does have meaning. To protect America from the panoply of threats we face around the world, we must know what our enemies are planning and what they are doing. We get that information through our intelligence agencies, and one of the most useful sources for them is communications intelligence.

The Foreign Intelligence Surveillance Act, or FISA, gives the Government the authority, with court approval, to collect communications intelligence inside the United States. Unfortunately, the law has not kept pace with the incredible advances in telecommunications technology of the last 30 years.

As this debate proceeds over these coming days, it is important for all Members to understand why FISA exists and why it is necessary for us to update it. The Congress passed FISA to protect Americans inside the United States from inappropriate eavesdropping by the Government. The FISA statute created a system that allowed the Government to go to a special court and show probable cause that someone inside the United States was an agent of a foreign power. If it agreed, if the court agreed, the court then issued an order allowing the Government to collect the intelligence.

Over time, the flow of global communications changed. The nature of these communications changed. The system of fiber optic cables carrying international communications grew, and wireless technology began to dominate our domestic system. This was a marked change from the communications architecture that existed in 1978, when FISA was started, when local

calls were transmitted over a wire and international ones usually went via satellite.

As technology changed and America became the hub for international communication, our intelligence agencies were presented with collection opportunities that were never envisioned—never even thought about in 1978. But because of the way that FISA was drafted, they were unable to take advantage of the new opportunities to collect significant intelligence inside the United States against targets located overseas.

After September 11, 2001, the President chose to deal with the problem unilaterally and created a warrantless surveillance program that relied on, to my mind, questionable legal justification. I think that was a mistake. I believe the President should have sought, and would have received from Congress, the necessary changes to FISA to accommodate the international communications he wished and needed to target.

The public disclosure of the warrantless program ultimately led the President to seek approval from the FISA Court and then to seek additional authority from the Congress, which is where we are.

Our first attempt to address this issue was the Protect America Act passed last August. That legislation allowed our intelligence community to undertake the collection needed to monitor terrorist communications, but the PAA, as we shall call it, is flawed legislation that does not achieve the balance between protecting security and preserving our civil liberties, which is so essential. It provided an expanse of new authority to collect intelligence inside the United States, with little court involvement or oversight from the Congress.

But we had the foresight to include in the PAA—the Protect America Act—a 6-month sunset. That 6-month period allowed us the time we needed to craft a bill that does achieve this important balance: security and civil liberties. It gives the intelligence community the authority it needs to keep us safe, and it puts in place the safeguards needed to protect America's liberties. That is the bill the Senate is now considering; i.e., S. 2248.

This bill was reported to the Senate last October on a strong bipartisan vote under Senator BOND and myself, Vice Chairman BOND and myself, by a vote of 13 to 2. Vice Chairman BOND and I worked hard to craft a bill that would garnish support from both sides of the aisle and that would have the support of the administration, leaders of the intelligence community and, most importantly, would achieve our twin goals of protecting the security and privacy of Americans. I should say at this point we went to great lengths to check all our bases in this process. We didn't do this in a cocoon and we didn't do it in a partisan way. We reached out to the experts, whether they were inside the administration or outside the administration. We wanted to do it so we could make this legislation as effective as possible.

But, as with any legislation, this bill is not perfect. I have welcomed the input from others as we have moved forward. On this point, I must particularly acknowledge the work of the Senate Judiciary Committee. The Judiciary and Intelligence Committees shared jurisdiction over FISA. The Judiciary Committee also happens to be led by two individuals with considerable knowledge and experience with these issues from the perspective of both committees. It may not be known to all, but Senator PAT LEAHY served as vice chairman of the Intelligence Committee in the mid-1980s, and Senator SPECTER served as chairman in the mid-1990s. I appreciate the time and thought they have put into this legislation.

The Judiciary Committee considered the Intelligence Committee bill on sequential referral and has reported a proposed amendment to our bill. That amendment is now the pending amendment. The Intelligence Committee bill and the Judiciary Committee amendment take a similar approach to addressing the underlying problems with FISA—not a huge difference. The Judiciary Committee included several provisions that I think further improve the already robust protections for privacy contained in S. 2248. We were enriched by working with them.

I intend to support amendments to incorporate many of these changes into the underlying bill, which is the Intelligence Committee bill, and even though I cannot support everything in the Judiciary Committee substitute amendment, nevertheless, there is very good material there.

Before I discuss possible amendments, let me take a few minutes to walk through the bill before us today. I apologize, but I think this is necessary as we begin this debate on what is a highly complicated and somewhat arcane subject.

In crafting this legislation, the Intelligence Committee set out to accomplish four main goals.

First, we wanted to ensure that activities authorized by this bill are only directed at persons outside the United States. The bill requires the FISA Court to approve targeting procedures designed to accurately make the determination of whether someone is outside the United States. For individuals inside the United States, the existing procedures under FISA continue to apply. Individual court orders, FISA orders, are still required.

Secondly, our bill improves the protection of information from or about a U.S. person. Unlike the Protect America Act, this bill provides for court review of the so-called minimization procedures. These are procedures used to shield information about Americans who may be overheard or mentioned in the conversation of foreign targets.

Court review of these procedures is central to the protection afforded under FISA. But the FISA Court's role was left out of the Protect America Act.

Third, the bill includes a new protection for U.S. citizens outside the United States. The Intelligence Committee rejects the proposition that Americans lose their privacy rights because they travel or work elsewhere in the world.

Under current law, the intelligence community can target U.S. citizens outside the U.S. solely on the authority of the Attorney General. Our bill requires an order of the FISA Court before an American can be targeted, regardless of the American's location. This is a concept that both committees endorsed, and it enjoys bipartisan support. Director of National Intelligence Mike McConnell also endorsed this in testimony before the Intelligence Committee. This is an area of law, however, that requires careful attention to avoid, as the Director described, ''unintended consequences.''

Both the Intelligence Committee and Judiciary Committee approaches need further refinement. Therefore, I believe we have reached an agreement on a bipartisan amendment that would reconcile the approaches of the two committees and resolve the concerns of the administration. Vice Chairman BOND and I will offer this modification as part of the managers' amendment.

Finally, the Intelligence Committee bill adds significant new oversight authority to collect inside the United States against foreign targets. The new oversight will be conducted by all three branches of Government.

The bill includes a series of annual reports to Congress on the authorized collection, including instances of noncompliance; inspector general reviews by the Justice Department and the Intelligence Committee; and FISA Court review and approval of acquisition and minimization procedures.

Beyond these steps to update FISA, the other major component of the bill passed by the Intelligence Committee—and, unfortunately, not included in the Judiciary Committee amendment—is liability relief for companies that may have helped the Government collect critical intelligence after the September 11 terrorist attacks.

I understand this is controversial. But everybody should know that this is an issue the Intelligence Committee has considered very carefully. We had a number of hearings on this subject. In reviewing the record of correspondence from the administration to these companies, I and most members of the committee became convinced that companies acted in good faith. They relied on the legal conclusion of the Nation's most senior law enforcement official, and they provided assistance because they wanted to help stop terrorist attacks.

The companies received letters, and I tried very hard to convince Steve Hadley—Director McConnell very much approved of this—to make it possible for every Member of the Senate to have those letters that the companies received from the National Security Agency, so Members could understand that this was not some kind of a game, that this wasn't ''wordsmithing.'' What these letters stated was that the companies' assistance was ''required,'' that the requested assistance was based on an order of the President, and that the Attorney General had certified the legality of the order. And then the NSA Director, as I say, required, compelled these companies—there were various uses of words, but they were all very firm, leaving no wiggle room—to comply. And they did. They did it because they were told to do so by the highest authorities in the land. They did so because—I believe it is possible to say this—there are a lot of big corporations that are very patriotic.

Private companies should be allowed to rely on this assertion from these high officials. They should be allowed to do that. Our longstanding legal structure is specifically designed not to force a private company to second guess the Government in these circumstances. I know many colleagues on the other side believe that the President acted with his constitutional authority when he established this program. I believe the legal foundation for this program was questionable at best and was part of an overarching legal framework that sought to dramatically alter the balance of power between the branches of power in favor of the executive. But that is a dispute that needs to be settled between the President, the Congress, and the courts. We should not allow private companies who simply wanted to come to the aid of their country, or were required or compelled to do so, to be caught in the crossfire of this disagreement.

A bipartisan consensus of the Intelligence Committee supported the narrowly drawn liability relief included in the bill. We did not include the open-ended immunity sought by the administration that would have prevented suits against the Government, or Government officials who knowingly broke the law.

The committee's liability relief provision applies only to companies who may have participated in the warrantless surveillance program after September 11, 2001, until January 2007, when the whole matter was placed under FISA Court authority. That is why there can be no question about prospective; it is retrospective.

The question of whether the President had the authority to launch the warrantless surveillance program leads me to the issue of exclusivity. This is whether FISA is the exclusive means by which the President may authorize the surveillance of Americans for foreign intelligence purposes.

The President's justification for creating the warrantless surveillance program relied in part on a claim that the legislation authorizing the use of military force after 9/11 somehow gave him the authority to ignore the FISA statute. I don't buy this argument.

The President also claims he has the authority, as Commander in Chief, to approve surveillance even when statutes of this coequal branch of Government would prohibit him specifically from so doing. No act of Congress by itself can finally resolve the debate between Presidential and congressional authority.

We can make it clear, however, which statutes authorize the use of electronic surveillance. This is not academic. It is important to clarify this point for the future. When the Nation next faces a military emergency, we don't want Congress to hesitate while it debates whether its authorization to use force will have unintended consequences, such as authorizing the President to spy on Americans.

To avoid this situation, both the Intelligence and Judiciary Committees included provisions intended to clarify which statutes constitute the exclusive means for conducting electronic surveillance. I have worked with Senator FEINSTEIN, who serves on both committees, and Senator LEAHY on an amendment that will bridge the differences between the two bills and will settle this issue in a way that I think clarifies the statute.

Another important provision is the sunset. This bill provides a significant new authority, and it is essential—because it is a significant new authority in what is still emerging in the collection of intelligence—that we carefully monitor the implementation of this authority and revisit it to ensure it is working as we now envision.

The Intelligence Committee bill includes a 6-year sunset. The Judiciary Committee has a 4-year sunset. I will join with Senator CARDIN and others in support of an amendment to incorporate the Judiciary Committee 4-year sunset into the underlying bill. Four years will ensure that the decision on permanency is made during the next Presidential term.

As we proceed with this debate, every Member should have the same two goals we had in the Intelligence Committee: providing our intelligence professionals with the tools they need to keep us safe, and establishing a system with sufficient safeguards to ensure that Americans' civil liberties are protected over the long term. I think the Intelligence Committee bill does that, and with a few changes it will be even stronger.

I yield the floor.

The PRESIDING OFFICER (Mr. NELSON from Nebraska). The Senator from Missouri is recognized.

Mr. BOND. Mr. President, again, we rise with a renewed consideration of the Foreign Intelligence Surveillance Amendments Act, or the FISA Amendments Act, of 2008.

I thank the chairman for his very powerful and thoughtful statement on behalf of the original bill presented by the Senate Intelligence Committee, with the managers' amendments that we will incorporate.

Simply put, this legislation gives the Intelligence Community the tools it needs right now, and over the next 6 years, to protect our country. The Protect America Act, passed by Congress in August of this past year, allowed the intelligence community to close critical intelligence gaps. I disagree that the Protect America Act was flawed. It was a temporary measure. It didn't deal with all of the subjects we needed to deal with, including protections for carriers alleged to participate. But it did not cut back on any of the basic protections in FISA, and it served to provide us the means in this 6-month period to collect vitally needed intelligence on foreign subjects who might be planning attacks either on our troops abroad or in the United States. But this vital legislation expires in 1 week, and we must not let those gaps reopen.

We initially began debate on the FISA Amendments Act in December of last year. As was their right, several Members of this body decided a filibuster was a better course for our national security. So we listened for hours to unfounded allegations about the terrorist surveillance program and to mischaracterizations about the Intelligence Committee's FISA bill. Ultimately, this bill was pulled from the floor and further debate was postponed until now.

Early this week, we returned to the Senate. Now, given that the Protect America Act expires in a few short days, one would have thought that FISA would be the first up on the agenda. I don't want to minimize the importance of Indian health legislation, or any other important legislation that the Senate should consider, but let's be clear: If the intelligence community cannot protect this country from terrorist attacks, then it doesn't matter much what else we debate or pass. We have to protect the country first and protect our troops and other personnel abroad in order to have a country, and we must improve upon other legislation. But here we are, only a few days shy of the PAA's expiration, and the drumbeat is there already by some stating we need more time to consider the Intelligence Committee bill; we should just do a short extension of the PAA. That is a bad idea. Some have called it flawed.

I believe it is important, but I believe the Intelligence Committee bill goes much further and does what we absolutely must do to make sure not only that we have the ability to collect on foreign terrorists who are planning attacks here or abroad but also to protect the constitutional rights, the privacy rights of Americans.

The Intelligence Committee spent over 9 months looking at FISA modernization. We have held hearings. We have gone out to NSA and watched its

implementation. We have reviewed the terrorist surveillance program. We have looked at the implementation of the PAA. We have gone to review all the documents upon which the TSP—the terrorist surveillance program—was based, and we have come with a solid bipartisan bill. We are ready to act, and the intelligence community is waiting for us to act, and so are our allies abroad who have relied very heavily and continue to rely upon our collection ability to help keep their countries safe. Every day, we hear about attacks that have been disrupted by allies across the world. Without being specific in any areas, I think one can generally assume that our collections have helped our allies protect themselves against attacks in their countries.

There is no reason to extend the PAA, much as I liked it. We have a bill that is responsible, and it is more effective. It addresses concerns about the PAA. It gives our intelligence operators the tools they need, and it ensures that our private parties will continue to cooperate with the Government. I am pleased the majority leader and minority leader have come to agreement on this fact.

As the majority leader stated appropriately 2 days ago when he supported moving to this legislation immediately—and I thank the majority leader for that—we need to act now, and I hope we will be able to pass a solid FISA bill in short order. Some hope today. I join with that hope. I am not an incurable optimist, but we can always hope.

We have before us the Senate Intelligence Committee bill, S. 2248, which was passed out of the committee by a 13-to-2 vote. We need bipartisan legislation. This is bipartisan. Nothing is ever going to be unanimous in an area that is this technical and this important, but we passed it 13 to 2. This bipartisan bill will give the intelligence community the authority and flexibility it needs to track foreign terrorists quickly and efficiently.

In November, the Judiciary Committee reported a substitute on a straight party-line vote. The substitute added numerous provisions that were not fully vetted with the intelligence community. Regrettably, it ignores significant concerns expressed by working-level officials in the Department of Justice and the intelligence community—the very operators who know how this complex, technical, and overwhelmingly supervised and reviewed system works. The Judiciary Committee also ignored the concerns of its own minority members. As a result, this totally partisan substitute changed the Intelligence Committee bill in ways that will gut—gut—our intelligence surveillance capabilities. This substitute amendment is what we will be considering first this morning.

Last night, at the very last minute, the chairman of the Judiciary Committee filed a new substitute that modified the original Judiciary Committee substitute. Regrettably, the Judiciary Committee did not share this with my staff, and we only received the strikeout version, one that shows the changes between the substitute that has been at the desk for 2 months now and this last-minute switch. We received it from the ranking member's staff late last night.

After a quick review, my staff and I can tell my colleagues that the core problems remain, and although the DNI and the Department of Justice also have had little time to digest it, they have told us that their primary concerns remain. They cannot support this new substitute. It does not get the job done.

Conversely, the Intelligence Committee's bipartisan bill was drafted after months and months of studying the collection program. Members of our committee went out to the National Security Agency—we refer to it as NSA—to see how the program worked and to inspect the layers of protection built into their collection methodologies to make sure the agency stayed within the bounds of law.

Over several months, Chairman ROCKEFELLER and I put together an agreement with our committee on both sides which adds more protections to the constitutional rights and the privacy rights of American citizens. I can be very proud and I think the Members of this body can be very proud that we have extended and improved protections for American citizens.

We worked with the intelligence community representatives and the Department of Justice lawyers to make sure our legislation would work and would not impede vital collection—more protection but keep the system working. I think that is where we ought to be, and that is where we are in the underlying Intelligence Committee bill.

Most importantly, we fashioned a legislative solution that both Democrats and Republicans could accept. I thank our Intelligence Committee members and staffs for their efforts, long and hard work, to come up with this bipartisan bill. Our bill has been publicly available for scrutiny for over 3 months now, and it remains the most solid bipartisan way to move forward.

Two provisions of the bill, however, were added to the initial markup without the input of the intelligence community. As a result, both provisions in the bill could cause unintended operational consequences, and they needed to be fixed. Chairman ROCKEFELLER, Senator WHITEHOUSE, Senator WYDEN, and I worked together with the community to come up with solutions to these problems, and I hope we can have broad support for a managers' amendment to remedy that situation. One of these provisions provided important new protections, but it had to be reworked to protect Americans abroad in a manner which was consistent with our structure of laws and those of other countries.

The DNI has told us that with the managers' amendment fixing these two problems, the community will support our bill. That is important for Chairman ROCKEFELLER and me because we want to pass a bill that works and will become law. It would do no good to pass a bill that some may feel good about or may pass for good politics but does not work for those who protect us in all of our intelligence agencies. So the DNI's support of this bill, in particular, is critical. Consequently, with these fixes applied, we will also have a bill the President will sign into law.

My intention as a floor manager—and I believe Chairman ROCKEFELLER stands shoulder to shoulder with me in this—is to pass a bill that the DNI supports and that the President will sign. I believe we have that right now with the fixes to be applied.

If we attempt to change key painstakingly constructive provisions or to add bad provisions, however, we could hinder the intelligence community's ability to do its job and jeopardize the DNI's support for this bill and the chances of it becoming law. With the expiration of the PAA in a few days, I believe this is not the path we should take in the Senate. Anyone who has read FISA knows that it is very technical and each word matters. So it is imperative we do not add provisions without the input of the intelligence community, and we need to listen to their concerns. They are experts. They operate an incredibly technical and complicated system that is overlaid with legislation carefully drafted to recognize their capabilities, their limitations, and, most importantly, protections for U.S. persons and American citizens. We saw firsthand how difficult it is to deal with amendments that are not cleared with the intelligence community to make sure they work.

Let me just say that the Department of Justice and the Office of the Director of National Intelligence have been very helpful throughout the process, but we should not mistake their willingness to provide technical support to avoid operational problems with support for certain provisions. So while the DNI may have provided some technical support, there are several amendments that I believe, if added to our bill, could cause problems for the intelligence community, lose the support of the DNI and thus our ability to get this bill signed by the President.

First, I expect there to be some efforts to undo or modify the civil liberty provision in the Intelligence Committee's bill. Chairman ROCKEFELLER has already delivered a very strong and persuasive argument for this liability protection. It has been said once very well by the chairman, but this being the Senate, it needs to be said again, and I will be happy to do so.

This provision is essential to foreign targeting authorities. Without retroactive and prospective civil liability protection, it becomes much less likely that our private sector partners will be

able or willing to assist us in the future. That means the intelligence community would have to spend great time compelling telecommunications providers in each instance who are reluctant for fears of civil lawsuits to assist, to work with us to track terrorists.

The committee studied this issue, and we reached a broad bipartisan consensus that civil liability protection is for providers and not immunity for Government officials. That was the appropriate action. I repeat, the civil liability provision in this bill is for private parties who may have assisted the Government. There is no immunity or protection for the Government itself.

Additionally, the concept of ''substitution,'' where the Government is substituted for the private party as a defendant in court, is not an acceptable alternative. That would allow litigation to continue, including discovery against the providers, thereby risking the disclosure of our sensitive intelligence sources and methods.

At his confirmation hearing, I asked General Hayden, the nominee for the head of the CIA, who had previously been the head of NSA, how badly the disclosures of our intelligence collection methods had hurt us in the battle to get the intelligence we need. General Hayden told us ruefully that we are now applying the Darwinian theory to terrorists: We are only capturing the dumb ones.

With substitution, we would not only be risking disclosure of sources and methods, we would also, however, embitter private parties against us whose cooperation becomes public, thus endangering their personnel, their facilities, and their business reputation here and abroad, with grave consequences to those who had participated, as Chairman ROCKEFELLER said, in compliance with a Government directive from the highest officials in the land, and we would put taxpayers' dollars at risk for trial lawyers' coffers. We would also incur great expense in defending those lawsuits. The orders were issued—and I will discuss more about this later—under the President's article II constitutional power and responsibility to conduct foreign affairs.

Let me say a few words about an idea that came up shortly before the debate in the summer. Some are suggesting that before civil liability protection is granted, the FISA Court, the Foreign Intelligence Surveillance Court—and I will refer to it as the FISC—the FISC or other court must determine that those providers who allegedly assisted the Government with the terrorist surveillance program acted in good faith and pursuant to an objectively reasonable belief that the directives were lawful.

As reflected in the Intelligence Committee report accompanying S. 2248, the committee has already made this determination. We have studied this issue extensively, and we concluded that civil liability protection was the best and only solution. Why would Congress want to turn over its collective judgment to a single judge and pass a law stating that judge's ruling would be the final word on this issue? We don't even know what that ruling would be. This does not make much sense to me. We already went through this problem with the judicial variance on the FISC before, remember? The President's program was put under FISA, and then changes within the court, different judges, led to a problem with the intelligence gaps that spurred the need for short-term legislation last August. Congress should not roll the dice on this issue, close our eyes, cross our fingers and say: Whatever judge happens to be on call the day this issue comes up, well, that will be the final word on this question. Remember, the FISC's function is to approve applications for electronic surveillance. It is not set up for nor has established competence in this area. It makes no sense.

The providers need civil liability protection, and they deserve it now, not the prospect of further proving their good faith before yet another court. The longer this litigation drags on, the more likely it is that our intelligence sources and methods will be disclosed and the communications providers' businesses will suffer and they, their facilities, and their personnel will be at risk. It also becomes more likely and understandable that these companies, on which both the law enforcement and the Intelligence Committee rely for critical and timely information, could refuse to assist us in times of our need because of valid business reasons about the potential for further lawsuits. And I am not just talking about terrorist threats, I am talking about a provider refusing to give information voluntarily to help find a kidnapped child or help to find those who sexually entrap children on the Internet or proliferation or what have you. Should we be willing to take this risk? I don't think so.

Now, let me move to some of the issues the Judiciary Committee modified in our bill to the detriment of the overall product. Let me be clear, the new substitute that was filed last night is the same old wolf in different clothing. It does not alleviate any of these concerns. The Intelligence Committee bill included, as part of our compromise, a reiteration of the exclusive means provision in the current law, which states that FISA is the ''exclusive means'' in statute for conducting electronic surveillance. No statute that Congress ever passes can trump the President's article II powers. Numerous courts, and even the FISC itself, have reviewed this and stated the powers given to the President under the Constitution cannot be extinguished by a law passed by Congress. Even though we have passed a law on exclusive means, we have also passed a law called the Authorization for the Use of Military Force, which has to be read in conjunction with FISA.

Clearly, even those who believe a statute can somehow impinge on the article II constitutional powers of the President must recognize the powers of the President, if they were lessened by FISA, were reinvigorated by AUMF. Congress is making a statement in ''exclusive means'' that we want to see surveillance conducted under FISA. We have seen many attempts to broaden this language, but this is an area that calls for extreme caution. Exclusivity is more than a policy statement, it has a real operational component.

As we now know from our own experience in drafting this provision, the slightest word change can impede vital intelligence collection. I believe the Intelligence Committee's version addresses Members' views about exclusivity and further strengthens that statement, while at the same time preserving the ability to gather intelligence. Conversely, the majority's Judiciary Committee substitute now requires an act of Congress after the next attack, potentially before our intelligence professionals can do what they need to protect us. There is no exception if the attack comes from al-Qaida or another terrorist organization.

Now, it doesn't take a rocket scientist to figure out that as we stand here today, we have no idea where or when the next attack may come. Are we, each of us, willing to take the risk that Congress may not be able to act; that for whatever reason Members cannot make it back to Washington, DC, we cannot get a bill passed and signed by the President, which would leave our intelligence community without the authorities it needs to counter the threat or protect this country? I, for one, don't want to be explaining that back home to my constituents in Missouri. It is another nice sounding idea politically to some that makes no sense operationally and shuts down some potential intelligence collection.

Moreover, the Judiciary Committee's bill, and the latest substitute, would allow the FISC to assess compliance with the minimization procedures used for the acquisition of foreign intelligence information from individuals outside the United States. Minimization procedures are designed to protect U.S. identities if communications of U.S. persons are accidentally swept up in a surveillance operation or if a U.S. person is party to a conversation with a target—a lawful target—but that U.S. person is not of intelligence interest him or herself. We minimize, suppress, don't even record the name of that U.S. person. If there is no intelligence value, then that person is not at risk. To be at risk, that person would have to be receiving or instituting a call to a lawful target. That means that if somebody is calling a family member abroad, a business activity abroad, then there is no reason to fear that even those conversations would be picked up. But if others are picked up that are of no intelligence value, they would be minimized or suppressed.

Giving the court the ability, supposedly, or the responsibility to assess compliance may sound like a good idea in the abstract, but when we talk about foreign targeting, we are outside the FISC's expertise. The FISC was created solely to issue orders for domestic surveillance on a particular target. Congress, in 1978, recognized the court's expertise over domestic matters but specifically left foreign surveillance activities to the executive branch and the intelligence community and the oversight of the intelligence committees. By now requiring judicial review of minimization procedures for a foreign target, we would take a huge step back from a system that worked well for almost 30 years. So there is a red line, and I need to draw it.

But that line is already drawn. As a practical matter, when the FISC assesses compliance with minimization procedures, it would be second-guessing trained analysts' decisions about which foreign terrorist to track and how to do that. The FISC knows what to look for when it issues a warrant to tap someone's phone in Virginia, but when it comes to analyzing intelligence leads and deciding which foreign terrorists or spies should be surveilled, the court is simply not competent to make these judgments. This is what assessing compliance would have them do. The court knows this. Let me point to the court's own words from its published opinion on December 11, over a month ago, in the case In re: Motion for Release of Court Records. There the FISC judges say they are:

> Not expected or designed to become experts in foreign intelligence activities, and do not make substantive judgments on the propriety or need for a particular surveillance. Even if a typical FISA judge had more expertise in national security matters than a typical district court judge, that expertise would still not equal that of the Executive Branch, which is constitutionally entrusted with protecting the national security.

That is a quote from the court which some want to give this responsibility which they say they do not have. We need to heed the words of the FISC and not require them to make judgments they themselves believe are better left to the executive branch.

Let me repeat for my colleagues to hear clearly. The FISC, the FISA Court itself, is virtually saying: Congress, don't do this. We are not the right ones to make this determination. We should be wary to disregard their own assessment of their own competency in this vital intelligence collection area.

Additionally, throughout this debate, we must remember we are talking about foreign terrorists operating in foreign countries intent on harming us and our interests. Senator LEAHY's new substitute slightly modifies a requirement from the original substitute that the Department of Justice inspector general conduct a comprehensive review of the President's Terrorist Surveillance Program. That modification, however, does not address the underlying concerns with his provision. This review simply is not necessary and is beyond the expertise of the DOJ inspector general.

The Intelligence Committee has had numerous briefings and hearings on the TSP. We have spoken at length with lawyers from the Department of Justice and with the operators, and we have read document after document on which this program was based. We have spent more time on FISA than I ever dreamed possible or that I ever wanted to do. Yet I have not heard one convincing argument as to why this review must be conducted. Again, it may look good politically, it may make good sound bites, but we have reviewed this program to death over the past year. Yet another review is redundant, unnecessary, and because of that is wasteful.

Finally, as a part of my agreement with Chairman ROCKEFELLER, we included a 6-year sunset in the bill. Personally, I think sunsets are a bad idea when we are talking about national security. The Attorney General, General Mukasey, has stated repeatedly, "There are no sunsets in our enemies' fatwas." I understand what he is getting at. The terrorists' desire to get after us is not limited. We should give our intelligence operators something they can hang their hat on when they retool their systems and move forward with intelligence collection.

If there is a debate about sunsets, I am considering saying we ought to get rid of even the 6-year sunset. I agreed to 6 years to get this bill moving, but shorter than that I don't believe is acceptable. If we provide stricter, shorter term sunsets, that would tell the private entities and our intelligence communities that Congress's view on civil liability protection is only temporary and the power for our intelligence collection is only temporary. This new statute gives our operators confidence in the new statute. It gives our collaborating allies abroad confidence we will be there.

Let me make one thing clear. Our job in the Senate Intelligence Committee, and the same on the House side, is to review intelligence collection methods. We review it on a semiannual or even monthly basis. If we find there is a problem with this bill, we should not have to wait until the sunset comes to change it. We see a problem, we need to fix it. We don't need to wait for 6 years or 4 years to fix it. If there is a problem, let's start fixing it as soon as we find it.

A sunset does not prevent us from passing new legislation when we see fit. No sunset at all would put even greater pressure on us to make sure it is working properly. If in 1 year the bill was shown to be inadequate, we should act immediately to fix it, not wait until the sunset. So I don't like sunsets, but the 6 years was a compromise with the chairman and other members of the committee to produce this bill.

The Judiciary Committee, in this new substitute, seeks to further shorten the time frame to 4 years. Our intelligence collectors, our troops on the battlefield, the private parties who depend on this authorization need certainty, not authorities that change depending on what year it is. A 4-year sunset would not give them the certainty they need.

In conclusion, our intelligence collectors, our troops who are in harm's way, need this legislation, and our country needs this legislation. But let me talk about the troops. In May, when I visited Iraq, I talked directly with the commander of our Joint Special Operations Command, who told me the limitations under the old law, shutting down of the collection that occurred because of the new technology, so adequately described by the chairman, prevented him from collecting key information he needed to protect our troops in the theater, on the battlefield. My son happened to be one who was there at the time. That got my attention. It had the attention of the troops and the commanders. The commander told us he could kill or capture top al-Qaida leaders, but he was not able to collect signals intelligence on them. Does that make sense? No.

The bottom line in this story of FISA is terrorists were able to use technology and our own outdated laws to stay a step ahead of us. We can't afford to give them that step. The Intelligence Committee's bill gives our intelligence operators and law enforcement officials the tools they need to conduct surveillance on foreign terrorists and foreign countries planning to conduct attacks inside the United States against our troops and against our allies. It is the balance we need to protect our civil liberties without handcuffing our intelligence professionals.

I hope we can do the right thing—pass this bill, with the perfecting managers' amendment but without any additional changes that will compromise its functionality and prevent it from becoming law. We need a bill both Democrats and Republicans support, the DNI supports, that is good for the intelligence community, and that the President will sign into law.

That means we need to dispense with the Judiciary substitute that is immediately before us and proceed with consideration of amendments to the bipartisan Intelligence Committee bill. I look forward to making this happen.

I yield the floor.

The PRESIDING OFFICER. The Senator from Wisconsin.

Mr. FEINGOLD. Mr. President, I ask unanimous consent that following my remarks, the Senator from Florida, Mr. NELSON, be recognized for his remarks.

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

Mr. FEINGOLD. Mr. President, I strongly support Senator LEAHY in his effort to replace the Senate Intelligence Committee bill with the version passed by the Judiciary Committee. I am a member of both of these

committees. As a member of both committees, I have been deeply involved in the process of having looked at those two products.

Having been involved in helping shape them, I urge my colleagues to support the Judiciary Committee version of this legislation. Indeed, I had hoped very much that the Senate would take up that bill to begin with rather than the flawed Intelligence Committee bill.

In December, I along with 13 other Senators, urged the majority leader to make the Judiciary Committee bill the base bill on the Senate floor. Unfortunately, our request was denied. So it is very disappointing that we are now forced to fight an uphill battle of offering the Judiciary bill as an amendment.

I would like to lay out the reasons the Senate should support the Judiciary Committee bill rather than the Intelligence Committee bill. One obvious reason is the Judiciary Committee bill, unlike the Intelligence Committee bill, does not contain unjustified retroactive immunity for companies alleged to have participated in an illegal wiretapping program.

I do not want to spend a lot of time on this today because there will be an opportunity to debate this issue as the Senate's consideration of this legislation moves forward. But I will say that having spent the last year and a half studying what happened at the NSA from 2001 to 2006, I strongly oppose immunity.

Under current law, telecom companies already get immunity as long as they follow certain requirements that are clearly spelled out in the law. I see no reason for Congress to change the rules this late in the game.

Today, I would like to focus on the other significant parts of these bills, the part contained in title I of each bill that contains sweeping new changes to the FISA law for years to come. Let me start off by pointing out that there are a number of similarities between title I of the Intelligence Committee bill and title I of the Judiciary Committee bill. Their basic structure is the same.

Title I of both bills authorize the Government to conduct surveillance of individuals reasonably believed to be overseas without court approval for individualized warrants. Both bills authorize the Government to develop and implement procedures to govern that type of surveillance and provide the procedures to the FISA Court for review after they have gone into effect.

Now, let's be clear. These are extraordinary powers that both bills give to the executive branch. And there is no difference between these two bills in terms of the intelligence they permit the Government to acquire. No difference between the bills as regards to the effort to go after those who may be trying to do us harm in this respect. Rather, the differences between these two bills comes in the form of critically important checks and balances on those powers.

The Judiciary bill contains a number of important changes to improve court oversight of these broad new executive branch authorities and to protect the privacy of law-abiding Americans—the privacy of law-abiding Americans. The Intelligence Committee bill, on the other hand, leaves it up to the executive branch to police itself, an approach that has all too often proven to be a bad idea throughout American history. I would say particularly under this administration.

Let me state as clearly as I can the differences between these two bills have nothing—nothing—to do with our ability to combat terrorism. They have everything to do with ensuring that the executive branch follows the rule of law and does not unnecessarily listen in on the private communications of Americans who are doing absolutely nothing wrong.

This debate is about whether the court should have an independent oversight role and what protections should apply to the communications of Americans that somehow get swept up in these broad new surveillance powers. If you believe the courts should have a meaningful oversight role with regard to Government surveillance, then you should support the Judiciary bill.

If you believe that Congress should safeguard the communications of Americans at home that could be swept up in a broad new surveillance program that is supposed to be focused on foreigners overseas, then you should support the Judiciary bill. It is as simple as that.

