says we are going to take some of these areas where the taxes haven't been paid, we are going to give them to private debt collectors, and we are going to give them a commission for collecting it. So at the end of a year, the IRS lost $50 million.

I don't know how you lose $50 million when you are collecting taxes. That takes some genius apparently. It was estimated by the National Taxpayer Advocate that if the same money, just over $70 million that was invested in this program, had been invested in hiring the agents at the Internal Revenue Service, generally based on what they calculate, they would have collected $1.4 billion. So for this investment, the IRS could collect $1.4 billion or they could lose $50 million. Talk about staggering gross incompetence.

It would be kind of nice to put in the RECORD the names of every person who was involved in the administration so they can somehow be recognized in a ''Hall of Shame.'' How on Earth do you lose $50 million at the Internal Revenue Service with a program as goofy as this one? Again, take delinquent taxes, give them to private debt collection, and lose $50 million, or take the same amount of money and invest it in IRS collection and collect $1.4 billion.

What is the choice? The President's people said the choice is to give it to the private collection agencies because we like to privatize everything, and they end up losing $50 million. That is unbelievable.

We are going to try once again this year—and I think we will succeed—to shut this program down. Aside from losing $50 million, we have had experience with this program before. It was tried before. It was a miserable failure when it was tried previously. We have examples of what happens when private debt collectors get ahold of these things. First of all, you have very sensitive information about people's lives, the financial information on tax returns. There are criminal penalties for dealing with that information. You are going to farm that out. They say: We will farm it out, but we will protect the information.

It makes no sense at all to have been through this and then to farm it out to a private debt collection agency and find one elderly couple who gets 150 telephone calls over 27 day from a collection agency. It turns out they were not the taxpayers who were being called but, nonetheless, their phone rang 150 times. That is the kind of thing that goes on and shouldn't, in addition to the incompetence of losing $50 million.

Senator MURRAY, myself, and many others are going to fix this problem. It is important the American people understand what happened, and someone needs to be accountable for it.

STRATEGIC PETROLEUM RESERVE

I wish to mention one additional point because tomorrow Secretary Bodman is coming to Capitol Hill. He is the Secretary of Energy. I have great respect for Secretary Bodman. I work closely with the Department of Energy. I chair the appropriations subcommittee that funds all the water and energy projects in our country. So I have a relationship with the Department of Energy. I like the Secretary and I like some of the people who work for him down at the Department of Energy. But there is something going on down there that bothers me a lot, and I intend to talk to the Secretary about it tomorrow.

At a time when oil is priced at $90 to $100 per barrel and when the Strategic Petroleum Reserve—that is oil we stick underground that is saved for a rainy day, a national emergency or a time when we desperately need the oil—at a time when the Strategic Petroleum Reserve is 97 percent filled, this administration is taking oil through royalty-in-kind payments from producers in the Gulf of Mexico and sticking it underground. They are taking oil out of the supply pipeline that should have gone into the supply pipeline, at a time when we have these unbelievable prices for oil, and sticking it underground in domes to increase the supply in the Strategic Petroleum Reserve. It is exactly the wrong thing to do at this point in time. It is exactly what we should not be doing.

From August of 2007 to January 2008, 8.4 million barrels of oil were taken out of the supply. That is oil that was given as a payment in kind for the royalties our Government was owed. Instead of taking that and putting it into the supply, using the money to reduce the Federal debt and having the oil in the supply pipeline, the Dept. Of Energy stuck it underground. So at nearly a hundred dollars per barrel, we are putting oil underground, which tends to price gasoline at a much higher rate because you are diminishing supply at a time when that is the last thing we should do.

Now, the strategic petroleum reserve is filled with about 700 million barrels of oil. The administration's approach is: Well, let's top it off. Let's fill it to 727 million barrels of oil. The administration just awarded three companies contracts—Shell, Sunoco Logistics, and B.P. North America—to place an additional 12.3 million barrels of royalty-in-kind oil into the Strategic Petroleum Reserve for the next 6 months. So that means another 12 million barrels will be taken out of supply and stuck underground.

I mean, can anybody think of something that makes less sense at a time when $100 or $90 or $80 a barrel of oil exists? People are driving to the gas pump and having to consider a mortgage to fill their tank. Can't anybody think of something that we should rather do than take oil out of the supply pipeline and stick it underground? It makes no sense to me at all.

So I am going to propose legislation that says no more for filling the strategic petroleum reserve for the next year, unless oil drops below $50 a barrel. Let's take that royalty-in-kind oil and put it in the supply pipeline and make sure it contributes to an increasing supply and, therefore, lower prices for gasoline. Instead, the administration is intent on taking that oil and sticking it underground. That will have the impetus of pushing gas prices up.

Now, some would say: We are not talking about a large portion of oil here. Well, no, it is true, we are only talking about 12.3 million barrels in the next 6 months—8.4 million barrels from August to January. Is that a massive quantity of oil? No. But we have had witnesses testify before the Senate Energy Subcommittee and the Homeland Security Permanent Subcommittee on Investigations that the government is taking light sweet crude, which is part of a smaller subset of more valuable oil, and putting it underground that has the effect of increasing the price of gasoline.

So I am going to ask the Secretary a lot about this issue tomorrow when he appears before the Senate Energy & Natural Resources Committee, and I intend to address this in the appropriations process this year so that we can prevent this from happening further. At least until the point we have seen the price of oil come back down. My legislation proposes a prohibition from filling the Strategic Petroleum Reserve for 1 year or at least until a time when the price of oil comes back below $50 a barrel.

Again, the Strategic Petroleum Reserve is nearly 96 percent filled. Why would we put upward pressure on gas prices? Because the Federal Government has decided to do things that would put upward pressure on gas prices by putting oil underground at a time when we have hundred-dollar-per-barrel oil. It defies common sense. You couldn't find two people in Mike's Bar in Regent, ND, to make a judgment like that after they have been there a couple hours. Just common sense would tell you this makes no sense and we ought to stop it, and I intend to visit about this at some length with the Secretary tomorrow when he comes before the Senate Energy Committee.

Mr. President, I yield the floor.

FISA AMENDMENTS ACT OF 2007

The PRESIDING OFFICER (Mr. CASEY). Under the previous order, the Senate will resume consideration of S. 2248, which the clerk will report by title.

The assistant legislative clerk read as follows:

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

Pending:

Rockefeller/Bond amendment No. 3911, in the nature of a substitute.

Whitehouse amendment No. 3920 (to amendment No. 3911), to provide procedures for compliance reviews.

Feingold amendment No. 3979 (to amendment No. 3911), to provide safeguards for communications involving persons inside the United States.

Cardin amendment No. 3930 (to amendment No. 3911), to modify the sunset provision.

Feingold/Dodd amendment No. 3915 (to amendment No. 3911), to place flexible limits on the use of information obtained using unlawful procedures.

The PRESIDING OFFICER. The Senator from Wisconsin.

Mr. FEINGOLD. Mr. President, I ask unanimous consent that the pending

amendment be set aside so that I may call up an amendment.

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

AMENDMENT NO. 3913 TO AMENDMENT NO. 3911

Mr. FEINGOLD. Mr. President, I call up amendment No. 3913.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from Wisconsin [Mr. FEINGOLD], for himself, Mr. MENENDEZ, and Mr. DODD, proposes an amendment numbered 3913.

Mr. FEINGOLD. Mr. President, I ask unanimous consent that the reading be dispensed with.

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

The amendment is as follows:

(Purpose: To prohibit reverse targeting and protect the rights of Americans who are communicating with people abroad)

On page 6, line 6, strike ''the purpose'' and all that follows through line 9 and insert the following: ''a significant purpose of such acquisition is to acquire the communications of a particular, known person reasonably believed to be located in the United States, except in accordance with title I;''.

On page 7, line 7, strike ''United States.'' and insert the following: ''United States, and that an application is filed under title I, if otherwise required, when a significant purpose of an acquisition authorized under subsection (a) is to acquire the communications of a particular, known person reasonably believed to be located in the United States.''.

On page 9, between lines 9 and 10, insert the following:

''(iii) the procedures referred to in clause (i) require that an application is filed under title I, if otherwise required, when a significant purpose of an acquisition authorized under subsection (a) is to acquire the communications of a particular, known person reasonably believed to be located in the United States;

On page 17, line 2, strike ''United States.'' and insert the following: ''United States, and are reasonably designed to ensure that an application is filed under title I, if otherwise required, when a significant purpose of an acquisition authorized under subsection (a) is to acquire the communications of a particular, known person reasonably believed to be located in the United States.''.

Mr. FEINGOLD. Mr. President, this amendment, approved by the Senate Judiciary Committee, assures the new authorities contained in this bill will not be used to engage in what is known as ''reverse targeting of Americans.'' FISA requires the Government to get a court order when it is listening in on Americans on American soil. Reverse targeting refers to the possibility that the Government will try to get around this requirement by using these new authorities to wiretap someone overseas when what the Government really wants to do is listen to the American with whom that foreign person is communicating.

The Director of National Intelligence has testified that reverse targeting is a violation of the fourth amendment. This amendment merely codifies that constitutional principle. Specifically, the amendment says the Government needs an individualized court order when a significant purpose of the surveillance is to acquire communications of a person inside the United States. Now, this language is critical if we are to protect the constitutional rights of Americans because the underlying bill merely requires a court order if the purpose of the acquisition is to target the American.

