

lesson for those around the country who may be listening.

For our own part here in the Senate, let's pledge today to uphold these principles and their values and the eloquence with which they were expressed, with the same dedication and persistence in courage as the great first generation of Americans who wrote them.

I thank the Chair, and I yield the floor.

The ACTING PRESIDENT pro tempore. The assistant majority leader is recognized.

Mr. DURBIN. Mr. President, it is my understanding that the time between now and 11:30 is equally divided between myself and a Senator on the Republican side?

The ACTING PRESIDENT pro tempore. That is not part of the unanimous consent agreement.

Mr. DURBIN. Is there any pending unanimous consent or any pending consent relative to the time?

The ACTING PRESIDENT pro tempore. Only that morning business continue until 11:30.

Mr. DURBIN. I ask unanimous consent to speak for 10 minutes—well, let me just make that request, that the remaining time between now and 11:30 be equally divided between the Democratic side and the Republican side and that I be allocated the Democratic time.

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

Mr. DURBIN. I thank the Chair.

#### MEDICARE

Mr. DURBIN. Mr. President, after this debate on the history of our country and this institution, it is worth reflecting on the fact that were it not for this Chamber, this Senate, we may not be a United States of America. They couldn't reach an agreement on what to do with small Colonies when they became States. Would they be overwhelmed by some House of Representatives where the big Colonies with the big populations would dominate? So the small Colonies held back, and they reached a compromise. They said: We will create a Senate of small Colonies and large Colonies, soon to become States; they will each have two Senators. So even if you are small in population, you will have an equal voice as a large Colony and a large State. That is why today in the Senate, every State has two Senators regardless of its size, and that is why the Senate is of equal import in the legislative process as the House. That was the great compromise.

Then the Senate wrote its rules consistent with that compromise and said: And then within the Senate, each of these States will be recognized and respected as a minority. So it takes more votes to do things in the Senate than it does in the House. It isn't strictly a majority rules.

They created something called a filibuster. A filibuster, which some of you

recall from Jimmy Stewart in "Mr. Smith Goes to Washington," is when a Senator would stand and start to speak, hold the floor, stop the debate, and this Senator, by himself or herself, really controlled the Chamber. For the longest time, that is the way it worked or, in fact, didn't work. Any Senator could stop the train. Any Senator could stop the Senate.

Then, in the early 1900s, they said: Well, there ought to be a way to stop one Senator from bringing the Senate to a halt. Maybe if we came up with 67 votes or a two-thirds vote of the Senate, then we could make that Senator stop filibustering and go on with our business. That was the rule for a long time. Then in the 1960s it was changed again to 60 votes. Today that is the rule. If any Senator starts a filibuster to amend or stop any nomination, any bill, any treaty, it takes 60 votes to stop the filibuster and move forward on the bill.

How often are filibusters used? In the history of the Senate, rarely. But now there is a new game in town. The history of the Senate tells us that the largest number of filibusters in any 2-year period in the history of the Senate has been 57 filibusters.

Look at the record for this session of Congress. We have had 79 Republican filibusters, and we are still counting. In other words, 79 different times the Republican minority Senators have tried to stop the business of the Senate, stop the debate, stop the amendment, and force this vote, the 60 votes to resume business in the Senate.

Of course, every time we have to come up with 60 votes, we have to burn 30 hours off the clock. So we waste a day and a few hours. And every time we need 60 votes to move something forward, we need at least nine Republican Senators joining the 51 Democrats. That is the math of the Senate today, 51 to 49.

On many occasions, when 79 Republican filibusters were initiated, the matter before the Senate came to a halt. We could not come up with 60 votes. The filibuster prevailed. We had to move on to another item of business.

You say to yourself: How do you ever get anything done? If any Senator can stand up and stop the Senate, and 79 times in the last year and a few months this has happened, how do you ever get anything done? The answer is, there are some Senators who do not want anything to get done. They are determined that the Senate not take up controversial issues, that the Senate not pass legislation, and they are the dominant voice in the minority today.

The most recent issue that brought this before the Senate is one that affects 40 million Americans directly. I am talking about senior citizens under Medicare and another 8 or 9 million Americans under TRICARE, which is the health insurance plan for those members of the military and their families and some veterans. Here is the issue.