That said, the Judiciary Committee bill is not perfect. More still needs to be done to protect the privacy of Americans. That is why it should be an easy decision to support the Judiciary Committee bill as our starting point on the floor of the Senate as we work on this legislation.

Let me also remind my colleagues that the process by which the Judiciary Committee considered, drafted, and amended and reported out its bill was an open one, allowing outside experts and the public at large the opportunity to review and comment. With regard to legislation so directly connected to the constitutional rights of Americans, the result of this open process should be accorded great weight, especially in light of the Judiciary Committee's unique role and expertise in protecting those rights.

I also point out that several of the administration's criticisms of the Judiciary Committee bill have been based on technical drafting concerns. But in the version that Chairman LEAHY has brought to the Senate floor, he has made the changes necessary to address those technical concerns. So I hope we do not hear any arguments in this floor debate about these issues that have already been addressed.

Exactly what are the differences between these two bills? First, the Judiciary bill gives the secret FISA Court more authority to operate as an independent check to the executive branch. For example, one provision in the Judiciary bill fixes an enormous problem with the Intelligence Committee bill; that is, the complete lack of incentives for the Government to target people overseas rather than to target people in the United States.

The Judiciary bill solves this problem by giving the FISA Court the discretion to limit the use of information concerning Americans when that information is obtained through procedures that the FISA Court ultimately finds are not—are not—reasonably designed to target persons overseas.

Another provision of the Judiciary bill ensures that the FISA Court has the authority to oversee compliance with what are called minimization procedures. Minimization procedures have been held up as the primary protection in the Intelligence Committee bill for the privacy of Americans whose communications get swept up in this new surveillance authority.

Now, I do not think current minimization procedures are strong enough to do the job. But to the extent that minimization can help protect Americans' privacy, its implementation surely needs to be overseen by the court. So that means giving the court the authority to review whether the Government is complying with the minimization rules and to ask for the information it needs to make that assessment.

Now, without this provision from the Judiciary bill, the Government's dissemination and use of information on innocent law-abiding Americans will occur without any checks and balances whatsoever, no checks and balances at all.

Once again, ''trust us'' will have to do. Now, I believe in this case, as in so many others, ''trust us'' is not enough. The Judiciary bill offers other types of oversight, as well. For one thing, it requires relevant inspectors general to conduct a complete review of the President's illegal wiretapping program, which, frankly, is long overdue.

It improves congressional access to FISA Court orders. The Intelligence Committee bill required the Congress to be provided with orders, decisions, and opinions of the FISA Court—that includes significant interpretations of the law—within 45 days after they are issued.

Now, that is good as far as it goes. But the Judiciary Committee bill adds that Congress should be provided with the pleadings, the pleadings filed with the court associated with the opinions that contain significant interpretations of law.

At times, the court's opinions merely reference and approve arguments made in the Government's pleadings. In that case, the pleadings may be critical to understanding the reasoning behind any particular decision. It is not enough just to have the cursory court opinion.

It also requires that significant interpretations of law not previously provided to Congress over the past 5 years

be provided. Congress needs to have the full story of how the law has been interpreted in the past in order to make the right decisions on what changes in the law should be made in the future.

The Judiciary bill also does a better job of protecting Americans from widespread warrantless wiretapping. First, it provides real protection against what is called reverse targeting. It ensures that if the Government is wiretapping a foreigner overseas in order to collect the communications of the American with whom that foreign target is communicating, it gets a court order on the American. Specifically, the Judiciary Committee bill says the Government needs an individualized court order when a significant purpose of its surveillance is, in fact, listening to an American at home.

The Director of National Intelligence himself said reverse targeting violates the fourth amendment. All this provision that I am raising does is simply codify that principle. The administration continues to oppose this provision.

I have a simple question: Why? Why is it opposed to a provision that prohibits a practice that its own Director of National Intelligence says is unconstitutional?

The Judiciary Committee bill also prohibits something called bulk collection. Now, that is this sweeping up of all communications between the United States and overseas. The DNI said in public testimony that this type of massive bulk collection would be—would be—permitted by the Protect America Act that is currently in effect. But he has also said that what the Government is seeking to do with these authorities is something very different.

It is, he said:

Surgical. A telephone number is surgical. So, if you know that number, you can select it out.

So if the DNI has said he does not need broader authorities, there should be no objection to this modest provision which, again, simply holds the DNI to his word.

The prohibition against bulk collection ensures that the Government has some—some—foreign intelligence interest in the communications that it is collecting and not just vacuuming up every last communication between Americans and their friends and business colleagues overseas.

Targets do not need to be known or named individuals; they can be phone numbers, which is how the DNI has described how the Government collects. And the Government does not have to identify or explain its interest in the targets to the FISA Court. It merely has to make a general certification that individual targets exist.

As was already alluded to on the Senate floor, the Judiciary Committee bill also has a sunset of 4 years rather than 6 years, ensuring that Congress will reevaluate this law at least once before the end of the next Presidential term. And, critically, it contains a strong statement that Congress intends for FISA to be the exclusive means by which foreign intelligence surveillance is conducted. It also closes purported statutory loopholes that the Justice Department relied on to make its torture arguments that the congressional authorization for the use of force in Afghanistan authorized the President's illegal wiretapping program. The Judiciary bill makes clear, once and for all, that the President must follow the law.

For all of these reasons, the Senate should support the Judiciary Committee's product. Let me repeat what I said at the outset. The differences between these two bills have nothing to do with our ability to combat terrorism. Nothing. They have everything to do with ensuring that the executive branch adheres to the rule of law and does not necessarily listen in on the private communications of Americans. The fact that the administration is so strongly resisting these commonsense protections really says a lot. It ought to give pause to those who are considering opposing it.

It is time for Congress to stop being an enabler when it comes to this administration's indifference to the rule of law and, instead, start being a protector of the rights and freedoms of our citizens.

I urge my colleagues to support the Judiciary Committee bill.

I yield the floor.

The PRESIDING OFFICER. The senior Senator from Florida.

Mr. NELSON of Florida. Mr. President, I, as the Senator from Wisconsin, my colleague, have had difficulty as we sit side by side in the Intelligence Committee with the issue of immunity.

First of all, I want to say that I think the intelligence community, headed by Admiral McConnell, is doing an excellent job. They are correcting colossal mistakes. We had a colossal mistake on intelligence on September 11. We had another colossal mistake of intelligence leading up to the Iraq war. And in order for us to protect ourselves, we, in fact, have to have information in order to disrupt the plans to attack us, to harm the Nation.

So I give credit to Admiral McConnell, the Director of National Intelligence. I give credit to General Hayden, the head of the CIA, to Steve Kappes, the Deputy Director of the CIA. I think they are doing a terrific job.

I compliment the chairman and the vice chairman of our committee, and they are within earshot, and I want them to hear how much this Senator appreciates their cooperation between each other to work in a bipartisan fashion. They are talking right now, so I am not sure they are hearing me. I want them to know my personal appreciation for how they have taken a bipartisan approach. It is important that we thank people for the work they are doing.

This legislation is an attempt to be crafted so that these folks can better perform their job but at the same time protecting the precious civil liberties Americans have that make us unique from any other society on planet Earth. We want to protect those rights of privacy. I believe there are protections in this bill that will extend to Americans, regardless of their physical location. One of the things we amended in the Intelligence Committee was that it doesn't make any difference, if an American is here in the United States or if they are abroad, if you are going after an American as a target, they ought to have to go to the FISA Court to get a court order called a warrant, regardless of where that American is, if they are a target of surveillance. That is important. It is important to support our constitutional protections of privacy and that the Government can't come and intrude in our lives. I think we have started off in the right direction.

As the Senator from Wisconsin has said, I have a problem with the blanket immunity as well. I agree with Admiral McConnell. At the end of the day, we have to have the cooperation of the 10 communications companies, and they should not have the threat of a spurious lawsuit hanging over their heads, thinking they are going to be dragged out in public court over time as a means of trying to extract a pound of flesh from them. There should be every opportunity and encouragement for the telecommunications companies to cooperate with the U.S. Government intelligence community for the protection of the country. The bill before us does, in fact, give that immunity for any of the surveillance that did not have a warrant from the FISA Court from the period of September 11, 2001, to January 17, 2007.

The problem I have with that is, I am not sure the telecommunications companies were attending to their knitting, as to whether they were getting legal orders from the United States Government, not in the first year after September 11, not in the second year, perhaps not even in the third year after the attack on New York City and the Pentagon and the attempt on other facilities in Washington. I am talking about this went on for a fourth year and a fifth year. I am not sure that, in fact, they had the legal basis to say that the Government, in fact, was complying with the law. Of course, I make that judgment, and my judgment is based on something I can't say here on the Senate floor, because it is not only highly classified; it is highly compartmented. I have read the documents. I have a problem with that.

At the end of the day, if it means we have to pass the bill and it has immunity in it, I am going to vote for the bill, because it is much more important that we go ahead and have a procedure set out by which we can try to protect ourselves from the bad guys and at the same time protect the civil rights, the right of privacy of our citizens. That is contained within the committee bill, and that is the way I voted in committee. I voted against the immunity,

but that amendment only got three votes. When it came to passage of the final bill, I voted for it, because that is in the interest of the country. If that is what I am confronted with here, that is the way I am going to vote and support the chairman and vice chairman of our committee.

Maybe it doesn't have to be as stark as Senator FEINGOLD has said, that it is either immunity or no immunity. Maybe what the issue ultimately ought to be is somewhere in between. That is the Feinstein-Nelson amendment that will be offered later in which it will put a review of the telecommunications carriers' actions squarely under the jurisdiction of the special Federal court set up to handle these top-secret matters called the FISA Court. The court would review all aspects of the telecommunications carriers' involvement and make a decision on immunity based on three criteria. No. 1, if the court decided that the telecommunications carrier did not provide the assistance as alleged, then, of course, the court would dismiss the lawsuit against the company. No. 2, if the assistance was provided, the court then would determine whether the documentation sent by the U.S. Government to the companies met the requirements of the law and was adequate. This law that would have to be met states that a telecommunications carrier needs a court order or a written certification from the Attorney General that no court order is required. It further has to state that all statutory requirements have been met. So then this FISA Court, in other words, would, in fact, judge that. If the conditions of the statute had been met, then the companies would be shielded from the lawsuit and the lawsuit would be dismissed.

Or the third criteria the court would look at: If the special Federal court, the FISA Court, found there was no certification given to the telecommunications company, then the court would examine whether the company acted in good faith and with an objectively reasonable belief that it was legal. If the court determined that, then the immunity would be provided.

That seems to be a way in which the companies would be protected, and at the same time we can get to this issue of this third year, fourth year, and fifth year that the United States Government is saying this is legal without a court order, when, in fact, it seems to me that the CEOs of those companies and the general counsels of those companies ought to have been jumping up and down saying: Wait a minute. We want additional information. The amendment to be offered by the Senator from California and me creates a series of three requirements that must be met in order for the telecommunications companies to receive immunity. It is going to preserve the rights of private citizens to make their case in front of a judge without jeopardizing these highly sensitive kinds of not only top-secret but compartmented material that need to be classified for the protection of the country.

Practically speaking, what is going to happen? We can't pass anything around here unless you get 60 votes. That is a huge threshold. As this comes before the Senate, I doubt the Feingold amendment is going to get 60 votes to cut off debate. I doubt the Feinstein amendment is going to get 60 votes. That brings us right back to the Intelligence Committee bill which is before us right now, in which case, on final passage, I am certainly going to vote for that. But there is another opportunity to address this specific issue. It is unlikely that the House of Representatives is going to pass this legislation with the immunity for the companies. Therefore, there will be a huge difference between the Senate bill and the House bill, as the clock continues to tick down toward the deadline in which agreement is going to have to be reached. It seems to me the Feinstein-Nelson approach is a reasonable compromise at that point.

I hope in time we are going to be able to pass this, that we will pass it before the deadline which, to my knowledge, is in a week or so, maybe a week and a half. The majority leader says he is going to keep us in all weekend in order to get this passed. If I were he, I would do the same. It is so critically important to our country that we pass this legislation.

So on we go. Let the legislative process work itself out. Hopefully we will get this thing passed.

I yield the floor.

The PRESIDING OFFICER (Mr. BROWN). The senior Senator from Texas is recognized.

Mr. BOND. Mr. President, may I ask the distinguished Senator from Texas to yield for a unanimous consent request and then she will be recognized after that.

Mrs. HUTCHISON. Yes.

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

Mr. ROCKEFELLER. Would the distinguished vice chairman be willing to yield for a parliamentary matter?

Mr. BOND. Please.

The PRESIDING OFFICER. The Senator from West Virginia.

Mr. ROCKEFELLER. Mr. President, I ask unanimous consent that the time until 2 p.m. today be for debate prior to the vote in relation to the Judiciary Committee amendment, as modified, with no amendment in order to the amendment prior to the vote, with all time equally divided and controlled between Senators LEAHY and BOND or their designees, with the 30 minutes prior to the vote divided as provided above, with Senator LEAHY controlling the final 15 minutes and the vote will be at 2.

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

The Senator from Missouri.

Mr. BOND. Mr. President, since we have had two speakers on the majority side, I ask unanimous consent that Senator HUTCHISON and then Senator BROWNBACK be recognized on our side.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

Mr. BOND. I thank the Chair.

The PRESIDING OFFICER. The senior Senator from Texas is recognized.

Mrs. HUTCHISON. Thank you, Mr. President.

First, Mr. President, let me say, while the distinguished chairman and ranking member of the Intelligence Committee are both on the floor, that I believe the Intelligence Committee has done a fine job on this very important legislation, the Foreign Intelligence Surveillance Amendments Act, that will modernize and allow our law enforcement officials to have the tools they need to protect our country.

The Intelligence Committee voted the bill out on a bipartisan basis. It was certainly debated and balanced within the committee. I think this Senate should support the Intelligence Committee and all the work they have done to prepare this very important legislation. So to Senator ROCKEFELLER and Senator BOND, I say thank you for doing a great job.

I do rise today to support this bill. It is essential that we do so to protect our country. I was proud to join my colleagues last August in passing the Protect America Act. It will expire in 8 days—in 8 days. The majority leader has said we are going to pass this legislation this week out of the Senate. That is a good thing. The House needs a week to look at it and determine if they will pass it. I hope they will pass the same legislation that is before us from the Intelligence Committee and send it to the President without amendment.

Our enemies are not going to expire in 8 days. Al-Qaida, we know, uses cell phones and wireless Internet networks and countless other technologies that were not in place when the original FISA passed 30 years ago. Thirty years ago, we did not have cell phones. Thirty years ago, you would go to a court and say: We want to tap the phone line of this number. Today, a cell phone can be thrown away before you can go to get a court order.

So in the act we passed last year, we determined that you could get a court order to intercept the communications between suspected terrorists and you can go to the person rather than to a phone number, which would be unusable by the time you could get a court order. So that is one way we have begun to upgrade the technology to match the threat. Because our enemy is very technologically capable. We must be able to meet that with law enforcement. Delays could mean the difference between life and death.

Unless we take action, this protection of our ability to intercept potential plots against our country will go out of existence. We cannot, in good conscience, let that happen.

Let's talk about the litigation aspects because that is going to be the first amendment we vote on. The first amendment we vote on is going to be out of the Judiciary Committee. There will be other amendments, I know, that have already been discussed on the floor regarding litigation against telecom companies.

After 9/11, the Federal Government requested that America's telecom companies share proprietary information to help prevent future terrorist attacks. After the existence of the national security program was illegally leaked 2 years ago, America's telecom companies began to get hit with dozens of class action lawsuits that could expose them to catastrophic liabilities.

Originally, the telecom companies had nothing to fear from those lawsuits because they had evidence that what they did was at the request of our law enforcement officials. But due to the sensitive nature of the Government's request of these companies, the law enforcement officials barred the telecom companies from the release of certain documents that they needed for their trials. So we have created a situation in which companies have cooperated with law enforcement to keep our country safe, and then, when the lawsuits arose, they were not allowed to defend themselves. Now, some of my colleagues say: Well, that is tough. They should have known better.

We are talking about the security of our country. The people who are in the business of telecommunications were asked to be patriotic Americans. And they said yes. So if we do not give them protection for these actions, as well as those going forward, we are going to put our businesses in an untenable situation. Either they can help law enforcement, be sued and hampered in their legal defense because they are not able to introduce certain types of evidence because of security reasons, or they can say no to law enforcement and put our country in jeopardy.

Now, I will tell you that I have talked to the CEO of one of our major telecommunications companies. He has said: Senator, I am going to do what is right for America. That is my first responsibility as a citizen of this country. But, Senator, I don't think I should be put in jeopardy for my shareholders and my consumers while being a patriotic American.

The Senate must act responsibly. We must be able to go to a company and say: help our country. Because in the past a terrorist could communicate between two countries overseas, and we would have the right to intercept those messages. I wish I could say we have no enemies inside our country who would communicate with a terrorist outside our country, but we all know that is not the case. We all know there are people in our country today plotting to kill innocent Americans. We know because plots have been uncovered. And we know because that is what happened on 9/11. There were people inside our country who were aiding and abetting, living in our country, and planning to kill innocent Americans.

So we must have the capability to give protection to a telecommunications company that would cooperate with our Federal law enforcement officials to intercept messages between al-Qaida in Pakistan or Afghanistan or anywhere in the world communicating with a terrorist sympathizer in our own country. It is our responsibility to do this for the safety and security of Americans.

We must pass this bill. We must pass it in the form that the Intelligence Committee did on a bipartisan basis. We must respect the work that has been done by those who have heard hours and hours and hours of testimony and seen classified information about the threats to our country. We must do our part, along with the President, with the Members of the House of Representatives, and with our law enforcement officials to ensure that no stone is left unturned to uncover a plot against innocent Americans.

If that is not the duty of the U.S. Senate, Mr. President, I ask you, what is? That is our responsibility. That is why we were elected: to protect our country. I hope this body, of which I am so proud to be a Member, will do the right thing and extend this act and give our law enforcement the tools they need to do the job we are asking them to do to protect America.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The senior Senator from Kansas is recognized.

Mr. BROWNBACK. Thank you very much, Mr. President.

I join my colleagues, particularly my colleague from Texas and my colleague from Missouri, in supporting this bill and in opposition to the Leahy amendment.

My colleague from Texas identified a number of the issues that are in the amendment. I serve on the Judiciary Committee. It is a great committee. Senator LEAHY does an excellent job leading the committee. But on this particular issue it is my belief, as a Judiciary Committee member, that we should recede to what the Intelligence Committee has put forward on a bipartisan basis and move forward with this bipartisan bill we have rather than going with, essentially, the substitute that the Judiciary Committee came up with, which was put forward on a partisan basis.

My colleague from Texas noted we have 9 days until this legislation expires. If we go with the Leahy substitute—as much as I respect Senator LEAHY—the President is going to veto this bill and we are going to be in a nonfunctional position for a period of time while we get things put back together. There is no reason to do that. We have a bipartisan bill.

The Intelligence Committee bill passed with only two dissenting votes. The Judiciary Committee substitute, in essence, that is being put forward—it has been modified and changed, but, in essence, it is what came forward from the Judiciary Committee—came out on a strictly partisan party-line basis.

Why wouldn't we go with the bipartisan bill that passed, I believe, 13 to 2 rather than go with the partisan bill that will be vetoed and then we will just be back here? We are not going to have the votes for a veto override. We would then go without this needed law provision so we can provide for the security of the country, as well as protect the civil liberties and rights of individuals within America.

I want to note in particular on this issue of telecommunications companies and the information they provide, I think we need to provide some level of immunity for companies to participate and work with the Federal Government on information that the Federal Government has legitimately requested.

In case people think, ''Well, OK, you are just giving a pass to the telecommunications companies,'' I want to read what the requirements are within the Intelligence Committee bill toward the telecommunications companies. The telecommunications carriers face a series of threats and lawsuits presently over their complying with what the Federal Government required. But the Senate Intelligence Committee immunity provisions do not just simply dismiss the cases outright. Instead, the bill sets forth a process for the Attorney General to submit a certification to the court that the telecom carriers either, one, did not provide the Government the alleged assistance in the first place, or, two, provided assistance pursuant to a valid request, directive, or order indicating that the activity was authorized by the President and determined to be lawful. The court would then separately review the Attorney General's certification for an abuse of discretion. This multilevel certification and review process will ensure an underlying assessment by the Government and the courts of the genesis of the carriers' role, if any.

The immunity provisions would not apply to the Government or Government officials. Cases against the Government regarding the alleged programs would continue. And the provisions would apply only to civil and not criminal cases.

All in all, I think the Intelligence Committee bill strikes the right balance between intelligence gathering and protections for civil liberties.

My point in bringing this out is that this is not some blanket waiver toward telecommunications companies. It goes through a multilevel court and administrative review procedure that has to pass through both in order for the telecommunications company to be able to get this immunity from liability exposure. It is not just the Attorney General; it is also the court that is involved with this as well.

I would hope my colleagues who have concerns about civil liberties would

look at that and say: Well, this is going to be reviewed in both places. This should be sufficient to require them—the telecommunications companies—to participate in this program, and to give them the immunity from liability, if they do this according to the law as determined by both the Attorney General and as determined by the court.

That seems to me to be a good level and a good balance of our intelligence needs, which are significant, and our civil liberties guarantees and requirements, which are required—that we guarantee civil liberties for the individual and that I want to see protected. But at the same time I want to see our citizens protected as well. And we have to be able to have some access to information of these communications—with intelligence, with terrorist organizations, individuals—that may be taking place.

All in all, I think the Intelligence Committee has done an excellent job of striking that balance between providing for our security needs and guaranteeing civil liberties of the individual. It has provided a multilayered process for this immunity to be able to be granted by different entities within the Government. It has done so in a balanced fashion. It has done so in a bipartisan fashion. I don't know why, for the life of me, we would want to go with something on a partisan basis that is not going to get through the process, when we need the bill now and we have a good bill put forward by the Intelligence Committee.

So as a member of the Judiciary Committee, I would urge us to support the Intelligence Committee and not support the Leahy substitute. As much respect as I have for the chairman, I do not think that is the way for us to go in bringing this bill forward to closure for the good of the country.

I yield the floor.

The PRESIDING OFFICER. The assistant majority leader is recognized.

Mr. DURBIN. Mr. President, I will support the Judiciary Committee substitute to the FISA Amendments Act.

As a member of the committee, I wish to commend Chairman LEAHY for his leadership. I think we have struck the right balance to give the Government the power they need to keep us safe but to protect our privacy, which we cherish so much as Americans.

I wish to commend the majority leader, HARRY REID, for bringing the FISA Amendments Act to the floor as one of our first items of business this year. I wish to thank my colleague and friend from the Senate Intelligence Committee, Senator ROCKEFELLER. Though we may disagree on some aspects of this bill, he has been a real leader on an issue of great complexity.

Last August, Congress responded to the administration's request to approve foreign surveillance legislation on an expedited basis. Remember, we didn't come to this issue because the administration felt they needed to deal us into the picture. We came to this issue because the New York Times finally published an article and told us about this warrantless surveillance that was going on all across America for years, surveillance that was not approved by Congress and was clearly not allowed by law but continued by this administration with impunity until they were caught with their hands in the cookie jar by the New York Times. Then they came to Congress and said: Well, why don't you write a law. Can we help you write a law?

After 9/11, I can remember Senator ROCKEFELLER, Senator LEAHY, Senator SPECTER, and so many others who rose to the occasion and said: We will come together on a bipartisan basis to keep our country safe. We lost 3,000 innocent people. We don't want that to ever happen again. We passed the PATRIOT Act. It wasn't perfect, but it was bipartisan. It had a sunset built into it. We tried to give this Government the tools to keep America safe. There wasn't a lot of grandstanding and speechifying. We did our job.

Then what happened? The Bush administration decided, in so many different aspects of this war on terrorism, to deal Congress and the American people out of the picture from that point forward. We heard rumors about secret programs, and a handful of Members were briefed, I guess; I wasn't one of them. Then, it wasn't until the New York Times told the whole story that we were kind of drawn into this situation, where we are trying to write a law to approve a course of conduct which the administration was undertaking, at least to some degree, without even consulting or conferring with Congress in its constitutional capacity.

The Senate Intelligence Committee and the Senate Judiciary Committee have held a lot of hearings. They have debated how to write this law and voted on a lot of amendments. We are now facing the reality that the Protect America Act, which was passed a short time ago, will expire next Friday, February 1.

Under any circumstances, it would be difficult for the Senate to pass a bill of this complexity, reconcile our differences with the House, and get it all wrapped up in a week. But the President has made it clear he is not going to sign this bill unless it includes an amnesty for telephone companies that cooperated with the administration's warrantless surveillance program. This is a difficult, controversial issue many Members feel very strongly about. I am one of them. The President insists that an amnesty provision for telephone companies be included, and I think that is going to make it impossible for us to meet the February 1 deadline.

Senator REID, the majority leader, has asked for a 30-day extension of the Protect America Act. Let's continue the current law for 30 days. Let's try to work out our differences. Let's do this in a responsible way. Senator MCCONNELL on the Republican side objected—objected to carrying on the current law for 30 days while we tried to work out our differences. That objection speaks volumes. Even though he opposed the Protect America Act, the majority leader I think was acting in good faith and taking the sensible course of action: Let's try to work these things out and not punish anybody in the process. The current law would stay in effect for another 30 days. The Republican Senate leadership, MITCH MCCONNELL, said no.

Well, that is unfortunate. The spokesperson for the White House said on Tuesday:

> The Protect America Act expires in just 10 days, yet after nearly 6 months of delay, Congress still has not taken the necessary action to keep our Nation safe. For the sake of our national security, Congress must act now.

So said the White House 2 days ago.

I can't follow this logic. On the one hand, the White House claims we face grave national security threats if this program expires, and on the other hand, when Senator REID tries to extend the program for 30 days, the Republican leadership objects. I am sorry, but that doesn't follow.

It is worth recalling what brought us to this point. It is difficult to believe it has been over 6 years since the terrorists struck our country on 9/11. I will never forget that terrible day, and most Americans will not either. And we will never forget what happened afterwards when Congress came together and tried to respond and make our country safe. Sadly, today Osama bin Laden is still on the loose, and al-Qaida is still around and may be growing in size.

I wish the administration had continued the spirit of bipartisanship of the PATRIOT Act. They would have had the full support of Congress and the American people. We showed that with the passage of the PATRIOT Act. But even as we were debating that important law, the administration was secretly implementing torture and surveillance policies totally inconsistent with the values of our Nation. They didn't ask Congress to approve the warrantless wiretapping of innocent Americans or torture techniques such as waterboarding. Instead, they based their policies on the extreme view of some in the administration that the President, as Commander in Chief, was not bound by the law.

They discarded the Geneva Conventions after decades of America saying that was a significant underpinning of our relationship with the civilized world. They rejected it. They called it obsolete, the Geneva Conventions. They opened Guantanamo, which has become an international embarrassment. Former Secretary of State Colin Powell has joined so many others in saying: Close this embarrassment. Yet they continue.

The Justice Department's infamous torture memo narrowly redefined torture as limited only to pain equivalent to organ failure or death. Senator JOHN

MCCAIN, a man who was a prisoner of war during Vietnam for years and years, spoke out and led a bipartisan fight to establish standards when it comes to the treatment of prisoners. I was happy to join him on a bill that had more than 90 votes, a strong bipartisan sentiment, a bill which sadly was watered down by a signing statement from this President, and I am afraid—though we may never know—I am afraid it has been ignored at many levels by this administration.

We still fight the Taliban and al-Qaida in Afghanistan, and while we are doing it, the administration has launched a misleading propaganda campaign leading perhaps to the greatest foreign policy blunder in American history: the war in Iraq.

It is worth noting that in a new report issued this week, the Center for Public Integrity concluded:

President George W. Bush and seven of his administration's top officials, including Vice President CHENEY, National Security Adviser Condoleezza Rice, and Defense Secretary Rumsfeld, made at least 935 false statements in the two years following September 11, 2001, about the national security threat posed by Saddam Hussein's Iraq. An exhaustive examination of the record shows that the statements were part of an orchestrated campaign that effectively galvanized public opinion and in the process led the Nation to war under decidedly false pretenses.

Is there any more grievous sin in a democracy than for leaders at the highest level to mislead the people of a Democratic Nation into a war with such tragic consequences? Almost 4,000 of our best and bravest—innocent, hard-working, dedicated, and patriotic soldiers—have given their lives. Countless thousands have been injured because we were misled into a war by this administration.

The administration brooked no dissent from their misleading campaign for war or their misguided counterterrorism policies. If anyone raised an objection, they were branded as soft on terrorism. Who can forget John Ashcroft, our former Attorney General, blaming critics of the administration for spreading ''phantoms of lost liberty'' and warning ''your tactics only aid terrorists''?

Time and again, the administration and their allies pressured Congress to consider controversial proposals immediately before elections. Oh, that is when all the warning bells went off and the threat level colors were changed. We were told there was a threat on the way, and how were we to come to any other conclusion if we didn't see the evidence? What a coincidence that most of those warnings came right before an election. It was Karl Rove's playbook and the administration ran that play over and over and over again.

In 2002, the administration insisted Congress must vote to authorize the war in Iraq before the election or our security would be at risk. Why? White House Chief of Staff Andrew Card explained that ''from a marketing point of view'' that was the right time to ''introduce new products.''

In 2004, the administration and its Republican allies in Congress claimed it was imperative to reauthorize the PATRIOT Act before the election or our security would be at risk. This despite the fact it didn't expire until December 31, 2005. Congress chose this date for the express purpose of depoliticizing this debate.

For years, the administration insisted the President had unilateral authority to detain enemy combatants and try them in military commissions. Again and again our Supreme Court rejected the administration's arguments. Suddenly, shortly before the 2006 election, the administration changed course, insisting that Congress must vote to authorize military commissions or our security would be at risk. In fact, the administration's bill included amnesty for administration officials who had authorized illegal torture techniques. How will history judge us, granting amnesty to those who engaged in torture?

It is more than a year since Congress passed the Military Commissions Act. Despite their claims of urgency, the administration has failed to bring a single terrorist to trial.

In the 2006 election, the American people took a stand and rejected the politics and policies of fear and they rejected this administration's scare tactics. One would hope the administration would have learned a lesson. But in 2008, another election year has arrived and, unfortunately, here we go again with an administration continuing to stake out divisive positions on terrorism.

The administration claimed Attorney General Mukasey would turn a new page at the Department of Justice, but he has refused to say even now whether torture techniques known as waterboarding are illegal. During his confirmation hearing, Judge Mukasey promised to review the administration's classified interrogation techniques and assess their legality. It has been 2 months since then and yesterday I wrote to the Attorney General to remind him about that commitment. He has had ample time to study this issue.

Yesterday, the administration announced they were going to renominate Steven Bradbury to be head of the Office of Legal Counsel. This is the office that issues binding legal opinions for the executive branch, including having issued the infamous torture memo. I have repeatedly urged President Bush to withdraw this nomination of Mr. Bradbury because of his involvement in authorizing the administration's controversial interrogation and surveillance policies.

Now, the administration claims our security is at risk in this election year because Congress is allowing the Protect America Act to expire, even though Senator REID 2 days ago tried to extend it for a month, and the Republican leadership objected. Well, no surprise.

Yesterday, Vice President CHENEY weighed in. He gave a speech praising the administration's counterterrorism efforts. He ignored the lessons of the last 6 years. He praised Guantanamo Bay, even though his President has called for closing it, and he praised what he called the CIA's ''tougher interrogation program.'' Well, there is a phrase that is loaded. He claimed the CIA's interrogation techniques comply with our treaty obligations, although the military's top lawyers and others say they violate the Geneva Convention. He said Khalid Sheikh Mohammed, the alleged mastermind of 9/11, had been subjected to the CIA's ''tougher'' techniques. But the Vice President neglected to mention that 6 years after 9/11, Khalid Sheikh Mohammed and the other 9/11 planners still have not been put to trial. Some experts say it will be impossible to convict him because he was subjected to waterboarding and other torture techniques.

The Vice President urged Congress to pass FISA legislation. Quoting President Bush, he said:

The lessons of September 11 have become dimmer and dimmer in some people's minds.

Mr. Vice President, the American people haven't forgotten 9/11, and we never will.

We also have not forgotten that Osama bin Laden is still free and the resources needed to track him down were diverted to a war in Iraq.

We have not forgotten that the war in Iraq has cost our Nation billions and, tragically, the lives of almost 4,000.

We have not forgotten that instead of working with Congress to prosecute the war on terrorism in a bipartisan fashion that respects American values, this administration chose to go it alone.

We will never, ever forget the blood, sweat, and tears shed by countless American heroes, who fight even as we speak to defend what makes America unique in the world. They fight not to defend any race, religion, or ethnic group; they fight to defend a value—the value upon which our country was founded. We are a nation of laws, not men—not this President, not any President.

In his speech yesterday, the Vice President noted:

The terrorists waging war against this country don't fight according to the rules of warfare, or international law, or moral standards, or basic humanity.

That is true, but America is a lot better than the terrorists.

Ironically, the Vice President also noted:

This cause is bigger than the quarrels of party and agendas of politicians.

Well, that is true as well. I only wish the Vice President and the administration would have heeded his own words and stopped politicizing so many national security issues.

I urge my colleagues to reject the politics of fear and reject the scare tactics of this administration. Support the

Judiciary Committee substitute, support the majority leader's request for a 1-month extension in the Protect America Act. We can give the Government the power it needs to protect us, and we can still uphold the rule of law and protect the precious liberties of the American people.

I yield the floor.

The PRESIDING OFFICER. The Senator from Pennsylvania is recognized.

Mr. SPECTER. Mr. President, I have sought recognition to comment about the pending legislation on the Foreign Intelligence Surveillance Act and the so-called Leahy substitute. We are engaged here in the continuation of a historic debate. Confronted by terrorism on 9/11, the response has been made to legislate on the PATRIOT Act and the Protect America Act, in order to deal effectively with the terrorists. At the same time, there is great concern that there be an appropriate balance. While it is indisputable that our first duty is to protect America, it is also equally fundamental that the constitutional protections have to be kept in mind at all times, and it requires a balance.

The beauty of the Constitution is the doctrine of separation of powers, so that no one branch has too much. This has been a classic confrontation of the executive asserting its authority under article II, and disregarding statutes, such as the Foreign Intelligence Surveillance Act, disregarding the statutory requirement that the Members of the House and Senate Intelligence Committees be informed of activities like electronic surveillance, with the President asserting that authority under article II, saying that it supercedes a statute.