A member of the Intelligence Committee, the Senator from Georgia, has said the underlying bill only prohibits surveillance when the Government is targeting a foreigner solely—solely—to listen to the American with whom that foreigner is communicating. Now, what does this mean? That means if the Government has any passing interest at all in the foreigner being wiretapped, it could intentionally conduct ongoing, long-term surveillance of an American inside the United States without a warrant. Now, the DNI says that would be unconstitutional, but it appears to be permissible under the current bill.

Recently declassified exchanges between the administration and congressional intelligence committees demonstrate why the issue of reverse targeting is a very real problem.

According to the administration, ''if valid collection of the foreign intelligence target indicates that the person in the United States is of intelligence interest,'' NSA would disseminate an intelligence report to the FBI, which can request the identity of that person and ''which could''—I repeat, could—''seek a FISA court order to conduct electronic surveillance in the United States.''

Mr. President, I ask unanimous consent to have printed in the RECORD the declassified documents to which I am referring.

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

When NSA is acquiring the communications of a person in the United States during its targeting of a foreigner overseas, is it reasonable to impose a time limit on NSA's determinations of whether to target the person in the United States or drop that individual? It is not reasonable to impose time limits on NSA's targeting determinations in this manner. If frequent contacts occur between the foreign target overseas and a person in the United States and if there is no foreign intelligence to be obtained, analysts will———such that the interception of the communications of the person in the United States when targeting the foreigner overseas will not occur. If valid collection of the foreign intelligence target indicates that the person in the United States is of intelligence interest, NSA would disseminate an intelligence report with the identity masked to the FBI, which could seek a FISA Court order to conduct electronic surveillance in the United States. If valid foreign intelligence is expected to be obtained by targeting the foreign selector, any incidentally collected information about the person in the United States would be handled in accordance with NSA's minimization procedures.

How many times has NSA obtained a FISA order to target a person in the United States where the initial target was a foreigner overseas and a U.S. communicant became of foreign intelligence interest? How many cases have there been where the target remains the foreigner overseas and there have been multiple communications between that target and a person in the United States such that NSA considered whether to obtain a FISA order to conduct electronic surveillance against the person in the United States? This is difficult to answer because NSA routinely provides information to the FBI and it decides whether to follow up by getting a FISA order to conduct electronic surveillance in the United States. For example, if an analyst reviews an intercept and finds evidence that a party to the communication (not the target of the surveillance) is a U.S. person, he would go through his foreign intelligence calculus. That is, he determines whether the communication contains foreign intelligence. If he determines that it does contain foreign intelligence, he would disseminate a foreign intelligence report. The report would mask the U.S. person's identity as ''U.S. person'' under NSA's minimization procedures. Upon receipt, a customer (here probably the FBI) would likely request that person's identity. Under NSA's minimization procedures, NSA would provide it if the requester demonstrates that the request is within the scope of its mission and knowing the U.S. person's identity is necessary to understand or assess the foreign intelligence in the report. In this case, the FBI would likely meet that test and, upon receipt of the identity, can decide whether or not to follow up. NSA surveillance against the foreign target would continue.

Mr. FEINGOLD. Mr. President, this confirms that when the Government has an interest in an American, it is entirely up to the discretion of the FBI to decide whether the Government will seek a warrant to listen to that American's communications. But the FBI may not seek a warrant for any number of reasons, including lack of resources, insufficient coordination with other elements of the Government, or simple incompetence. A recent Justice Department inspector general report finding that the FBI's court-approved surveillance was disrupted because the Bureau failed to pay the telecommunications company on time should give us cause for concern.

In this case, this amendment would actually help us to stop terrorists by requiring that when a foreign terrorist talks to a person in the United States and that communication prompts a significant interest in the American, it can't just plain fall through the cracks.

Now, of course, the FBI might also choose not to seek a warrant because it doesn't have a real case against the American or because the Government doesn't want to tell the FISA Court the real reason it is interested in that American. So if the FBI doesn't seek a court order, can the NSA just listen in indefinitely to the communications of Americans so long as they are communicating with a person overseas? I am afraid to say, Mr. President, the answer appears to be yes. According to the administration, the FBI, upon receipt of the identity of the American, ''can decide whether or not to follow up. NSA surveillance against the foreign target would continue.''

The Government's apparent authority to continue indefinitely its surveillance of the international communications of Americans is not limited to terrorism cases where the Government should at least have an incentive to seek warrants against an American. It applies to all foreign intelligence. That includes the communications of an American who is talking to a person overseas who is not a terrorist suspect, is not suspected of any wrongdoing, and is not even an agent of a foreign power. Yet, no matter how interested the Government is in what that innocent American has to say, if the FBI doesn't think it is worth its while to seek a court order or if the FBI knows it couldn't get the order, the surveillance continues nonetheless.

This raises serious constitutional concerns, which is why the Rockefeller-Levin bill, the alternative to the Protect America Act that the Senate considered back in August, required procedures to seek a court order if electronic surveillance was ''of the nature or quantity as to infringe on the reasonable expectations of privacy of persons within the United States.'' Yet, in a recently released letter, the DNI complained about this requirement, saying it would take months to make this determination, that they couldn't determine in advance what such a procedure would say. In other words, even as the administration sought and obtained broad new authorities to collect communications of Americans, the administration refused to even consider when it might be violating the Constitution.

If the administration can't assure us that they respect the Constitution, Congress needs to step in. For all their promises that reverse targeting is not occurring, the record is clear there is nothing to stop it, and the administration has resisted establishing procedures to protect the rights of Americans. At the same time, it has sought to remove the FISA Court's ability to protect those rights.

This bill denies the FISA Court any role whatsoever in determining or monitoring why a person overseas has been wiretapped, which, of course, would help indicate whether the Government is conducting reverse targeting of an American. The bill denies the court the ability to monitor what becomes of the communications of Americans that are collected.

Mr. President, it is clear this administration won't protect the constitutional rights of Americans, and unfortunately, in the PAA, Congress passed legislation denying the courts any oversight role. It is critical Congress act to remedy this great problem. We have a unique opportunity to protect the Constitution and stop abuses before they happen. I hope my colleagues will support this amendment.

Mr. President, it appears there is no opposition to it, but nonetheless I will retain the remainder of my time.

Mr. President, I ask unanimous consent that the pending amendment be set aside so that I may call up another amendment.

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

AMENDMENT NO. 3912 TO AMENDMENT NO. 3911

Mr. FEINGOLD. Mr. President, I call up amendment No. 3912.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from Wisconsin [Mr. FEINGOLD], for himself, and Mr. DODD, proposes an amendment numbered 3912.

The amendment is as follows:

(Purpose: To modify the requirements for certifications made prior to the initiation of certain acquisitions)

On page 10 between lines 5 and 6, insert the following:

''(vii) the acquisition of the contents (as that term is defined in section 2510(8) of title 18, United States Code)) of any communication is limited to communications to which any party is an individual target (which shall not be limited to known or named individuals) who is reasonably believed to be located outside of the United States, and a significant purpose of the acquisition of the communications of the target is to obtain foreign intelligence information; and

Mr. FEINGOLD. Mr. President, this amendment ensures that in implementing the new authorities provided in this bill, the Government is acquiring the communications of targets in whom it has some foreign intelligence interest and is not conducting bulk collection of all communications between the United States and overseas. This amendment was also approved by the Judiciary Committee.

This amendment is necessary because of the vast and overbroad authorities provided by the PAA and this bill. In public testimony, the DNI stated that the PAA would authorize the bulk collection of all communications between the United States and overseas. Now, that could cover every communication between Americans inside the United States and Europe or South America or the entire world. It could also include a communication between Americans overseas and their family and friends back home.

This bill is understood to allow the warrantless targeting of a terrorist suspect overseas even when that person is communicating with an American at home. The bill does not simply apply to terrorist suspects, however. It permits warrantless collection of communications between law-abiding Americans and people overseas who are not suspected of doing anything wrong at all. That is a problem that needs to be addressed. But this bill does not just allow the targeting of conversations of people who are not suspected of any wrongdoing; this bill actually allows the Government to capture all international communications to or from the United States in bulk, for no good reason. I think it is safe to say no one in this country expects that all of their international communications can be collected by the Government. That kind of communications dragnet would offend anyone who has ever communicated with friends, family, or professional associates in other countries. It raises serious constitutional questions. It would completely overwhelm the already inadequate minimization procedures that are the only bump in the road to completely uncontrolled dissemination of information about Americans. And there would be no court oversight whatsoever.

Bulk collection poses yet another serious constitutional danger. By collecting all international communications, the Government would be collecting communications between Americans overseas and their friends and family back home.

Senators WYDEN and, WHITEHOUSE and I have fought hard to ensure that Americans overseas cannot be intentionally targeted without a warrant, but bulk collection is a backdoor way to conduct the same warrantless wiretapping. Imagine the number of Americans' communications, not with foreigners but with other Americans—with other Americans, Mr. President—that would be acquired by the Government through bulk collection of, say, communications between the United States and Britain. That means Americans studying and working abroad, tourists passing through, and even U.S. troops stationed there.

Nothing—nothing—would prevent their communications from being collected and retained, and nothing would prevent those communications from being disseminated so long as the Government decided there was foreign intelligence value.

I ask my colleagues: At what point do we draw the line? At what point does the Constitution mean something? I am sure some of my colleagues will say we should trust the Government not to do this, not to abuse this. Yet the DNI has testified that while bulk collection is not needed:

It would certainly be desirable, if it was physically possible to do so.