On July 1, there went into effect a provision that reduced the reimbursement for doctors who treated Medicare patients by 10.6 percent. We knew this was coming. We have tried to address it. Many doctors have said: This would be a disaster. If you reduce our reimbursement for Medicare, many of us cannot afford to take Medicare patients. We will reduce our caseloads, which means senior citizens will not have the choice and doctors they want.

Some of the doctors they trusted will say: I am sorry, we have to reduce the number of Medicare patients because we are not getting paid adequately by the Federal Government.

We had a provision before the Senate, and we said let's stop the 10-percent reimbursement cut from going into effect. That is what it said. The House considered that same provision, and the House passed it by a margin of 6 to 1. A majority of the Republicans joined the overwhelming number of Democrats and said: We don't want the pay cut for physicians treating Medicare patients to go into effect. It passed 6 to 1.

Then it came over here, and we thought it was fairly routine. Guess what. Filibuster No. 79. The Republicans stood up and said: We don't want you to consider this issue. You will need 60 votes to move forward on this Medicare issue. So we called it for a vote before the Fourth of July recess, and we lost. How many votes did we put on the board? We needed 60. We put 59 on the board. Of course, Senator KENNEDY is recovering. He was not here. But all the other Democrats—including Senator CLINTON who was back from the Presidential campaign, and Senator OBAMA came back—voted in favor of suspending this cut in Medicare reimbursement for physicians. But only nine of the Republicans crossed the aisle. We needed the 10th Republican, and we could not get it. We could not get 60 votes. As a result, we went home.

We are back because the issue is back because across America we are hearing from doctors, we are hearing from seniors, the American Medical Association, the American Association of Retired Persons, and scores of other health and senior groups that are saying to us: This is irresponsible. The Senate has a responsibility to stop this cut from going into effect and jeopardizing the medical care for 40 million seniors and 8 or 9 million members of military families.

So when the vote comes up tomorrow to strengthen Medicare, we need one more Republican vote. We need one more Republican Senator to join us. We are hoping that out of those who voted against this provision the last time, some have gone home and heard from seniors, heard from the doctors, and believe Medicare is important.

What I have just described to you is the centerpiece of this debate. But there is another part to it which I have to mention. The way we pay for this reimbursement to Medicare physicians is

to slightly—slightly—reduce the compensation given to private health insurance companies which are offering Medicare coverage. They are called Medicare Advantage companies. These companies were given this right to compete with Medicare a number of years back. Some of them have never been fans of Medicare. Some of them believe the private insurance companies can do a better job than the Government's Medicare Program, so they said: Let these private health insurance companies compete. Let them offer Medicare coverage.

They started offering it, and guess what happened. They started charging dramatically more for the same service that the Government Medicare Program was already providing. How much more? It was 13 to 17 percent more in cost.

Secondly, we found out they were not providing the basic health care they said they were going to provide to the Medicare people. And, third, they were using marketing practices that were unacceptable.

We reduced slightly the reimbursement to these companies so we can pay doctors under Medicare, and many of the Republicans objected saying they were more devoted to standing by these private health insurance companies than providing reimbursement for Medicare physicians.

The ACTING PRESIDENT pro tempore. The Senator's time has expired.

Mr. DURBIN. Mr. President, I ask for an additional 30 seconds.

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

Mr. DURBIN. That is the vote tomorrow. On the vote tomorrow, we need one more Republican Senator to join in this effort. We hope Senator McCain will be back. I don't know Senator McCain's position on this issue. I hope he is for Medicare. I hope he is against this physician Medicare cut. It is time for Senator McCain to make his position clear and return to the Senate for this critically important vote, this historic vote. We want to make sure tomorrow that Medicare's future is bright. We have confidence that the doctors will be reimbursed and that seniors across America can receive their Medicare services without fear of having them cut off. We need JOHN MCCAIN on the Senate floor tomorrow. We need to make sure we have enough Republican votes tomorrow to make this bipartisan measure the same success in the Senate as it was in the House.

Mr. President, I yield the floor.

The ACTING PRESIDENT pro tempore. The Senator from Maryland.

Mr. CARDIN. Mr. President, I understand there is no Republican who will claim the time remaining in morning business. I ask unanimous consent that I may have the time until 11:30 a.m.