Congress has been ineffective on congressional oversight. The courts have filled the void, undertaking very significant action. A key part of what we are considering here today is whether there will be jurisdiction stricken on the pendency of many cases in the Federal courts challenging what the telephone companies have allegedly done or whether there will be continued access to the courts. It is my view, for reasons which I will amplify in the course of this floor statement, that there can be an accommodation to keep the courts open and to allow the electronic surveillance to continue. That can be accomplished by an amendment Senator WHITEHOUSE and I intend to offer later today or perhaps tomorrow—at the first opportunity we have—where the litigation against the telephone companies would proceed, but the U.S. Government would be substituted as the party defendant.

There is no doubt that the telephone companies have been good citizens in whatever it is they have done. Yet there is nothing on the record as to what really happened. Whatever it is they have done, the indicators are that they have been good citizens, although, in the course of having the Federal Government substituted for the telephone companies, there will have to be evidence of compliance with the governmental request, a compliance in good faith.

The likelihood of verdicts being rendered, I think, in my legal judgment, is very remote. But that doesn't eliminate the requirement and the practice of keeping the courts open to make that determination.

The Specter-Whitehouse substitution amendment will place the Government in the shoes of the telephone companies to have the same defenses—no more and no less. For example, the doctrine of governmental immunity would not be available to the Government. There have been those who have criticized the Specter-Whitehouse amendment, who have ignored the very basic proposition that the suits cannot be dismissed because of governmental immunity.

On the other hand, by the same token, the state secrets defense will be available. In the lawsuits that are being prosecuted now against the telephone companies, the government has intervened to assert the state secrets doctrine. In fact, the Government has precluded the telephone companies from saying very much under that doctrine. When the Government is substituted for the telephone companies, the Government will retain the defense of the state secrets doctrine.

Before going into the body of the argument in support of the Specter-Whitehouse substitute approach, I wish to comment briefly on the substitute offered by the Judiciary Committee and by our distinguished chairman, Senator LEAHY, as the pending business.

I begin by commending Senator LEAHY for his work on the committee. For many years, we have worked together. His work as chairman has been exemplary, and there have been improvements that have been made by the modified Leahy substitute. Improvements have been made in that it clarifies that when surveillance occurs overseas, the FISA Court's role is limited to assessing probable cause and not the means of collection. It has further been improved by extending the length of emergency surveillance to conform to the Intelligence Committee bill's 7 days instead of 3 days. It has been improved by eliminating certain language criticized by the administration—and I think justifiably—as being overly broad. But it does retain the basic concept that the Foreign Intelligence Surveillance Act is the exclusive statutory procedure. So you preempt the Government argument that the Authorization for the Use of Military Force preempts and supersedes FISA. That argument has been made by the administration. I think it is a vacuous argument. In any event, this legislation would restate the proposition that the AUMF, or legislation like that, would not supersede FISA.

The substitute offered by the distinguished chairman also has a change which allows the continuation of surveillance pending en banc review by the Foreign Intelligence Surveillance Court. It also improves a provision calling for an inspector general review of the terrorist surveillance program.

I think, in essence, the substitute provision Senator LEAHY has offered is an improvement over the prior bill. I regret that I cannot support it because it leaves out the provision with respect to immunity. While I do not like the provision with respect to immunity and think we can improve upon it, as I have said, by the approach of substituting the Federal Government for the telephone companies, I believe it is important to keep protecting the telephone companies in the picture and to benefit from the activities which they are undertaking. Therefore, I will not be able to support the substitute offered by Senator LEAHY.

It is my hope that the Specter-Whitehouse amendment will be adopted, substituting the Government. If that fails, then with reluctance I will support retroactive immunity. To repeat, I think that is not the preferable course.

In dealing with the fundamental proposition of keeping the courts open, we have had an extended history in the past 2 or 3 years of the ineffectiveness of dealing with the expanded executive authority with congressional oversight. The PATRIOT Act reauthorization came out of the Judiciary Committee in 2005. I chaired it and was managing the bill on the floor of the Senate back in mid-December of 2005. I was very surprised that morning to read in the New York Times that the Federal Government had been undertaking the terrorist surveillance program without notifying the Intelligence Committees, as required by the National Security Act of 1947, and without notifying the chairman or ranking member of the Judiciary Committee. That was more than a surprise; it was a shock.

We were nearing the end of the consideration of the PATRIOT Act reauthorization, and all of the indicators were that we would get it passed. Some appeared on the floor of the Senate that day to say that they had intended to support the PATRIOT Act reauthorization, but no longer, in light of the fact that there had been the terrorist surveillance program, unknown to Congress, in violation of the Foreign Intelligence Surveillance Act and in violation of the National Security Act of 1947.

Now, it may be that the President was correct in asserting that he had article II power under the Constitution. If the President did have power under article II as Commander in Chief, then such power could not be reduced by legislation. That is a basic constitutional principle. But the determination of that really doesn't reside with the President alone.

I then introduced legislation to bring the terrorist surveillance program under the Foreign Intelligence Surveillance Court. I will not take the time

now to go through the lengthy efforts made in that regard. Suffice it to say that congressional oversight was not satisfactory. Where there has been a conflict between the Congress and the White House, the tools available to the White House have rendered the congressional oversight ineffective. When the Judiciary Committee has issued subpoenas, the subpoenas have been ignored by the White House, and the enforcement procedures are insufficient, really nugatory.

In the first place, if litigated, they take at least 2 years to have a judicial decision. The law requires the U.S. attorney for the District of Columbia to bring the action. The U.S. attorney for the District of Columbia is part of the executive branch, and some in the Department of Justice have said forget about having the action brought. It is theoretically possible to have a contempt citation on the floor of the Senate, but it is a practical impossibility. So the efforts at enforcement of congressional oversight through the subpoena process has been to no avail.

On the other hand, the courts have been effective. When the issue has arisen as to the detention at Guantanamo, the Supreme Court of the United States said in Hamdan that the Geneva Conventions applied, and in Rasul that habeas corpus was in effect, notwithstanding the fact Guantanamo was outside the territorial limit of the United States because the U.S. Government controlled Guantanamo.

Where the Congress has responded with legislation, the issue is now before the Supreme Court of the United States again in the Boumediene case. The courts have been effective in asserting a balance, in asserting constitutional governance. A whole series of court cases have shown the effectiveness of the courts. For instance, in the Hepting case that is pending on the terrorist surveillance program, the district court rejected a blanket application of the state secrets doctrine. In the Padilla case, the Supreme Court's decision to take up the case led the government to file criminal charges. A New York case involving the national security letters, Doe v. Gonzalez, found that certain NSL gag orders were unconstitutional in light of the First Amendment.

The Hamdan case involved a detainee by the U.S. Government. There the Supreme Court held that the President does not have a blank check to deal with detainees and that Congress had a role to play.

In the Al-Haramain case, the Terrorist Surveillance Program was litigated by an Islamic charity that allegedly had a TSP derived transcript. The case Ninth Circuit decision upheld the government's assertion of the state secrets doctrine in that case.

I do not go into great length on these judicial decisions but to note that when the court issues a order and insists on witnesses being presented on pain of having the case dismissed or on pain of having adverse action taken against the party who doesn't follow the court order, the courts have been effective. That is why, on a constitutional balance, I think it is very important not to foreclose action by the courts, not to, in effect, strip the Federal courts of jurisdiction of the many pending cases which have been brought against the telephone companies, and it can be done in a practical way, preserving the importance of law enforcement activities for whatever it is the telephone companies are doing by substituting the Federal Government as the party defendant.

I am especially concerned about this issue in the context of what occurred back in June of 2006, when the Judiciary Committee, while I was chairing it, was trying to exercise congressional oversight, assert a constitutional balance with the executive branch, and we were unsuccessful for a variety of reasons. Where the Federal Government had the defense of executive privilege, it was impossible to move effectively on congressional oversight. But when it became known about the alleged activities of the telephone companies, I sought, as chairman, to have subpoenas issued. The Vice President then contacted Republican members of the Judiciary Committee, in effect, behind my back—the protocol is to call the chairman first; if not to call the chairman first, to call the chairman sometime—leading me to write a letter, dated June 7, 2006.

I ask unanimous consent to have printed in the RECORD at the conclusion of my remarks this letter, dated June 7, 2006.

The PRESIDING OFFICER (Mr. TESTER). Without objection, it is so ordered.

(See exhibit 1.)

Mr. SPECTER. Mr. President, I did not like sending the Vice President a lawyer's letter, three pages, single spaced. It starts off—and I will read a short paragraph:

> Dear Mr. Vice President, I am taking this unusual step in writing to you to establish a public record. It is neither pleasant nor easy to raise these issues with the administration of my own party, but I do so because of their importance.

And then I go into the issues of the expansion of executive authority in many directions, the refusal of the executive branch to accommodate legitimate congressional oversight, and complain about the Vice President's activities in contacting Republican members of the Judiciary Committee.

To have the record complete, Mr. President, I ask unanimous consent to have printed in the RECORD at the conclusion of my remarks the Vice President's response to me, dated June 8, 2006.

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

(See exhibit 2.)

Mr. SPECTER. Mr. President, with that background, there is a particular sensitivity on my part to having retroactive immunity which I think would be an open invitation in the future for the executive branch to continue to ignore the statutes as the executive branch apparently ignored the Foreign Intelligence Surveillance Act that sets the exclusive way of getting wiretapping, a statement of probable cause to a judge, to ignore the National Security Act of 1947 in failing to notify the Intelligence Committees of the House and Senate as mandated, positively required, under that statute, to ignore that under the assertion of article II power. But the judicial branch of Government is the ultimate arbiter. To move to close the courts is a very serious and unwise step, especially when the objective can be retained of the law enforcement tools and having the litigation continue, of having the U.S. Government as the party defendant. I don't believe there will be verdicts against the Government, but if there are, it is part of the cost of doing business, part of the cost of fighting terrorism, and it ought to be borne by the U.S. Government, as opposed to being borne by the telephone companies which presumably have been good citizens, something they have to establish under the Specter-Whitehouse amendment to have the Government step in as a substitute.

Where we stand at the present time is on the substitute offered by the distinguished chairman. Again, I compliment him for the work he is doing generally and specifically about our Judiciary Committee activities on the Foreign Intelligence Surveillance Act. I have noted a number of particulars where I think Senator LEAHY's revised substitute has made improvements. To repeat, I regret I cannot support it because it leaves out the immunity provision. Again, I do not like the immunity provision and think we can improve it with the Specter-Whitehouse amendment. But if I am unsuccessful on that, then I will have to, at least speaking for myself, swallow the retroactive immunity provision on a balance of my own judgment as to the importance of having that kind of electronic surveillance, whatever it is, go forward, even with the retroactive immunity.

It is my hope, when we consider the ramifications, that we can command the majority in this body, work through the legislation with the House of Representatives, and find a way to allow the Government to have the advantages of the electronic surveillance but not foreclose the courts by the remedy of having the Government substituted as the party defendant.

I yield the floor.

EXHIBIT 1

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC, June 7, 2006.

Hon. RICHARD B. CHENEY,
The Vice President,
Washington, DC.

DEAR MR. VICE PRESIDENT: I am taking this unusual step in writing to you to establish a public record. It is neither pleasant

nor easy to raise these issues with the Administration of my own party, but I do so because of their importance.

No one has been more supportive of a strong national defense and tough action against terrorism than I. However, the Administration's continuing position on the NSA electronic surveillance program rejects the historical constitutional practice of judicial approval of warrants before wiretapping and denigrates the constitutional authority and responsibility of the Congress and specifically the Judiciary Committee to conduct oversight on constitutional issues.

On March 16, 2006, I introduced legislation to authorize the Foreign Intelligence Surveillance Court to rule on the constitutionality of the Administration's electronic surveillance program. Expert witnesses, including four former judges of the FISA Court, supported the legislation as an effective way to preserve the secrecy of the program and protect civil rights. The FISA Court has an unblemished record for keeping secrets and it has the obvious expertise to rule on the issue. The FISA Court judges and other experts concluded that the legislation satisfied the case-in-controversy requirement and was not a prohibited advisory opinion. Notwithstanding my repeated efforts to get the Administration's position on this legislation, I have been unable to get any response, including a ''no''.

The Administration's obligation to provide sufficient information to the Judiciary Committee to allow the Committee to perform its constitutional oversight is not satisfied by the briefings to the Congressional Intelligence Committees. On that subject, it should be noted that this Administration, as well as previous Administrations, has failed to comply with the requirements of the National Security Act of 1947 to keep the House and Senate Intelligence Committees fully informed. That statute has been ignored for decades when Presidents have only informed the so-called ''Gang of Eight,'' the Leaders of both Houses and the Chairmen and Ranking Members on the Intelligence Committees. From my experience as a member of the ''Gang of Eight'' when I chaired the Intelligence Committee of the 104th Congress, even that group gets very little information. It was only in the face of pressure from the Senate Judiciary Committee that the Administration reluctantly informed subcommittees of the House and Senate Intelligence Committees and then agreed to inform the full Intelligence Committee members in order to get General Hayden confirmed.

When there were public disclosures about the telephone companies turning over millions of customer records involving allegedly billions of telephone calls, the Judiciary Committee scheduled a hearing of the chief executive officers of the four telephone companies involved. When some of the companies requested subpoenas so they would not be volunteers, we responded that we would honor that request. Later, the companies indicated that if the hearing were closed to the public, they would not need subpoenas.

I then sought Committee approval, which is necessary under our rules, to have a closed session to protect the confidentiality of any classified information and scheduled a Judiciary Committee Executive Session for 2:30 P.M. yesterday to get that approval.

I was advised yesterday that you had called Republican members of the Judiciary Committee lobbying them to oppose any Judiciary Committee hearing, even a closed one, with the telephone companies. I was further advised that you told those Republican members that the telephone companies had been instructed not to provide any information to the Committee as they were prohibited from disclosing classified information.

I was surprised, to say the least, that you sought to influence, really determine, the action of the Committee without calling me first, or at least calling me at some point. This was especially perplexing since we both attended the Republican Senators caucus lunch yesterday and I walked directly in front of you on at least two occasions enroute from the buffet to my table.

At the request of Republican Committee members, I scheduled a Republican members meeting at 2:00 P.M. yesterday in advance of the 2:30 P.M. full Committee meeting. At that time, I announced my plan to proceed with the hearing and to invite the chief executive officers of the telephone companies who would not be subject to the embarrassment of being subpoenaed because that was no longer needed. I emphasized my preference to have a closed hearing providing a majority of the Committee agreed.

Senator Hatch then urged me to defer action on the telephone companies hearing, saying that he would get Administration support for my bill which he had long supported. In the context of the doubt as to whether there were the votes necessary for a closed hearing or to proceed in any manner as to the telephone companies, I agreed to Senator Hatch's proposal for a brief delay on the telephone companies hearing to give him an opportunity to secure the Administration's approval of the bill which he thought could be done. When I announced this course of action at the full Committee Executive Session, there was a very contentious discussion which is available on the public record.

It has been my hope that there could be an accommodation between Congress's Article I authority on oversight and the President's constitutional authority under Article II. There is no doubt that the NSA program violates the Foreign Intelligence Surveillance Act which sets forth the exclusive procedure for domestic wiretaps which requires the approval of the FISA Court. It may be that the President has inherent authority under Article II to trump that statute but the President does not have a blank check and the determination on whether the President has such Article II power calls for a balancing test which requires knowing what the surveillance program constitutes.

If an accommodation cannot be reached with the Administration, the Judiciary Committee will consider confronting the issue with subpoenas and enforcement of that compulsory process if it appears that a majority vote will be forthcoming. The Committee would obviously have a much easier time making our case for enforcement of subpoenas against the telephone companies which do not have the plea of executive privilege. That may ultimately be the course of least resistance.

We press this issue in the context of repeated stances by the Administration on expansion of Article II power, frequently at the expense of Congress's Article I authority. There are the Presidential signing statements where the President seeks to cherry-pick which parts of the statute he will follow. There has been the refusal of the Department of Justice to provide the necessary clearances to permit its Office of Professional Responsibility to determine the propriety of the legal advice given by the Department of Justice on the electronic surveillance program. There is the recent Executive Branch search and seizure of Congressman Jefferson's office. There are recent and repeated assertions by the Department of Justice that it has the authority to criminally prosecute newspapers and reporters under highly questionable criminal statutes.

All of this is occurring in the context where the Administration is continuing warrantless wiretaps in violation of the Foreign Intelligence Surveillance Act and is preventing the Senate Judiciary Committee from carrying out its constitutional responsibility for Congressional oversight on constitutional issues. I am available to try to work this out with the Administration without the necessity of a constitutional confrontation between Congress and the President.

Sincerely,

ARLEN SPECTER.

EXHIBIT 2

THE VICE PRESIDENT,
Washington, DC, June 8, 2006.

Hon. ARLEN SPECTER,
Chairman, Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: This is in response to your letter of June 7, 2006 concerning the Terrorist Surveillance Program (TSP) the Administration has described. The commitment in your letter to work with the Administration in a non-confrontational manner is most welcome and will, of course, be reciprocated.

As recently as Tuesday of this week, I reiterated that, as the Administration has said before, while there is no need for any legislation to carry out the Terrorist Surveillance Program, the Administration will listen to the ideas of legislators about terrorist surveillance legislation and work with them in good faith. Needless to say, that includes you, Senator DeWine and others who have ideas for such legislation. The President ultimately will have to make a decision whether any particular legislation would strengthen the ability of the Government to protect Americans against terrorists, while protecting the rights of Americans, but we believe the Congress and the Administration working together can produce legislation to achieve that objective, if that is the will of the Congress.

Having served in the executive branch as chief of staff for one President and as Secretary of Defense for another, having served in the legislative branch as a Representative from Wyoming for a decade, and serving now in a unique position under the Constitution with both executive functions and legislative functions, I fully understand and respect the separate constitutional roles of the Congress and the Presidency. Under our constitutional separation between the legislative powers granted to Congress and the executive power vested exclusively in the Presidency, differences of view may occur from time to time between the branches, but the Government generally functions best when the legislative branch and the executive branch work together. And I believe that both branches agree that they should work together as Congress decides whether and how to pursue further terrorist surveillance legislation.

Your letter addressed four basic subjects: (1) the legal basis for the TSP; (2) the Administration position on legislation prepared by you relating to the TSP; (3) provision of information to Congress about the TSP; and (4) communications with Senators on the Judiciary Committee about the TSP.

The executive branch has conducted the TSP, from its inception on October 4, 2001 to the present, with great care to operate within the law, with approval as to legality of Presidential authorizations every 45 days or so by senior Government attorneys. The Department of Justice has set forth in detail in writing the constitutional and statutory basis, and related judicial precedents, for warrantless electronic surveillance under the TSP to protect against terrorism, and that information has been made available to your Committe and to the public.

Your letter indicated that you have repeatedly requested an Administration position on legislation prepared by you relating to the TSP program. If you would like a formal Administration position on draft legislation, you may at any time submit it to the Attorney General, the Director of National Intelligence, or the Director of the Office of Management and Budget (OMB) for processing, which will produce a formal Administration position. Before you do so, however, it might be more productive for executive branch experts to meet with you, and perhaps Senator DeWine or other Senators as appropriate, to review the various bills that have been introduced and to share the Administration's thoughts on terrorist surveillance legislation. Attorney General Alberto R. Gonzales and Acting Assistant Attorney General for the Office of Legal Counsel Steven G. Bradbury are key experts upon whom the executive branch would rely for this purpose. I will ask them to contact you promptly so that the cooperative effort can proceed apace.

Since the earliest days of the TSP, the executive branch has ensured that, consistent with the protection of the sensitive intelligence sources, methods and activities involved, appropriate members of Congress were briefed periodically on the program. The executive branch kept principally the chairman and ranking members of the congressional intelligence committees informed and later included the congressional leadership. Today, the full membership of both the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence (including four Senators on that Committee who also serve on your Judiciary Committee) are fully briefed on the program. As a matter of inter-branch comity and good executive-legislative practice, and recognizing the vital importance of protecting U.S. intelligence sources, methods and activities, we believe that the country as a whole, and the Senate and the House respectively, are best served by concentrating the congressional handling of intelligence matters within the intelligence committees of the Congress. The internal organization of the two Houses is, of course, a matter for the respective Houses. Recognizing the wisdom of the concentration within the intelligence committees, the rules of the Senate (S. Res. 400 of the 94th Congress) and the House (Rule X, cl. 11) creating the intellgence committees mandated that the intelligence committees have cross-over members who also serve on the judiciary, foreign/international relations, armed services, and appropriations committees.

Both in performing the legislative functions of the Vice Presidency as President of the Senate and in performing executive functions in support of the President, I have frequent contact with Senators, both at their initiative and mine. We have found such contacts helpful in maintaining good relations between the executive and legislative branches and in advancing legislation that serves the interests of the American people. The respectful and candid exchange of views is something to be encouraged rather than avoided. Indeed, recognizing the importance of such communication, the first step the Administration took, when it learned that you might pursue use of compulsory process in an attempt to force testimony that may involve extremely sensitive classified information, was to have one of the Administration's most senior officials, the Chief of Staff to the President of the United States, contact you to discuss the matter. Thereafter, I spoke with a number of other Members of the Senate Leadership and the Judiciary Committee. These communications are not unusual—they are the Government at work.

While there may continue to be areas of disagreement from time to time, we should proceed in a practical way to build on the areas of agreement. I believe that other Senators and you, working with the executive branch, can find the way forward to enactment of legislation that would strengthen the ability of the Government to protect Americans against terrorists while continuing to protect the rights of Americans, if it is the judgment of Congress that such legislation should be enacted. We look forward to working with you, knowing of the good faith on all sides.

Sincerely,

DICK CHENEY.

Mr. LEAHY. Mr. President, I know the Senator from Connecticut has the floor at this point, but I wonder if he will yield to me for about another minute.

Mr. DODD. Absolutely.

Mr. LEAHY. Mr. President, I appreciate the comments of the distinguished senior Senator from Pennsylvania. I have enjoyed my work with him. Of course, we have been friends from the time we first met when we were both young prosecutors.

Mr. SPECTER. Younger prosecutors.

Mr. LEAHY. I note that my amendment on the Judiciary Committee bill does not preclude a debate on the question of immunity for the telecommunications carriers. It speaks to what the FISA Court can or should do with this new surveillance authority.

If my amendment is voted down, several parts of it will be debated again. Many parts of this amendment will be germane after cloture, and we will be debating those as separate amendments. On the immunity issue, there will be an amendment by the distinguished Senator from Pennsylvania and the distinguished Senator from Rhode Island on the issue of substitution. We will vote either up or down on that amendment. My amendment is about the oversight of the FISA Court and Congress.

I understand the position of the Senator from Pennsylvania, but I hope he will look carefully at a number of the provisions in this bill. If he is unable to vote for the overall amendment, I hope he will support many of its provisions in separate amendments.

I have taken the time of the Senator from Connecticut who has worked with me and has been one of the leading voices on the important issue of oversight for electronic surveillance. We all want to be able to collect as much intelligence as we can against those who would act against the United States of America, but we have also lived long enough to see the danger when there are not enough checks on the government. We remember COINTELPRO and other circumstances where the government has used the great resources of this country not against enemies but against Americans. No voice in this body has been stronger on that issue than the distinguished senior Senator from Connecticut.

I yield the floor.

Mr. DODD. Mr. President, I thank both my colleague from Vermont, the chairman of the committee, and the Senator from Pennsylvania as well. I arrived in this body in January of 1981 with a very engaged Senator from Pennsylvania as a new Member that day in January of 1981. The Senator from Vermont had already been here for a term. They do a tremendous job, and their voices are worth listening to on matters affecting civil liberties and the rule of law.

I spoke at some length last evening and back in December on the issue of the Foreign Intelligence Surveillance Act amendments and what I consider to be the most egregious provision in the Intelligence Committee bill: retroactive immunity for the telecommunications companies that may have helped this administration break the law. I have objected to that immunity on very specific grounds because it would cover an immense alleged violation of trust, privacy, and civil liberties.

But even more importantly, immunity is wrong because of what it represents: a fatal weakening of the rule of law that shuts out our independent judiciary and concentrates all the power in the hands of one branch—the executive branch.

We know there has been a pattern of behavior over the past 6 or 7 years. As I said last evening on this floor, had this been the first instance of an administration overreaching, candidly, I would have had some difficulty in objecting to the Intelligence Committee's proposal. If the alleged violation had been limited to a period of a few months, 6 months, a year even after 9/11, I might not have objected.

But all of us in this Chamber know there has been a 6 or 7 year pattern of this administration's abuses against the rule of law and civil liberties. And this alleged violation went on not for 6 months or a year but for 5 years—and it would still be ongoing today had it not been for a whistleblower in an article in a major publication, which revealed this program's ongoing activities to literally vacuum—and I am not exaggerating when I say ''vacuum''—every telephone conversation, fax, and e-mail of millions of people in this country. I would object to retroactive immunity not just in this administration but in any administration, Democratic or Republican, that sought immunity to this extent, that sought to concentrate such power in the hands of the executive branch.

The Founders of this great Republic strenuously argued for a process that concentrates power not in one branch but provides a balance of that power, a tension, if you will, between the judicial, the legislative, and the executive branches. To grant such power to one branch, as this bill seeks to do, is a dangerous step. And it would be no matter which administration requested it.

The Foreign Intelligence Surveillance Act, as we have seen, was written precisely to resist that concentration.

When we divide power responsibly, terrorist surveillance is not weakened; it is strengthened, Mr. President, made more judicious, more legitimate, and less subject to the abuse that saps public trust. I firmly believe any changes to this FISA bill must be in keeping with the original spirit of shared powers and the respect of the rule of law.

If we act wisely, as every previous Congress has for 30 years when amending the Foreign Intelligence Surveillance Act, then I think we can ensure terrorist surveillance remains inside the law—not an exception to it. The Senate should pass a bill doing just that.

But the FISA Amendments Act, as it comes to us from the Intelligence Committee, is not that bill, Mr. President. Its safeguards against abuse, against the needless targeting of ordinary American citizens, are far too weak. The power it concentrates in the hands of the executive branch is far too expansive. However, the Senate also has before it a version of a bill that embodies a far greater respect for the rule of law, and that is the proposal before us at this hour, offered by the chairman of the Judiciary Committee, Senator PATRICK LEAHY of Vermont. Both versions of the bill—both versions—authorize the American President to conduct overseas surveillance without individual warrants.

Both of these bills allow the President of the United States to submit his procedures for this new kind of surveillance for the review of the FISA Court after those procedures are already in place. But only one version of the bill balances these significant new powers with real oversight from the Congress and the courts, and that is the Leahy amendment.

That is the balance we need to strike. That is what every Congress has done for three decades—for three decades—with over 35 different changes to this bill, since its adoption in the late 1970s, passing every Congress almost unanimously, with the approval of Democrats and Republicans alike, balancing the tension between our determination to keep us safe from those who would do us harm with our need to protect the rule of law and the rights of the American people. That is the tension, that is the balance that we have struck over the last 30 years.

After three decades of maintaining that long-held balance, we are about to deviate from it. The intelligence version of this legislation, I am afraid, is a bill of token oversight and very weak protections for innocent Americans. Specifically, the intelligence version of the bill fails on five specific counts.

First, its safeguards against the targeting of Americans—its minimization procedures—are insufficient. The Intelligence Committee bill significantly expands the President's surveillance power while leaving the checks on that power unchanged. The intelligence version provides practically no deterrent against excessive domestic spying and no consequences if the court finds that the President's—any President's—minimization procedures are lacking. If his targeting procedures are found lacking, the President hardly has to worry. They administration can keep and share all the information it has obtained, and it can continue its actions all the way through the judicial review process, which can take months, if not years.

It should be clear to all of us that real oversight includes the power of enforcement. The Intelligence Committee's bill offers us the semblance of judicial oversight—but not the real thing. Imagine, if you will, a judge convicting a bank robber and then letting him keep the loot he stole, as long as he promises to never, ever, ever do it again. That might as well be the Intelligence version of the bill.

In fact, the Intelligence version would allow the President to immediately target anyone on a whim. Wiretapping could start even before the court has approved it. In the Intelligence Committee bill, oversight is exactly where the President likes it—after the fact. Don't get me wrong, Mr. President, when a President—any President—needs immediate emergency authority to begin wiretapping, that President should have it. All of us, I think, agree with that. We find that obvious.

The question is what to do in those cases that aren't emergencies—because not every case is an emergency. In those cases, I believe there is no reason that the court shouldn't give advice and approval beforehand. President Bush disagrees. He believes in a permanent state of emergency.

Second, the Intelligence Committee bill fails to protect American citizens from reverse targeting—the practice of targeting a foreign person on false pretenses without a warrant in order to collect the information on an American on the other end of the conversation. Reverse targeting, according to Admiral McConnell, the Director of National Intelligence, says:

> It is not legal. It would be a breach of the fourth amendment.

That is according to the Director of National Intelligence. He is absolutely correct, of course, which is why it is so vital the FISA bill before us contain strong enforceable protections against reverse targeting. Unfortunately, the Intelligence Committee version doesn't have one.

Third, the intelligence version, by purporting to end warrantless wiretapping of Americans, might actually allow it to continue unabated. That is because the bill lacks strong exclusivity language—language stating that FISA is the only controlling law for foreign intelligence surveillance. With that provision in place, surveillance has a place inside the rule of law. Without it, there is no such guarantee, Mr. President.

Who knows what specious rationale this or any administration might cook up for lawless spying? The last time, as we have seen, Alberto Gonzalez—laughably, I might add, if it weren't so tragic—tried to find grounds for warrantless wiretapping in the authorization of force against Afghanistan. Those are the legal lengths to which this administration has proved willing and able to go to in order to achieve its goals.

As I mentioned last evening, Senator Daschle, the former majority leader, who was deeply involved in the negotiations of the authorization language to use force in Afghanistan, wrote an op-ed piece absolutely debunking the argument that any part of that negotiation included granting the administration the power to conduct warrantless wiretaps. He was offended by the suggestion that somehow we in this Congress, on a vote of 98 to nothing, gave the administration the power to conduct warrantless wiretappings. He was directly involved in those negotiations. It never, ever, ever came up. It is offensive that Alberto Gonzalez argued that Afghanistan justified warrantless wiretapping is offensive—but it is a good example, Mr. President, of what can happen if you don't have exclusivity.

FISA is the vehicle, and has been for 30 years, by which we allow for warrants to be granted to conduct surveillance when America is threatened. What is next without strong exclusivity language? The Intelligence Committee version of the bill would leave that question hanging over our heads.

Fourth, Mr. President, unlike the Leahy amendment, the Intelligence Committee version of the bill lacks strong protections against what is called "bulk collection"—the warrantless collection of all overseas communications, a massive dragnet with the potential to sweep up thousands or even millions of Americans, without cause. Today, bulk collection is not feasible. But Admiral McConnell said:

> It would be authorized, if it were physically possible to do so.

Before any administration has that chance, I think it is important that we should clearly and expressly prohibit such an unprecedented violation of privacy. The intelligence version fails to do so.

In fact, I would suggest that the previous collection of data by the telecom industry, in fact, nearly approached such bulk collection: as we now know, millions and millions and millions of faxes, of e-mails, and of phone conversations were swept up over 5 years, without any warrants whatsoever.

Now, the legality of that is an unanswered question—but we are never going to know the answer if we grant retroactive immunity. We would shut the door forever on determining whether it was legal.

Even though global bulk collection is not yet feasible, we have already seen a vacuum operation sweep up millions of conversations, e-mails, and faxes. So

we know the will for true bulk collection is there, and the Director of National Intelligence has admitted as much. So failure of the Intelligence version of the bill to prohibit bulk collection ought to cause us all some concern.

Fifth, and finally, Mr. President, the intelligence committee version of the bill stays in effect until 2013, through the next Presidential term and into the next one after that. Compare that to the 4-year sunset in the Leahy amendment. I believe that, when making such a dramatic change in the Nation's terrorist surveillance regime, we ought to err on the side of some caution. Once the new regime has been tested, once its effectiveness against terrorism and its compromises of privacy have been weighed, we deserve to have this debate again. Hopefully we will all be more informed when that happens; I trust that it will be a much less speculative debate.

And there is another advantage to coming back to this bill with greater frequency. We are learning painfully that the abilities those who would do us harm are growing more sophisticated year by year. We need to be flexible, as well. To not allow for a review of this legislation until 2013, except under extraordinary circumstances, locks us in place for far too long. We ought to come back and review whether we are facing additional problems that didn't exist even a year ago, given the warp speed with technology changes globally. We shouldn't wait 6 years. Given the ever-changing terrorist threats we face, taking another look at this bill sooner is in our security interest.

Mr. President, I said last evening that I admire the work of Senator ROCKEFELLER and Senator BOND, and the members of the Intelligence Committee. And I know people say, ''Oh, you are just being collegial.'' But this is not easy work. I know they struggle with these issues, and I don't want my criticism to be interpreted to suggest that I don't respect the work they do. I clearly respect it.

But this is such a critical issue, and maybe I have more of a passion about it, because it is so important. Once you begin to accept expanded executive power, it is so easy to move to the next step and the next step—and we have to be so careful about that.

We are mere custodians, those of us who serve here, over our rights and the rule of law. We are relying on the work of those who have preceded us. And I think all of us admire immensely what various Congresses have done over three decades since the adoption of the original FISA bill, which was done in a bipartisan, almost unanimous fashion. But the issue we face today is historic. It is not something that began just after 9/11. The tension between keeping us safe and protecting our rights has been an ongoing debate for more than two centuries, and it will be a continuous debate.

It will be a contentious debate. But striking that balance is what is so important. And the temptation to err on one side of that balance is so strong. James Madison warned more than two centuries ago that our willingness to give up domestic rights is always contingent upon the fear of what happens abroad. So while all of us here want to make sure we are doing everything to keep our country secure, we do not want to be willing to give up the basic rule of law here, and denigrate the importance of those rights.

It is very dangerous to confront the people of this country with a choice between rights and security. It is a false choice. In truth, we become more secure when we protect our rights. We have learned that over the years. And if we forget that lesson now, I believe we will come to deeply, deeply regret it.