This is not a short-term piece of legislation. It is not reassuring that the intelligence community cannot currently collect all international communication. This bill does not sunset for years. What is technically possible in this area changes rapidly. Given the potential impact on the privacy and constitutional rights of Americans posed by bulk collection, Congress needs to act now. The DNI has put us on notice that bulk collection is both authorized and, in his words, desirable. Legislative silence on this issue is consent. This body must take a position on this issue. Should the Government be able to sweep up all international communications involving Americans at home and abroad? We cannot avoid that question. The bill, combined with the DNI's comments, places it squarely before us.

The amendment I have offered here is extremely modest. It merely requires the Government to certify to the court

that in using these broad new authorities to conduct warrantless surveillance, it is collecting the communications of foreign targets from whom it expects to obtain foreign intelligence information. The Government does not have to explain its foreign intelligence interests to the Court; it does not even have to identify its target. It merely has to say that an interest exists, and the court cannot challenge this certification. Because this amendment is so modest, opponents have raised an absurd hypothetical argument against it, and this is what it is: that it would somehow prevent the collection of communications into or out of an enemy-occupied city that the U.S. military is about to invade.

This argument is plain silly. My amendment requires that there be a foreign intelligence purpose for collection. This hypothetical posited by opponents of the amendment—and all individuals in a city our troops are about to invade would clearly have foreign intelligence value. That is what distinguished this case, in which the Government can easily make the certification required by the amendment and, on the other hand, the bulk collection of all communications between, say, the United States and Europe.

The reason absurd scenarios such as this have been raised as ''unforeseen consequences'' is that opponents of this amendment do not want to address the consequences of not passing it, the consequences of the Government collecting all communications between the United States and Canada or Europe or South America, the consequences of millions of innocent Americans' communications being collected, the consequences of already inadequate minimization procedures being overwhelmed by the collection.

These are not even unforeseen consequences. The DNI testified that if this were physically possible, bulk collection would certainly be desirable. The DNI envisions a country where the Government, if it were technologically feasible, would listen in on every international phone call made by its citizens and read every international e-mail. That is a police state, not the United States of America.

This amendment will help put to rest another concern that has been expressed about this legislation. In August, after the enactment of the PAA, the DNI stated:

> Now, there is a sense that we are doing massive data mining. In fact, what we are doing is surgical. A telephone number is surgical. So if you know what the number is, you can select it out.

And the DNI then added:

> We have got a lot of territory to make up with people believing that we are doing things that we are not doing.

The best way to assure Americans that the Government is not doing massive data mining of their international communications is not to authorize the massive collection of their international communications. The DNI cannot have it both ways. He cannot complain that people believe the Government is doing things it is not doing, and then oppose amendments to the law that would prohibit the Government from doing those very same things, especially when he has also said that bulk collection would be ''desirable'' if it were physically possible.

Finally, my amendment would help resolve a serious constitutional question surrounding this bill. When Americans are on the line, the constitutionality of the surveillance depends in part on how it is conducted. Bulk collection of millions of Americans' communications of which the Government has no interest in the person on the other end of the line could very well be unreasonable under the fourth amendment. We can eliminate this particular constitutional problem with the adoption of this very modest amendment.

I challenge anyone who opposes this amendment to stand up on this floor and explain to the American people why the Government should have the authority to engage in bulk collection of their private communications. Let's tell the American people the truth for once. Do not rely on hypothetical, unintended consequences that are easily answered. Explain why this very modest protection of the privacy of our citizens cannot be granted.

I believe this amendment brings this bill into line with its actual intent. It gives Congress a say in how far these vast new authorities will be taken, and it protects the civil liberties of Americans.

I urge my colleagues to support it.

I yield the floor and I reserve the remainder of my time.

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

Mr. BOND. Mr. President, I am sorry I was not here for all of my colleague's descriptions of his two amendments. But let me make one thing clear. What he is laying out is a scenario that does not exist. He is raising all kinds of concerns that are dealt with in the underlying bill. They are dealt with by the Constitution of the United States. They were dealt with by the Protect America Act.

I can assure the American public that we are not collecting all of the communications they send overseas and reading them and listening to them and using them in some way that violates the fourth amendment or the provisions of these two measures.

Before we actually have a vote on these measures, we will talk about them more in detail. I think he raised the reverse targeting amendment first. Let me be clear and explain that you cannot target a person inside the United States without a court order. All acquisitions must comply with the fourth amendment.

Last week we agreed to an amendment offered by Senator KENNEDY which ensures that the authorities in this bill will not be used to acquire communications where the sender and all intended recipients are known to be in the United States. That has to be with a FISA Court order if you are targeting somebody in the United States. This is an explicit, bright-line prohibition against reverse targeting in the current bill. If one would look at page 6 of the statute, section 703(b)(2), I will read it for you. It says:

> An acquisition authorized under subsection (a) may not intentionally target a person reasonably believed to be located outside the United States if the purpose of such acquisition is to target a particular known person reasonably believed to be in the United States except in accordance with title I or title III.

It does not get much clearer than that. So if the purpose in targeting someone outside the United States is actually to target a person inside the United States, you cannot use the authorities under this bill. It is clear. That is what the DNI stated his purpose was; that is what the bill provides. You have to get a FISA Court order if you are targeting somebody. You cannot do it by the back door.

Now, I heard yesterday some far-out explanations that a family whose child goes overseas to go to school, we would be listening in on those conversations. That is absolutely nonsense. If that is a United States person, we could not even target that United States person abroad, and we certainly do not target someone in the United States without a court order. We have provisions to assure that the United States person who goes overseas cannot be targeted without an application to the FISA Court. Quite simply put, that does not happen.

Now, if somebody is calling a suspected terrorist overseas, one on whom we have initiated collection because of intelligence sources certified by the Attorney General and the Director of National Intelligence, this person has significant terrorist information, significant intelligence information, foreign intelligence information, if one were to call that number, then it is possible, it is likely, and we would expect that they would find out what is in that call.

If it is an innocent call, if it has nothing to do with terrorist activity, it is immediately suppressed; ''minimized'' is the term. They do not even record the name of the United States person.

But when calls come from outside the United States into the United States from a person, a known terrorist abroad, or when they initiate the call, someone from the United States does, then what we must do is find out if they are talking about planned terrorist activity in the United States. That is the most important collection we can make. We have lots of important information targeting foreign terrorists, suspected terrorists, foreign intelligence targets overseas that is useful to our allies in protecting their countries. There are lots of instances where we have done that or when they

are—and that does not require minimization, and it should not. But the information that is used is only that information which applies to a direct threat, a terrorist threat, or other significant foreign intelligence value. If a United States person is involved in that, if there is an involvement of the terror plot in the United States or elsewhere, then that information would be accepted, and if it is necessary to collect further against that American citizen or United States person, then they have to go through the normal procedure. Probably the FBI would get their normal search warrant and go after that person and determine what role, if any, he or she has in carrying out terrorist activity. So in addition to the bright-line test, there is clear oversight authority. There is oversight exercised by the supervisors at NSA, by the inspector general, by the Department of Justice, whose lawyers oversee it, and by our Intelligence Committee to make sure that the prohibitions on reverse targeting are being observed.

If this proposal were to be accepted, the uncertainty, the operational uncertainty of determining what a purpose is in reverse targeting would make this an impossible situation for an analyst to observe and to make that determination. There is a clear prohibition against reverse targeting.

The other amendment which he brought up, 3912, is on bulk collection. The bipartisan Intelligence bill contains numerous provisions to ensure that acquisitions targeting foreign terrorists overseas—that is foreign terrorists overseas—comply with the fourth amendment and follow court-approved targeting. It gives clear protection, as I said earlier, against reverse targeting.

The amendment that has been proposed under 3912 has some very negative consequences for protecting our troops abroad. This amendment, for example, would prevent the intelligence community from targeting a particular group of buildings or geographic area where, for example, terrorist activity is known to be occurring, and preventing them from collecting signals intelligence prior to operations by our Armed Forces.

If there is an area which has significant terrorist activity, to say we cannot collect all of the communications coming out of that area to identify who the terrorists might be, whether there are innocent persons involved before our military goes in, does not make any sense, because if we send our military in, they are going in and probably going to be using significant lethal force. Had this bulk collection provision been in place, it would have prevented our troops from conducting surveillance in Fallujah, for example, prior to their military operations.

The details on this are classified. We can provide more information in a secure setting. But this amendment, according to the Director of National Intelligence and the Attorney General, ''could have serious consequences on our ability to collect necessary foreign intelligence information, including information vital to conducting military operations abroad and protecting the lives of our servicemembers, and it is unacceptable.'' I agree with them because I have had the opportunity to learn how the system operates. My colleague from Wisconsin has. I believe it is very clear from the information we have received and the knowledge we have about it that the evils which he purports to address are evils that do not exist. I strongly urge my colleagues to oppose both amendments.

I reserve my time.

The PRESIDING OFFICER. The Senator from Wisconsin.

Mr. FEINGOLD. It is sort of odd that we are debating these two amendments together. But there is one advantage. Under our system of government, the way we make sure that abuses don't occur is by passing laws to make it absolutely clear that abuses aren't occurring and can't occur. We are supposed to accept the say-so of one Senator who says we are not doing these things. We are not conducting bulk collection. We are not doing reverse targeting so don't worry. Yet he resists two amendments that simply make it clear you can't do these things. What is the objection on the merits to these two amendments? They would apply to an administration that initiated an illegal wiretapping program in disregard of the statutes. We have reason to believe that maybe they would do things we don't know about and don't like and don't think are legal, but we are supposed to simply take the word of one Senator instead of passing a law to clearly protect the American people.