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

## FOREIGN INTELLIGENCE SURVEILLANCE AMENDMENTS ACT OF 2008

Mr. CARDIN. Mr. President, I rise today in opposition to final page of this legislation, H.R. 6304, the Foreign Intelligence Surveillance Act of 1978, FISA, Amendments Act of 2008, if it is not amended to change the retroactive immunity provisions.

The President must have the necessary authority to track terrorists, intercept their communications, and disrupt their plots. Our Nation still faces individuals and groups that are determined to do harm to Americans, as well as our interests throughout the world.

I have spent many hours at the National Security Agency, which is located in Fort Meade, MD. The men and women of our intelligence agencies are dedicated public servants who are doing a great job on behalf of their country. They are trying to do their jobs correctly, and comply with all applicable laws and regulations.

As a member of the Judiciary Committee, I have received classified briefings about the advice and requests that were given to the telecommunications companies by the U.S. Government. I have seen the opinions of counsel on this issue. I have attended numerous hearings on this issue.

Congress must indeed make needed changes to FISA to account for changes in technology and rulings from the FISA Court involving purely international communications that pass through telecommunications routes in the United States. While we have a solemn obligation to protect the American people, we must simultaneously uphold the Constitution and protect our civil liberties.

After learning about executive branch abuses in the 1960s and 1970s, Congress passed very specific laws which authorize electronic surveillance. Congress has regularly updated these measures over the years to provide the executive branch the tools it needs to investigate terrorists, while preserving essential oversight mechanisms for the courts and the Congress. FISA requires the Government to seek an order or warrant from the FISA Court before conducting electronic surveillance that may involve U.S. persons. The act also provides for postsurveillance notice to the FISA Court by the Attorney General in an emergency.

I am very concerned that the FISA law was disregarded by the administration, and want to ensure that we put an end to this type of abuse. We are a nation of laws and no one is above the law, including the President and Attorney General. The President deliberately bypassed the FISA Court for years with his warrantless wiretapping program—long after any emergency period directly following the 9/11 terrorist attacks—and did not ask Congress to change the FISA statute. In fact, President Bush refused to fully brief

Congress on the Terrorist Surveillance Program, TSP, the existence of which was only exposed through a New York Times story. After the story broke, the administration reluctantly agreed to place this program under the supervision of the FISA Court.

I do believe that many of the telecommunications companies cooperated with the Government in good faith, and may be entitled to relief. But the FISA statute of 1978 already lays out procedures for the Government to seek a court order and present this order to the telecommunications companies and require their assistance. The 1978 FISA statute also provides certain immunities to telecommunications companies that provide this type of assistance to the Government.

The President chose to ignore the FISA statute. If the President did not want to use the FISA statute or wanted to change it, he had the responsibility to come to Congress and ask for that change. He cannot change the law by fiat, or by issuing a Presidential signing statement. Congress must change the law, and the courts must interpret the law. Congress and the courts have the power, and often the responsibility, to disagree with the President, and these co-equal branches have the constitutional checks to override his veto, disapprove of a request for a warrant, or strike down an action as unconstitutional.

I will vote against retroactive immunity for the telecommunications companies. The current bill only authorizes the district court to review whether the companies received written requests from the U.S. Government stating that the activity was authorized by the President and determined to be lawful by the executive branch. The Court would have to simply accept the executive branch's conclusion that the warrantless wiretapping outside of the FISA statute and without FISA Court approval was legal, which means the executive branch—not the judiciary—gets to decide whether the law was broken. I want the courts to be able to look at what the executive branch is doing. I want the court to protect individual rights. Granting this type of immunity would violate the basic separation of powers. It would also create a dangerous precedent for future administrations and private actors to violate the law, and then seek relief in Congress or from the President through an after-the-fact amnesty or pardon.

There was a way to provide the telecommunications companies with appropriate relief. Senator FEINSTEIN's amendment would have allowed the courts to grant relief to the telecommunications companies if they acted reasonably under the reasonable assumption that the Government's requests were lawful. This amendment would have preserved the independent judgment of the judiciary, and preserved the necessary check and balance in our system of government. Unfortunately, the negotiators for this legislation rejected this compromise.