This bill, the Intelligence Committee bill, reduces court oversight merely to the point of symbolism. It allows the targeting of Americans on false pretenses. It opens us up to new, twisted rationales for warrantless wiretapping, the very thing it ought to prevent. It would allow bulk collection as soon as this administration—or any administration—has the wherewithal to do it.

Mr. President, we are letting this debate become one of Republicans versus Democrats, liberals versus conservatives. But the Constitution is not a partisan document. It is a document which all of us embrace. It deeply troubles me that we have allowed things to come to this point instead of insisting that we can find the wisdom and the ability to keep America safe without compromising the rule of law.

In sum, the Intelligence version is entirely too trusting a bill, and not just for this administration. People say: If there were a Democrat sitting in the White House, you would not be saying this. Yes, I would. If any Democrat tried to do this, I would speak just as passionately, maybe more so, offended that someone I thought I shared some values with was suggesting a similar course of action.

My concern with what we are doing is not just about the next year; it is for the years and years and years to come, for the precedent we are setting, not only for this administration, but for all those that will follow.

So my passion about this is not rooted in partisanship; it is rooted in my deep conviction that abandoning or undermining the rule of law—we don't have the right to do that. We are temporary custodians of the Constitution of the United States.

So the Intelligence version is too trusting, as I said. With its immunity provisions, with its wiretapping provisions, it simply responds to the executive branch's offer of ''trust me'' with an all-too-eager to say ''yes.''

I leave my colleagues with a simple question: Has that trust been earned, not just by this President, by any President? What would our Founders think? Why did they craft a system which insisted that there be a judicial, a legislative, and an executive branch? If we walk away from that balance, then we walk away from the very trust we were endowed with by those who elected us to this office and the oath we took here.

So I urge my colleagues to support the substitute being offered by Senator LEAHY.

Again, I commend Senator ROCKEFELLER and Senator BOND and members of that committee who worked hard at it. There are a lot of good ideas, outside of immunity, in the Intelligence Committee version of the bill. I think we can improve it; and the Leahy amendment does that.

I yield the floor.

The PRESIDING OFFICER. The Senator from Georgia.

Mr. CHAMBLISS. Mr. President, while I have great admiration and respect for my friend from Connecticut, this is an issue upon which we simply disagree.

I rise today in opposition to the Judiciary substitute amendment to S. 2248, the FISA Amendments Act.

This legislation would strike, in its entirety, the bipartisan bill voted out of the Intelligence Committee by a 13-to-2 vote and replace it with a bill full of limitations on our foreign intelligence collection.

There are serious differences between the Judiciary Committee's substitute and the bill voted out of the Intelligence Committee. The Intelligence Committee bill is the result of a long drafting process where the committee reviewed the classified mechanisms under which FISA operates. As a result, the bill reflects the minimum tools our intelligence community needs to improve our foreign intelligence collection. Some of the provisions of the Judiciary bill seem to ignore the needs of our intelligence analysts and instead seek to hamper our ability to protect the Nation from hostile foreign intelligence collection and terrorists.

I believe the Judiciary Committee bill is seriously flawed, and I would like to highlight just two examples of how seriously flawed this amendment is.

First, it seeks to impose an unreasonable new restriction on the use of foreign intelligence information.

If the FISA Court finds the minimization procedure is deficient in some manner, information, including information not concerning U.S. persons obtained or derived from those acts, may not be kept. Our intelligence community analysts have used and complied with minimization standards for over 25 years. They know how to do it. They are familiar with when and how to minimize information in order to protect the identity of U.S. persons.

It is important to point out that minimization is used when disseminating important foreign intelligence. In other words, an intelligence analyst

has determined that the information contains relevant foreign intelligence. Under the Judiciary Committee provision, if the FISA Court determines that the general proscriptions on how to minimize need improvement, the intelligence community may not use any previously gathered intelligence. This allows the FISA Court to second-guess trained analysts. The FISA Court's own opinion from December 11, 2007, recognizes that the executive branch has the expertise in national security matters, that the court should not make judgments as to which particular surveillances should be conducted.

Second, the Judiciary Committee amendment contains no provision for retroactive or prospective immunity for communications providers.

After careful review of the President's terrorist surveillance program, a bipartisan majority of the Intelligence Committee believed that providing our telecommunications service providers immunity for their assistance to the Government is absolutely necessary.

I think without question this is such a critical part of the bill that came out of the Intelligence Committee for all of the right reasons. The Intelligence Committee heard testimony and reviewed the President's specific intelligence program. The President granted the committee members and staff access to the legal memoranda and other documents related to this program. As stated in the committee report accompanying this legislation, the committee determined:

> That electronic communication service providers acted on a good faith belief that the President's program, and their assistance, was lawful.
>
> The committee reviewed correspondence sent to the electronic communication service providers stating that the activities requested were authorized by the President and determined by the Attorney General to be lawful, with the exception of one letter covering a period of less than 60 days, in which the Counsel to the President certified the program's lawfulness.

The statement continues:

> The committee concluded that granting liability relief to the telecommunications providers was not only warranted, but required to maintain the regular assistance our intelligence and law enforcement professionals seek from them. Although I believe that the President's program was lawful and necessary, this bill makes no such determination. This is not a review or commentary on the President's program.

I urge my colleagues to support the determinations of the Intelligence Committee, which is charged with regularly reviewing the intelligence activities of the United States and all of the agencies included within the intelligence community. Providing our telecommunications carriers with liability relief is the necessary and responsible action for Congress to take.

The Government often needs assistance from the private sector in order to protect our national security, and in return, they should be able to rely on the Government's assurances that the assistance they provide is lawful and necessary for our national security. As a result of this assistance, America's telecommunications carriers should not be subject to costly legal battles.

This is not the last time that the private sector is going to be asked to come to the aid of the American people in protecting us on a matter of national security. There will be other days when the private sector will be called upon by the Government to act in concert and in partnership to protect the American public. If we do not grant immunity in this particular instance, should we expect the private sector to be cooperative with us in the future? I think the answer to that is pretty clear.

That was the gist of the bipartisan discussion and agreement within the Intelligence Committee about the main reason why, if no other reason, we should seriously look and give the immunity to the telecommunications providers that may have been involved in this situation.

I urge my colleagues to reject the Judiciary Committee substitute amendment, which contains numerous problematic provisions which will hamper and try to micromanage our intelligence collection, and support the carefully crafted bipartisan bill passed out of the Intelligence Committee.

Mr. President, I suggest the absence of a quorum and ask unanimous consent the time be equally divided on both sides.

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

The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. BOND. 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. BOND. Mr. President, I will be speaking more at about 1:30 on the Judiciary Committee substitute, but I thought I would clarify a few concerns that have been raised that I have heard. I know there are a number of Members coming down, and I do not want to hold them up, but I do want to point out that my good friend, the senior Senator from Pennsylvania, was concerned that the President's terrorist surveillance program was not briefed to Members of Congress. It is my understanding it was briefed to the leadership of the Intelligence Committee and the leadership on both sides. Personally, I would have preferred that more Members be briefed, but it is my understanding that when these leaders were briefed, it was their view that in light of the urgency and the need and the difficulties of explaining what we were going to do prior to—which could delay the implementation of the terrorist surveillance program, that it was a consensus of these meetings that the President should not bring a measure before Congress modifying FISA to take account of the new means of electronic surveillance and electronic communication.

Secondly, my good friend, the senior Senator from Connecticut, in his comments urged that we ban reverse targeting. I would call his attention to section 703(b), subparagraph 2 and subparagraph 3, which do explicitly ban targeting of overseas terrorist activities in order to gain information on U.S. persons. That is explicitly banned.

The Senator from Connecticut also spoke warmly of the exclusive test that existed in FISA from the period from 1978 forward.

We have included in the bill the exclusive means test that worked for some 30 years. That is in section 102. Without getting into classified information, we can say that this bill does not allow our intelligence community to listen in on conversations or read mail unless those persons are afforded the protection of the Intelligence Committee bill. To clarify that, the collection is carefully limited and overseen. There have been comments that the collection efforts by the NSA are not subject to oversight. I can only suggest to the people who have raised those concerns to ask members of the Intelligence Committee how much time we have spent looking into electronic surveillance. I can assure them that we enjoy looking into all these issues. We do so on a continuing basis. We have done so extensively over the last 9 months. I am sure they can count on us continuing to exercise that oversight. The Intelligence Committee has been set up specifically to review all of the intelligence collection methods of our intelligence community. They do a great job. We look over their shoulders and suggest ways they can improve the collection and analysis and also take steps to ensure they stay carefully within the boundaries of the Constitution and the laws that apply to them. With respect to collection methods such as 12333, we also oversee that as well.

So the people of America can be assured that the laws, the Constitution, and the regulations are being complied with. That is our job in the Intelligence Committee. We intend to continue to do so. I didn't want to leave without clarification of the suggestion that some of these matters were not attended to.

I see my colleague from Utah. I thank him for his great work. He is not only a valuable member of the Intelligence Committee but his work on the Judiciary Committee reflects his keen understanding and devotion to ensuring that we do a proper job of oversight and legislation when it comes to these very important collection methods.

I yield the floor.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, I thank my dear colleague from Missouri for the leadership he has provided, along with Senator ROCKEFELLER, on the Intelligence Committee and throughout this process. We ought to be listening to him. This is a very important bill,

one of the most important in the history of the country, and we have to get it right. I congratulate him and thank him for the hard work he has done, and also Senator ROCKEFELLER who, as chairman of the committee, led us in this matter.

As the only Republican on both the Intelligence and Judiciary Committees, I have been very involved in the process of developing the FISA modernization bill with a unique understanding of the journey this bill has taken through the Senate. I continue to express my full support for the bill as passed out of the Intelligence Committee and encourage my colleagues to reject the risky and problematic Judiciary substitute amendment.

The seeds of discontent with the Judiciary substitute were sown from the very beginning of that committee's consideration. Late in the afternoon the day before the markup, a Judiciary substitute amendment was circulated that replaced the entire first title of the Intelligence Committee-reported bill. This substitute included 10 Democratic amendments and no Republican amendments. It was eventually adopted on a party-line vote. Unfortunately, the careful bipartisan balance crafted by the Intelligence Committee was irrevocably altered and effectively nullified by partisan maneuvering. The Judiciary Committee was not able to coalesce to advance a compromise bill, as evidenced by the consistent 10-to-9 party-line votes on amendments and final passage. These votes typified the approach the Judiciary Committee undertook.

We know that this bill, like all national security legislation, needs bipartisan support to pass. The Judiciary substitute simply doesn't have it. I remind my colleagues that on November 14, 2007, Attorney General Mukasey and Director of National Intelligence McConnell sent a letter to the chairman and ranking member of the Judiciary Committee stating:

> If the Judiciary substitute is part of a bill that is presented to the President, we and the President's other senior advisors will recommend that he veto the bill.

In addition, on December 17, 2007, a statement of administration policy was distributed for S. 2248 which stated:

> If the Judiciary Committee substitute amendment is part of a bill that is presented to the President, the Director of National Intelligence, the Attorney General, and the President's other senior advisors will recommend that he veto the bill.

Both of these letters illustrate extensive problems with provisions included in the Judiciary substitute and in very specific terms. These warnings from the very people in the Government who are asked to protect us from terrorist threats should be heeded. We disregard these warnings at our own peril.

I ask unanimous consent that both of these letters be printed in the RECORD.

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

STATEMENT OF ADMINISTRATION POLICY

S. 2248—TO AMEND THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978, TO MODERNIZE AND STREAMLINE THE PROVISIONS OF THAT ACT, AND FOR OTHER PURPOSES

(Sen. Rockefeller (D–WV), Dec. 17, 2007)

Protection of the American people and American interests at home and abroad requires access to timely, accurate, and insightful intelligence on the capabilities, intentions, and activities of foreign powers, including terrorists. The Protect America Act of 2007 (PAA), which amended the Foreign Intelligence Surveillance Act of 1978 (FISA) this past August, has greatly improved the Intelligence Community's ability to protect the Nation from terrorist attacks and other national security threats. The PAA has allowed us to close intelligence gaps, and it has enabled our intelligence professionals to collect foreign intelligence information from targets overseas more efficiently and effectively. The Intelligence Community has implemented the PAA under a robust oversight regime that has protected the civil liberties and privacy rights of Americans. Unfortunately, the benefits conferred by the PAA are only temporary because the act sunsets on February 1, 2008.

The Director of National Intelligence has frequently discussed what the Intelligence Community needs in permanent FISA legislation, including two key principles. First, judicial authorization should not be required to gather foreign intelligence from targets located in foreign countries. Second, the law must provide liability protection for the private sector.

The Senate is considering two bills to extend the core authorities provided by the PAA and modernize FISA. In October, the Senate Select Committee on Intelligence (SSCI) passed a consensus, bipartisan bill (S. 2248) that would establish a sound foundation for our Intelligence Community's efforts to target terrorists and other foreign intelligence targets located overseas. Although the bill is not perfect and its flaws must be addressed, it nevertheless represents a bipartisan compromise that will ensure that the Intelligence Community retains the authorities it needs to protect the Nation. Indeed, the SSCI bill is an improvement over the PAA in one essential way—it would provide retroactive liability protection to electronic communication service providers that are alleged to have assisted the Government with intelligence activities in the aftermath of September 11th.

In sharp contrast to the SSCI's bipartisan approach to modernizing FISA, the Senate Judiciary Committee reported an amendment to the SSCI bill that would have devastating consequences to the Intelligence Community's ability to detect and prevent terrorist attacks and to protect the Nation from other national security threats. The Judiciary Committee proposal would degrade our foreign intelligence collection capabilities. The Judiciary Committee's amendment would impose unacceptable and potentially crippling burdens on the collection of foreign intelligence information by expanding FISA to restrict facets of foreign intelligence collection never intended to be covered under the statute. Furthermore, the Judiciary Committee amendment altogether fails to address the critical issue of liability protection. Accordingly. if the Judiciary Committee's substitute amendment is part of a bill that is presented to the President, the Director of National Intelligence, the Attorney General, and the President's other senior advisors will recommend that he veto the bill.

THE SENATE SELECT COMMITTEE ON INTELLIGENCE BILL

Building on the authorities and oversight protections included in the PAA, the SSCI drafted S. 2248 to provide a sound legal framework for essential foreign intelligence collection in a manner consistent with the Fourth Amendment. As in the PAA, S. 2248 permits the targeting of foreign terrorists and other foreign intelligence targets outside the United States based upon the approval of the Director of National Intelligence and the Attorney General.

The SSCI drafted its bill in extensive coordination with Intelligence Community and national security professionals—those who are most familiar with the needs of the Intelligence Community and the complexities of our intelligence laws. The SSCI also heard testimony from privacy experts in order to craft a balanced approach. As a result, the SSCI bill recognizes the importance of clarity in laws governing intelligence operations. Although the Administration would strongly prefer that the provisions of the PAA be made permanent without modification, the Administration engaged in extensive consultation in the interest of achieving permanent legislation in a bipartisan manner.

The SSCI bill is not perfect, however. Indeed, certain provisions represent a major modification of the PAA and will create additional burdens for the Intelligence Community, including by dramatically expanding the role of the FISA Court in reviewing foreign intelligence operations targeted at persons located outside the United States, a role never envisioned when Congress created the FISA court.

In particular, the SSCI bill contains two provisions that must be modified in order to avoid significant negative impacts on intelligence operations. Both of these provisions are also included in the Judiciary Committee substitute, detailed further below.

First, as part of the debate over FISA modernization, concerns have been raised regarding acquiring information from U.S. persons outside the United States. Accordingly, the SSCI bill provides for FISA Court approval of surveillance of U.S. persons abroad. The Administration opposes this provision. Under executive orders in place since before the enactment of FISA in 1978, Attorney General approval is required before foreign intelligence surveillance and searches may be conducted against a U.S. person abroad under circumstances in which a person has a reasonable expectation of privacy. More specifically, section 2.5 of Executive Order 12333 requires that the Attorney General find probable cause that the U.S. person target is a foreign power or an agent of a foreign power. S. 2248 dramatically increases the role of the FISA Court by requiring court approval of this probable cause determination before an intelligence operation may be conducted beyond the borders of the United States. This provision imposes burdens on foreign intelligence collection abroad that frequently do not exist even with respect to searches and surveillance abroad for law enforcement purposes. Were the Administration to consider accepting FISA Court approval for foreign intelligence searches and surveillance of U.S. persons overseas, technical corrections would be necessary. The Administration appreciates the efforts that have been made by Congress to address these issues, but notes that while it may be willing to accept that the FISA Court, rather than the Attorney General, must make the required findings, limitations on the scope of the collection currently allowed are unacceptable.

Second, the Senate Intelligence Committee bill contains a requirement that intelligence analysts count ''the number of persons located in the United States whose communications were reviewed.'' This provision would likely be impossible to implement. It

places potentially insurmountable burdens on intelligence professionals without meaningfully protecting the privacy of Americans, and takes scarce analytic resources away from protecting our country. The Intelligence Community has provided Congress with a detailed classified explanation of this problem.

Although the Administration believes that the PAA achieved foreign intelligence objectives with reasonable and robust oversight protections, S. 2248, as drafted by the Senate Intelligence Committee, provides a workable alternative and improves on the PAA in one critical respect by providing retroactive liability protection. The Senate Intelligence Committee bill would achieve an effective legislative result by returning FISA to its appropriate focus on the protection of privacy interests of persons inside the United States, while retaining our improved capability under PAA to collect timely foreign intelligence information needed to protect the Nation.

THE SENATE JUDICIARY COMMITTEE PROPOSAL

The Senate Judiciary Committee amendment contains a number of provisions that would have a devastating impact on our foreign intelligence operations.

Among the provisions of greatest concern are:

An Overbroad Exclusive Means Provision That Threatens Worldwide Foreign Intelligence Operations. Consistent with current law, the exclusive means provision in the SSCI's bill addresses only ''electronic surveillance'' and ''the interception of domestic wire, oral, and electronic communications.'' But the exclusive means provision in the Judiciary Committee substitute goes much further and would dramatically expand the scope of activities covered by that provision. The Judiciary Committee substitute makes FISA the exclusive means for acquiring ''communications information'' for foreign intelligence purposes. The term ''communications information'' is not defined and potentially covers a vast array of information—and effectively bars the acquisition of much of this information that is currently authorized under other statues such as the National Security Act of 1947, as amended. It is unprecedented to require specific statutory authorization for every activity undertaken worldwide by the Intelligence Community. In addition, the exclusivity provision in the Judiciary Committee substitute ignores FISA's complexity and its interrelationship with other federal laws and, as a result, could operate to preclude the Intelligence Community from using current tools and authorities, or preclude Congress from acting quickly to give the Intelligence Community the tools it may need in the aftermath of a terrorist attack in the United States or in response to a grave threat to the national security. In short, the Judiciary Committee's exclusive means provision would radically reshape the intelligence collection framework and is unacceptable.

Limits on Foreign Intelligence Collection. The Judiciary Committee substitute would require the Attorney General and the Director of National Intelligence to certify for certain acquisitions that they are ''limited to communications to which at least one party is a specific individual target who is reasonably believed to be located outside the United States.'' This provision is unacceptable because it could hamper U.S. intelligence operations that are currently authorized to be conducted overseas and that could be conducted more effectively from the United States without harming U.S. privacy rights.

Significant Purpose Requirement. The Judiciary Committee substitute would require a FISA court order if a ''significant purpose'' of an acquisition targeting a person abroad is to acquire the communications of a specific person reasonably believed to be in the United States. If the concern driving this proposal is so-called ''reverse targeting''—circumstances in which the Government would conduct surveillance of a person overseas when the Government's actual target is a person in the United States with whom the person overseas is communicating—that situation is already addressed in FISA today: If the person in the United States is the target, a significant purpose of the acquisition must be to collect foreign intelligence information, and an order from the FISA court is required. Indeed, the SSCI bill codifies this longstanding Executive Branch interpretation of FISA. The Judiciary Committee substitute would place an unnecessary and debilitating burden on our Intelligence Community's ability to conduct surveillance without enhancing the protection of the privacy of Americans.

Part of the value of the PAA, and any subsequent legislation, is to enable the Intelligence Community to collect expeditiously the communications of terrorists in foreign countries who may contact an associate in the United States. The Intelligence Community was heavily criticized by numerous reviews after September 11, including by the Congressional Joint Inquiry into September 11, regarding its insufficient attention to detecting communications indicating homeland attack plotting. To quote the Congressional Joint Inquiry:

''The Joint Inquiry has learned that one of the future hijackers communicated with a known terrorist facility in the Middle East while he was living in the United States. The Intelligence Community did not identify the domestic origin of those communications prior to September 11, 2001 so that additional FBI investigative efforts could be coordinated. Despite this country's substantial advantages, there was insufficient focus on what many would have thought was among the most critically important kinds of terrorist-related communications, at least in terms of protecting the Homeland.''

(S. Rept. No. 107–351, H. Rept. No. 107–792 at 36.) To be clear, a ''significant purpose'' of Intelligence Community activities is to detect communications that may provide warning of homeland attacks and that may include communication between a terrorist overseas who places a call to associates in the United States. A provision that bars the Intelligence Community from collecting these communications is unacceptable, as Congress has stated previously.

Liability Protection. In contrast to the Senate Intelligence Committee bill, the Senate Judiciary Committee substitute would not protect electronic communication service providers who are alleged to have assisted the Government with communications intelligence activities in the aftermath of September 11th from potentially debilitating lawsuits. Providing liability protection to these companies is a just result. In its Conference Report, the Senate Intelligence Committee ''concluded that the providers . . . had a good faith basis for responding to the requests for assistance they received.'' The Committee further recognized that ''the Intelligence Community cannot obtain the intelligence it needs without assistance from these companies.'' Companies in the future may be less willing to assist the Government if they face the threat of private lawsuits each time they are alleged to have provided assistance. The Senate Intelligence Committee concluded that: ''The possible reduction in intelligence that might result from this delay is simply unacceptable for the safety of our Nation.'' Allowing continued litigation also risks the disclosure of highly classified information regarding intelligence sources and methods. In addition to providing an advantage to our adversaries by revealing sources and methods during the course of litigation, the potential disclosure of classified information puts both the facilities and personnel of electronic communication service providers and our country's continued ability to protect our homeland at risk. It is imperative that Congress provide liability protection to those who cooperated with this country in its hour of need.

The ramifications of the Judiciary Committee's decision to afford no relief to private parties that cooperated in good faith with the U.S. Government in the immediate aftermath of the attacks of September 11 could extend well beyond the particular issues and activities that have been of primary interest and concern to the Committee. The Intelligence Community, as well as law enforcement and homeland security agencies, continue to rely on the voluntary cooperation and assistance of private parties. A decision by the Senate to abandon those who may have provided assistance after September 11 will invariably be noted by those who may someday be called upon again to help the Nation.

Mandates an Unnecessary Review of Historical Programs. The Judiciary Committee substitute would require that inspectors general of the Department of Justice and relevant Intelligence Community agencies audit the Terrorist Surveillance Program and ''any closely related intelligence activities.'' If this ''audit'' is intended to look at operational activities, there has been an ongoing oversight activity by the Inspector General of the National Security Agency (NSA) of operational activities and the Senate Intelligence Committee has that material. Mandating a new and undefined ''audit'' will divert significant operational resources from current issues to redoing past audits. The Administration understands, however, the ''audit'' may in fact not be related to technical NSA operations. If it is the case that in fact the Judiciary Committee is interested in historical reviews of legal issues, the provision is unnecessary. The Department of Justice Inspector General and the Office of Professional Responsibility are already doing a comprehensive review. In addition, the phrase ''closely related intelligence activities'' would introduce substantial ambiguities in the scope of this review. Finally, this provision would require the inspectors general to acquire ''all documents relevant to such programs'' and submit those documents with its report to the congressional intelligence and judiciary committees. The requirement to collect and disseminate this wide range of highly classified documents—including all those ''relevant'' to activities ''closely related'' to the Terrorist Surveillance Program—unnecessarily risks the disclosure of extremely sensitive information about our intelligence activities, as does the audit requirement itself. Taking such national security risks for a backwards-looking purpose is unacceptable.

Allows for Dangerous Intelligence Gaps During the Pendency of an Appeal. The Judiciary Committee substitute would delete an important provision in the SSCI bill that enables the Intelligence Community to collect foreign intelligence from overseas terrorists and other foreign intelligence targets during an appeal. Without that provision, we could lose vital intelligence necessary to protect the Nation because of the views of one judge.

Limits Dissemination of Foreign Intelligence Information. The Judiciary Committee substitute would impose significant new restrictions on the use of foreign intelligence information, including information

not concerning United States persons, obtained or derived from acquisitions using targeting procedures that the FISA Court later found to be unsatisfactory for any reason. By requiring analysts to go back to the databases and pull out certain information, as well as to determine what other information is derived from that information, this requirement would place a difficult, and perhaps insurmountable, burden on the Intelligence Community. Moreover, this provision would degrade privacy protections, as it would require analysts to locate and examine U.S. person information that would otherwise not be reviewed.

Requires FISA Court Approval of All "Targeting" for Foreign Intelligence Purposes. The Judiciary Committee substitute potentially requires the FISA Court to approve "[a]ny targeting of persons reasonably believed to be located outside the United States." Although we assume that the Committee did not intend to require these procedures to govern all "targeting" done of any person in the world for any purpose—whether it is to gather human intelligence, communications intelligence, or for other reasons—the text as passed by the Committee contains no limitation. Such a requirement would bring within the FISA Court a vast range of overseas intelligence activities with little or no connection to civil liberties and privacy rights of Americans.

Imposes Court Review of Compliance with Minimization Procedures. The Judiciary Committee substitute would require the FISA Court to review and assess compliance with minimization procedures. Together with provisions discussed above, this would constitute a massive expansion of the Court's role in overseeing the Intelligence Community's implementation of foreign intelligence collection abroad.

Amends FISA to Impose Burdensome Document Production Requirements. The Judiciary Committee substitute would amend FISA to require the Government to submit to oversight committees a copy of any decision, order, or opinion issued by the FISA Court or the FISA Court of Review that includes significant construction or interpretation of any provision of FISA, including any pleadings associated with those documents, no later than 45 days after the document is issued. The Judiciary Committee substitute also would require the Government to retrieve historical documents of this nature from the last five years. As drafted, this provision could impose significant burdens on Department of Justice staff assigned to support national security operational and oversight missions.

Includes an Even Shorter Sunset Provision Than That Contained in the SSCI Bill. The Judiciary Committee substitute and the SSCI bill share the same flaw of failing to achieve permanent FISA reform. The Judiciary Committee substitute worsens this flaw, however, by shortening the sunset provision in the SSCI bill from six years to four years. Any sunset provision, but particularly one as short as contemplated in the Judiciary Committee substitute, would adversely impact the Intelligence Community's ability to conduct its mission efficiently and effectively by introducing uncertainty and requiring retraining of all intelligence professionals on new policies and procedures implementing ever-changing authorities. Moreover, over the past year, in the interest of providing an extensive legislative record and allowing public discussion on this issue, the Intelligence Community has discussed in open settings extraordinary information dealing with intelligence operations. To repeat this process in several years will unnecessarily highlight our intelligence sources and methods to our adversaries. There is now a lengthy factual record on the need for this legislation, and it is time to provide the Intelligence Community the permanent stability it needs.

Fails to Provide Procedures for Implementing Existing Statutory Defenses. The Judiciary Committee substitute fails to include the important provisions in the SSCI bill that would establish procedures for implementing existing statutory defenses and that would preempt state investigations of assistance allegedly provided by an electronic communication service provider to an element of the Intelligence Community. These provisions are important to ensure that electronic communication service providers can take full advantage of existing liability protection and to protect highly classified information.

Fails to Address Transition Procedures. Unlike the SSCI bill, the Judiciary Committee bill contains no procedures designed to ensure a smooth transition from the PAA to new legislation, and for a potential transition resulting from an expiration of the new legislation. This omission could result in uncertainty regarding the continuing validity of authorizations and directives under the Protect America Act that are in effect on the date of enactment of this legislation.

Fails to Include a Severability Provision. The Judiciary Committee substitute, unlike the SSCI bill, lacks a severability provision. Such a provision should be included in the bill.

The Administration is prepared to continue to work with Congress towards the passage of a permanent FISA modernization bill that would strengthen the Nation's intelligence capabilities while protecting the constitutional rights of Americans, so that the President can sign such a bill into law. The Senate Intelligence Committee bill provides a solid foundation to meet the needs of our Intelligence Community, but the Senate Judiciary Committee bill represents a major step backwards from the PAA and would compromise our Intelligence Community's ability to protect the Nation. The Administration calls on Congress to forge ahead and pass legislation that will protect our national security, not weaken it in critical ways.

NOVEMBER 14, 2007.

Hon. PATRICK J. LEAHY,
Chairman, Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: This letter presents the views of the Administration on the proposed substitute amendment you circulated to Title I of the FISA Amendments Act of 2007 (S. 2248), a bill "to amend the Foreign Intelligence Surveillance Act of 1978, to modernize and streamline the provisions of that act, and for other purposes." We have appreciated the willingness of Congress to address the need to modernize FISA permanently and to work with the Administration to do so in a manner that allows the intelligence community to collect the foreign intelligence information necessary to protect the Nation while protecting the civil liberties of Americans. With all respect, however, we strongly oppose the proposed substitute amendment. If the substitute is part of a bill that is presented to the President, we and the President's other senior advisers will recommend that he veto the bill.

In August, Congress took an important step toward modernizing the Foreign Intelligence Surveillance Act of 1978 by enacting the Protect America Act of 2007 (PAA). The Protect America Act has allowed us temporarily to close intelligence gaps by enabling our intelligence professionals to collect, without a court order, foreign intelligence information from targets overseas. The intelligence community has implemented the Protect America Act in a responsible way, subject to extensive congressional oversight, to meet the country's foreign intelligence needs while protecting civil liberties. Unless reauthorized by Congress, however, the authority provided in the Protect America Act will expire in less than three months. In the face of the continued terrorist threats to our Nation, we think it is vital that Congress act to make the core authorities of the Protect America Act permanent. Congressional action to provide protection from private lawsuits against companies that are alleged to have assisted the Government in the aftermath of the September 11th terrorist attacks on America also is critical to ensuring the Government can continue to receive private sector help to protect the Nation.

In late October, the Senate Select Committee on Intelligence introduced a consensus, bipartisan bill (S. 2248) that would establish a firm, long-term foundation for our intelligence community's efforts to target terrorists and other foreign intelligence targets located overseas. While the bill is not perfect, it contains many important provisions, and was developed through a thoughtful process that ensured that the intelligence community retains the core authorities it needs to protect the Nation and that the bill would not adversely impact critical intelligence operations. Importantly, that bill would afford retroactive liability protection to communication service providers that are alleged to have assisted the Government with intelligence activities in the aftermath of September 11th. The Intelligence Committee recognized that "without retroactive immunity, the private sector might be unwilling to cooperate with lawful Government requests in the future without unnecessary court involvement and protracted litigation. The possible reduction in intelligence that might result from this delay is simply unacceptable for the safety of Our Nation." The committee's measured judgment reflects the principle that private citizens who respond in good faith to a request for assistance by public officials should not be held liable for their actions. The bill was reported favorably out of committee on a 13–2 vote.

We respectfully submit that your substitute amendment to Title I of the Senate Intelligence Committee's bill would upset some important provisions in the Intelligence Committee bill. The substitute also does not adequately address certain provisions in the Intelligence Committee's bill that remain in need of improvement. As a result, we have determined, with all respect to your efforts, that the substitute would not provide the intelligence community with the tools it needs effectively to collect foreign intelligence information vital for the security of the Nation.

I. LIMITATIONS ON INTELLIGENCE COLLECTION AND NATIONAL SECURITY INVESTIGATIONS

The substitute would make several amendments to S. 2248 that would have an adverse impact on our ability to collect effectively the foreign intelligence information necessary to protect the Nation. These amendments include the following:

Prohibits Intelligence and Law Enforcement Officials From Using Valuable Investigative Tools. The substitute contains an amendment to the "exclusive means" provision of FISA that could severely harm our ability to conduct national security investigations. As drafted, the provision would bar the use of national security letters, Title III criminal wiretaps, ad other well-established investigative tools to collect information in national security investigations.

Threatens Critical Intellilgence Collection Activities. The "exclusive means" provision also

could harm the national security by disrupting highly classified intelligence activities. Among other things, ambiguities in critical terms and formulations in the provision—including the term ''communications information'' (a term that is not defined in FISA) and the introduction of the concept of targeting communications (as opposed to persons)—could lead the statute to bar altogether or to require court approval for overseas intelligence activities that involve merely the incidental collection of United States person information.

Limits Existing Provisions of Law that Protect Communications Service Providers. The portion of the substitute regarding protections to communication service providers under Government certifications contains ambiguities that could jeopardize our ability to secure the assistance of these providers in the future. This could hamper significantly the Government's efforts to obtain necessary foreign intelligence information. As the Senate Intelligence Committee noted in its report on S. 2248, ''electronic communications service providers play an important role in assisting intelligence officials in national security activities. Indeed, the intelligence community cannot obtain the intelligence it needs without assistance from these companies.''

Allows for Dangerous Intelligence Gaps During the Pendency of an Appeal. The substitute would delete an important provision in the bipartisan Intelligence Committee bill that would ensure that our intelligence professionals can continue to collect intelligence from overseas terrorists and other foreign intelligence targets during the pendency of an appeal of a decision of the FISA Court. Without that provision, whole categories of surveillances directed outside the United States could be halted before review by the FISA Court of Review.

Limits Dissemination of Foreign Intelligence Information. The substitute would impose significant new restrictions on the use of foreign intelligence information, including information not concerning United States persons, obtained or derived from acquisitions using targeting procedures that the FISA Court later found to be unsatisfactory. By requiring analysts to go back to the databases and pull out the information, as well as to determine what other information is derived from that information, this requirement would place a difficult, and perhaps insurmountable, operational burden on the intelligence community in implementing authorities that target terrorists and other foreign intelligence targets located overseas. This requirement also strikes us as at odds with the mandate of the September 11th Commission that the intelligence community should find and link disparate pieces of foreign intelligence information. The requirement also harms privacy interests by requiring analysts to examine information that would otherwise be discarded without being reviewed.