With regard to reverse targeting, the Senator asserts that somehow having a provision that says ''the'' purpose would have to be targeting an American before a court order is required is going to protect us. But that doesn't protect us. That language would mean that any incidental reason for targeting a foreign person when the government wants to listen to the American would be a sufficient basis for ongoing warrantless surveillance of the American. In fact, the Senator from Georgia has indicated that what this means is that the sole purpose of the collection would have to be to obtain information on the American before a court order is required. If that is true, then it would be very easy for the government to bootstrap any incidental interest in a foreign target so that they can listen in on an American.

The DNI has said that reverse targeting is unconstitutional. What is the legitimate objection to making it absolutely clear that this can't be done in this statute? There is no substantive objection. The same thing goes for bulk collection. Again, one Senator assures the American people that the government is not doing bulk collection. That might be right. We may not be doing it now. But the DNI has said it would be desirable. He would love to do it. Yet the Senator will not permit a simple amendment that says that something that the DNI has also said is not actually needed but would raise serious constitutional problems, should be prohibited.

This is an amazing moment. Instead of legislating, we are supposed to trust. With regard to all of our international communication, we are supposed to simply trust one Senator's assurance that there is nothing to worry about. I suggest the American people deserve better than that.

To show the complete lack of content to these arguments, I addressed what the Senator, who was not out here at the time, has called the Fallujah example. He keeps saying that under this provision, you couldn't get information about what was going on in Fallujah when we were attacking al-Qaida and others there. That is absolutely false. I laid it out. As long as the Government says there is a foreign intelligence information purpose, of course they can do it. If there is a terrorist hotbed, they can do it. They just have to assert that. This argument that somehow this would interfere with that collection flies directly in the face of the bill and the amendment. There is no truth to that argument at all. The amendment is absolutely clear in cases of conflict, where the government merely needs to assert that it has a foreign intelligence purpose for conducting surveillance in that area. In that situation, the purpose is clear.

Because of the floor situation, the arguments related to these two amendments have merged, but it sort of works in a way because both of them are such straightforward, simple protections that a majority of the Judiciary Committee agreed had to be included in this bill to protect the rights of the American people.

I reserve the remainder of my time.

The PRESIDING OFFICER. The Senator from Missouri.

Mr. BOND. Mr. President, there are quite a few things I disagree with that my colleague from Wisconsin has brought up. No. 1, he said the administration instituted an illegal wiretapping program. That is not true. That is wrong. I reviewed the documents on which they based it—article II, and the authorization for use of military force. That was not an illegal effort. But that is a debate for another time. The administration did advise the leaders of Congress what they were going to do. The big eight were advised, and they did not deem any legislation advisable at the time.

Secondly, he gives me too much credit in saying it is only the word of one Senator that his amendments are unworkable and unnecessary. This was brought up and debated in the Intelligence Committee. We spend our time overseeing intelligence collection. It was not adopted there. It was withdrawn.

If my colleague has any evidence that there are any violations in reverse

targeting or bulk collection of the fourth amendment of the Constitution or other violation of privacy rights, then I suggest he bring them up in our Intelligence Committee in closed session where we can debate all the activities that are going on. I assume he has been out to NSA to see how it operates. He has been in and had the opportunity to question leaders of the intelligence community. He says there is a total lack of substance. I have to say there is a total lack of substance to the allegations he makes. There are legitimate concerns which we address in this bill by specifically prohibiting reverse targeting. It is specifically prohibited in this bill. I have to say the people who run the program are the ones who have told us the additional bells and whistles he wants to put on for no reason or even reasonable prospect of violations would make it impossible to carry out the business of collection on foreign terrorists with potential activities in the United States.

Again, there will be others who will discuss this. But it is not the word of one Senator. It is the word of a majority of the Intelligence Committee, and it is the word of the intelligence community itself, backed up by the Attorney General, that this is unwise, unnecessary, that these amendments would significantly hamper the ability of the intelligence community to conduct its operations.

I reserve the remainder of my time.

The PRESIDING OFFICER. The Senator from Wisconsin.

Mr. FEINGOLD. Briefly, Mr. President, it is important to put in the RECORD that the Judiciary Committee, after carefully considering this not just in the context of intelligence—and I do serve on the Intelligence Committee as well—but in the context of the relationship between intelligence and civil liberties, came to the opposite conclusion on both reverse targeting and bulk collection and voted by a majority to adopt the very sort of amendments I am proposing. With regard to the vice chairman's assertion that I had not put forward any concerns about the impact of these authorities on the civil liberties of Americans, I, in fact, sent a classified letter to the DNI in December expressing serious concerns about the implementation of the Protect America Act and its effect on the rights of Americans. I can't discuss classified specifics here. But the fact is, these aren't merely theoretical concerns.

One final point: The thrust of our concern about reverse targeting and bulk collection doesn't have to do necessarily with what has already occurred but what could occur, what abuses could occur if we do not clarify in the law that they should not be done. This is especially important in light of the fact that, as I have indicated, the Director of National Intelligence has said it would be desirable to do this bulk collection. If the DNI says that, wouldn't that be a reason to be a little concerned and to make sure it is clearly prohibited?

I reserve the remainder of my time.

The PRESIDING OFFICER. The Senator from Connecticut.

AMENDMENT NO. 3907

Mr. DODD. Mr. President, I want to inquire as to how we are to proceed. I was asked to offer my amendment on behalf of myself and Senator FEINGOLD regarding striking the language dealing with immunity in the bill. I don't want to interrupt the debate. I don't know how we ought to proceed. Is this debate concluded? I will check with the author.

Mr. President, I ask unanimous consent to set aside the pending amendment so I may offer the Dodd-Feingold amendment dealing with retroactive immunity.

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

Mr. DODD. Let me inform my colleagues that what I intend to do is not to speak at length. I know under the previous time agreement, there are 2 hours allocated to this amendment. My intention this evening is to use probably 10 or 15 minutes of debate on this amendment. I see my colleague from Washington. I don't know if she has an intention to address the Senate on this matter or something else. I am going to take 10 or 15 minutes to talk about the amendment and then reserve the remainder of my time for tomorrow. There are other Members who would like to be heard on this amendment. I don't want to consume too much of the time to deny others the opportunity to be heard. I presume my colleague from Wisconsin tomorrow may want some time. I will take a brief amount of time this evening and then reserve the balance until later. Then my colleague from Washington can certainly be heard or anyone else for that matter.

I send to the desk an amendment offered by myself and Senator FEINGOLD, and Senators LEAHY, KENNEDY, HARKIN, WYDEN, SANDERS, OBAMA, BIDEN, and CLINTON and ask for its consideration.

The PRESIDING OFFICER. The clerk will report.

The legislative clerk read as follows:

The Senator from Connecticut [Mr. DODD], for himself, Mr. FEINGOLD, Mr. LEAHY, Mr. KENNEDY, Mr. HARKIN, Mr. WYDEN, Mr. SANDERS, Mr. OBAMA, Mr. BIDEN, and Mrs. CLINTON, proposes an amendment numbered 3907.

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

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

The amendment is as follows:

(Purpose: To strike the provisions providing immunity from civil liability to electronic communication service providers for certain assistance provided to the Government)

Strike title II.

Mr. DODD. Mr. President, this amendment we have talked about at length over the last number of weeks going back into December. This is a striking amendment to strike the language in the bill out of the Intelligence Committee that would provide for retroactive immunity to the telecom industry. It has been debated at length. This amendment strikes that language in the bill, conforms it to what has been adopted by the other body in its legislation dealing with the Foreign Intelligence Surveillance Act suggestions and recommendations, and conforms it to what has been included in the Senate Judiciary Committee bill. So while there have been three different committees that have reported their suggestions to the Congress on this issue, the committees in the House of Representatives and one committee here have reached different conclusions than that of the Intelligence Committee, where they have recommended that retroactive immunity be granted to the telecom industry for having kept over the last 5 years sort of a vacuum-cleaner approach to telephone conversations, faxes, e-mails that have been engaged in by Americans across the board.

This goes back immediately to after 9/11. As I said, had this been a temporary deviation from the norm, particularly in the wake of 9/11, I would not be standing here asking that retroactive immunity not be granted. But this program went on for 5 years. It only came to an end because of a revelation by whistleblowers and others that the program stop. This was 5 years of collecting data and information on U.S. citizens without a court order.

The FISA Court was established back in 1978 specifically to provide for warrants and court orders when such information was being solicited and needed to provide for the security of our country. I think these amendments that we need to update the FISA legislation are critically important, and I certainly want to see them adopted. But I believe it is going way beyond the pale in the midst of all this to extend retroactive immunity back to a group of companies that decided this was an appropriate request and they were going to comply with it. I would point out to my colleagues that not all companies did. If every single company complied with this, you might make the case that there was something going on that required, or certainly warranted, their decision to agree to this invasion of privacy without a court order. There were companies that said: No, we will not comply with that request absent a court order. That court order was never forthcoming and those companies did not engage, to the best of our knowledge, in the collection of this data and information.

Now I am not drawing the conclusion—but I have my opinions about this—as to whether what the companies did was legal or illegal. That is not a matter for 51 of us here by a majority vote to decide. That is a matter for which the courts exist in this country. It is not a matter for the executive branch to decide. It is why we have three coequal branches of Government.

When matters such as this arise, raising the legality of certain actions, then that matter ought to be appropriately decided by that third coequal branch of Government, as the Framers intended, in exactly these kinds of cases; that is, the matter to determine whether those who are suggesting that these telephone companies did exactly what they should have done under the circumstances. There are many here and elsewhere who believe otherwise, and while short of reaching a determination as to legality, believe that the courts ought to make that determination.

There are some 40 cases now pending before the courts on this very matter. If we take the action adopted by the Intelligence Committee, we will never, ever know whether these actions were legal, whether the privacy of millions and millions of Americans were invaded. Once we have set the precedent of allowing this retroactive immunity to go forward, why not then in other areas outside of the case of telecommunications? What about medical records? What about financial records? The Congress will have voted that it is all right to grant retroactive immunity. The next time an American President asks these companies or other companies to engage in similar activities, why not use the precedent established by the telecommunications industry to comply with that request absent a court order?

These are critical moments involving the rule of law—the rule of law—not the whim of a President, any President. Given the pattern of behavior of this administration over the last 6 or 7 years, in example after example where there has been a disregard, in my view, of the rule of law and the Constitution of the United States, what more does this body need to understand in this matter than to once again grant this administration a pass and in effect say to those companies: It doesn't make any difference. We don't know whether what you did was legal, but you get a pass on this right now. I think nothing could be more dangerous than to allow that precedent to go forward without us insisting that the courts be allowed to exercise their judgment in these matters.

There are arguments that have been raised on why we shouldn't let this happen. One: It might hurt these companies financially. That argument is so offensive I hesitate to make it even on behalf of those who would argue it. The idea that some financial injury is far more important than the rule of law ought to be offensive to every American, whether you agree or disagree with whether these companies did the right thing, or somehow that these companies had no idea what they were doing; they went along with this because an American President asked for it.

I would point out that in 1978, during the drafting of the FISA legislation, many of these companies were directly involved in the drafting of that legislation. They knew exactly what the law is in this area. I would further point out that it has been reported to the press that there have been more than 18,000 requests of FISA Courts over the last 30 years when it has come to these kinds of inquiries. In all but 5 cases, out of the more than 18,000 requests, the FISA Courts have complied with executive branch requests for warrants to invade or to engage in surveillance activities. Only in 5 cases were they rejected, out of more than 18,000 requests. That is better than 99.9 percent of the cases. Why not in this one? Why were the courts not solicited to provide the kind of approval for the court orders that would have allowed for this surveillance to go forward? It is not a minor point. It is a huge point.

I would further point out that the administration, of course, originally requested that immunity be granted not only to the telecommunications industry but everyone involved in this matter. Thanks to the wisdom of Senator ROCKEFELLER and Senator BOND, that broad request was rejected, and I thank them for it. But it is important that our colleagues understand that that is what they wanted to do; They wanted total immunity for everyone involved in this 5-year plan. But the committee wisely rejected that request and narrowed the immunity only to the telecommunications industry. But nonetheless, I think all of us understand the net effect. If we grant retroactive immunity as requested by this legislation, then we will never get to the bottom of what occurred here, and once again, opening the door to possible future violations.

It is being suggested by some: Well, this is just a bunch of Democrats going after a Republican administration. I will tell my colleagues that if this were a Democratic administration, I would be standing here with as much passion as I am today. This is not about Republicans or Democrats, liberals or conservatives; it is about the rule of law. It is about the Constitution of the United States. All of us here, regardless of political ideology or what party we affiliate with, this is a matter that transcends all of that. We ought to—as we have sworn to do when we raised our right hand in the well of this body, as each one of us has here as Members of this institution—protect and defend the Constitution of the United States. Nothing less than that is being asked of us when we vote on this matter: to strike this provision and allow the courts to do their work; to determine whether, as those who are advocating for retroactive immunity assert, that this was an appropriate and proper response by these companies, or to draw the different conclusion that it was not and that it was inappropriate, illegal, and improper for them to do what they have done; and that all other bodies in this country, private or otherwise, need to understand when this administration or any administration makes a similar request in the future, the Congress has spoken on this matter, so that they do so only when they receive those kinds of court orders and then provide that kind of immunity which, in every single case in the past, they have when the court order has been approved by the FISA Courts. That is the sum and substance of this debate.

There are various other arguments for immunity, including the argument that somehow you can't protect private information. As one Federal judge has already pointed out—I might point out a Republican appointee to the bench—what are we all hiding from? We all know this went on. This is not some secret. We all know that for 5 years or more, this information was being vacuumed up. That is no longer a secret. What is potentially a secret is how this was done—methods and means—and I appreciate those who want to make sure that we don't allow for the revelation of that kind of information. But there are ample examples of how the Federal courts have handled these matters in the past, acting in a way that protects this kind of information. The suggestion that this is too dangerous to allow these matters to go forward I don't think is a valid argument, particularly when you are going to sweep across retroactive immunity. There are plenty of examples. In fact, I would note that the Presiding Officer—I don't know this, but I presume in his previous life as an attorney general—faced matters in his own State where certain private information had to be kept private and secret and there were matters before the courts before which he operated where that was exactly the case. I have listened to other attorneys general cite examples where there was privacy and other information that did not belong in the public domain and was protected. So the argument that somehow we can't run the risk of allowing the Federal courts to handle these matters given the revelation of information that otherwise shouldn't be in the public domain—I don't buy that argument either. But those are the arguments for having retroactive immunity on this legislation.

I have spoken at great length about this in the past and I appreciate the indulgence of the chairman and others to listen to me over and over again on this subject matter. But this is a matter I care deeply about and I know others do too. This is not a Democrat standing up here trying to cause trouble for a Republican administration. That is an offensive argument. I think we know each other well enough to respect and understand that these are serious debates and serious arguments. The tension that has existed for the life of our great Republic is this debate today, how do we protect the rights and liberties of our American citizens and simultaneously protect our people from those who would do us great harm and injury. It is not an easy debate; I understand that. But it is one that is as old as our Republic, to make sure

that we maintain those rights and liberties while simultaneously fulfilling that obligation to protect our citizens from those who would do us great harm. I believe the tension is such that I don't believe we want to give up these rights, these important systems we put in place. In fact, the very FISA Courts as they exist were designed to specifically address that balance more than 30 years ago, and I believe on some 30 different occasions over the years we have amended the FISA legislation to allow us to stay current with technologies that could be used against us as well as allowing those technologies that allow us greater opportunity to learn about those who would do us harm. So over the years we have made those recommendations. Almost unanimously—and I believe I am correct in that assessment—previous Congresses have adopted those recommendations and suggestions. To suggest, as was done here, that because of Senator FEINGOLD's amendments dealing with reverse targeting and bulk collections, that somehow we are violating that history, I think is wrong. I think those suggestions are worthwhile and warranted, and it can improve not only what we are doing technologically in this bill, but also fulfilling the second part of that obligation, and that is to protect the rights of our citizenry.

It is truly a false dichotomy to suggest that we can only become more secure by giving up rights. I think that is a very dangerous argument to make. Too many in this country are subscribing to it today. That is exactly the opposite of what the case ought to be: that we become more secure when we insist upon those rights and liberties. That has been the history of our great country. In every single example I can think of when we have allowed our rights to be shortchanged to the argument of security, we look back historically and regret those moments. When we think about the internment of Japanese Americans during World War II and other examples, I think all of us look back and regret those moments, if we did anything but give our country more security. We have had great moments when we stood up for the rights and liberties of our fellow citizens in the face of arguments that our security was in jeopardy if we didn't somehow tailor those rights and liberties to give us additional security. I think that is the same argument today. I think we will be a proud body by rejecting this piece of the bill before us, allowing the courts to do their job as the Framers intended them to do, to determine the legality of the actions taken by these companies at the request of this administration, to allow them to make that decision, not by some vote in this body that would allow these matters to be swept aside for all of history without ever knowing whether we did great damage to the rights and liberties of our fellow citizens.

I will make additional arguments here tomorrow, but I want to reserve time because here we are on Super Tuesday and a lot of people are not here who want to engage in this debate. So I will reserve the remainder of my time so that others can be heard on this matter when it comes up either tomorrow or whenever the matter comes back to the floor. But I appreciate the managers of this legislation giving me a few minutes to make my case on this issue. I have said so many times before, and I will say again, JAY ROCKEFELLER and KIT BOND are very good friends of mine. I have great admiration for these men. We have served a long time together here. They don't have an easy job. This is a very difficult committee to have to work on, given the difficult matters they are faced with. I am sure they understand that my objections are not about our friendship or my respect for the work they do, but about a fundamental disagreement. I admire what they are trying to do, I respect the job they have been asked to do, and I thank them for it.

The PRESIDING OFFICER. The Senator from Missouri is recognized.

Mr. BOND. Mr. President, I thank my good friend from Connecticut for the kind words. We are delighted to have him back, although some would wish that he were otherwise occupied tonight. But we welcome him back and welcome him to the debate. I express my appreciation for the kind words he said about me in Iowa. It didn't do much good in Iowa, but I always appreciate them.