Imposes Court Review of Compliance with Minimization Procedures. The substitute would allow the FISA Court to review compliance with minimization procedures that are used on a programmatic basis for the acquisition of foreign intelligence information by targeting individuals reasonably believed to be outside the United States. This could place the FISA Court in a position where it would conduct individualized review of the intelligence community's foreign communications intelligence activities. While conferring such authority on the court is understandable in the context of traditional FISA collection, it is anomalous in this context, where the court's role is in approving generally applicable procedures rather than individual surveillances.

Strikes a Provision Designed to Make the FISA Process More Efficient. The substitute would strike a provision from the bipartisan Senate Intelligence Committee bill that would allow the second highest-ranking FBI official to certify applications for electronic surveillance. Today, the only FBI official who can certify FISA applications is the Director, a restriction that can delay the initiation of surveillance when the Director travels or is otherwise unavailable. It is unclear why this provision from the Intelligence Committee bill, which will enhance the efficiency of the FISA process while ensuring high-level accountability, would be objectionable.

II. NECESSARY IMPROVEMENTS TO S. 2248

The substitute also does not make needed improvements to the Senate Intelligence Committee bill. These include:

Provision Pertaining to Surveillance of United States Persons Abroad. The substitute does not make needed improvements to the Committee bill, which would require for the first time that a court order be obtained to surveil United States persons abroad. In addition to being problematic for policy reasons and imposing burdens on foreign intelligence collection abroad that do not exist with respect to collection for law enforcement purposes, the provision continues to have serious technical problems. As drafted, the provision would not allow for the surveillance, even with a court finding, of certain critical foreign intelligence targets, and would allow emergency surveillance outside the United States for significantly less time than the bipartisan Senate Intelligence Committee bill had authorized for surveillance inside the United States.

Maintains a Sunset Provision. Rather than achieving permanent FISA reform, the substitute maintains a six year sunset provision. Indeed, several members on the Judiciary Committee have indicated that they may propose amendments to the bill that would shorten the sunset, leaving the intelligence community and our private partners subject to an uncertain legal framework for collecting intelligence from overseas targets. Any sunset provision withholds from our intelligence professionals the certainty and permanence they need to conduct foreign intelligence collection to protect Americans from terrorism and other threats to the national security. The intelligence community operates much more effectively when the rules governing our intelligence professionals' ability to track our adversaries are established and are not changing from year to year. Stability of law, we submit, also allows the intelligence community to invest resources appropriately. In our respectful view, a sunset provision is unnecessary and would have an adverse impact on the intelligence community's ability to conduct its mission efficiently and effectively.

Fails to Remedy an Unrealistic Reporting Requirement. The substitute fails to make needed amendments to a reporting requirement in the Senate Intelligence Committee bill that poses serious operational difficulties for the intelligence community. The Intelligence Committee bill contains a requirement that intelligence analysts count ''the number of persons located in the United States whose communications were reviewed.'' This provision would be impossible to implement fully. The provision, in short, places potentially insurmountable burdens on intelligence professionals without meaningfully protecting the privacy of Americans. The intelligence community has provided Congress with a further classified discussion of this issue.

We also are concerned by other serious technical flaws in the substitute that create uncertainty.

The Administration remains prepared to work with Congress towards the passage of a permanent FISA modernization bill that would strengthen the Nation's intelligence capabilities while respecting and protecting the constitutional rights of Americans, so that the President can sign such a bill into law. We look forward to working with you and the Members of the Judiciary Committee on these important issues.

Thank you for the opportunity to present our views. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to the submission of this letter.

Sincerely,

MICHAEL B. MUKASEY,
Attorney General.
J.M. MCCONNELL,
Director of National Intelligence.

Mr. HATCH. On numerous occasions I have voiced very specific concerns with the Judiciary substitute. I again want to list some of the reasons that illustrate why I oppose this measure. One phrase that has been expressed on the floor of the Senate is that the Judiciary substitute supposedly ''strengthens'' oversight. That might sound like a good talking point, but what does it mean? Does it mean that the Intelligence Committee version is weak on oversight? Based on their previous statements, some of my colleagues seem to believe this. One of my colleagues described the Intelligence Committee bill as ''a bill of token oversight and weak protections for innocent Americans.'' This same colleague also stated that ''it really reduces court oversight nearly to the point of symbolism.'' Another colleague stated the bill will allow the Government to ''review more Americans' communications with less court supervision than ever before.''

The truth is actually much different. The Intelligence Committee bill contains extensive new oversight provisions for the Foreign Intelligence Surveillance Court and Congress. I think it should be perfectly clear that it is a fallacy to claim that the Intelligence Committee bill does not have adequate oversight. On the contrary, it has a level of oversight that is unprecedented and quite possibly provides the most comprehensive oversight of any historical bill relating to foreign intelligence gatherings.

We have also heard the contention that this bill would provide broad new surveillance authorities. Since I have discussed the expanded oversight, I wish I could put up some charts that illustrate this so-called massive expansion of surveillance authority. The problem is that expansion is not in the bill. It doesn't exist. Despite the phrase being repeated over and over, this bill simply contains no new broad and unprecedented surveillance authorities.

For the first time, the Federal Intelligence Court will review and approve targeting procedures used by the intelligence community. For the first time since 1978—it wasn't done before—FISC will determine whether the procedures

are reasonably designed to ensure targeting is limited to persons outside the United States.

This bill simply accounts for the technological change in international communications from over the air to cable. It is the bare minimum, but it does give them what they need.

Given the amount of opposition to the Judiciary substitute, I wish to highlight one of the controversial provisions added in the Judiciary Committee relating to ''reverse targeting.''

One of the basic requirements of any FISA modernization proposal is that we should not have any provisions which could be interpreted as requiring warrants to target a foreign terrorist overseas. Quite simply, foreign terrorists living overseas should never receive protections provided by the fourth amendment to the Constitution. They never have and they never should. Reverse targeting refers to the possibility, as alleged by critics of lawful Government surveillance, that the Government could target a foreign person when the real intention is to target a U.S. person, thus circumventing the need to get a warrant for the U.S. person. Reverse targeting has always been unlawful in order to protect the communications of U.S. persons. Contrary to what most people believe, the legitimate definition of U.S. persons is not limited to U.S. citizens.

What is a United States person? ''An alien lawfully admitted for permanent residence'' and ''a corporation which is incorporated in the United States.''

So from an intelligence-gathering standpoint, reverse targeting makes no sense. From an efficiency standpoint, if the Government were interested in targeting an American, it would apply for a warrant to listen to all of the American's conversations, not just conversations with terrorists overseas. But let's not let logic get in the way of good conspiracy theory.

Even though reverse targeting is already considered unlawful, a provision is included in the Intelligence bill which makes it explicit. This provision is clearly written and universally supported. However, the Judiciary Committee passed an amendment by a 10-to-9 party-line vote which altered the clear language of this provision. Where before the provision said you cannot target a foreign person if the ''purpose'' is to target a U.S. person, the new language adds the ambiguous term ''significant purpose.'' If this amendment became law, an analyst would now have to ask himself the following question when targeting a terrorist overseas: Is a ''significant purpose'' of why I am targeting this foreign terrorist overseas the fact that the terrorist may call, A, an airline in America to make flight reservations or, B, a terrorist with a green card living in the USA? If the answer is yes, then the language in this amendment would require a warrant to listen to that foreign terrorist overseas. Do foreign terrorists overseas deserve protections from the courts in the United States? Of course not. The ambiguous and unnecessary text of this amendment should not be left up to judicial interpretation. Enactment of this amendment could lead to our analysts seeking warrants when targeting any foreign terrorist, since the analyst may be afraid he or she is otherwise breaking our new law.

Now we should remember that the Intelligence Committee spent months working on a bipartisan compromise bill. This amendment I have been talking about was not in the Intelligence bill. So people should assume that the Judiciary Committee spent a great deal of time debating this amendment, right? Wrong. The Judiciary Committee spent 7 minutes debating this amendment before it was adopted on a 10-to-9 party-line vote. Let me repeat that number: 7 minutes.

Now, the inclusion of this amendment alone would cause me to vote against this Judiciary substitute. But there are many more provisions that were added via party-line vote which I strongly oppose.

The Judiciary Committee also adopted an amendment to shorten the length of the sunset in the Intelligence Committee's bill. There are a few quick things we should realize when talking about sunsets.

It takes a great deal of time to ensure that all of our intelligence agencies and personnel are fully trained in any new authorities and restrictions brought about by congressional action. This is not something that happens overnight. We cannot just wave a magic wand and have our Nation's intelligence personnel instantaneously cognizant of every administrative alteration imposed by Congress. Like so many things in life, adjusting for these new mechanisms takes time and practice.

While certain modifications are necessary, do we want to make it a habit of consistently changing the rules? I do not think so. Don't we want our analysts to spend their time actually tracking terrorists? Or is their time better spent navigating administrative procedures that may constantly be in flux? I can tell you clearly what I want, and that is for our analysts to use lawful tools to keep our families safe. I do not want to see them unnecessarily diverting their attention by burying their heads in administrative manuals whenever the political winds blow. After all of the efforts to finally write a bill that provides a legal regime that governs contemporary technological capabilities, I am certainly not alone in my opposition to this sunset provision. In fact, my views are completely in line with what this body has done in the past when amending FISA. Remembering that FISA itself had no sunset—the 1978 bill had no sunset—let's look at how Congress has previously legislated in this area: Sunsets are not common in previous laws amending FISA. Other than the PATRIOT Act and the PATRIOT Act reauthorization, seven of the eight public laws amending FISA had no sunsets on FISA provisions, and the remaining public law had a sunset on only one of the provisions.

Now this statistic speaks for itself. What is so different about this bill? I do realize that it contains massive new oversight which could possibly hinder our collection efforts, and that we may need to revisit it for this reason. However, if this is the case, we obviously do not need a sunset to do this. We can legislate in this area whenever we want to.

The fact that the Judiciary Committee shortened the length of an already unnecessary sunset is yet another example of why I will oppose the Judiciary substitute amendment.

We all realize that the Judiciary Committee's bill also removed the bipartisan immunity provision. I have come to the floor on numerous occasions to articulate why this provision is so vital and so necessary. I will do so again when we debate the misguided amendment to strike this bipartisan compromise provision.

We are enacting national security legislation, and it is our responsibility to ensure that this bill does not lead to unintended consequences which provide protections to terrorists. I have no doubt that provisions in the Judiciary Committee substitute could significantly harm—significantly harm—our national security. I am not willing to take that chance. I am not willing to support a bill which raises operational hurdles that impede collection of foreign intelligence. I am not willing to support initiatives that would allow our collections to go dark during the appeal of a ruling from one judge. I am not willing to support a bill which handcuffs our intelligence agencies. I am not willing to support a bill which provides excessive and obtrusive oversight that placates fringe political groups at the possible expense of national security. The stakes are too high. The damage that can be done if we get this wrong is too great.

The PRESIDING OFFICER. The Senator's time has expired.

Mr. HATCH. Mr. President, I ask unanimous consent for an additional 30 seconds to finish.

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

Mr. HATCH. I will never apologize for voting in favor of provisions which protect national security and civil liberties. During the remainder of this debate, I will continue to support initiatives that properly protect the lives and liberty of Americans. I am hopeful my colleagues will do the same. And I hope we will table this Judiciary Committee partisan amendment.

I yield the floor.

The PRESIDING OFFICER. The Senator from New York.

Mr. SCHUMER. Mr. President, I will speak later on the floor on the FISA amendment. I want to say that I think the Judiciary Committee amendment

is careful and balanced and takes into account both security and liberty. I also note, my colleague from Utah talked about the fact that every citizen would need a warrant in terms of wiretapping. There always has been, and will be in this bill, an emergency exception. So if we have to quickly find someone, there will be an ability to wiretap, and then go get the warrant. We do insist, however—and this is one of the big differences on oversight—to make sure those emergency provisions and the other provisions are being used according to law, and it is not willy-nilly, whatever anybody wants at any time in any place.

Mr. President, I ask unanimous consent to speak as in morning business.

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

(The remarks of Mr. SCHUMER are printed in today's RECORD under ''Morning Business.'')

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

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. KENNEDY. 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. KENNEDY. Mr. President, I strongly urge my colleagues to support the substitute amendment and pass the FISA bill reported by the Judiciary Committee. Since I introduced the original FISA legislation over 30 years ago, I have worked to amend the FISA law many times and I believe that only the bill reported by the Judiciary Committee is faithful to the traditional balance FISA has struck. FISA remains an essential tool in our battle against America's enemies, and the bills introduced by both the Judiciary Committee and the Intelligence Committee give the executive branch vast authority to conduct electronic surveillance that may involve Americans. But the Intelligence Committee bill lacks safeguards to provide oversight and prevent abuse, and Americans deserve better. The Foreign Intelligence Surveillance Act is one of our landmark statutes. For three decades it has regulated Government surveillance in a way that protects both our national security and our civil liberties and prevents the Government from abusing its powers. It is because FISA enhances both security and liberty that it has won such broad support over the years from Presidents, Members of Congress, and the public alike. It is important to remember that before this administration, no administration had ever resisted FISA, much less systematically violated it.

When the Bush administration finally came to Congress to amend FISA after its warrantless wiretapping program was exposed, it did so not in the spirit of partnership but to bully us into obeying its wishes. The Protect America Act was negotiated in secret at the last minute. The administration issued dire threats that failure to enact a bill before the August recess would lead to disaster. Few, if any, knew what the language would actually do. The result of this flawed process was flawed legislation which virtually everyone now acknowledges must be substantially revised.

I commend the members of the Intelligence Committee for their diligent efforts to put together a new bill. They have taken their duties seriously and they have made notable improvements to the Protect America Act. But their bill is deeply flawed and I am opposed to enacting it in its current form. This bill fails to protect America's constitutional rights and fundamental freedoms. It is not just that the Intelligence Committee bill gives retroactive immunity to telecoms, which I strongly oppose; there are also many problems with title I of the Intelligence Committee bill.

First: It redefines ''electronic surveillance,'' a key term in FISA, in a way that is unnecessary and may have unintended consequences. We have still not heard a single good argument for why this change is needed.

Second: Court review occurs only after the fact with no consequences if the court rejects the Government's targeting of minimization procedures. This is a far cry from the traditional role played by the FISA Court.

Third: It is not as clear as it should be that FISA and the criminal wiretap law are the sole legal means by which the Government may conduct electronic surveillance. This leaves open the possibility that future administrations will claim that they are not bound by FISA.

Fourth: Its sunset provision is December 31, 2013. For legislation as complicated, important, and controversial as this, Congress should evaluate it much sooner. After all, the principal argument in support of reforming FISA is that technology has evolved rapidly and the law must change to take this into account. Because this legislation will make major untested changes to the FISA system and the pace of technology change will only increase, we should evaluate it sooner rather than later.

The bill purports to eliminate the ''reverse targeting'' of Americans, but does not actually contain language to do so. Reverse targeting can occur if the Government wiretaps someone abroad because it wants to listen to a correspondent in the United States, thereby evading the traditional warrant requirement for domestic surveillance. The Intelligence Committee bill has nothing similar to the House bill's provision on reverse targeting which prohibits use of the authorities if ''a significant purpose'' is targeting someone in the United States.

Mr. President, this legislation does not fully close the loophole left open by the Protect America Act, allowing warrantless interception of purely domestic communications. The administration has acknowledged that when it knows ahead of time that both the person making the call and the person receiving the call are located inside the United States, it should have to get a court order before it can listen in on that call. But the language of the bill doesn't clearly require it.

It does not require an independent review and report on the administration's domestic warrantless eavesdropping program. Only through such a process will we ever learn what happened and achieve accountability and closure on this episode. It is enormously important, Mr. President, that we find out exactly what happened during this period of our history.

Add it all up, and the sum is clear: This bill is inconsistent with the way FISA was meant to work and with the way FISA has always worked.

Fortunately, the Judiciary Committee's FISA bill shows that there is a better way, one that is faithful to the traditional FISA balance. The Judiciary Committee bill shares the same basic structure, but it addresses all of the problems I listed earlier. The Judiciary Committee bill was negotiated in public, which allowed outside groups and experts to give critical feedback. It was also negotiated later in time than the Intelligence bill, meaning we had the benefit of reviewing their work.

Like the Intelligence Committee's bill, the Judiciary Committee's version also gives the executive branch significantly greater authority to conduct electronic surveillance than it has ever had before. Make no mistake, it, too, grants substantial power to the intelligence community. But unlike the Intelligence Committee's bill, the Judiciary Committee's version sets reasonable limits to protect innocent Americans from being spied on by their Government without justification.

No one should underestimate the importance of title I of FISA. The rules governing electronic surveillance affect every American. They are the only thing that stands between the freedom of Americans to make a phone call, send an e-mail, and search the Internet, and the ability of the Government to listen in on that call, read that e-mail, and review that Internet search.

In our information age, title I of FISA provides Americans essential protections against Government tyranny and abuse. We have a choice. We can adopt the Judiciary Committee's bill and preserve those protections or we can adopt the Intelligence Committee's version of title I and abandon them.

As I have said before, I also strongly oppose title II of the Intelligence Committee bill, which grants retroactive immunity to the phone companies. At the appropriate time, I will come to the floor and explain why we must strike title II.

Mr. GRAHAM. Mr. President, I rise today in support of the bipartisan

FISA legislation passed by the Senate Select Committee on Intelligence. This legislation, which was passed by the Intelligence Committee on a 13–2 vote, will give the intelligence community the tools it needs to effectively protect our Nation. It is not a perfect bill, but it is the balanced product of months of hard work by the Intelligence Committee members and their staff.

On the other hand, the substitute amendment proposed by the Judiciary Committee would have substantially weakened the Intelligence Committee legislation and our nation's ability to protect itself. Unlike the bipartisan Intelligence Committee bill, the Judiciary Committee legislation was passed on a series of party-line 10–9 votes. The substitute would have added onerous and unnecessary hurdles to the collection of vital national security intelligence. It would have hamstrung our intelligence community at a very dangerous time in our country's history. I am pleased that the Senate quickly rejected the Judiciary Committee substitute. It would have been foolhardy for the Senate to hinder America's ability to protect itself from terrorists and other threats by gutting the Intelligence Committee bill.

Perhaps the biggest failure of the Judiciary substitute is its lack of a retroactive immunity provision for electronic communication service providers who are alleged to have assisted the government with intelligence activities in the aftermath of September 11. The telecommunications companies that lawfully responded to written requests from their government to help protect the nation need and deserve immunity from frivolous lawsuits that seek hundreds of billions of dollars in damages.

The Intelligence Committee bill includes a responsible retroactive immunity provision to protect the telecommunications companies that aided the government in the wake of the September 11 attacks. However, it leaves legal actions against the government and government officials untouched. The Judiciary Committee substitute does not address the critical need for retroactive immunity for cooperating companies and would risk a future where companies refuse to cooperate with vital government intelligence operations, lest they risk massive legal liability. Without immunity, our Nation faces a substantial decrease in future intelligence. Such a decrease would endanger American lives and is simply unacceptable.

Again, while not a perfect bill, the Intelligence Committee legislation would appropriately balance national security and individual civil liberties. Our intelligence community must be able to gather the information necessary to effectively protect the country. The Intelligence Committee bill is a bipartisan compromise with effective safeguards. The Senate should quickly pass this legislation to give the intelligence community the tools it needs to protect America.

The PRESIDING OFFICER (Mr. SALAZAR). The Senator from Missouri is recognized.

Mr. BOND. Mr. President, I ask unanimous consent that I be given the full 15 minutes that was allotted to us before the 2 o'clock vote. I have some remarks, and I believe Senator ROCKEFELLER, if we need that, would like the full 15 minutes.

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

Mr. BOND. Mr. President, last night, as I was preparing to leave my office, I learned, with surprise, that Senator LEAHY had made significant modifications to the pending Judiciary Committee substitute.

Our study during the night of these modifications revealed that the partisan, Democratic-only Judiciary Committee substitute remains deeply flawed.

While some aspects of the modified substitute have been cleaned up—and, in fact, appear to borrow language that Senator ROCKEFELLER and I have been negotiating over the past several months as part of our perfecting managers' amendment—the substitute contains many problematic provisions that I cannot support.

In contrast to the underlying Intelligence Committee bill, I doubt that the problematic provisions in the modified substitute were vetted with the Republican Judiciary Committee members, the intelligence community, or the Department of Justice.

It should be no surprise, then, that the DNI and the Department of Justice continue to oppose the modified substitute.

Let me clarify some matters that were brought up by the distinguished senior Senator from Massachusetts. First, the Protect America Act, which expires on February 1, was not negotiated in secret. The DNI asked the Intelligence Committee in April to consider a bill he set up. He came before our committee and testified openly in May. He came before the Senate in a classified meeting in S–407 in June. When we had not been able to get a markup in the Senate Select Committee on Intelligence and time was running short, he offered a stripped-down version that would allow intelligence collection to continue. We were unable to get a markup, so we filed with Leader MCCONNELL the bill on Wednesday. That bill sat on the floor Wednesday, Thursday, and Friday.

There were secret negotiations, but those were on the majority side. The chairmen of several committees worked without informing the members of the Intelligence Committee or, to my knowledge, any Republicans on any of the committees, and they finally presented that to us less than an hour before we went to the floor. So that was negotiated in secret. It was unacceptable, and it did not allow intelligence collection to continue. I am glad to say, on a bipartisan basis, we rejected the secretly negotiated bill and passed the Protect America Act.

The Protect America Act did not expand on the authorities of FISA, other than to clarify the means of collection, which previously were by radio. Most communications overseas are by radio. Many communications were going through America. This bill before us today, the Intelligence Committee bill, does not, as my friend said, expand on the powers of the intelligence community to collect. In fact, they impose more restrictions to guarantee the privacy rights and the constitutional rights of Americans. Those are in the bill. Those were negotiated. We pushed the DNI and the Department of Justice lawyers as far as we could to build in additional protections. Those are in the bill.

Now, if one reads the bill, you would see that reverse targeting is prohibited in section 703(b), subparagraphs 2 and 3. It does strengthen the privacy protections. That is why the Senate Intelligence Committee bill is the bill that we should pass.

Moving back to the Judiciary Committee substitute, there is no provision for retroactive or prospective immunity for communications providers or for preemption of State investigations into providers' alleged assistance to the Government in relation to the terrorist surveillance program.

The distinguished chairman of the committee, Senator ROCKEFELLER, laid out at length, and very forcefully, why this protection is needed. This protection is needed to assure that we can have the continued assistance of carriers who might be called on not only in terrorist matters but on many domestic crimes to provide assistance. Furthermore, if we don't have that protection, if these lawsuits continue, it is quite likely that the court proceedings will get into details further on how the collection of electronic information and communications is accomplished. Every time we talk about that and lay out more, we give more information and more guidance to the terrorists themselves on how to avoid our surveillance. We don't want to be in that position.

The next problem with the substitute from the Judiciary Committee is that, unlike the managers' amendment that Senator ROCKEFELLER and I intend to offer for the Senate's consideration, the new substitute doesn't fix the reporting problems of the Wyden amendment, which had a great objective—and I agreed with the objective—but it is unworkable. We are going to make it workable in our bill.

Furthermore, it requires the intelligence community to perform the impossible task of estimating and recording U.S. person communications in its possession. Anybody who wants to know why that is so, we would be happy to meet with them in a closed meeting and explain why that is not workable. It would be an impossible burden, one we cannot undertake on the committee.

Next, the substitute modifies the exclusive means provision from the original substitute, but it is still problematic and requires an express statutory authorization. That presumes that after the next attack Congress will be in a position to act quickly to pass necessary authorizations. I don't think we want to impose that provision.

The underlying Intelligence Committee bill provides the same exclusive means, directions, and limitations that were in the FISA bill initially.

Another problem with the Judiciary Committee bill is that it places a provision in the Intelligence Committee bill that would have allowed collection to continue until the FISA Court of review has—if they had gotten an unfavorable ruling from one judge, it allows collection to continue until the court of review rules on it. This is a real problem if there is one unfavorable opinion that might put us deaf to collections that are necessary.

The Intelligence Committee determined that anything except an automatic stay through the FISA Court of review could jeopardize our intelligence collection. This was already a compromise from the full automatic stay that was in the Protect America Act.

Next, the substitute would impose unreasonable new restrictions on the use of foreign intelligence information, including information not concerning U.S. persons, obtained or derived from acquisitions using targeting procedures that the FISA Court found to be deficient in some manner, throwing out vital terrorist information because we didn't protect the constitutional rights or there were some procedural flaws in targeting a foreign terrorist in a foreign land.

It creates a superexclusionary rule in the foreign intelligence arena that is at odds with the 9/11 Commission's mandate for the intelligence community to find and link disparate pieces of foreign intelligence information.

Read what they said. It was important. They said we are not sharing information, and we need to share information within the community if we are going to have a chance to prevent the next 9/11.

On reverse targeting, the substitute changes the bright-line reverse targeting provision in S. 2248 to a new rule that changes ''the purpose'' to ''a significant purpose.'' This change is a significant concern to the DNI and DOJ. They told us it creates so much uncertainty in the appropriate legal standard for collection, and it may confuse analysts trying to follow the standards. This could inadvertently lead to less robust intelligence collection.

Under the bulk collection, while the new substitute modifies the bulk collection prohibition in the original Judiciary Committee substitute, it doesn't solve the problem. This provision could have significant unintended operational consequences, and it is unnecessary given restrictions in S. 2248 about intentionally targeting persons in the United States.

As I said, for example, if a general is about to order troops into Fallujah, this prohibition could impede the ability of the intelligence community to listen to calls coming into and out of that city without a court order.

The FISA Court would be commanded, under the Judiciary Committee's substitute, to assess compliance with minimization procedures used for the acquisition of foreign intelligence information from individuals outside the United States. As I reported earlier in my floor speech, there is a FISA Court opinion, In Re: Motion For Release, December 11, stating:

> The Court recognizes the executive branch has the expertise in national security, and the Court should not be making judgments as to which particular surveillance unit should be conducted.

Finally, it replaces a 6-year sunset with a 4-year sunset. As the Senator from Massachusetts said, this bill ought to be reviewed continually. Exactly. That is what the intelligence community should do. We should not have a provision that would sunset the authority for our collection of vital information. But we should have continuing oversight which the Intelligence Committees have provided and will continue to provide to make sure that collection is proceeding in a manner consistent with the Constitution, with the laws, and the regulations overseeing it.

We provide a robust oversight of the NSA collection. That collection must be done in a manner consistent with the guidelines that Congress has laid down, the Constitution has laid down, and the administration has laid down. If there is any problem with that, then it is up to the Intelligence Committees of both Houses to bring before the Congress, if we cannot correct it by interceding with the people in the agency, a bill to change it.

I see my chairman, Senator ROCKEFELLER, is here. I will be glad to yield the remaining 3 minutes of my time to the distinguished chairman of the committee.

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

The PRESIDING OFFICER. The Senator from Missouri controls 2½ minutes. The Senator from Vermont controls 14 minutes.

The Senator from West Virginia.

Mr. ROCKEFELLER. Mr. President, I wish to take a few minutes to describe to the Senate my views on the amendment reported by the Judiciary Committee, and why I will be opposing the amendment when we vote at 2.

First, I wish to repeat a few comments I made in my opening remarks when we debated the motion to proceed to S. 2248 in December.

From the beginning of the Senate's consideration of foreign intelligence surveillance legislation in 1976, the resulting law—the Foreign Intelligence Surveillance Act of 1978—has been the joint responsibility of both the Intelligence and Judiciary Committees. FISA is, after all, a law that concerns both intelligence collection and judicial proceedings.

The bill now before the Senate, S. 2248, was reported to the Senate by the Intelligence Committee last October, and then sequentially reported to the Senate by the Judiciary Committee in November.

As a parliamentary matter, the measure as reported by the Judiciary Committee is the pending amendment to the bill reported by the Intelligence Committee.

I agree with a number of the recommendations of the Judiciary Committee. I have been pleased to work with members of the Judiciary Committee on modifications that address particular concerns that had been raised by the administration.

I will accordingly support individual amendments to add those recommendations, as modified when necessary, to S. 2248. These include a strengthened exclusivity provision, a 4-year sunset, court review of compliance with minimization procedures, and an inspectors general report on the President's warrantless surveillance program in order to ensure there is a comprehensive historical record of that experience.

While I support many aspects of the Judiciary amendment, I cannot agree with recommendations of the Judiciary Committee that may have an adverse impact on U.S. intelligence collection or collection analysis, and that are not warranted by a realistic concern about U.S. privacy interests.

If any of those provisions are offered as individual amendments, I will, of course, study them, but must reserve the right to oppose them.

I will illustrate my concern by describing two provisions of the Judiciary amendment.

The Judiciary Committee substitute contains a ''significant purpose'' requirement. This has been described as a way to prevent reverse targeting—that is, conducting surveillance of a person overseas when the real target of the surveillance is a person within the United States.

The Intelligence Committee bill already explicitly codifies the existing prohibition on reverse targeting. What the Judiciary Committee substitute actually does is turn the reverse targeting prohibition on its head. I fear it would impose a new affirmative requirement that the government must seek a FISA Court order when in the course of targeting a foreign person outside the United States the government incidentally collects the communications of U.S. persons.

This is unworkable and would create untenable gaps in our intelligence coverage without significantly enhancing the privacy of Americans. Incidental communications with or about Americans should be handled properly, through minimization—a process that

is strengthened in our bill. But the fact that there may also be a foreign intelligence interest when a foreign target is in contact with the United States should not be the cause of making it more difficult to undertake the surveillance of the foreign target.

The Judiciary Amendment also includes a provision altering the consequences of a FISA Court determination that there is a deficiency in the Government's targeting or minimization procedures under the new foreign targeting authority that will be enacted in S. 2248. Upon such a court determination, the Intelligence Committee bill would require the Government to either correct the deficiency or cease new acquisition.

The Judiciary Committee provision goes beyond the requirement that deficiencies be corrected or new acquisitions ceased. It would take the further step of preventing all use of information already acquired under the new procedure that concerns U.S. persons, unless the Attorney General determines that the information indicates a threat of death or serious bodily harm.

The provision is impractical. And it creates risks that we will lose valuable intelligence.

The Judiciary Committee provision would require intelligence analysts to go through all of the intelligence that had been collected under the new process—presumably a very large collection of materials—to identify information that might be subject to the restriction and make sure that it had been not used in disseminated intelligence.

Even for minor deficiencies in procedures, this provision would therefore require the Intelligence Community to discard information that might constitute significant intelligence, and to focus its analytical resources on satisfying this provision rather than collecting and analyzing new intelligence. In my view, this allocation of resources makes no sense.

At the end of our debate this morning, the Senate will be asked to vote on the pending Judiciary Committee amendment as a whole, either by way of a tabling motion or directly on the amendment.

Although, as I have indicated, there are parts of the Judiciary amendment that I look forward to supporting, there are two reasons, with all respect to the members of the Judiciary Committee, why I cannot support the pending substitute amendment as a whole.

The first is that the form, and consequently the effect of the amendment, goes beyond what the members of the Judiciary Committee decided during their deliberations, and guts key parts of S. 2248 beyond any reasons agreed to by a majority of the Judiciary Committee.

S. 2248 has two substantive titles, in addition to a third title on transition procedures.

The first title addresses intelligence collection; it is the direct replacement of the Protect America Act.

The second title addresses the many lawsuits against telephone and internet companies for their alleged cooperation with the Government.

At its markup, the Judiciary Committee rejected, by a clear 7-to-12 vote, an amendment to strike title II on liability protection. Previously, the Intelligence Committee had voted against striking title II by a 3-to-12 vote. In short, while there may be good ideas, that certainly merit debate, about improving title II, there has not been majority support in the Senate for striking it.

Yet, notwithstanding the lack of support in either the Judiciary or Intelligence Committee for striking title II, the form in which the Judiciary Committee reported its amendment would do just that.

We will welcome a debate about improving title II, but on behalf of the Intelligence Committee—which voted overwhelmingly for title II—I must defend keeping title II in the base text before the Senate. For that reason alone, I must oppose the Judiciary amendment, even as I support individual elements of it.

Second, as I have previously mentioned, even with respect to title I, there are portions of the Judiciary amendment that I must oppose on the ground that they will have an adverse impact on intelligence collection or the use of intelligence that is not warranted by a realistic concern about U.S. privacy interests.

Accordingly, with great respect for my colleagues on the Judiciary Committee, I will vote against the Judiciary amendment. I also look forward to joining them in urging the adoption of specific amendments to improve the Intelligence Committee bill.

The PRESIDING OFFICER. The Senator's time has expired.

The Senator from Vermont.

Mr. LEAHY. Mr. President, obviously I disagree with the description of the Senate Judiciary Committee's amendment. I spoke on this yesterday, but I am going to take a few minutes to describe what is in the Judiciary Committee's bill.

I support the Judiciary Committee amendment to the FISA Amendments Act of 2007. The Judiciary Committee amendment would make important improvements to the Intelligence Committee bill, at the same time maintaining its structure and its authority.

The so-called Protect America Act was rushed through the Senate last summer in an atmosphere of fear and intimidation. We even saw a key member of the administration make commitments to numerous Senators, Republicans and Democrats, on that bill and then break his word, first to us and then on national television.

It was a bad bill that has provided sweeping new powers to the Government. It imposes no checks on the Government and provides no oversight or protection for Americans' privacy.

The Intelligence Committee did important work last fall in crafting a bill that begins to walk back from the excesses of the Protect America Act. I commend both Senator ROCKEFELLER and Senator BOND for that. But two committees in the Senate have jurisdiction over FISA the Intelligence Committee and the Judiciary Committee.

The Intelligence Committee acted first to establish a good structure for conducting critical overseas surveillance. The Judiciary Committee's amendment maintains that structure and the authority for surveillance. But in my view and in the view of many Senators, the Intelligence Committee bill does not do enough to protect the rights of Americans. Indeed, many members of the Intelligence Committee voted for that bill knowing that the Judiciary Committee would have an opportunity to improve it, and they expected us to do that.

FISA is among the most important pieces of legislation this Congress has passed. It is there to provide a mechanism to conduct surveillance, it is critical to our security, but also protect the privacy and civil liberties of all Americans.