On this debate, however, I respectfully say that my good friend, with whom I have worked on many measures and intend to work with on many more, is dead wrong. He is correct that the FISA law was passed in 1978, but the problem is it has been superseded by technological changes. The technology of transmission of signals changed significantly. He probably was not here when I mentioned it earlier, but when the terrorists struck on 9/11, there was a question of how we could prevent further attacks that were planned and some of them were under way. The appropriate intelligence community officials recommended electronic surveillance and noted that since the laws had not changed, but technology had changed, it was quite likely that FISA, as it existed from 1978, even with minor tweaks, would not accommodate the collection that was needed. The intelligence community leaders and the administration leaders addressed this with the Gang of 8, the leaders of both parties, both Houses, and both sides of leadership on the Intelligence Committees, and they concluded that there was not time to change the law, so the President went ahead, using his article II powers as enhanced by the authorization for the use of military force. The President issued orders and, for the most part, the Attorney General signed off on it when he was available. The Director of National Intelligence issued them, and companies, understanding the urgency of providing collection against foreign terrorists—this was directed against foreign terrorists calling into the United States—complied.

Now, the fact that one or two may not have complied speaks no praise for those companies, because if they failed to comply with what I have reviewed and believe to be valid orders of the Federal Government, and as a result, communications that might have tipped off an imminent attack on the United States of America were missed, then it would be a great shame for those companies.

Now, I cannot speak for the other body. I do say that the Judiciary Committee, which has broad jurisdiction over many important things—and I respect the leadership of that Committee—doesn't spend the time that we in the Intelligence Committee do on intelligence matters—going out to NSA, having people come before us, being briefed, going through laboriously technical operations that allow these searches and surveillance, and going through and listening and observing the means of assuring that these functions are carried out in compliance not only with constitutional directions but the regulations and the statutes of the United States is very important. We have seen the oversight. There is the supervisor and the inspector general who act as an independent check; the Department of Justice lawyers who come and review it from their standpoint; but also the Intelligence Committees in both Houses, which have not only the right but the responsibility to oversee this.

Based on that, our committee determined and reported out a measure saying it was absolutely essential for the continued security of this country to eliminate lawsuits that had been filed against a number of carriers alleging that they may have participated in this activity.

Now, why is that a problem? Well, today, we had open hearings involving the DNI, the Director of the FBI, the Director of the CIA, the Director of the Defense Intelligence Agency, and the Deputy Secretary of State for the INR Division. We asked all of them why it was essential that they provide retroactive liability protection.

The first and most important concern raised was that allowing these lawsuits to continue against the company—my colleague from Connecticut is right. We permit cases to go forward against the Government or Government officials. We are just protecting private companies. It is the pleadings, the discovery, and the testimony that would inevitably tell us, and the terrorists, much more about the operations of the program than the terrorists ought to know. In May of 2006, after the disclosures of this terrorist surveillance, GEN Mike Hayden came before our committee for confirmation. I asked him: What impact has the disclosure of our terrorist surveillance

program had on the collection of intelligence from foreign terrorists and suspected terrorists? He smiled and said, ruefully: We are applying the Darwinian theory to terrorists. We are only collecting the dumb ones.

I can assure you the people we want to listen in to are the very clever, very witty, very diabolical, murderous heads of al-Qaida and other terrorist organizations who want to do great bodily harm to the United States. They think, what we can do to tell them more about it, which would tell them how to evade even the means of collection that we have left available, that would leave our intelligence community deaf and blind to threats not only to this country, which is most important to all of us but to our allies and our troops overseas.

All the heads of the intelligence agencies I mentioned said one of the most important things we can do is provide this retroactive liability protection because, without it, then the private carriers—the telecom companies—will no longer participate voluntarily to requests from Government entities. We have many areas where the telecommunications companies work with the Federal Government—whether it is tracking a missing child, tracking down a sex offender or, on another level, breaking up a drug cartel or, on another level, protecting against cyber attacks from other countries. If litigation is allowed to proceed against these companies, not only will it likely describe in detail the means that our intelligence community uses to collect information, it will put the companies in such dire straits in terms of business reputation here and abroad that it will be a very serious blow to the shareholders, to the pension funds that own the companies, and it will lead the counsel for those companies to say: never participate with the Federal Government again.

This could be a disaster for effective collection. I believe it was the consensus of those present at our hearing today—the Director of the FBI, the Director of CIA, the general in charge of the Defense Intelligence Agency, Under Secretary in charge of INR, and Admiral McConnell, the DNI—that retroactive liability protection for any carriers that may have participated, as well as carriers that are getting sued that didn't participate, that cannot exercise the state secrets to protect them, it will ensure that we don't get protection, don't get the cooperation from these telecommunications carriers when we need it.

We have worked hard on this measure. After reviewing all the information available to us, including opinions and authorizations that we reviewed in the executive office, the committee determined, on a strong bipartisan basis, that the providers acted in good faith pursuant to representations from the highest level of the Government, that the TSP was lawful.

We worked hard to fashion a limited liability protection provision that serves the dual purpose of ending the litigation against the providers while allowing the cases against the Government to continue. Go ahead and attack the Government. There is no shortage of that in this body. I have heard it previously earlier today. That is part of our role on a partisan basis. We exchange criticism of the other party and particularly the administration when it is of the other party. We can make our best arguments. But we need to stop investigations, for example, by State public utility commissions of the providers' conduct under the TSP.

These investigations involve very sensitive, classified information that no public service commission or public utility commission is competent to handle, maintaining the secrecy, the confidentiality we need of our collection methods. We know this program has inflicted no harm on our citizenry and has protected us from harm.

I invite my colleagues, once again, to go to the fourth floor confidential classified hearing room or come to the Intelligence Committee's offices in Hart, if they want to see, from the Director of National Intelligence, a list of things that have been accomplished under the Protect America Act because collecting this electronic information is vitally important. It is right up there with interviewing detainees—high-value detainees—in providing us our most valuable information. To strike this provision of retroactive liability protection from the bill would significantly lessen our ability to collect intelligence and will make our country much less safe.

I ask that my colleagues vote against it. I will shortly yield time to my colleague and the chairman of the committee. At this point, I ask unanimous consent that the pending amendment be temporarily set aside.

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

AMENDMENTS NOS. 3938 AND 3941, AS MODIFIED

Mr. BOND. Mr. President, I call up amendments numbers 3938 and 3941 and ask unanimous consent that they both be modified with the changes at the desk.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

The clerk will report.

The legislative clerk read as follows:

The Senator from Missouri [Mr. BOND] proposes amendments numbered 3938 and 3941, en bloc.

Mr. BOND. I ask unanimous consent that reading of the amendments be dispensed with.

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

The amendments are as follows:

AMENDMENT NO. 3938, AS MODIFIED, TO AMENDMENT NO. 3911

On page 70, strike line 1 and insert the following:

SEC. 110. WEAPONS OF MASS DESTRUCTION.

(a) DEFINITIONS.—

(1) FOREIGN POWER.—Subsection (a)(4) of section 101 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801(a)(4)) is amended by inserting '', the international proliferation of weapons of mass destruction,'' after ''international terrorism''.

(2) AGENT OF A FOREIGN POWER.—Subsection (b)(1) of such section 101 is amended—

(A) in subparagraph (B), by striking ''or'' at the end

(B) in subparagraph (C), by striking ''or'' at the end; and

(C) by adding at the end the following new subparagraphs:

''(D) engages in the international proliferation of weapons of mass destruction, or activities in preparation therefor; or

''(E) engages in the international proliferation of weapons of mass destruction, or activities in preparation therefor, for or on behalf of a foreign power; or''.

(3) FOREIGN INTELLIGENCE INFORMATION.—Subsection (e)(1)(B) of such section 101 is amended by striking ''sabotage or international terrorism'' and inserting ''sabotage, international terrorism, or the international proliferation of weapons of mass destruction''.

(4) WEAPON OF MASS DESTRUCTION.—Such section 101 is amended by inserting after subsection (o) the following:

''(p) 'Weapon of mass destruction' means—

''(1) any destructive device described in section 921(a)(4)(A) of title 18, United States Code, that is intended or has the capability to cause death or serious bodily injury to a significant number of people;

''(2) any weapon that is designed or intended to cause death or serious bodily injury through the release, dissemination, or impact of toxic or poisonous chemicals or their precursors;

''(3) any weapon involving a biological agent, toxin, or vector (as such terms are defined in section 178 of title 18, United States Code); or

''(4) any weapon that is designed to release radiation or radioactivity at a level dangerous to human life.''.

(b) USE OF INFORMATION.—

(1) IN GENERAL.—Section 106(k)(1)(B) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1806(k)(1)(B)) is amended by striking ''sabotage or international terrorism'' and inserting ''sabotage, international terrorism, or the international proliferation of weapons of mass destruction''.

(2) PHYSICAL SEARCHES.—Section 305(k)(1)(B) of such Act (50 U.S.C. 1825(k)(1)(B)) is amended by striking ''sabotage or international terrorism'' and inserting ''sabotage, international terrorism, or the international proliferation of weapons of mass destruction''.

(c) TECHNICAL AND CONFORMING AMENDMENT.—Section 301(1) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1821(1)) is amended by inserting '' 'weapon of mass destruction','' after '' 'person',''.

SEC. 111. TECHNICAL AND CONFORMING AMENDMENTS.

On page 84, line 12, strike ''and 109'' and insert ''109, and 110''.

On page 87, line 12, strike ''and 109'' and insert ''109, and 110''.

On page 87, line 21, strike ''and 109'' and insert ''109, and 110''.

On page 88, line 10, strike ''and 109'' and insert ''109, and 110''.

AMENDMENT NO. 3941, AS MODIFIED, TO AMENDMENT NO. 3911

On page 13, strike lines 3 through 13, and insert the following:

''(C) STANDARDS FOR REVIEW.—A judge considering a petition to modify or set aside a directive may grant such petition only if the judge finds that the directive does not meet the requirements of this section, or is otherwise unlawful.