Let's be clear, this new authority expands FISA to allow more flexibility to conduct surveillance. If we are going to expand surveillance, we have to take great care to protect American civil liberties, and that is what the Judiciary Committee adds.

I praise the members who serve on both the Judiciary and Intelligence Committees—Senators FEINSTEIN, FEINGOLD, and WHITEHOUSE, who contributed so much to the Judiciary Committee's efforts to improve this legislation. These Senators and others on the Judiciary Committee worked hard to craft amendments that preserve the basic structure and authority in the bill reported by the Select Committee on Intelligence, while adding crucial protections for Americans.

The Judiciary Committee bill makes about 12 changes to the Intelligence Committee bill. Let me address a few of them.

First, the Judiciary Committee bill contains a very strong exclusivity provision. This provision makes clear that the Government cannot claim authority to operate outside the law—outside of FISA—from measures that were never intended to provide such exceptional authority.

This administration argues that the Authorization for the Use of Military Force, passed after September 11, provided the justification for conducting warrantless surveillance of Americans for more than five years. No, what it did was authorize going into Afghanistan to get Osama bin Laden—the man who masterminded the attacks on 9/11. Not only did the administration fail to do that, it took our troops out of Afghanistan—when they had bin Laden cornered—to invade Iraq.

When we authorized going after Osama bin Laden, we did not authorize explicitly or implicitly the warrantless

wiretapping of Americans. Yet this administration still clings to this phony legal argument. The Judiciary Committee bill would prevent that dangerous contention with strong language reaffirming that FISA is the exclusive means for conducting electronic surveillance for foreign intelligence purposes. The Senate Intelligence Committee's bill would do nothing to preclude the AUMF argument in the future.

We also provide a more meaningful role for the FISA Court in this new surveillance. This court is a critical independent check on Government excess in the sensitive area of electronic surveillance.

The fundamental purpose of many of the Judiciary Committee changes is to ensure that this important independent check remains meaningful, while maintaining the flexibility of ''blanket'' orders, which we all agree are necessary. The Intelligence Committee bill would give the FISA Court only a very limited role in overseeing surveillance.

The Judiciary Committee bill would give the FISA Court the authority it needs to assess the Government's compliance with minimization procedures. It would allow the Court to request additional information from the Government, and allow the Court to enforce compliance with its orders. The amendment would also give the court discretion to impose restrictions on the use and dissemination of Americans' information if it is collected unlawfully.

The Judiciary bill would make other important changes. It reduces the sunset for this new law from 6 years to 4 years. This was Senator CARDIN's amendment. There is too much here that is new and untested to allow the authorities go longer than even the next President's term before requiring a thorough review. It clarifies that the bill does not allow bulk collection that would simply sweep up all calls into and out of the United States. It also clarifies that the Government may not use this new authority to target Americans indirectly if they are not allowed to do it directly. The administration says it would never do this. They have no credibility. The Judiciary Committee's bill would make sure they keep their word.

Finally, the Judiciary Committee bill includes a requirement that inspectors general, including the Department of Justice inspector general, conduct a thorough review of the so-called Terrorist Surveillance Program and report back to the Congress and, to the extent it can in an unclassified version, to the American people.

The Department of Justice inspector general will have the responsibility to look at, among other things, the process at the Department of Justice that limited knowledge and review of important legal decisions to a tiny group of like-minded individuals, at great cost to the rule of law and American values. This is a key measure that would finally require accountability for this administration. We have not yet had anything close to a comprehensive examination of what happened and how it happened. We cannot expect to learn from mistakes if we refuse to allow them to be examined.

I strongly oppose a provision in the Intelligence Committee bill that would grant blanket retroactive immunity to telecommunications carriers for their warrantless surveillance activities from 2001 through earlier this year. That provision goes even beyond the so-called Protect America Act. It would insulate this administration from accountability for its lawbreaking. The Judiciary Committee bill does not have that provision. I know that will be a separate debate on this floor.

With the authority of a majority of the Judiciary Committee members, I made a few changes to the amendment as we reported it in November. There are no major additions or deletions. The original 12 changes are still there. The revised version makes some changes to address technical issues and concerns the administration raised about our substitute. We have considered the Statement of Administration Policy from last December and we have talked with the administration. We have listened and made changes that we think address some legitimate concerns.

For example, we have revised the exclusivity provision. The provision in the earlier version of the Judiciary Committee amendment could have been read to extend the scope of FISA in a way that was not intended. We corrected that.

Another concern we addressed was about the issue of staying FISA Court decisions pending appeal. The Intelligence Committee bill would automatically stay FISA Court decisions, thereby requiring possibly illegal surveillance to continue throughout a lengthy appeal process. The original Judiciary Committee amendment left the decision about a stay to the discretion of the FISA Court judges—which is how it is typically done in courts. The administration was concerned that this left too much power to stop surveillance in the hands of a lone judge. We listened and made a change that would permit the stay decision to be made—promptly—by a panel of the FISA Court of Review.

Another change we made to address an administration concern was the important IG audit provision. That provision now makes it clear that no department inspector general has the authority to conduct a review of another department.

These revisions make the Judiciary Committee's product stronger. I think overall the Judiciary Committee's bill dramatically improves the Intelligence Committee bill. As the distinguished chairman of the Intelligence Committee said, we included a number of items he supports. If this gets voted down, these are changes that Senators will have to offer piece by piece, and will. Most of it will be germane after cloture. If we really want to conclude this FISA debate quickly, adopting this amendment will save the Senate countless hours of debate. I urge my colleagues to support this amendment. Now, Mr. President, what is the parliamentary situation?

The PRESIDING OFFICER. The Senator from Vermont has 2 minutes 40 seconds.

Mr. LEAHY. Mr. President, let me just talk about this a little bit.

Incidentally, I ask for the yeas and nays on my amendment.

The PRESIDING OFFICER. Is there a sufficient second?

Mr. BOND. I am going to offer a motion to table, but yes.

The PRESIDING OFFICER. There appears to be a sufficient second.

The yeas and nays were ordered.

Mr. LEAHY. Mr. President, we all want to be able to collect intelligence on terrorists. When I came here, during the Cold War, we wanted to be sure we could collect on our adversaries. We still want to be sure we can do that. That is why I have voted for dozens of changes to FISA over the years, requested by both Republican and Democratic administrations. I voted for them because the administrations made a clear and convincing case each time that we needed a change to keep up with the technology or to keep up with a changing threat.

But let's not be so frightened by terrorists that we go back to the situation we had during the Watergate era, when we found our Government was spying on people who disagreed with it. The government spied on people who had legitimate concerns about, for example, the war in Vietnam or the excesses of J. Edgar Hoover. The government could do that back then because there were no checks and there was no oversight. We do not want to go back to that time. We can do our intelligence gathering and protect Americans at the same time.

Now, Mr. President, has my time expired?

The PRESIDING OFFICER. The Senator from Vermont has 30 seconds.

Mr. LEAHY. Is that the only time anybody has?

The PRESIDING OFFICER. The Senator is correct.

Mr. LEAHY. I yield back all time.

The PRESIDING OFFICER. The Senator from Missouri.

Mr. BOND. Mr. President, I move to table, and I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There appears to be a sufficient second.

The question is on agreeing to the motion to table the Judiciary Committee substitute, as modified. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. DURBIN. I announce that the Senator from New York (Mrs. CLINTON)

and the Senator from Illinois (Mr. OBAMA) are necessarily absent.

Mr. KYL. The following Senators are necessarily absent: the Senator from South Carolina (Mr. GRAHAM) and the Senator from Arizona (Mr. MCCAIN).

The PRESIDING OFFICER (Mr. WEBB). Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 60, nays 36, as follows:

[Rollcall Vote No. 2 Leg.]

YEAS—60

Alexander	Dole	Mikulski
Allard	Domenici	Murkowski
Barrasso	Ensign	Nelson (FL)
Bayh	Enzi	Nelson (NE)
Bennett	Grassley	Pryor
Bond	Gregg	Roberts
Brownback	Hagel	Rockefeller
Bunning	Hatch	Salazar
Burr	Hutchison	Sessions
Carper	Inhofe	Shelby
Chambliss	Inouye	Smith
Coburn	Isakson	Snowe
Cochran	Johnson	Specter
Coleman	Kyl	Stevens
Collins	Landrieu	Sununu
Corker	Lieberman	Thune
Cornyn	Lugar	Vitter
Craig	Martinez	Voinovich
Crapo	McCaskill	Warner
DeMint	McConnell	Wicker

NAYS—36

Akaka	Dorgan	Lincoln
Baucus	Durbin	Menendez
Biden	Feingold	Murray
Bingaman	Feinstein	Reed
Boxer	Harkin	Reid
Brown	Kennedy	Sanders
Byrd	Kerry	Schumer
Cantwell	Klobuchar	Stabenow
Cardin	Kohl	Tester
Casey	Lautenberg	Webb
Conrad	Leahy	Whitehouse
Dodd	Levin	Wyden

NOT VOTING—4

Clinton	McCain
Graham	Obama

The motion was agreed to.

Mr. BOND. I move to reconsider the vote and to lay that on the table.

The motion to lay on the table was agreed to.

The PRESIDING OFFICER. The majority leader.

Mr. REID. Mr. President, there will be an amendment offered by Senators ROCKEFELLER and BOND. It is a substitute that will be pending for a while. What we are going to try to do over here, I have spoken to a number of Members who want to offer amendments relating to title I. We are working out an order in which they will be offered. What we would like to do is have a number of them offered, debated, and have a time this afternoon that we can vote on all of them in succession. We will try to finish all the title I amendments, and then we will move to title II. We hope there isn't a lot of time spent on each amendment, but Members have a right to take whatever time they want. In an effort to make this more understandable, rather than jumping back and forth, title I and title II, on this side we will try to offer amendments as they relate to title I.

We understand there is no requirement to do this. But if there are amendments the minority wants to offer, we will certainly be cooperative and make sure we have the ability to go back and forth.

The PRESIDING OFFICER. The Senator from Wisconsin.

Mr. FEINGOLD. Mr. President, I ask unanimous consent that the pending amendment be set aside and I call up amendment——

Mr. REID. Mr. President, the Senator from Wisconsin has been very patient. As soon as Senators ROCKEFELLER and BOND finish offering their substitute, I ask unanimous consent that Senator FEINGOLD have the floor.

The PRESIDING OFFICER. Is there objection?

Mr. MCCONNELL. I will object momentarily. I wish to discuss the matter with the majority leader. Let's have Senator ROCKEFELLER and Senator BOND go ahead.

The PRESIDING OFFICER. Objection is heard.

Mrs. MURRAY. 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. I ask unanimous consent that the order for the quorum call be rescinded.

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

The Senator from West Virginia is recognized.

AMENDMENT NO. 3911

Mr. ROCKEFELLER. Mr. President, I send an amendment to the desk on behalf of myself and Senator BOND and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from West Virginia [Mr. ROCKEFELLER], for himself and Mr. BOND, proposes an amendment numbered 3911.

Mr. ROCKEFELLER. I ask unanimous consent that reading of the amendment be dispensed with.

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

(The amendment is printed in today's RECORD under "Text of Amendments.")

Mr. ROCKEFELLER. Mr. President, the distinguished vice chairman, Senator BOND, and I have joined in a bipartisan amendment to S. 2248, the FISA Amendments Act of 2008. The Rockefeller-Bond amendment perfects various details of the underlying bill but its main purpose is to provide explicit statutory protection, for the first time in the 30 years of FISA, for Americans who are outside the United States.

The amendment stands for the simple proposition that Americans, whether they are working, studying, traveling or serving in our Armed Forces outside the United States, do not lose their rights as Americans when it comes to the actions of their own Government. In 1791, when the Bill of Rights was ratified, including, of course, the fourth amendment, which protects our people from unreasonable search and seizure, there were 4 million Americans. That was it. Now that very number of Americans, 4 million, lives outside the United States and, of course, many millions more travel each year outside the United States.

Because this amendment is so important and because it has gone through so much development to reach the point at which we have now arrived, I would like to take, frankly, a few minutes to describe its origin and evolution, with the forbearance of my colleagues.

The protection of Americans outside the United States may have been the single most important piece of business left undone by the original FISA statute created in 1978. To fill that void, President Reagan issued an executive order, Executive Order 12333, that addresses the use of intelligence techniques such as electronic surveillance or unconsented searches against Americans abroad.

Executive Order 12333 requires that intelligence agencies have procedures and that those procedures protect the constitutional rights of Americans overseas. It also requires the Attorney General to determine that there is probable cause to conclude that the American overseas is an agent of a foreign power before the U.S. Government undertakes electronic surveillance or conducts searches abroad against that person. That was good but insufficient. In our country of laws, we do not usually leave it, outside of an emergency, to any Attorney General to decide alone whether there is probable cause for a search. That is a decision which we entrust to neutral judges.

Our bipartisan amendment—Senator BOND's and mine—makes sure Americans do not lose that important protection by setting foot outside the United States.

Vice Chairman BOND and I took the first step when we included, in our October Intelligence Committee mark, a provision concerning acquisition by the intelligence community of the communications of U.S. persons abroad.

We focused our proposal on the circumstance when the Government is seeking those communications from electronic communication providers within the United States. We did not address the targeting of U.S. persons overseas by intelligence community collection methods that are employed outside the United States.

The provision before the Intelligence Committee in its October markup would have allowed the Attorney General to determine that a U.S. person outside the United States was a foreign power, agent of a foreign power, or an officer or employee of a foreign power, and then target that person for collection. Under our proposal, the Attorney General would then have been required to submit that probable cause determination to the FISA Court for review.

But as the chairmen and ranking members of committees sometimes learn from their full membership of

their committees, important ideas may require broad solutions.

During our committee markup, Senator WYDEN offered an amendment on targeting U.S. persons abroad that substituted two new sections in place of the language described above on targeting U.S. persons abroad.

First, the Wyden amendment required the Government to obtain a standard FISA order for electronic surveillance—known as a title I order—before the Government could target U.S. persons outside the United States by seeking their communications from providers in the United States.

Thus, rather than the new procedure described in our chairman and vice chairman mark, the amendment required a title I FISA application and order whenever the collection against an American abroad occurred with the assistance of a provider in the United States.

Second, the Wyden amendment required that the Government, when acting outside the United States, obtain a FISA Court order before targeting the communications of U.S. persons located outside the United States.

Specifically, it required a FISA Court order that there was probable cause to believe that the U.S. person who was the target of surveillance was, in fact, a foreign power or an agent of a foreign power before the Government employed surveillance techniques outside the United States. This second part of the Wyden amendment implemented an entirely new concept of law.

A court order has never before been required for foreign intelligence collection that is conducted entirely outside the United States, even if that collection involves U.S. persons. But while new, it quickly became evident it was an idea whose time had come. The Wyden amendment passed the committee with a vote of 9 to 6.

Yet, as often is the case for an initial amendment of such magnitude, it was also immediately clear that further work needed to be done before the proposal became law to make sure it worked well in practice.

During the markup, Senator WHITEHOUSE, who is a member of the Judiciary Committee—and in his first year in this body has already emerged as a leading legal voice among us—stated he would be willing to work on the language of the amendment in the Judiciary Committee, on which he also serves, during the sequential referral process to ensure that it achieved its desired goal and did not result in unintended decreases in collection.

Senator WHITEHOUSE, working with the Department of Justice, was largely responsible for the changes made to the provision on U.S. persons outside the United States that is included in the Judiciary Committee substitute amendment. It is a good amendment.

He focused his efforts to changes on the second part of the section, the portion relating to collection of electronic communications outside the United States. The provision requiring a traditional FISA electronic surveillance application for collection inside the United States remained mostly unchanged in the Judiciary Committee markup.

The Judiciary Committee amendment makes some necessary technical fixes to the section on collection outside the United States. It stressed that the FISA Court would only be permitted to assess the question of probable cause for collection outside the United States, not the methods of acquisition of the information, as any such inquiry might delve into very sensitive intelligence matters.

The Judiciary Committee section on collection outside the United States also made three other important changes:

First, the addition of emergency procedures, similar to those included in other parts of FISA, that would allow the Attorney General to acquire the information as long as a subsequent order is obtained; second, a more explicit, individualized review of minimization procedures; and, third, the addition of procedures to transition current acquisitions under Executive Order 12333 over to the new procedure.

The managers' amendment, offered by Senator BOND and myself, now seeks to complete this process by fully integrating the new procedure into the overall reforms contained in the FISA Amendments Act of 2008 and does so in a manner that maintains an effective system of intelligence collection.

In the course of doing that, we have sought to resolve, in conjunction with the Department of Justice and the intelligence community, several problems identified with the Judiciary Committee substitute.

The most significant changes in the managers' amendment have been made to the first part of the Wyden amendment: the requirement that the Government obtain standard electronic surveillance—title I—orders for the targeting of U.S. persons abroad that occurs within the United States.

That provision, as of this moment, remains a part of our base bill and will remain so until an amendment is adopted. As I will discuss in more detail, our proposed changes are required because the language of this provision, as reported out of both the Intelligence and Judiciary Committees, would prevent certain types of important foreign intelligence collection.

First, the definition ''agent of a foreign power'' in FISA, which requires a U.S. person to have engaged in certain types of wrongdoing, is different than the definition of ''agent of a foreign power'' that has traditionally been used in overseas collection against Americans.

The Director of National Intelligence has therefore proposed, and we agree, that collection against a U.S. person abroad should be expanded beyond ''agent of a foreign power'' to ''an officer or employee of a foreign power,'' to cover the types of collection that have traditionally been allowed against U.S. persons overseas.

For example, the notorious Charles Taylor, the former President of Liberia, who is now charged with crimes against humanity, is an American who was an officer of a foreign power.

Second, the Judiciary Committee provision did not deal with the issue of stored electronic communications or stored electronic data, the collection of which is dealt with under title III rather than title I of FISA and which are an important part of the acquisition system that is established by the new title VII that S. 2248 will add to FISA.

To address this issue, the managers' amendment that Senator BOND and I are proposing, after extensive technical consultations with the intelligence community and the Department of Justice, adds two sections to the new title VII in our committee's bill, and, in so doing, addresses the intelligence collection concerns identified by the Director of National Intelligence.

By placing all the relevant detail for collection against U.S. persons overseas in the same new title of FISA—title VII—that includes all other procedures for persons outside the United States, the managers' amendment provides a comprehensive, consolidated roadmap for all those in the intelligence community, the Department of Justice, and the FISA Court who will have the responsibility to implement our amendment.

In conclusion, I would like to underscore some major points.

As is evident from everything I have described, it is important to thank two members of our committee for their work on this issue of targeting Americans overseas.

Senator WYDEN, obviously, is one of those. I wish to recognize his leadership at all times in this area. He recognized the importance of the issue and successfully offered an amendment at the Intelligence Committee mark-up that broadened the protections contained in our bill.

Senator WHITEHOUSE has been indispensable contributor to the effort on this provision as well, quietly working out problems and making things work better. His work goes a long way toward ensuring that the provision can be successfully implemented by the intelligence community, which is key.

By adopting this amendment on a bipartisan basis, the Intelligence Committee—and now the vice chairman and myself in our managers' amendment—seek to ensure that Americans are protected from unwarranted surveillance, whether they are inside or outside the United States.

This is a significant new protection for U.S. persons. When the United States conducts foreign intelligence collection overseas on a U.S. person located outside the United States, currently only the Attorney General, not a court, makes a probable cause determination. I have said that. U.S. citizens have never before been entitled by

statute to court protection in this area. Now, hopefully, they will be.

Our bipartisan goal is clear: A court must be involved when U.S. persons are targeted for surveillance, no matter where those persons are located or how they are targeted.

We are also in agreement that our original committee provision and the work of the Judiciary Committee needed refinement to ensure it did not have unintended consequences that might limit the collection of foreign intelligence information. The purpose of our amendment is to make sure we do not reduce the scope of any current intelligence collection.

Our managers' amendment accomplishes this goal. Under the managers' amendment, if a U.S. person is targeted overseas by using a communications provider within the United States, FISA will now require that the Government submit an application to the FISA Court and obtain a FISA Court order. Although the process to obtain the order is tailored to address some of the operational concerns relevant to the issue of collection on U.S. persons located outside the United States, and consolidated in a new title of FISA, the procedures are as robust and protective of the privacy rights of U.S. persons as existing FISA procedures.

If the acquisition occurs outside the United States, FISA will now require that the FISA Court issue an order finding that there is probable cause to believe the U.S. person who is the target of the acquisition is an agent, officer or employee of a foreign power, without involving the FISA Court in the methods of overseas collection.

Those methods of overseas collection will continue to be governed by applicable executive branch directives, such as Executive Order 12333, which impose limits on intelligence agencies in order to protect the constitutional rights and other legal rights of Americans.

Mr. President, I urge the adoption of this amendment.

The PRESIDING OFFICER. The Senator from Missouri.

Mr. BOND. Mr. President, I thank the chairman for his extensive discussion of this measure. This is one of the significant additions we are making to the preexisting FISA law. It is something that was brought up and discussed in the committee. There was general agreement that an American or a U.S. person who goes abroad ought to be provided some form of protection. We discussed it at length.

The objective was provided in a very brief statement in the amendment that appeared before the committee. I was very concerned about it because I knew just enough about the FISA law to be thoroughly confused about how it would work. I voted against it but expressed my desire and willingness to work with the sponsor of this amendment and the other members of the committee because it was a good idea.

Well, we found out how complicated it is to amend and to change the FISA law because of the many working parts, not only within the law but within the actual means of interception.

Well, we worked for better than a month on a bipartisan basis with the proponents of this measure—and I consider myself a proponent of this measure—with the intelligence community, lawyers for the Department of Justice, and we came up with a simple little 25-page statutory provision. It is now included in the managers' amendment.

Should anyone think it is simple to amend FISA, I suggest you begin reading at page 5 of the measure before us, and read through page 29, I believe it is, to show how it is accomplished. Nevertheless, this puts in a new layer of protection for U.S. persons. Obviously, we are concerned. Those are American citizens who are abroad.

There were questions raised: Well, if I go abroad, can the intelligence community tap my phone without a court order? Well, first of all, the intelligence community is not going to be tapping anybody's phone or trying to listen in on any—intercept any conversations unless they have good, solid information that that phone is in a terrorist's hands. They have to have intel before they even look at that conversation. That intel could come in many forms which I won't describe here, but that—first of all, if you are abroad, you would not have been targeted unless you had certain reasonable connections with a terrorist activity or a terrorist who would give the Attorney General and the intelligence community the basis for asserting that there was a terrorist content to the phone conversation.

Now, why do they do this? Because they have more communications than they can handle. They have more terrorist communications almost than it is possible to keep up with. The last thing they want to do is target a conversation of a U.S. person or an American abroad who doesn't have any connection to terrorist activities. So previously, only if there was one of the connections that would give reasonable grounds to lead the Attorney General to say that there was valuable foreign intelligence collection would you collect on it. But now, if that is an American citizen or, more broadly, a U.S. person, they have to go to the intelligence court, the FISC, to get an order—two different kinds of orders depending upon how the collection is going to occur—and get an order finding that there is probable cause to believe, as the chairman has said, that this person is an agent, officer, employee of a foreign power and has foreign intelligence information that may be communicated.

So this is a protection that I hope those concerned about the use of electronic surveillance will understand is a significant step we have taken toward protecting the rights of American citizens. But I point out the fact that it took us a month and about 24 or 25 pages to accomplish it. But with that being said, I urge my colleagues on both sides of the aisle to support it. This is a major new expansion of protection for American citizens, U.S. persons, and this is one of the privacy constitutional right protections added by this bill that was never there before. I urge my colleagues to support it.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Wisconsin is recognized.

AMENDMENT NO. 3909 TO NO. 3911

Mr. FEINGOLD. Mr. President, I call up amendment No. 3909.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from Wisconsin [Mr. FEINGOLD] proposes an amendment numbered 3909 to amendment No. 3911.

The amendment is as follows:

(Purpose: To require that certain records be submitted to Congress)

Strike subsection (b) of section 103, and insert the following:

(b) REPORTS BY ATTORNEY GENERAL ON CERTAIN OTHER ORDERS.—Such section 601 is further amended by adding at the end the following new subsection:

''(c) SUBMISSIONS TO CONGRESS.—The Attorney General shall submit to the committees of Congress referred to in subsection (a)—

''(1) a copy of any decision, order, or opinion issued by the Foreign Intelligence Surveillance Court or the Foreign Intelligence Surveillance Court of Review that includes significant construction or interpretation of any provision of this Act, and any pleadings associated with such decision, order, or opinion, not later than 45 days after such decision, order, or opinion is issued; and

''(2) a copy of any such decision, order, or opinion, and the pleadings associated with such decision, order, or opinion, that was issued during the 5-year period ending on the date of the enactment of the FISA Amendments Act of 2008 and not previously submitted in a report under subsection (a).''.

Mr. FEINGOLD. Mr. President, I ask unanimous consent that Senator DODD be added as a cosponsor.

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

Mr. FEINGOLD. Mr. President, this amendment is a straightforward reporting requirement that is critical if Congress is to understand how the foreign intelligence surveillance laws it passes, including this one, are being interpreted and applied. The issue is very simple. If the FISA Court makes a significant interpretation of the law, I think Congress should know about it. Congress can't conduct oversight of intelligence unless it knows what the court is and is not permitting the administration to do. Congress can't pass new legislation without knowing how the court has interpreted current law.

This issue is absolutely fundamental to our constitutional system. Congress has a responsibility to understand the impact of the laws it is passing. The courts should have the assurance that when they interpret the law, those interpretations will be communicated to the legislature. This isn't some unusual idea; this is how our system of

government has operated from its inception.

Specifically, this amendment does two things. First, it requires that when the court issues an opinion that includes a significant legal interpretation, the Government must provide the Government's pleadings associated with that decision to Congress. Now, these pleadings are often critical to understanding the legal interpretations of the court. This is in part because at times the court's opinions merely reference and approve the Government's arguments made in those pleadings. So it is really necessary to be able to review the pleadings themselves if you are going to understand the court's decision. They are also necessary to understand how the Government interprets and seeks to implement the law.

Neither Congress's oversight of the intelligence community nor any responsible legislating in the area of foreign intelligence surveillance can be effective without these documents. Yet, even today, as Congress considers this FISA legislation, the administration continues to refuse to provide Congress with important FISA Court pleadings.

The other reason is this: The amendment requires that the Government provide Congress with FISA Court orders that include significant interpretations of law over the last 5 years. Now, this is necessary because there was an enormous loophole in previous statutory reporting requirements that would be closed for the first time by this Intelligence Committee bill.

The Government didn't previously have to provide Congress with significant interpretations of law if they were included in court orders rather than court decisions or opinions. But we know from the administration's public announcement in January about the President's wiretapping program that such legal interpretations are, in fact, found in orders. For Congress to have any sense of how the court has interpreted the FISA statute, therefore, it is critical to understand recent jurisprudence. Congress needs to have access to FISA Court orders not just going forward but for the past 5 years as well.

This is not theoretical. The administration has refused to provide to Congress orders containing significant interpretations of law, and that is just what we know of. Without this amendment, we might never know what other important legal interpretations are out there.

To be clear, I first offered an amendment to require that FISA Court orders and other documents be provided to Congress through the intelligence authorization bill. It was approved on a bipartisan basis. It was later removed from the authorization bill, and only a watered-down version was included in the Intelligence Committee FISA bill. What my amendment today does is merely put the language back that has already been given the support of a bipartisan majority of the Intelligence Committee.

The most appropriate arrangement for Congress to obtain information related to the FISA Court would be for the court to provide it directly, without the involvement of the executive branch. So granting the executive branch any role in an exchange between the two other branches of Government, which is what my amendment actually allows, is, in fact, already a compromise.

But this amendment is a direct response to the administration's assertion that it can withhold FISA Court opinions and documents that include significant interpretations of law from Congress—not letting us read these things. Imagine if the administration tried to keep Supreme Court decisions from Congress. Even worse, imagine if the administration tried to keep from Congress a decision like Hamdan v. Rumsfeld, which rejected the administration's military commissions, just as Congress was considering the Military Commissions Act. Congress wouldn't stand for it. Yet that is exactly what is happening in the world of intelligence.

There are really no serious, substantive reasons to oppose this amendment. Orders and pleadings will be provided to the Intelligence Committee in a classified and, if necessary, redacted manner, just as FISA Court decisions are now. This is the furthest thing from an onerous reporting requirement. If there are FISA Court orders that include significant interpretations of law, Government lawyers certainly know what they are and where to find them.

It is sometimes said that intelligence in technical terms ''belongs'' to the executive branch. I disagree. But in any case, such an argument simply doesn't apply here. This amendment relates to the documents of an article III court. Just last month, that court confirmed in a rare public opinion that it has ''inherent power'' over its own records—in other words, they do not belong to the executive branch.

Finally, let me stress the scope of the information Congress needs before it can conduct effective oversight and legislative responsibility.

While the public is understandably focused on the FISA Court's involvement with regard to the President's warrantless wiretapping program, the FISA Court is actually responsible for interpreting all of the FISA statutes. Now, that includes the electronic surveillance issues we are considering here today but also physical searches of Americans' homes and the collection of sensitive business records, including library and medical records. Just as Congress should know how the Protect America Act and this FISA bill will be interpreted, it should have similar information with regard to the FISA provisions related to the PATRIOT Act and any other legislation that governs surveillance and affects the rights of Americans.

This simple reporting requirement is critical to congressional oversight, and I urge my colleagues to support it.

Mr. LEAHY. Mr. President, I support Senator FEINGOLD's amendment to provide Congress with additional materials from the FISA Court to enable Congress to conduct more effective oversight. This amendment is one of the many improvements to the Senate Intelligence bill adopted by the Judiciary Committee and included in the Judiciary Committee's substitute amendment. Regrettably, that substitute was tabled by the full Senate earlier today. But I urge Senators to reconsider their votes with respect to this simple but critically important reporting requirement.

Under current law, semi-annual reporting requirements allow the government to wait up to a year before informing the Congress about important interpretations of law made by the FISA Court. The Senate Intelligence bill took a step in the right direction by requiring that Congress be provided with the orders, decisions and opinions of the FISA Court that include significant interpretation of law within 45 days after they are issued.

Senator FEINGOLD's amendment would go a step further to ensure sound oversight by Congress of the activities of the FISA Court. It would require that, when the FISA Court issues an opinion containing a significant legal interpretation, the government must provide Congress with the government's pleadings related to the case. This is critically important because, where the FISA Court simply adopts the government's reasoning in one of its decision, Congress will have no way of knowing the true basis for the court's ruling without access to the government's pleadings.

The Feingold amendment would also require that Congress now be provided with any significant interpretations of law by the FISA Court that were not provided to Congress over the past 5 years. Access to past jurisprudence, as well as current decisions, is critical to Congress's understanding of how FISA is being interpreted and implemented.

Opponents of this amendment say that it may create additional ''paperwork.'' But if Congress can be better informed about the workings of the FISA Court—a court Congress created—and can more effectively oversee the government's advocacy in that Court, then any incremental additional paperwork is clearly in the best interests of the American public. Opponents also say that the pleadings may reveal sources and methods, and therefore cannot be turned over to the Congress. This is a red herring. As Senator FEINGOLD has stated repeatedly, this amendment is not intended to compel disclosure of this kind of information, and nothing in the amendment could be construed to change the time-tested practice of redacting information that could reveal sources and methods.

I urge all Senators to support the Feingold amendment, and to reject any attempts to water down this important reporting requirement by way of second-degree amendments.

I yield the floor.

The PRESIDING OFFICER. The Senator from Missouri is recognized.

Mr. BOND. Mr. President, this measure has been considered in the Intelligence Committee. I believed it was not necessary to require additional paperwork, but also I think it is important to note that some of the charges made about the powers given to the intelligence community are way out of bounds.

This measure before us does, in fact, put further constraints on the intelligence community. There are powers that exist in both the intelligence community and in law enforcement agencies which may not be affected here. But to say this offers broad new means of getting into business records and other personal effects of individuals—this is a bill devoted to electronic surveillance. The reason we needed to do the bill on electronic surveillance was the fact that the means of electronic surveillance have changed, and the old FISA law did not permit the kind of collection that previously was permitted when communications outside the United States were by radio rather than by cable.

The whole purpose of this bill is to ensure that there are procedures in place to permit surveillance targeting people reasonably believed to be outside the United States who have connections with terrorist activities, so that they are an agent or an employee or an officer of a foreign power and have legitimate foreign intelligence information. That is the test. That is what this does. Arguments about the nature of foreign intelligence surveillance should be limited to this bill.

Mr. President, I yield the floor.

Mr. KYL. Mr. President, might I inquire of the Senator from Wisconsin a question. As I read the amendment, it is silent with respect to the ability of the administration to—or the appropriate authorities to redact material in the interests of protecting their sources and methods. Is it assumed in the amendment that the authority to redact would exist?

Mr. FEINGOLD. Not only is it assumed, but I just stated specifically on the floor a few minutes ago that it would exist.

Mr. KYL. I thought I had heard the Senator indicate that redaction would be permitted, and that is the intent of the amendment; is that correct?

Mr. FEINGOLD. Correct.

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

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

AMENDMENT NO. 3916 TO AMENDMENT NO. 3909

Mr. BOND. Mr. President, I send a second-degree amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The legislative clerk read as follows:

The Senator from Missouri [Mr. BOND] proposes an amendment numbered 3916 to amendment No. 3909.

Mr. BOND. Mr. President, I ask unanimous consent that the reading of the amendment be dispensed with.

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

The amendment is as follows:

On page 1, line 8, strike all after ''subsection (a)'' through page 2, line 14, and insert the following: '', with due regard to the protection of the national security of the United States—

''(1) a copy of any decision, order, or opinion issued by the Foreign Intelligence Surveillance Court or the Foreign Intelligence Surveillance Court of review that includes significant construction or interpretation of any provision of this Act, not later than 45 days after such decision, order, or opinion is issued; and

''(2) a copy of any such decision, order, or opinion that was issued during the 5-year period ending on the date of the enactment of the FISA Amendments Act of 2008 and not previously submitted in a report under subsection (a).''.

Mr. BOND. Mr. President, as the sponsor of the first-degree amendment has noted, this was debated and it was adopted on I believe a 10-to-5 or 9-to-6 vote in the committee, but we found out there were substantial problems with this amendment to which the intelligence community objected. We modified it to the provisions that are now in the current managers' amendment and the underlying bill.