''(D) PROCEDURES FOR INITIAL REVIEW.—A judge shall conduct an initial review not later than 5 days after being assigned a petition described in subparagraph (C). If the judge determines that the petition consists of claims, defenses, or other legal contentions that are not warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law, the judge shall immediately deny the petition and affirm the directive or any part of the directive that is the subject of the petition and order the recipient to comply with the directive or any part of it. Upon making such a determination or promptly thereafter, the judge shall provide a written statement for the record of the reasons for a determination under this subparagraph.

''(E) PROCEDURES FOR PLENARY REVIEW.—If a judge determines that a petition described in subparagraph (C) requires plenary review, the judge shall affirm, modify, or set aside the directive that is the subject of that petition not later than 30 days after being assigned the petition, unless the judge, by order for reasons stated, extends that time as necessary to comport with the due process clause of the fifth amendment to the Constitution of the United States. Unless the judge sets aside the directive, the judge shall immediately affirm or affirm with modifications the directive, and order the recipient to comply with the directive in its entirety or as modified. The judge shall provide a written statement for the records of the reasons for a determination under this subparagraph.

On page 13, line 14, strike ''(D)'' and insert ''(F)''.

On page 13, line 17, strike ''(E)'' and insert ''(G)''.

On page 14, strike lines 10 through 19, and insert the following:

''(C) STANDARDS FOR REVIEW.—A judge considering a petition filed under subparagraph (A) shall issue an order requiring the electronic communication service provider to comply with the directive or any part of it, as issued or as modified, if the judge finds that the directive meets the requirements of this section, and is otherwise lawful.

''(D) PROCEDURES FOR REVIEW.—The judge shall render a determination not later than 30 days after being assigned a petition filed under subparagraph (A), unless the judge, by order for reasons stated, extends that time if necessary to comport with the due process clause of the fifth amendment to the Constitution of the United States. The judge shall provide a written statement for the record of the reasons for a determination under this paragraph.

On page 14, line 20, strike ''(D)'' and insert ''(E)''.

On page 14, line 24, strike ''(E)'' and insert ''(F)''.

Mr. ROCKEFELLER. If the Senator will yield, it is very important for a particular person on this floor to be able to, within the next 15 minutes—and for a particular reason—say some things that are very important to her, not on either of our pending amendments, the two amendments you and I are about to offer. The Senator has already approached the Parliamentarian in this matter. I ask if the Senator from Missouri would be willing to allow the Senator from Washington to speak on a different subject for 15 minutes for a very good reason.

Mr. BOND. Mr. President, I have no intention of continuing this discussion.

These are amendments, I hope, will be accepted. Chairman ROCKEFELLER and I will describe them later. I ask that our time be reserved, and I defer to Members on the other side who may wish to go into morning business.

The PRESIDING OFFICER. The Senator from West Virginia is recognized.

Mr. ROCKEFELLER. Mr. President, understanding whatever it is that the Senator from Arizona decides he wants to do, there is a particular reason and a particular time constraint that the Senator from Washington has to speak now. That is why I asked that she be allowed to speak in morning business. She will make that request, and I hope there will be no objection to it.

Mr. KYL. Mr. President, I have no objection to that. But I would like to add that when the Senator from Washington has concluded her remarks, I be recognized for my remarks.

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

The Senator from Washington is recognized.

Ms. CANTWELL. Mr. President, I ask unanimous consent to speak as in morning business for up to 15 minutes and that the time not be counted against the debate on the FISA legislation.

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

STIMULUS PACKAGE

Ms. CANTWELL. Mr. President, I rise today to speak about clean energy production tax credits, investment tax credits, and the energy efficiency provisions in the pending stimulus package, which I think are critical to restoring economic growth in America and continuing what is a burgeoning industry that is helping us create jobs and economic stimulus across our country. We are talking about tax credits that are a proven stimulus and business investment. They give consumers, in this case, energy efficiency credits of up to $500 to make energy efficiency improvements to their homes, which could save homeowners as much as $800 per year in avoided energy costs. We are talking about $20 billion of stimulus and 116,000 jobs that could be impacted.

The bottom line is the renewable energy industry generated over $40 billion of revenue in 2006 and accounted for 450,000 direct and indirect jobs last year. So we know that clean energy is one of the fastest growing sectors of our economy. But by failing to act when we didn't pass these critical tax incentives last year, we caused turbulence in what is a very new and growing industry. And if the Senate rejects these incentives now, we could put this industry in a tailspin by not giving them predictability on their tax credits. That is why it is so important we pass the stimulus package tomorrow.

Let's talk about what we are hearing from some of those in the industry who know this sector very well. The Alliance to Save Energy, a group of business, government, and consumer leaders, committed to seeing this country take advantage of cost savings from efficiency have said:

> Energy efficiency tax incentives put money into the economy by encouraging the purchase of energy efficient products and services.

This group has representatives of this body as part of that alliance. Their job is to advocate for policies to help this industry grow. What are we hearing from particular industries? I like this chart particularly because so many of my colleagues—I do it, and so many on the other side, and even the President of the United States speaks at these various clean energy industry plant sites and advocate and are excited about the jobs they create. But sometimes it stops there and after the ribbon cutting they fail to support the necessary policies. That is why recently a particular solar company CEO made this statement:

> The Senate can ensure that we keep the economic engine moving forward and extend the solar tax credits as part of the economic stimulus bill.

That is directly from the solar industry that we politicians like to stand in front of and talk about jobs being created. Here is somebody who was the prop behind one of these events in the last week, and they are telling us to pass this tax credit in the stimulus package.

What are we hearing from a consortium of those in the industry? We are hearing from one consolidated report of the renewable industry that said:

> Over 116,000 U.S. jobs, and nearly $19 billion—

This is just on solar, wind, and other renewable electricity sources—

> nearly $19 billion in U.S. investment could be lost in one year if renewable energy tax credits are not renewed by Congress.

That report came out earlier this week.

The reason why people are so concerned about this is because what we have seen traditionally—and we can see on this chart that in 2000, 2002, and 2004 where we did not give predictability to this industry by saying we are going to continue the tax credit policy—what happened is a 93-percent drop in investment; in 2000. In 2002, a 73-percent drop in investment; and again in 2003, another 77-percent drop in investment.

Here is where this industry is now in 2007. It is a growing industry. As I said, in 2006, it was $40 billion in revenue and over 450,000 direct and indirect jobs. And we are about to kill this level of investment and put it into a tailspin by not continuing this tax policy.

In fact, that is exactly what this solar industry CEO, who had the pleasure of standing there with Governor Schwarzenegger and others, said. He said Federal tax credits for solar energy are about to expire. They are about to expire and it will send the solar industry into a tailspin.

It doesn't have to get any clearer than that: CEOs of companies that are the backdrop of great press events telling us we are about to send their industries into a tailspin. I suggest we instead pass these tax incentives and get

on with what could be certainty in tax policy.

What I like about wind is the fact that it is happening in lots of places across this country, but it is also giving farmers a second crop. Almost 200 members of the American Wind Energy Association have sent us a letter saying that ''companies in our industry are already reporting a decrease in investment as a result of the uncertainty surrounding tax policy.'' They are saying they are already seeing people starting to cancel projects.

We want to help our economy grow, and there is stimulus in these tax incentives, but I ask my colleagues to consider what is going to happen when they do not renew them. They are actually going to cause more damage to the economy because people are going to start canceling projects.

Let me explain. This same report by Navigant came out earlier this week and got very specific as to which States had significant investment by renewable companies and exactly what was going to happen both in the loss of opportunity for new jobs and in actually having jobs cut when there is not predictability.

Texas, one of the biggest investors from a wind production side, could lose a future opportunity and existing jobs of upwards of 23,000; Colorado, 10,000; Illinois, 8,000; Oregon, 7,000; Minnesota, 6,000 plus; Washington State, nearly 5,000 jobs are at stake. The list goes on to other States that have made incredible progress in renewable energies that are creating jobs, and all these jobs are at stake for the future and some of them represent jobs where people are getting a paycheck today. Instead, they will take our rebate check, if we pass the House bill, and they will receive a pink slip because their jobs are not going to be there anymore. That is why we have to pass this package.

In fact, I want to give examples of two specifics where people will actually lose jobs.

Noble Environmental Power is developing projects for wind in New York and Texas, and they plan to construct two parks in New York State and two in Texas. If the production tax credit is not extended, these projects will not be built which will eliminate 1,200 full-time construction jobs. That is 600 jobs in each State.

In addition, the company in its head count will be cut from 220 to 120 because they will also cut other jobs related to planning. In fact, if we do not give them this predictability this year, in 2008, $200 million in orders for equipment will be canceled. That is stimulus, $20 million that will not be made because they do not have certainty and they are going to cancel their plans for equipment.

Additionally, $18 million in engineering services are going to be canceled because they do not have predictability in this Tax Code.

Again, if the production tax credit is not extended, 600 full-time construction jobs will be eliminated in each State, New York and Texas.

Another example. Safeway, which is a major grocery store chain, is planning on retrofitting additional stores with solar panels. Why are they doing that? Because they know they can get offset rising energy costs out of those solar panels. They are looking at 15 additional stores with solar panels and injecting an additional $30 million into the economy if the solar investment credit is extended. If it is not extended, these jobs are going to be in jeopardy.

Here are companies trying to help us stimulate the economy, create jobs, lower energy costs, and I am sure that helps with the bottom line of food costs in America, and yet we are not giving them predictability.