The major problem with this amendment is the pleadings. Pleadings have historically been protected during any litigation involving FISA. Congress has only received limited access to certain pleadings, certain actions for audit purposes in controlled circumstances.

This amendment I have offered incorporates the national security protection, which the author of the underlying amendment suggested, and it does provide for the 5 years of back opinions from the FISC. This gives the 5 years. We have had semiannual reports from the FISC on all of the opinions handed down in the previous 6 months.

It is somewhat burdensome, but I have been negotiating with the Department of Justice lawyers. They say while it is burdensome, this is not objectionable. They prefer not to have it, but the one thing on which they are standing firm and believe they cannot accept is to require turning over the pleadings.

The pleadings are actually some of the most sensitive intelligence information we have because in those pleadings the Government has to describe the facilities to be used, the targets of the collection, the information, and how the information is going to be collected, who gave them the information, how they got it. This is the ultimate description of sources and methods. Any time the sources and methods or the assets are disclosed, it is possibly a death sentence to someone who is working with us undercover or as an agent. The Department of Justice believes this information is so sensitive that it has to be kept extremely closely held within the court and the people who must see it to issue the order. Without that protection, they believe that our most sensitive assets, our means of collection, where the facilities are, the whole framework of our intelligence system could be brought down. The opinions themselves go into legal reasoning; they give the justifications. They are the end product of the work of the FISC.

What the Department of Justice says the intelligence community is unwilling to give is to lay out and submit to Congress the whole list of information of sources, methods, facilities, targets, the names of assets, or the identification of assets that could result in death for the informant, the agents, or the assets.

We have accepted a portion of the amendment proposed by the Senator from Wisconsin. This accepts another portion, but that final portion is objectionable and is a red line. I urge my colleagues not to support the amendment which turns over the very most secret sources and methods which the intelligence community cannot afford to share.

I yield the floor.

The PRESIDING OFFICER. The Senator from Wisconsin.

Mr. FEINGOLD. Mr. President, I rise to oppose the second-degree amendment. This is a classic example of people hiding behind a tragedy in this country to make arguments that have no merit. This argument, that the provision of pleadings, legal arguments by the Government, will somehow compromise sources and methods and bring down the intelligence system, has no merit.

When the Senator from Arizona asked me specifically whether my amendment allows for certain sensitive information to be redacted, my answer was yes, and he didn't respond. In fact, I had already stated that in my opening statement. Everything the Senator from Missouri referred to—confidential information, sensitive information about individuals we are going after, critical intelligence—all of that can be redacted. What the Senator wants to help the administration do is prevent Members of Congress—and by the way, these are kept classified; it is only people who have certain clearances who can see them—from seeing the pleadings provided to an article III court. That is the basis for their arguments.

As I pointed out in my statement, a lot of times the court just refers to the pleadings in its orders. So if we don't have the pleadings, we have no idea what the order is about.

Listen very carefully because this kind of argument is going to be used with regard to every aspect of this bill.

Everything is a red line. I want to tell you something, Mr. President, it is not a red line for the duly elected representatives of the people of this country in a classified setting to be able to review documents from a court proceeding. That is a ridiculous notion and disrespectful to the United States Congress that has an oversight role.

I was involved in the debate, as the Senator from Missouri knows, in the Intelligence Committee. We won fair and square on this vote by a majority bipartisan vote when it was first offered to the Intelligence Authorization bill. Because of various issues and pressures relating to other matters, we later had to compromise, and ultimately they said, why don't you do it on the FISA bill, which is exactly what I am doing. But the idea that somehow this endangers America to allow certain Members of Congress and a few staff members who have been cleared to look at the pleadings of the Government in a court proceeding takes this way too far.

There are no substantive arguments against doing this, and I urge Senators to reject the second-degree amendment and adopt the underlying amendment.

Mr. ROCKEFELLER. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. WYDEN. 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. WYDEN. Mr. President, I ask unanimous consent to speak on the managers' amendment, as offered earlier by the distinguished chairman and vice chairman.

The PRESIDING OFFICER. The Senator has that right.

Mr. WYDEN. Mr. President, I wish to commend the distinguished chairman of the committee and the distinguished vice chairman because they have worked with me many hours on this issue. It is an extraordinarily important issue as it relates to the rights of Americans in the digital age, and I appreciate the involvement the chairman and vice chairman have had with me on this matter.

What this debate is all about, and I know it is very hard to follow the complicated legal language that is associated with this discussion, is the proposition that Americans ought to have the same rights overseas that they have inside the United States. Now, the chairman and the vice chairman have worked with me through the last few weeks to ensure that we can embed this basic proposition in this FISA legislation and do it in a way that is not going to have any unintended consequences or any impact on our national security.

I have long felt, literally for decades, that the FISA law has represented the ultimate balance between America's need to fight terrorism ferociously and to protect the constitutional rights of our people, and it is a balance that should not be eliminated because an American leaves U.S. soil. It ought to always mean something to be an American, and that ought to apply even outside the United States. Now, under current law, before conducting surveillance on an American citizen within the United States, the Government must establish probable cause before a criminal court for law enforcement cases or before the FISA Court for intelligence cases.

So what this means is the U.S. Government needs a court-approved warrant to deliberately tap the phone conversations of a person living in Medford, OR; or Kansas City, MO; or Arlington, VA; or anywhere else. This protection, however, is not extended to Americans who are outside the United States. So if the U.S. Government wants to deliberately tap the phone conversations of the same Americans on business in India or serving their country in Iraq, the Attorney General can personally approve the surveillance by making his own unilateral determination of probable cause.

During the Senate Intelligence Committee's consideration of legislation that would revise FISA, I offered the amendment that has been discussed by the distinguished chairman and the vice chairman to require the Government to secure a warrant from the FISA Court before targeting an American overseas.

This amendment was cosponsored by our colleagues, the Senator from Wisconsin, Mr. FEINGOLD, and the Senator from Rhode Island, Mr. WHITEHOUSE. It was, as the chairman of the committee has noted, approved on a bipartisan basis. It has largely been incorporated into the Senate Judiciary Committee approach as well.

Since then the administration has raised concerns about this issue. There have been concerns raised by several others. And we have sought to address those through many hours of negotiations so that we can make sure in the digital age, when Americans travel so frequently, we are not seeing their rights go in the trash can when they travel outside U.S. soil.

We have almost reached a final agreement on this important issue, but I wanted to take just a minute. I see the distinguished chairman on the Senate floor and the distinguished vice chairman. I would like to just outline very briefly for them what my remaining concern is because my hope is we can work this out.

I would also like to say that throughout this day the Justice Department, as we have been looking at it, has been talking to our staffs as well. I think they have been very cooperative also.

The issue that is outstanding, I would say to my colleagues, is the managers' amendment does not require the Government to specify what facilities it is targeting, even in situations where the Government has historically been required to do so. So one automatically thinks of a hypothetical kind of situation that goes something like this: Under current law, the Government has to specify, for example, that it is going to do surveillance on an apartment dweller on a military base overseas. That is something that has to be approved with specificity, and that is required under current law.

What I am troubled about is the hypothetical possibility. That is what we are dealing with now, hypothetical possibilities. And if the language is not written carefully with respect to facilities—and my concern is that it has not yet been dealt with adequately—the Government could, in effect, do surveillance on that military base for all of the apartment dwellers in the building or conceivably all of the people on the military base at large.

Now, my friend, the distinguished vice chairman of the committee, clearly does not want to see that happen, nor does the chairman of the full committee. So what I have been trying to do, and had some discussion with the Justice Department about, is to try to persuade the Justice Department to take the precise language they have found acceptable in title I and move it over to the title VII that we have all been working on in a cooperative kind of fashion. It deals with what is called the after acquisition issue, to again make sure we are able to stay on top of the serious threats our country faces but not at the same time overreach and sweep all kinds of individuals like, say, an apartment dweller on a military base oversees into a surveillance program.

So I am going to continue, and I want to make this clear to the vice chairman who is on the Senate floor, and the chairman who has had to leave the floor for a few minutes, that I want to continue to work with them. This is an important issue. In the digital age, it makes no sense for Americans' rights and freedoms to be limited by physical geography. That is what we got bipartisan support for in the Intelligence Committee. Suffice it to say, there is a history of support for this kind of approach. During the initial consideration of the first FISA Act back in 1978, many Members of Congress argued for the inclusion of protections for Americans overseas.

All of the committees that debated the bill noted the significance of the issue. But at that time there was a judgment made that it was best to deal with this matter by separate legislation.

For example, the Senate Intelligence Committee in the 1978 report on FISA stated:

> Further legislation may be necessary to protect the rights of Americans abroad from the improper electronic surveillance by their Government.

It seems to me, 30 years later, it is time to take action. So we are going to continue these discussions. I want to

express my appreciation to the vice chairman of the Intelligence Committee and his staff. They have put many hours into this matter working with us and clearly have sought to make sure that we can modernize this particular part of the FISA statute, and do it without what all of us have said are the unintended consequences or potential impact on national security.

I think we are there once we deal with this remaining issue. I think it would be very hard for any of us to explain how it is that current law has to specify what facilities are being targeted and then, now, in the name of the so-called reform approach, adopt something that hypothetically—again, I talk only hypothetically about it—might sweep some, for example, soldiers on a military base overseas into a surveillance program. I do not want that. The distinguished vice chairman of our committee, Senator BOND, does not want that.

So we are going to keep working on this matter. I see my friend from Missouri has indicated his desire to speak. As always, I am anxious to hear his thoughts on it and to work with him.

I ask unanimous consent to have a few, perhaps up to 10 additional minutes after the vice chairman has had a chance to address us.

The PRESIDING OFFICER (Mrs. MCCASKILL). Without objection, it is so ordered.

The Senator from Missouri.

Mr. BOND. Madam President, I thank my colleague from Oregon. As usual, he states objectives that he and I agree with. We both have the same desire, to protect American citizens, U.S. persons, certainly military men and women and their families on military bases.

I would say to my friend, under the clear provisions of section 703 and 704, if they are an American military person overseas, the first test would be: Are you an officer or an employee of a foreign government?

Obviously, they are employees of our Government. But you would have to be acting as an agent of a foreign power, and, furthermore, there would have to be intelligence information provided showing that there was reasonable grounds to believe there was intelligence information.

Now, there could be the situation, as there has been in the past—it has happened within the CIA; it has happened within the military—that some person may turn into an agent of a foreign power even though they are wearing our uniform. That is a very rare situation. But in that instance, then, you would be able, if you had intelligence information, to suggest this person was acting as an agent and had the appropriate foreign intelligence.

Absent that, nobody is going to sweep them up, nobody is going to listen in, nobody is going to listen in to their phone calls back home to their families or their families' calls to them.

Now, my colleague mentioned some other questions about collection. And this is a very important discussion, a complicated discussion, but regrettably a classified discussion. So let me suggest to him that we understand. He has talked to the Department of Justice. I believe they have had some confidential discussions. We would be happy to have more with him. I regret we cannot have them on the floor of the Senate because they go into matters which are classified.

But he and I share the same objective. We have slightly different ways of getting there. There are certain items I think have to be discussed off the Senate floor.

I yield the floor.

The PRESIDING OFFICER. The Senator from Oregon.

Mr. WYDEN. Madam President, I will be very brief in terms of responding to the distinguished vice chair. I also note the person we look to for counsel on these matters, Senator WHITEHOUSE, is here. I want to express my appreciation to him for all of his assistance. If anyone is capable of, once again, stepping in and bringing together all of the parties—Senator BOND, the Bush administration, Senator ROCKEFELLER, myself—Senator WHITEHOUSE is that person. He has done it repeatedly, and we thank him for all of his help.

On the one remaining issue, just to be very brief in terms of responding to the vice chairman, the vice chairman is spot on with respect to the fact that in most respects, the language of our joint efforts does seek to zero in only on the legitimate targets. And that is all to the good.

What we are concerned about, and again, steering clear of anything classified, is some of the technical issues with respect to the definition of ''facilities,'' which lead us to be concerned that others could be swept in. That is what we still need to resolve.

So let's do this. The distinguished Senator from Rhode Island wants to have a chance to speak on this issue. This is not going to be the last word on the subject. But I would say this is an opportunity, after months and months of discussion, to get it right in terms of modernizing the Foreign Intelligence Surveillance Act.

Thirty years ago, it was a big issue. It is an even bigger issue today. I think a business person, for example, in Kansas City, MO, or Portland, OR, or anywhere else, when they travel the globe and are doing business, speaking to loved ones, they have an expectation that their rights are not thrown into the trash can when they leave the soil of the United States.

We have taken steps to ensure, under the efforts of Senator ROCKEFELLER, Senator BOND, myself and others, we have gone a long way to extending the overseas protections for our people that they have here. We are not quite there yet. We have one issue left to deal with, and it is an important issue.

We are going to continue to have these discussions, and they will certainly be good-faith discussions. I hope we can persuade all parties, and particularly those in the administration, to support our efforts to deal with this one remaining matter, which literally is a question—we have staff on the floor—of importing language that the administration says works in other parts of this legislation, into this area which we think is substantially the same.

I yield the floor.

The PRESIDING OFFICER. The Senator from Rhode Island is recognized.

Mr. WHITEHOUSE. Madam President, first, let me thank the Senator from Oregon for his very kind words, probably too kind words, but that is one of the glorious conventions of this body.

I salute his leadership in this area because perhaps the most significant thing that has been accomplished so far in this FISA dispute, that has been accomplished in a bipartisan fashion, in a manner in which great credit reflects on Vice Chairman BOND who is here on the Senate floor, is consensus has been reached that when an American travels overseas, the rights they believe they enjoy here in these United States, the rights the Constitution guarantees them here in these United States, travel with them and cannot be overruled at the whim of the very same branch of Government that seeks the surveillance. And the reason that was able to take place is because the Senator from Oregon had the foresight to put together the amendment that he and Senator FEINGOLD and I argued for in the Intelligence Committee. I express my personal appreciation to him for his wisdom in that regard.

I ask unanimous consent that the pending amendment be set aside in order that I might call up amendment No. 3908.

Mr. BOND. Madam President, I must object to that. I do commend the Senator from Rhode Island and the Senator from Oregon for their leadership on the issues which they have addressed. They have made a strong push, and they worked with us through the 20-plus pages of construction to get a workable means of achieving the goal they so eloquently champion. We will continue to work with them on those efforts dealing with the items the Senator from Oregon addressed. However, I must object to setting aside the pending amendment.

The PRESIDING OFFICER. Objection is heard.

Mr. WHITEHOUSE. Madam President, I am disappointed to hear that. The Senator, of course, clearly has that right. As everyone in this body knows, we are facing a deadline of February 1 to conclude this legislation. There is considerable other business related to the stimulus package, given our economic concerns in this country, and I would hope now that the FISA bill has been called up, that we are on this bill here on the floor, that amendments to the title I provisions we are

working on now could be called up and considered. It would certainly move things along in the process if they could be called up and debated so that when it came time for a vote, we could move more expeditiously through the process. I hope very much this is not a signal that it is anyone's intention to slow down this process.

We saw in August how unfortunate the result can be when this body's time to give a major issue such as this significant attention is compressed. Indeed, I refer to that unfortunate August situation as ''the August stampede.'' I don't think we reflected great credit on this institution when we did what we did back then.

The effort we are undertaking now is an effort, in fact, to remedy some of those concerns. There has been significant bipartisan effort to get us to this point. While there are clearly remaining points of disagreement, I would think it would be in everyone's interest to work through those issues and to give these different amendments a chance to be voted on. For instance, the amendment I had hoped to call up is one that is supported not only by myself but Chairman ROCKEFELLER, the distinguished chairman of the Intelligence Committee. It is supported by Chairman LEAHY, the distinguished chairman of the Judiciary Committee. It is supported by Senator SCHUMER, the distinguished Senator from New York. It is supported by Senator FEINGOLD, the distinguished Senator from Wisconsin who serves, like myself, on both the Intelligence and Judiciary Committees. It addresses a very important issue to this body which is the terms on which we will allow this administration to spy on Americans.

It is an amendment that a lot of work has gone into. It reflects a convergence of ideas that was developed by Senator SCHUMER and Senator FEINGOLD in the Judiciary Committee, that we developed in the Intelligence Committee, again, through an often bipartisan process. Senator FEINGOLD played a critical role in both committees in advancing this issue. We have worked very carefully with the Department of Justice to incorporate changes that they have recommended as technical assistance. It is a meaningful, worthy, well-thought-out amendment that merits consideration and discussion on the floor. It relates to an issue that is a fairly simple one but in order to understand it, you have to have a basic understanding, at least, of wiretap surveillance.

As United States Attorney and as Rhode Island's Attorney General, I oversaw wiretap and surveillance investigations, and I am familiar with the procedures. With any electronic surveillance, whether it is in a domestic law enforcement context or intelligence gathering on international terrorism, what you find is that information about Americans is intercepted incidentally. You have, as all the prosecutors in this body well know, including the distinguished Presiding Officer, the target of your investigation. The target has certain rights; a warrant requirement under the Constitution, for instance. But what you find is that once you have surveillance up on your target, they obviously talk to other people. Those other people who are incidentally intercepted in the surveillance also have rights as well.

In domestic law enforcement, there are clear and established procedures for what is called minimizing the interception of the conversations to the extent that they touch on the incidentally intercepted person who is not the target of the surveillance. The minimization procedures govern the collection and the retention of this information to ensure that the privacy of innocent Americans is protected. These are sensible measures. I have been in the trailers with the FBI agents as they are switching on and off to honor the minimization procedures. But one of the key elements of these minimization procedures is the knowledge on the part of the surveilling agency that they are subject to court oversight. That is natural in the domestic law enforcement context. You are operating under a court order to begin with. In the domestic context, it happens as a simple consequence of there being a court order in the first place.

When you are dealing with Americans abroad and when they are swept up in international surveillance for national security purposes, the situation can be different. We have had to provide for these minimization procedures. Under the Senate Intelligence bill, the court, the Foreign Intelligence Surveillance Court, is now being given the authority to approve the minimization procedures when an American is listened to incidentally in surveillance that targets another individual. The court has the authority to approve the procedures. But what was missing is that the court did not have the authority to determine whether the procedures it has approved are actually being followed. You would think that would be obvious. If you are going to set it up so that the court can approve minimization procedures, should it not follow as a matter of simple logic that the court should have the authority to see whether the procedures the court approved are in fact being followed?

We have worked very carefully with Vice Chairman BOND, with Chairman ROCKEFELLER, with the technical folks at the Director of National Intelligence Office, and at the Department of Justice. At present, we have a situation in which it has been agreed that the court will have the power to determine whether its rules are being followed if the target of the surveillance is an American in the United States. We have also reached agreement that the Foreign Intelligence Surveillance Court will have the authority to determine whether its rules are being followed if the target is an American overseas. The issue that remains involves those cases in which the target is a foreign person but they are in touch with a U.S. person, an American, who is being incidentally intercepted because they are in touch with a foreign target—because the foreign target has called them, because the foreign target is discussing them, because they have called the foreign target, whatever.

I cannot for the life of me understand why this is a difference that we are obliged to come to the Senate floor to decide. It would seem to me that when the purpose of the exercise is enforcing minimization procedures that benefit the U.S. person who is incidentally intercepted, it should not matter whether the target is an American in the United States or an American overseas or a foreign person. The person we are trying to protect is the U.S. person incidentally swept into the surveillance. So the purpose of this amendment, if I were to be permitted to call it up, would be to see to it that the court, which has the authority to determine the minimization procedures when there is a foreign target who talks to a United States person, should have what would seem to me obviously consequent authority to determine whether those rules it has approved are being followed.

It may even be that it is so inherent in the nature of a court that subsequent litigation would determine that in fact the court does have that right. It comes, in its very nature as an article III court, to have the authority to determine whether its rules and whether its orders are being followed. But rather than force it to that point, it would be better if we simply cleared up the matter here.

Again, I regret that merely calling up the amendment at this point is being objected to. I hope this is not a signal that we are trying to recreate, to put it mildly, the hectic atmosphere of the August stampede. I would like as quickly as possible to work through the amendments that relate to title I. There are a number of them. I expect we will be staying rather late if we can't start working through them now. But when the time comes, I will come back to the floor and again seek permission to call up this amendment; I hope at that time with more success.

I yield the floor.

The PRESIDING OFFICER. The Senator from Missouri.

Mr. BOND. Madam President, we too want to move through this bill. This amendment, sponsored by the Senator from Rhode Island, was included in the Judiciary Committee substitute for the Intelligence Committee bill. We defeated that.

The chairman of the Judiciary Committee has said we are going to come back and vote on all of these amendments one by one. At this point I think it is appropriate that the leaders are discussing or will discuss how we are going to proceed. In the meantime, we are not going to set aside amendments

until we have some direction from the leadership on how they wish to handle these amendments.

On the substance of the amendment, earlier today in discussing the Judiciary Committee substitute, I pointed out that the FISA Court, or the FISC as it is called, has said: We are not going to get into this area. We don't want to get into the business of trying to oversee how foreign intelligence is collected. That means whether it is collected or whether there is incidental collection, those challenges are significantly different from the challenges that the FBI would face in carrying out their court order.

But it should be noted, as I believe the Senator from Rhode Island has, that the FISA court order, the FISC, will set out the requirement that minimization procedures be followed. There will be significant review and oversight of those because the person conducting the surveillance has a supervisor who will look over their shoulder. That supervisor knows there will be a representative of the inspector general who is watching, who is looking for any problems. That inspector general knows there will be a lawyer from the Department of Justice overseeing it to assure there is compliance.

We have an Intelligence Committee with a very able staff, some of whom understand very well how the NSA programs work, whether it is under the FISC or under the previous time. It is our job, under our challenge, our charter, as an oversight committee of the intelligence community, to make sure these laws are followed. So I will say that when the FISC was challenged to take on a broader role in handling foreign intelligence, they stated in the December 17 released opinion, In re Motion for Release of Court Records, at the very bottom of page 19, footnote 31, the appellant claimed that the court could conduct a review because it is a ''specialized body with considerable expertise in the area of national security.'' The FISC itself said that this overstates the FISC's expertise:

> Although the FISC handles a great deal of classified material, FISC judges do not make classification decisions and are not intended to become national security experts. . . . (FISC judges are not expected or desired to become experts in foreign policy matters or foreign intelligence activities, and do not make substantive judgments on the propriety or need for a particular surveillance). Furthermore, even if a typical FISC judge had more expertise in national security matters than a typical district court judge, that expertise would still not equal that of the Executive Branch, which is constitutionally entrusted with protecting the national security.

They cite a case, which says:

> . . . (''a reviewing court must recognize that the Executive departments responsible for national defense and foreign policy matters have unique insights'' into national security harms that might follow from disclosure). . . .

At the end it says:

> For these reasons, the more searching review requested by the [appellant in that case] would be inappropriate.

So while there are court orders that the minimization procedures be followed, there is an existing framework for significant oversight, and there is the oversight not only by the executive branch but by the legislative branch, and the FISC says that is not the business they are to get into.

We will have an opportunity to revisit this when the matter is brought up. But I wanted to advise my good friend, a diligent worker on the Intelligence Committee, why we had argued against that provision in the amendment or the substitute that the Judiciary Committee proposed.

I thank the Chair and yield the floor.

The PRESIDING OFFICER (Mr. SANDERS). The Senator from Rhode Island.

Mr. WHITEHOUSE. Mr. President, I thank the very distinguished vice chairman of the committee for his description of his views on this matter. I know they are honestly held and founded in his beliefs.

I do take some issue with his recollection of the travel of this in the Intelligence Committee. I thought I heard the distinguished vice chairman say this amendment had been voted down in the Intelligence Committee. It is my recollection that I withdrew it because there were technical concerns that were described by some of the officials from the Office of National Intelligence and from the Department of Justice who were present.

Indeed, it was that withdrawal and willingness to work to try to find a better amendment that resulted in the very commendable process by which the distinguished vice chairman agreed to allow the court to oversee compliance with its own rule in those two circumstances I mentioned earlier: where the target is an American, either overseas or at home.

Other than that, the only other point I would add is that I think it is probably a situation unique in the annals of American law that an American court would be provided the authority to approve a rule or make an order but denied the authority to determine whether it was complied with. I can certainly think of no situation in our law or in our history where that has ever been the case.

I know the distinguished Senator from Maryland seeks the floor. I yield the floor, and I thank the Presiding Officer.

The PRESIDING OFFICER. The Senator from Maryland.

Mr. CARDIN. Thank you, Mr. President.

Mr. President, I ask unanimous consent that the pending amendment be set aside so I can offer amendment No. 3859.

Mr. BOND. I object, Mr. President.

The PRESIDING OFFICER. Objection is heard.

Mr. BOND. Mr. President, if I may respond to the Senator from Rhode Island—I apologize to the Senator from Maryland—I say to the Senator from Rhode Island, what I said was his provision was in the Judiciary substitute that we defeated. We did not deal with his amendment in the Intelligence Committee. We discussed it. He offered it, and it was accepted in the Judiciary substitute. That amendment was defeated.

What I raised was the concern that our leadership has about going back and revisiting all the elements of the Judiciary substitute.

I thank the Chair, and my apologies and thanks to my colleague from Maryland.

The PRESIDING OFFICER. The Senator from Maryland.

Mr. CARDIN. Mr. President, let me point out to the cochair of the Intelligence Committee and the distinguished Republican whip on the floor why I asked for this amendment to be called up. I hope there will be a time when we will have a chance to vote on this amendment. It is one I hope would gain some broad support in this body.

What this amendment would do is to change the automatic termination date that is in the statute, the bill now—which is at 6 years—to 4 years. I know there are some Members of this body who are opposed to any termination date. The administration is opposed to a termination date.

I applaud the Intelligence Committee for including a termination date, a sunset in the legislation, recognizing it is our responsibility to make sure we are included in the appropriate oversight with the executive branch. Knowing the history of this legislation, knowing how quickly technology changes, it is important that Congress be intimately involved in reviewing the operations of this statute, the changing technology, and that we have the full attention and cooperation not only of the intelligence community but also the White House and the executive branch of Government.

The reason why I believe the 4 years is much more preferable than 6—I urge my colleagues to please follow this debate—with a 4-year sunset, it will be a requirement of the next administration to be involved in this FISA statute. They are not going to be able to sit back for their entire term and say: Gee, we have this authority; there is no need to make the information readily available to Congress.

Let me remind my colleagues, it was not easy to get information from the executive branch on the use of their authority, of which for some we recently found out the full extent of the use of their authority. So if we keep a 6-year sunset, there will be no legal need for the next administration to work with Congress to make sure there is broad support for what the administration is doing, to make sure we do not have another situation where there was the use of power by the executive branch that, quite frankly, we did not know about, and that we will at least know whether the technology is the right technology. We will have much better attention.

So for the purposes of our oversight, our responsibility as the legislative branch of Government, we should make it clear to the next administration: Sure, you have plenty of time under this authority. You do not have to worry about this authority terminating. You have almost your entire term in office. But we want you to focus on it, and make sure we are not only protecting the rights of Americans, that we are not only making sure the intelligence community has the tools it needs, but we are making sure that as technology changes during the next years—and technology is changing very quickly—we are all engaged in the subject.

We are ready to take action as the legislative branch of Government to make sure we are working with the executive branch to give the intelligence community the tools it needs to gather the information on foreign targets, and that they are also doing it in ways, as the chairman and vice chairman of the committee and the committee have said, that respect the rights of Americans and the civil liberties of the people of our Nation.

It is for that reason that I urge we find a time to take this up. I took this few moments now in the hopes that when we come back to this amendment we will not quite need as much time. I do hope the Members will understand this is being offered so we in the Congress can carry out our responsibility.

It is interesting that there were several debates on the floor of this body when the original PATRIOT Act was passed and the Protect America Act was passed to make sure there were sunsets in it. We are now amending the bill today. The chairman and vice chairman of the Intelligence Committee just brought forward a set of amendments, and as I listened to the chairman and vice chairman talk, they said: We want to make sure we get it right.

There were a lot of technical changes made as of today. I do not think anyone here feels totally comfortable that we got it right. We are going to have to stay engaged on this subject. I think it is critically important we have the attention of the next administration to make sure we can do the right thing for the people of this Nation to keep them safe and to protect their civil liberties.

So that is the reason I intend to offer this amendment. It was in the Judiciary Committee substitute. We debated it in the committee. We had a good debate in the Judiciary Committee. Senator KENNEDY had offered a 2-year sunset. We talked about that also. There are others who have been interested in this. I am not alone in this request. I know I am joined by Senator MIKULSKI as a cosponsor of this amendment, who serves on the Intelligence Committee, and was part of getting that bill together. I know Senator ROCKEFELLER is sympathetic and supportive of this issue, as is Senator LEAHY.

I urge my colleagues on both sides of the aisle to take a careful look at this amendment when we come back to it. Hopefully, I will have your support.

With that, Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Oklahoma.

Mr. INHOFE. Mr. President, I ask unanimous consent that I be recognized for up to 15 minutes as in morning business.

Mrs. FEINSTEIN. Mr. President, reserving the right to object, if I may, I ask unanimous consent that I be recognized following the remarks of Senator INHOFE.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

The Senator from Oklahoma.

Mr. INHOFE. Thank you very much, Mr. President.

(The remarks of Mr. INHOFE pertaining to the introduction of S. 2551 are printed in today's RECORD under "Statements on Introduced Bills and Joint Resolutions.")

Mr. LEAHY. Mr. President, Senator KENNEDY and I have offered an important amendment to ensure that there will be some measure of accountability for the unlawful actions of this administration in the years following 9/11. Regrettably, those opposing this commonsense review have so far succeeded in stopping the full Senate from even considering its merits.

It is a sad day for the American public when its elected officials stonewall a measure designed to shed light on the Government's efforts to unlawfully spy on its own citizens. I urge Senators across the aisle to allow this amendment to be called up, debated, and given an up-or-down vote.

As we all now know from press accounts, in the years after 9/11, the Government secretly conducted surveillance on its own citizens on a massive scale through what has become known as the Terrorist Surveillance Program, TSP. It was done completely outside of FISA, the law specifically drafted to regulate such conduct. And it was done without the consent or even the knowledge of the Congress. It is crucial that Congress and the American people understand why and how these decisions were made, both in the months after 9/11, and in the several years following that difficult time. This inspector general review amendment will provide that accountability.

This review would be conducted jointly by the Offices of Inspectors General of each component of the intelligence community that may have played any role in the TSP, including the inspector general of the Department of Justice. It will examine the circumstances that led to the approval of the TSP, as well as any procedural irregularities that may have taken place within the Department of Justice Office of Legal Counsel—the part of the Justice Department that is supposed to give unvarnished legal advice to the President. It will result in a final report to be submitted to the Intelligence and Judiciary Committees in the House and Senate within 180 days, containing recommendations and a classified annex. There has been no such comprehensive review to date.

This amendment is particularly important because the administration and some of its allies in Congress are relentlessly arguing for retroactive immunity for the 40 or so lawsuits against those telecommunications companies that may have assisted in conducting this secret surveillance. They are trying to shut down avenues for investigating and determining whether their actions were lawful. This amendment will ensure that there will be an objective assessment of the lawfulness of the secret spying program and the manner in which the Government approved and carried out the program.

Critics of the amendment claim that Congress has already conducted sufficient oversight of the TSP, and that no further review is warranted. That is simply not true. Only a small number of Senators and Representatives have been granted access to classified documents related to the TSP. Those of us who have been granted access can provide a measure of oversight by reading through documents to try to piece together how the Government decided to spy on its own citizens, for years, and how the Justice Department came to bless this unlawful conduct. But the documents don't tell the full story. As we learned from Jack Goldsmith, the former head of the Office of Legal Counsel, the President's program was a "legal mess" when he took over. It is crucial to understand how this "legal mess" got approved in the first place. Who was responsible? Were the normal procedures followed at the Office of Legal Counsel? And, perhaps most importantly, how can we stop something like this from ever happening again?

This amendment is one of the many improvements to the Senate Intelligence bill that were adopted by the Judiciary Committee and included in the Judiciary Committee's substitute amendment. Regrettably, that substitute was tabled by the Senate earlier today. I urge Senators to reconsider their votes with respect to this simple but critically important accountability measure.

If the critics succeed in quashing not only the outstanding lawsuits seeking accountability, but also congressional efforts to arrive at the truth through a comprehensive review of the TSP, the American public will never forgive us. This administration is hoping it will end its time in office without any meaningful review of its more than 5 years of illegal surveillance. We must not let this happen. I urge all Senators to support this commonsense amendment to ensure accountability.

The PRESIDING OFFICER. The majority leader is recognized.

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

The PRESIDING OFFICER. The clerk will call the roll.

The bill 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.

Mr. REID. Mr. President, is one of the managers on the floor? Yes. I have been in contact with the distinguished Republican leader. I ask unanimous consent that Senator KENNEDY be recognized for 5 minutes for purposes of offering an amendment, and following his 5 minutes, that Senator FEINSTEIN be recognized for 5 minutes, and following their statements and their attempt to offer amendments, that I then be recognized.

The PRESIDING OFFICER. Is there objection?

Mr. KYL. I didn't hear the last half.

Mr. REID. Following their 5-minute statements, I be recognized.

Mr. KYL. Mr. President, as propounded, I object to the request, but I have no objection to Members each asking consent to which there would be no objection and certainly not to their speaking for whatever length of time or whatever order the leader would desire.

Mr. REID. So you have no objection to Senator KENNEDY being recognized for 5 minutes and Senator FEINSTEIN being recognized for 5 minutes?

Mr. KYL. Absolutely no objection to that.

Mr. REID. And then following their statement, that I be recognized?

Mr. KYL. I have no objection to that.

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

The Senator from Massachusetts is recognized.

Mr. KENNEDY. Mr. President, at the appropriate time, I hope the Senate will permit us to take action on an amendment I will offer on behalf of myself and Senator LEAHY and others. This amendment we have prepared is very simple, but it is absolutely critical to this bill.

The amendment would require the inspectors general of the Department of Justice and the National Security Agency and other relevant offices to work together to review the Bush administration's warrantless wiretapping program. The inspectors general will analyze this program and then issue a report on what they find. Members of Congress will receive a classified version of the report. The public will receive an unclassified version of the report.

Simply put, there is no other way to put this episode behind us. Court cases looking into the administration's warrantless wiretapping have been stymied by concerns about standing, mootness, and the state secrets privilege. If Congress grants retroactive immunity, some of these cases will be eliminated altogether.

But either way, court cases are no substitute for an inspector general review when it comes to finding and reporting the facts. Traditional rulings will tell us whether any laws were broken and which ones. The inspector general review will tell us why and how this happened, and it will help us avoid a similar lapse in the future.

The administration has decided to share documents with the Senate Judiciary Committee but not with the House Intelligence Committee, or the Judiciary Committee whose FISA bill it doesn't like. It has refused to share any documents with other Members of the House and Senate who are now expected to vote on this legislation. So where are we now?

We know that for 5 years the Bush administration conducted a massive program of warrantless surveillance that may have violated the rights of literally millions of innocent Americans. What we do not know is how this program was started, why it was started, what it covered, how many Americans were spied on, or what happened to the information it collected. We are being kept in the dark about one of the most significant and outrageous constitutional violations by the executive branch in modern history.

An inspector general review is the only way to shed light on this abuse, the only way to document and assess the administration's warrantless surveillance activities over the past 6 years. The review will help bring clarity, closure, and accountability to this episode. It will help us draw lessons and move on from it.

Millions of Americans have been secretly spied on for years. They at least deserve to know the reason. The Senate also deserves to know. Senators who vote to pass this amendment will be not only honoring their constituents' right to learn what was done to them, they will also be enabling themselves to serve their constituents better in the future.

The inspector general report will produce information that will assist us in our legislative duties. When Congress takes up FISA in the future, the results of this report will be enormously valuable in helping us to enact legislation to meet the genuine national security and civil liberty needs of the Nation.

It is revealing in how quiet the White House has been in opposing the inspector general review. Make no mistake, they have been clear they don't want any kind of investigation into what they did. But their arguments against the inspector general review have been very quiet, indeed, perhaps because they know how transparently weak and self-serving their arguments are. They said we should not have an inspector general review because it might reveal classified information or help our enemies. This argument is nothing more than a scare tactic.

The inspectors general public report will contain only unclassified material. Any classified material will go into a classified appendix. It has been said an inspector generals' review might fuel a partisan witch hunt. Senator LEAHY and I have drafted this amendment to be tightly limited to the warrantless wiretapping program. The inspectors general will have a very specific mandate, and they will do their work without any political influence whatever.

Understanding what happened to the rights of Americans over the past 6 years is not a partisan effort. All Members of Congress should want to learn about the activities in which the administration has engaged. The American people are concerned about what their Government has been up to. They need an independent review to restore trust in the Government and to feel confident that both their security and their liberty are being protected.

Finally, I have heard it said the inspectors general are not the appropriate entity to conduct this review. The question is, if not the inspectors general, then who? The inspectors general are experienced and independent; they are trusted by Congress and the American people. They frequently conduct confidential investigations and have procedures in place to protect classified information. It is precisely for situations such as this that we created the inspector general.

It has been reported that the Justice Department recently reopened the Office of Professional Responsibility's investigation into the warrantless surveillance program. That is a positive step, but it is not relevant to this amendment. The scope of the OPR investigation is severely limited. It deals with attorney misconduct, and it is confined to the Justice Department. By contrast, the inspector general review will cover all of the relevant agencies, including the National Security Agency, and it will examine the use of warrantless surveillance much more fully.

Moreover, the inspectors general are more independent than OPR, and for investigating a warrantless surveillance program authorized by the President, independence is of critical importance.

Inspectors general also have a proven track record that gives them unique credibility. For example, the inspector general report on national security letters showed widespread abuse by the FBI, and it helped Congress understand what needs to be done.

There is one reason, and only one reason, to oppose this amendment, and that is to cover up the administration's actions. A vote against the inspector general review is a vote for silence and secrecy, for stonewalling and denial. It is a vote to erase the past.

Many of the issues we have been debating on FISA are difficult and complicated, and there is room for reasonable people to disagree. But there is no such room on this amendment. It is simple and straightforward. Its potential benefits are great, and its costs are negligible.

No matter where one stands on the issues of retroactive immunity for the

phone companies, this amendment should be a no-brainer. In fact, for my colleagues who want to eliminate the court cases against the phone companies, this should be even more critical because it will at least preserve some measure of accountability. It will give the Senate critical information to fulfill its constitutional duty to protect the rights of Americans, the separation of powers, and our national security.

Many Senators who have been defending retroactive immunity have done so by emphasizing that the phone companies were just following White House orders. If you believe that argument, you should be especially in favor of this amendment because it places the inquiry exclusively on the White House. Here is what the amendment says:

The unclassified report shall not disclose the name or identity of any individual or entity of the private sector that participated in the program or with whom there was communication about the program.

Even though we oppose retroactive immunity, Senator LEAHY and I included that provision because we want to make this amendment as uncontroversial as possible. We want to make it crystal clear that all Senators who take their constitutional duties seriously, whether they are Democrats or Republicans, need to support this amendment.

I urge all of my colleagues to pass this amendment and take a vital step toward restoring honesty and the rule of law in America's surveillance policy.

I yield the floor.

The PRESIDING OFFICER. The Senator from California is recognized.

Mrs. FEINSTEIN. Mr. President, I wish to speak for a short period of time on an amendment that I would like to offer, in the event I am given the opportunity to do so.

The Terrorist Surveillance Program began in mid-October of 2001, and it operated until January of 2007. It operated outside of the jurisdiction of the FISA Court during that period of time. That is 5 years and 2 months, when a program operated with no court review or no court approval.

Now, I must regretfully say the United States—long before this President and the prior President, but for decades—has had a rather sordid history of misusing foreign intelligence for domestic political purposes. This was well outlined in the Church Committee's report, which led to the development of the Foreign Intelligence Surveillance Act—which is the bill we are talking about—in 1978.

If you go back and read the record, you will see that President Carter signed the bill. In his signing statement, as well as the record of the deliberations of the Congress at that time, he tried to overcome this sordid history by making the Foreign Intelligence Surveillance Act—this bill—the exclusive authority for electronic surveillance of Americans for the purpose of foreign intelligence. That was the bottom line, so that never again could foreign intelligence be used politically against American citizens domestically.

FISA has continued over the decades, and I think it has served this Nation well.

What we have seen develop now is a Presidency and a President who believes very strongly in his executive authority and has tried, through many different ways, to enhance that executive authority. One of those ways has been signing statements—more signing statements by this President, saying what part of the law he would follow and what part he would not follow; the concept of the unitary Executive, which has been espoused, whereby all commissions, even the FCC, would be subject to the will of the Presidency and by his use of article II authority—asserting that authority under the Constitution as supreme to any statute.

The battle over FISA going back to 1978—was to give FISA statutory authority that would be supreme in this one particular area. The President strove to do it at the time, and the Congress strove to do it at the time. The Judiciary Committee bill has this strong statement of exclusivity in it, which I will propose in an amendment to this bill. The amendment is cosponsored by the chairmen of both committees, Intelligence and Judiciary, Senators ROCKEFELLER and LEAHY; Senator NELSON, who serves on the Intelligence Committee; Senator WHITEHOUSE, who serves on both committees along with myself; Senator WYDEN from the Intelligence Committee; Senator HAGEL from Intelligence; Senator MENENDEZ; Senator SNOWE from the Intelligence Committee; and Senator SPECTER, the ranking member of the Judiciary Committee.

All of us together believe there should be strong exclusivity language that reinforces the intent of the Congress, that the Foreign Intelligence Surveillance Act be the exclusive authority for the wiretapping of Americans for the purpose of foreign intelligence. It makes sense and should be the case.

Finally, the administration said in January of last year: OK, we will try to put the program under the FISA Court. In fact, the program today is under the FISA Court through the Protect America Act. So there is a court review and, where warranted, court warrants are granted for the collection of content. That is the way it should be. As we move to this bill, minimization strictures will be spelled out, approved by the court prior, and that is the way it should be.

We would like to add to this bill the exclusivity language contained in the Judiciary Committee bill. All of us are in agreement, whether we are Intelligence Committee members or Judiciary Committee members, that FISA should become the exclusive authority, and we should try to reinforce it so that in 2 years, 10 years, or 20 years we will not be right back to where we are today.

Let me quickly describe the amendment, and shortly I will try to send a modification of the amendment that is at the desk now, which has some technical corrections in it.

Let me describe this amendment briefly. We add language to reinforce the existing FISA exclusivity language in title 18 by making it part of the FISA language, which is codified in title 50.

The second provision addresses the so-called AUMF loophole. The administration has also argued that the authorization for the use of military force against al-Qaida implicitly authorized warrantless electronic surveillance.

The amendment we would offer states that only an express statutory authorization for electronic surveillance in future legislation shall constitute an additional authority outside of FISA. This makes clear that only a specific future law that provides an exception to FISA can supersede FISA. Only another statute specific can supersede FISA.

Third, the amendment makes a similar change to the penalty section of FISA. Currently, FISA says it is a criminal penalty to conduct electronic surveillance, except as authorized by statute. The amendment replaces that general language with a prohibition on any electronic surveillance except as authorized by FISA, by the corresponding parts of title 18 that govern domestic criminal wiretapping, or any future express statutory authorization for surveillance.

Finally, the amendment requires more clarity in any certification that the Government provides to a company—in this case, a telecom company—when it requests assistance for surveillance and there is no court order.

The FISA law provides only two ways to do electronic surveillance. One of the ways is a court order. That is clear, that is distinct, that is understandable.

The second way provides that if assistance is based on statutory authorization, a certification is sent to the company, in writing, requesting assistance and saying that all statutory requirements have been met.

Under this amendment, the certification must specify what provision in law provides that authority and that the conditions of that provision have been met. This adds specificity to the certification process which today is called for by the FISA law. I believe this is something that is necessary to have in law.

In good conscience, I could not vote for any law that did not make the test case that we need to make, which is our legislative intent that FISA is intended to be the exclusive authority for the collection of electronic surveillance, foreign intelligence involving a U.S. person.

It should be subject to FISA law. I don't think any one of us would want to vote to prevent that from happening.

I believe this amendment could be adopted given a chance. We have vetted it. It will not interfere with the collection of intelligence. We have vetted it with the Department of Justice and with the intelligence agencies. As I say, it is bipartisan.

What I would like to do at this time is call up the amendment. It is No. 3857, and I ask unanimous consent to send a modification to the desk to that amendment.

The PRESIDING OFFICER. Is there objection to setting aside the pending amendments?

Mr. KYL. For the reasons Senator BOND explained earlier, I object.

The PRESIDING OFFICER. Objection is heard.

The majority leader.

Mr. REID. Mr. President, yesterday our Vice President gave a speech at the Heritage Foundation talking about the need to pass the Foreign Intelligence Surveillance Act. Today, the President gave a statement; it was a brief statement. The President gave a statement following up on the Vice President's speech yesterday. The Vice President gave a speech; the President gave a statement today.

Among other things, he said:

> If Congress does not act quickly, our national security professionals will not be able to count on critical tools they need to protect our nation, and our ability to respond to new threats and circumstances will be weakened. That means it will be harder to figure out what our enemies are doing to recruit terrorists and infiltrate them into our country. . . .
>
> So I ask congressional leaders to follow the course set by their colleagues in the Senate Intelligence Committee, bring this legislation to a prompt vote in both houses. . . .
>
> Congress' action—or lack of action—on this important issue will directly affect our ability to keep Americans safe.

Let the record be spread with the fact that all 51 Democrats joined with 49 Republicans in that we want to do everything we can to make our homeland safe. We want, if necessary, within the confines of the law, to do wiretapping of these bad people. But having said that, we want to do it within the confines of the law and our Constitution. We want to make sure this wiretapping does not include innocent Americans who happen to be part of what they are collecting. That is what the American people expect us to do.

So I again say, no one can question our patriotism, our willingness to keep our homeland safe. We have tried to move forward on this legislation. We have tried in many different ways. What we have been doing today and yesterday is moving forward on this legislation. As the distinguished Senator from California said, there are amendments that will make this legislation better. That is in the eye of the beholder, and we all understand that. But shouldn't the Senate have the ability to vote on those amendments because no matter what we do as a Senate, it has to have a conference with the House. They have already passed their legislation. We have been stalled every step of the way—every step of the way.

The Feingold amendment, for example, was offered. It certainly is germane. But we are being told he cannot get a vote on this amendment because it concerns FISA's court orders. His amendment was discussed at length previously. Half of it was accepted on a bipartisan basis, the other half was not. But certainly he is entitled to a vote.

Senator FEINGOLD and I do not mean to embarrass him—is a legal scholar. He is a graduate of one of our finest law schools in the world. He is a Rhodes Scholar. Senator WHITEHOUSE has been attorney general of the State of Rhode Island and is certainly known all over the country as someone who understands the law. He has been a tremendously good person as a Member of the Senate. He serves on both committees, the Intelligence Committee and on the Judiciary Committee, and he is a thoughtful person.

He thought the legislation that came out of the Intelligence Committee should be improved, and as a member of the Judiciary Committee, he worked to have it improved. He sought to offer a germane amendment a short time ago concerning minimization. What does that mean? That means if you pick up by mistake an American, that you drop it. You push that out of the way, that isn't going to be made public in any manner. We want to vote on that amendment. It seems everyone would vote for it. I certainly hope so. But there is an objection to even having a vote on that amendment.

Senator CARDIN, a long-time Member of Congress, a relatively new Member of the Senate, but a long-time, experienced Member of the Congress of the United States sought to offer a germane amendment shortening the sunset provision. The bill that is before us that came out of the Intelligence Committee is for 6 years. Things are changing rapidly in our country and in the world as it relates to electronics. We don't know what is going to take place in regard to terrorism, violence or what is going to take place with our ability to do a better job electronically to uncover some of what we believe should be uncovered. He wants this legislation to be for not 6 years but 4 years. That is a pretty simple amendment. I support it. I think it is a good amendment. But he has been unable to offer that simple amendment.

Senator FEINSTEIN has given a very fine statement seeking consent to offer a germane amendment on exclusivity, meaning that FISA is the only basis for the President's eavesdropping. There have been editorials written virtually in every State of the Union in the newspapers saying that should be the law, but she has not been able to offer that amendment.

Senator KENNEDY wanted to offer an amendment that is so rational, so important. He says: Let's have the inspector general do an investigation about the whole wiretapping program to find out what has taken place, who has been involved in it, and report back to Congress, not tomorrow; he sets a reasonable time that be done. But guess what. We cannot even vote on that amendment. He cannot even offer the amendment.

I say to my friends it does not matter what we try to do, we cannot do it. It appears the President and the Republicans want failure. They don't want a bill. So that is why they are jamming this forward.

I am going to vote against cloture. It is not fair that we have a major piece of legislation such as this and we are not allowed to offer an amendment as to whether the bill should be 4 years or 6 years, and we are not allowed to offer an amendment as to minimization, that is whether Americans picked up by mistake are going to be brought out in the public eye, or Senator FEINGOLD's germane amendment dealing with how court orders are issued, a real good amendment, an important amendment.

If there were ever a Catch-22, this is it because what we are being asked to do is irrational, irresponsible, and wrong. From where does this ''Catch-22'' come? We all know it was a bestseller. Joseph Heller wrote this book. He was a pilot during World War II. Joseph Heller thought he was crazy. He was a bomber pilot. We all know how difficult it was to fly those big airplanes in World War II. The casualty rate was high. If you were crazy and you said so, you would be grounded from flying these big bombers. But the officials of the military would say: We are not going to let you not fly airplanes because you have to be crazy to fly one of these in the first place. That is what Joseph Heller was stuck with because it was crazy to fly bomber missions, and they would immediately make you fly more bomber missions.

That is what we have today. We are trying everything we can do, but no matter what we do, we step on each other in the process.

I suggest we were doing this the right way. We were looking at title I, which deals with procedures of this FISA legislation, and then we were going to come later and offer amendments to title II. For example, one of the difficult issues is whether there should be retroactive immunity for the phone companies. Senators DODD and FEINGOLD want to offer an amendment to strike from the provisions of the bill retroactive immunity. That is something on which we should be able to vote.

Senator LEVIN came up with the idea, and there are others—I believe Senator WHITEHOUSE also wanted to offer an amendment dealing with substitution,

saying: OK, if there is going to be retroactive immunity, have the Government pay for it, not the phone companies, because if, in fact, they were entitled to immunity, that means they were forced into something they shouldn't have been forced into. That is something I think is reasonable and logical to vote on, but we will not be able to vote on it.

I asked unanimous consent that we extend this matter for 30 days because it is very apparent, unless cloture is invoked—and I say to my Democratic colleagues I think this is an example of something on which we should not invoke cloture—if cloture is not invoked, this bill is not going to be finished by February 1 and this program will expire.

So we say to the President, who gave this statement today saying he wants the program to continue, he needs to talk with his Republicans in the Senate and say: OK, let's get an extension; let's see if we can work something out. Two weeks, a month, we are willing, if the President wants, to continue this awful program for a year, 15 months, wait until the next President comes along. We are willing to do that, and he will still have his authority.

We know one of his counsel, Mr. Yu, says he doesn't need this anyway; he can do what he wants without this legislation. But we are willing to do whatever is within the realm of possibility.

I said we will take a 30-day extension. We will take a 2-week extension. We will take a 12-month extension. We will take an 18-month extension. I tell all my friends, I have been told—and I appreciate very much my distinguished counterpart, Senator MCCONNELL, who has told me he has a cloture motion, it is all signed, and he is going to file it as soon as I yield the floor to him—I say to all my friends, under the regular order, we will have this vote Monday. If, in fact, cloture is invoked, we will have to have the vote early Monday because the 30 hours begins running, and we will have to finish it because we have so much to do before the final week. I explained all this to the distinguished Republican leader.

If cloture is going to be filed, and I know it is going to be, and if cloture is invoked, we have to have a vote no later than 1 p.m. on Monday, so the 30 hours runs out at a reasonable time on Tuesday so we can do other things. If cloture is not invoked—and I am not going to vote for cloture—unless the President agrees to some extension of time, the program will fail. I don't know any way out of that. But I, in good conscience, cannot support this legislation, at least unless we have a vote on retroactivity of immunity. I can't vote for cloture unless some of the very basic amendments that people want to offer are allowed. They all have asked for very short time limits. No one is questioning spending a lot of time. We Democrats are not in any way trying to stall this bill. We have been trying to expedite it for a long time now.

For purposes of making the record clear, and for my distinguished counterpart, I ask unanimous consent that the Judiciary Committee be discharged from further consideration of S. 2541, which is a 30-day extension of FISA, and that the Senate then proceed to its consideration; that the bill be considered read a third time, passed, and the motion to reconsider be laid on the table.

The PRESIDING OFFICER (Mr. WHITEHOUSE). Is there objection?

Mr. MCCONNELL. Reserving the right to object, I ask unanimous consent to modify the request so that instead of passing the House bill, we will now pass the bill we know the President will sign. So, therefore, I would ask the pending amendments to the substitute be withdrawn and the substitute offered by Senator ROCKEFELLER and Senator BOND be agreed to; that the bill be read a third time, and passed.

Mr. REID. Mr. President, we have, Republicans and Democrats—I acknowledge more Democrats than Republicans—who believe this Intelligence Committee bill can be improved upon, and I so appreciate the Judiciary Committee working in good faith with the Intelligence Committee. We think there are some tuneups that can be done to this bill to make it much better, and it is not fair, I say respectfully to my friend from Kentucky, it is really not fair that we be asked to just accept this without the ability to have a vote on a single amendment.

So I respectfully object to my colleague's request to modify the unanimous consent request.

The PRESIDING OFFICER. Objection is heard. Is there objection to the majority leader's request?

Mr. MCCONNELL. I object.

The PRESIDING OFFICER. Objection is heard.

Mr. REID. Mr. President, I am now going to ask unanimous consent to pass the House bill, which was passed by the House last November.

I ask unanimous consent that the Senate proceed to the immediate consideration of Calendar No. 517, H.R. 3773, which is the House-passed FISA bill; that the bill be read three times, passed, and the motion to reconsider be laid upon the table.

The PRESIDING OFFICER. Is there objection?

Mr. MCCONNELL. Mr. President, I object.

The PRESIDING OFFICER. Objection is heard. The Republican leader.

Mr. MCCONNELL. Mr. President, I am sure those watching C–SPAN 2 are probably thoroughly confused with all of the parliamentary discussion back and forth and the parliamentary nuances attached thereto. Obviously, there are two sides to every story.

In fact, in April of 2007, the DNI—the Director of National Intelligence—asked for this FISA bill to be passed. Our good friends on the other side of the aisle delayed it. In June and July of 2007, the DNI actually pleaded—pleaded—for help. Our friends on the other side delayed right up until the August recess, at which time we did pass the Protect America Act, which was a 6-month authorization.

Now, during September and October, the Permanent Select Committee on Intelligence, in a bipartisan way, produced the Bond-Rockefeller compromise, which is the pending proposal before the Senate. It was, I gather, a painful series of compromises that brought the two sides together 13 to 2 on this extraordinarily important piece of legislation to protect our homeland. And that is the pending issue before us.

Now, we all know on an issue as important as protecting the homeland we don't get the job done unless we get a Presidential signature, and we do know the President of the United States will sign the Rockefeller-Bond proposal that is before us. So my strong recommendation to our colleagues is that we avail ourselves of the opportunity to pass this measure, which is already the product of substantial bipartisan compromise between the chairman and vice chairman of the Permanent Select Committee on Intelligence and also the members, who approved it 13 to 2.

A way to do that, obviously, would be to invoke cloture on that proposal, indicating that 60 or more Members of the Senate believed this bipartisan compromise, which we know will get a signature by the President of the United States and go into effect, would be a good bipartisan accomplishment for the Senate, and ultimately for the House and for America.

CLOTURE MOTION

Bearing that in mind, Mr. President, I send a cloture motion on the substitute amendment; that is, the Rockefeller-Bond proposal, to the desk.

The PRESIDING OFFICER. The cloture motion having been presented under rule XXII, the Chair directs the clerk to read the motion.

The legislative clerk read as follows:

CLOTURE MOTION

We, the undersigned Senators, in accordance with the provisions of rule XXII of the Standing Rules of the Senate, do hereby move to bring to a close debate on the pending substitute amendment to S. 2248, Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2007.

Mitch McConnell, Christopher S. Bond, Kay Bailey Hutchison, Wayne Allard, Jon Kyl, Robert F. Bennett, Sam Brownback, John Thune, Pat Roberts, John Barrasso, Chuck Grassley, Johnny Isakson, Lamar Alexander, Gordon H. Smith, Tom Coburn, Jim DeMint, Richard Burr.

The PRESIDING OFFICER. The majority leader.

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

The PRESIDING OFFICER. The clerk will call the roll.

The 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.

Mr. REID. Mr. President, I am, of course, disappointed we are where we are, but that is where we are. I have had a conference just now with the distinguished Republican leader, and what we are going to do is to vote on this cloture motion at 4:30 on Monday. I have gotten agreement, and we will formalize that in just a bit. I have agreement that the vote will be as if it occurred at noon that day, so if in fact cloture is invoked, we can start something at 6 o'clock on Tuesday because we have a lot to do.

So having said that, Mr. President, we have one call to make, which I think will be fine, and I will make the request at a later time when we do have agreement of what we want to do. I will formalize that as soon as we make a phone call.

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

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

THE STIMULUS PACKAGE

Ms. CANTWELL. Mr. President, as my colleagues are trying to sort out issues related to scheduling votes, and I certainly do care about the pending issue and making sure that we come to a resolution that will protect a variety of interests, I rise now to speak specifically about the economic stimulus package which the Senate is going to take up next week.

We all know there has been a downturn in the economy caused by persistent high energy costs and an ongoing mortgage crisis, and we know we are seeing damages to both individual households and to businesses. We know that layoffs are accelerating, gas and home heating prices are skyrocketing, making us face some of the biggest economic challenges we have seen in years. So I think it is very important, Mr. President, that we continue on this rapid pace to get a stimulus package. And that is the good news; that in a bipartisan effort we have been working diligently along with the White House to immediately get some stimulus into the economy and help working people and businesses that are struggling.

I think our goal should be that we identify measures that are timely, targeted, and, when possible, address the underlying causes of our economic problems—that is getting money in people's pockets, I believe, must be a key component of this package. I have been following what the other side of the Capitol has been doing, the House of Representatives is working on a formidable package, and I know we are discussing a variety of issues here. But I believe any package should take the opportunity to invest in critical business stimulus measures that can alleviate some of the underlying problems that are causing Americans economic heartburn.

We are seeing oil prices in recent weeks hovering around $100 a barrel and natural gas prices remaining at exceedingly historic highs, which I think is adding great impact to what Americans are doing in trying to deal with this economy. In fact, a Los Angeles Times article in December cited economists' fear that high energy costs could ignite inflation. This would just aggravate our economic problems further.

High energy costs make it much more difficult for our manufacturing and agricultural sectors to make ends meet. Today the National Farmers Union came out in favor of a proposal that I think we should put into our stimulus package, and one that I am about to describe. It is an opportunity to include in the stimulus package incentives that both dramatically boost economic activity in 2008 and take an important step toward reducing energy costs.

I believe we should consider an extension of the clean energy tax incentives in the stimulus package. They meet the definition of short-term stimulus, targeted and timely. They have the benefit of getting immediate short-term results—that is, significant economic activity and new jobs in 2008. And they also result in long-term benefits which will help us deal with the underlying problem that is causing so much havoc with our economy, and that is high energy costs.

Mr. President, the American Wind Energy Association estimates that extending the production tax credit will result in as many as 75,000 new jobs in 2008 and $7 billion of capital spending over the next 12 months. All by Congress making the right decisions about tax incentives for the wind industry.

I think that would be a big boost to our economy. Wind generation alone has accounted for over 30 percent of our new generation placed in service last year. This industry is well beyond what some might consider a pilot phase and has significant sources of job diversity for the United States.

Likewise, the solar industry estimates that up to 40,000 new jobs could actually be lost in the next 12 months if we do not extend the investment tax credit. That is right; not only do those tax credits add stimulus to the economy, we should understand that by not doing them, by not passing them, we are actually taking away economic opportunity and investment plans that people would be making this year.

Included in this package are also four energy efficiency incentives for consumers. As a Deutsche Bank report released last November said:

> Gains in efficiency will have the effect of muting the effect of expensive oil.

If we want to get consumers to go shopping, why not encourage them to buy items that will reduce their energy costs? Everybody wins when this happens. Consumers get lower bills, retailers get more economic activity, and it reduces the upward pressure on prices by mitigating demand. All of which helps the overall economy rebound faster.

This is the kind of economic stimulus we need. It helps with jobs, it helps diversify the energy industry. The clean energy industry is one of the few bright spots in an otherwise slumping economy. Unless those incentives are extended in this quarter, we are taking a risk at an even steeper downturn in an industry that saw remarkable results in 2007.

Mr. President, that's why we need to make sure we extend these critical clean energy tax incentives. I will remind my colleagues that the three times Congress let the clean energy tax incentives lapse, the wind industry saw a 75- to 93-percent decline the following year, because we were not giving them the predictability in tax incentives. So while I am very happy to make sure the public is getting the incentives in the form of rebate checks, I also want to say to my constituents that we are also putting a variety of solutions on the table, that we are trying to deal with problems that will help them not just in the near term, but also to solve the underlying problem of high energy costs that is a drag on our economy.

I know some of my colleagues will probably talk about lots of different ways we can stimulate infrastructure development, but I will say that this is about a business tax investment strategy. These clean energy incentives will stimulate billions of dollars of capital outlay now in the next 12 months, and be a huge source of new job creation.

An immediate cash infusion into the economy is necessary, but we should not lose sight of the fact that this has the additional benefit of helping us with our long-term problem.

I look forward to working with my colleagues on an extension of these clean energy incentives as part of the stimulus package, and to demonstrate the leadership and foresight that we have here in the Senate to make the right decisions about a package that will simultaneously provide us near term economic boost, prevent job loss, and help solve high energy costs.

The PRESIDING OFFICER. The majority leader.

Mr. REID. Mr. President, I ask unanimous consent that the vote on the cloture motion just filed occur on Monday, January 28, at 4:30 p.m.; that the requirements of rule XXII be waived; that if cloture is invoked, all postcloture time during a recess or adjournment would be counted.

The PRESIDING OFFICER. Is there objection?

Mr. REID. Also, Mr. President, when we get the vote, the vote be deemed as having occurred at 12 noon on Monday, January 28.

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

The PRESIDING OFFICER. The assistant majority leader.

Mr. DURBIN. Mr. President, at the direction of the majority leader, I announce there will be no further votes today. The next vote is scheduled for 4:30 on Monday. It will be a cloture motion filed by Senator MCCONNELL relative to the bill on the Foreign Intelligence Surveillance Act.

The Senate will be in session tomorrow at 9:30 for morning business and debate. Members who care to may come to the floor to discuss issues of their choosing. I would say on behalf of the majority leader as well our frustration that we have reached this point. We have a deadline of February 1 to enact this new FISA act. The President has argued he needs this to keep America safe. We have offered to the Republican side an extension of the current law so that the President would be able to continue this policy and program uninterrupted for a month, several months, as long as a year and a half, and we have been rejected. The Republican leadership on the floor has argued they do not want to extend this program as we try to work out differences on the issue of the liability of telephone companies that provided information to the Federal Government. That is unfortunate.

It is also unfortunate that we had Members of the Senate come to the floor in good faith to offer amendments to this bill. I can tell you, having spoken to those on our side of the aisle, each of the amendments was prepared and offered to the Republican side for their review, no surprises. We understood that they would offer their own amendments in response. That is certainly proper. It would engage the Senate in debate on some very important issues relative to national security. But it was the decision of the Republican leadership they wanted no amendments, they wanted no debate. They wanted the President's version of this bill, take it or leave it. They would rather run the risk of closing down this program of surveillance of terrorists than perhaps give us a chance for a few amendments to be debated and voted on in the next 24 hours. That is an unfortunate start to the 2008 Senate session.

In the last year of the Senate, the Republicans were responsible for some 62 efforts to stop debate on the floor, 62 efforts at filibusters, which is a modern record; in fact, it is an all-time record for the Senate; 62 different occasions the Republicans engaged in filibusters to stop debate.

We were hopeful as we talked about the stimulus package and bipartisanship, working together, that things had changed. And then within a matter of hours, the Republican leadership came to the floor to stop us from having any amendments, any debate in a timely fashion on this important bill, and also to stop us from extending this bill, this law, so the President can use this program, and that America would never have its security at risk.

I think the Republicans have taken an untenable, indefensible position. They do not want the law extended so the President can use it. They do not want us to enact any revision to the law or even debate it on the off chance that there might be a change. They have taken the position it is their way or the highway.

Well, we will have a vote on Monday, an unfortunate vote that would have been avoided with a modicum of cooperation here in the Senate.

So there will be no further votes today; the first vote will be at 4:30 on Monday.

MORNING BUSINESS

Mr. DURBIN. Mr. President, I ask unanimous consent that the Senate now proceed to a period of morning business, with Senators permitted to speak therein for up to 10 minutes each.

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

Mr. DURBIN. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER (Mr. NELSON of Florida). The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

The PRESIDING OFFICER (Mr. WHITEHOUSE). Without objection, it is so ordered.

THE STIMULUS

Mr. HARKIN. Mr. President, I wish to take the floor for a few minutes before we adjourn today to talk about the economy and about this stimulus package we are hearing the House is developing and will send over here some time in the next few weeks.

I must say, first, it is clear that there is a downturn in the economy that is causing a lot of anxiety among all Americans. It is clear we need to do something. Over the last 6 years, I must admit, I have been disturbed by the lack of fiscal discipline by this White House and by this Congress, as the deficits have piled up.

Think about this: In 2001, when President Clinton left office, we had surpluses. We were going to have surpluses as far as the eye could see. We were talking about paying down the national debt, saving our Social Security system. That all changed. It all changed because the new President came in and said: What is more important than paying down the debt, paying our bills, putting us on a sound fiscal basis? What is more important than that is tax cuts for the wealthiest people in our country. Oh, sure, everybody got a little bit, but a lion's share of it went to the wealthiest in our country.

I guess I shouldn't have been too surprised. The President's philosophy has always been one of trickle down, trickle-down economics. How many times do we have to keep enduring trickle-down economics when time after time we know it does not work? It may give you a little bit of a good feeling for awhile, but it always leads to disastrous consequences.

So that is what we had in 2001. We had trickle down, give the most to the wealthiest in the country; it will trickle down to everybody. It didn't trickle down. What it did was widen the gap between the rich and the poor. The very highest income earners in our country have gotten wealthy beyond Midas' imagination and the rest are down here, and the poor have gotten poorer and they have gotten to be a bigger part of our population. Children in poverty have gone up since 2001.

I suppose it was a nice dinner party for those who were at the top of the ladder for the last 5, 6 years, a wonderful ride, but look what it has led to. Now we have these huge deficits. The debt has piled up. We are now stuck in a war in Iraq that is costing us $10 billion to $12 billion a month, with no end in sight. Still we have these big tax cuts for the very wealthy going on and on.

Again, here we are. And, now we have a downturn. What do we do? We have to do something. There are times when deficit spending in the short term is prudent and necessary. That is when there is an economic downturn. But during the times when the economy is sound, that is when you ought to be paying down your debts. When the economy was sound for the last few years, we gave it all away. We gave it away, again, mostly to the wealthiest in our country. Now we are in a situation in which we want to ward off a deep recession.

Recessions always hurt those at the bottom worst. And now we are going to have to, because we don't have any money, do it with deficit spending, which I don't like, but we are going to have to do it.

I think it behooves us if, in fact, we are going to have to ask our grandkids and great-grandkids to pay the bill—that is what the national debt is; they have to pay it—if we are going to borrow from them for right now to get us through a recession, then we ought to be prudent about what we do with that money and how we do it.

I guess from my standpoint, taking a bunch of money and throwing it out there is not the way to do it. Don't throw money at the problem. That is why I have very serious reservations about what I hear coming from the other body. We haven't seen anything. All I know is what I read in the paper and see on the news and what I hear about what the White House is doing.

I have no doubt the House is acting in good faith. I am all for a bipartisan solution. But I remind both the President and my colleagues that we in the Senate are going to have some say-so in shaping the final stimulus package. Any bill that comes from the House is