We also saw in my home State of Washington a company, Wellons, a leader in wood-fired energy systems, say they are going to mothball up to 20 projects unless they get the production tax credit. That means that some of the 500 people in this particular company will be laid off.

I think the Arizona Republic said it best. In fact, they had an editorial this week that said:

> The economic stimulus package from Congress . . . should include an extension of tax credits for renewable energy sources. For Arizona—

And I think this is similar for many other States, but Arizona is a leader in this area—

> the continued development of our solar industry is at stake.

That is why we need these credits. We had today the Los Angeles Times say:

> Investors won't pump money into clean power if there is a danger of losing their tax incentives . . . green technology is an extremely promising growth industry that could help make up for the loss of manufacturing jobs.

That is another editorial from today.

We know this, and yet we somehow want to pretend that the elimination of these tax credits does not matter. I know it matters to Governors because we have heard from the Governors of Iowa, Illinois, Indiana, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, South Dakota, and Wisconsin:

> We know that uncertainty of the future of a wind production tax credit must be avoided if this burgeoning industry is going to thrive in the years ahead.

So we are hearing from our Governors who are on the ground wanting to approve these projects knowing how much they mean to their local economies, and yet we are ignoring that.

We also heard from a growing industry partner, the American Corn Growers Association. They said:

> If President Bush will agree with the inclusion of the production tax credit in the stimulus package, he will be adding numerous jobs to our economy.

Why is that? Because this industry sees that this is a good partner. It is actually helping them with additional revenue, and it is helping those Midwest economies continue to grow.

What about the National Farmers Union, another organization, which said:

> Encourage your support including important renewable energy tax incentives in the economic stimulus package currently being considered by Congress.

The Farmers Union obviously knows this means jobs in their local economy. But for them, it also means that instead of paying the high prices of natural gas and not having any product compete with it, that having renewable energy generate an additional 6,000 megawatts of power can actually get alternative sources of electricity in the market and lower the demand on natural gas and thereby lowering the price. That helps lower the cost of fertilizer. It is critically important.

This past week, we had 41 Senators sign a letter, including 14 of my colleagues on the other side of the aisle, who agree that:

> Extending these expiring clean energy tax credits will help ensure a stronger, more stable environment for new investments and ensure continued robust growth in a bright spot in an otherwise slowing economy.

I ask unanimous consent to have printed in the RECORD this letter of bipartisan support.

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

U.S. SENATE,
Washington, DC, January 25, 2008.

Hon. HARRY REID,
Senate Majority Leader,
Washington, DC.
Hon. MAX BAUCUS,
Chairman, Senate Committee on Finance, Washington, DC.
Hon. MITCH MCCONNELL,
Senate Republican Leader,
Washington, DC.
Hon. CHARLES GRASSLEY,
Ranking Member, Senate Committee on Finance, Washington, DC.

DEAR SENATORS REID, MCCONNELL, BAUCUS, AND GRASSLEY: We strongly support current bipartisan efforts to mitigate an economic downturn by providing direct financial relief to American families. At the same time, we believe that we must be cognizant that energy prices have been a leading cause of our current economic environment. Accordingly, we strongly believe that we must provide a timely long-term extension of clean energy and energy efficiency tax incentives that expire at the end of this year. Given record energy prices and growing demand, postponing action on these critical energy incentives will only exacerbate the problems afflicting our economy. In fact, these renewable energy and energy efficiency investments have a verifiable record of stimulating capital outlays and promoting job growth. We must ensure that this impressive record is maintained in 2008 and extend these tax credits expeditiously.

Over one hundred thousand Americans could be put to work in 2008 if clean energy production tax credits were extended in the first quarter of this year according to industry estimates. However, because the incentives are set to expire this year. renewable energy companies are already reporting a precipitous decrease in investment due to uncertainly. Projects currently underway

may soon he mothballed. Clean energy incentives for energy efficient buildings. appliances and other technologies, as well as additional funding for weatherizing homes. would similarly serve to stimulate 2008 economic consumption, lower residential energy costs, and generate new manufacturing and construction jobs.

Failing to act on these crucial incentives could choke off promising business investment in 2008 and miss an opportunity to address high energy costs. a critical contributor to sinking consumer confidence and our nation's long-term economic challenges. Extending these expiring clean energy tax credits will help ensure a stronger, more stable environment for new investments and ensure continued robust growth in a bright spot in an otherwise slowing economy. To that end we look forward to working with you to extend these critical tax incentives in context of encouraging economic growth and vitality.

Sincerely,

Maria Cantwell; Olympia Snowe; Ron Wyden; Gordon Smith; Amy Klobuchar; John F. Kerry; Ken Salazar; Debbie Stabenow; Elizabeth Dole; Bernard Sanders; John E. Sununu; Barbara Boxer; Wayne Allard; Robert Menendez; Susan M. Collins; Tim Johnson; Byron L. Dorgan; Sam Brownback; Russell Feingold; Arlen Specter; Barbara A. Mikulski; Evan Bayh; Barack Obama; Patty Murray; Hillary Rodham Clinton; Carl Levin; John Cornyn; Sherrod Brown; Chris Dodd; Dianne Feinstein; Lisa Murkowski; Norm Coleman; Chuck Schumer; Ted Stevens; Frank R. Lautenberg; Patrick Leahy; Herb Kohl; Daniel K. Akaka; Pat Roberts; Richard Burr; Ben Cardin.

Ms. CANTWELL. Mr. President, we also received letters from 13 different organizations that also support the inclusion of these provisions in the tax package.

This is truly an opportunity for us to continue to stimulate the economy in a key growth area, but my colleagues should not be fooled. This is probably the only opportunity to do extend these credits before they expire. We have had a dispute between the House and the White House and Members of the Senate about how to move forward on these tax credits. Some want them paid for while taking money from oil revenues. Others, such as the White House, don't want them paid for at all.

This is an opportunity for us if we are going to do $150 billion worth of investment in what we think is an economic opportunity to get one of the best returns on investment in this stimulus package; that is, to invest about $5 billion and see over $20 billion in new energy investment in this country.

I hope my colleagues will consider this tomorrow and consider how much we truly need these budding clean energy industries to grow and thrive in our home States. Anyone who supports this industry has to vote for the Senate Finance bill or we could very well miss a key opportunity to stimulate our economy.

I yield the floor.

The PRESIDING OFFICER (Mr. WHITEHOUSE). The Senator from Arizona.

Mr. KYL. Mr. President, I wish to speak to the amendment offered by the Senator from Connecticut to the FISA bill, the Foreign Intelligence Surveillance Act, the amendment that would strike provisions from the bill that provide liability protection to those telecommunications companies that were asked by our Government to assist us in a dire time of need.

I begin by asking unanimous consent to have printed in the RECORD at the conclusion of my remarks a letter to Senator REID, dated February 5, 2008, and signed by Attorney General Mukasey and Director of National Intelligence Admiral McConnell.

(See exhibit 1.)

Mr. KYL. Mr. President, next, I would like to quote a few passages from this letter that relate specifically to this issue of liability protection. They begin by noting:

Liability protection is the just result for companies who answered their Government's call for assistance. Further, it will ensure that the Government can continue to rely upon the assistance of the private sector that is so necessary to protect the Nation and enforce its laws.

The point of beginning with this reference is to note the fact that what happened was that the U.S. Government, in the aftermath of 9/11, went to certain kinds of telecommunications and asked for their assistance in tracking down foreign terrorists, in providing intelligence-gathering services to the U.S. Government. These companies did not have a legal obligation to provide that support, but they certainly, as good citizens of the United States, undertook to provide the support, some of them in that capacity. The question is whether, having done that in good faith, they should now be protected from private lawsuits that have been filed against them or whether, as is the historic tradition in such circumstances, they would be immune from such lawsuits for volunteering to help the Government.

Here is a little bit of what Attorney General Mukasey and Admiral McConnell wrote in the letter.

In its report on S. 2248, 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 our Nation.''

The letter goes on to say:

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.

And that, in fact, has always been the common law rule in the United States of America. The concern is not only to protect those who were good enough to assist the Government in the past but also to ensure that in the future companies can rely upon this type of protection because of all of the situations in which they find themselves. It is very difficult for people to do business with them if they believe they might be hauled into court and all of the resultant effects of litigation would extend to them.

In the letter that Attorney General Mukasey and Admiral McConnell wrote to our leadership, they point out their objection to several amendments and one of those amendments is specifically the one offered by the Senator from Connecticut, striking the immunity provisions, No. 3907. They begin by discussing it in this way:

Extending liability protection to such companies is imperative; failure to do so could limit future cooperation by such companies and put critical intelligence operations at risk. Moreover, litigation against companies believed to have assisted the government risks the disclosure of highly classified information regarding extremely sensitive intelligence sources and methods. If any of these amendments—

And they specifically refer to this amendment—

. . . are part of the bill . . . we, as well as the President's other senior advisors, will recommend that he veto the bill.

We know we need a bill to become law. We know what the President will accept, and we know it would be unacceptable to strike the immunity provisions as amendment No. 3907 would do. But let me continue to quote from this letter, because the authors note something in addition to the problem I identified, and I will state from it precisely:

This amendment also would strike the important provisions in the bill that would establish procedures for implementing existing statutory defenses in the future and that would preempt State investigations of assistance provided by any electronic communication service provider to an element of the intelligence community. Those provisions are important to ensuring that electronic communication service providers can take full advantage of existing immunity provisions and to protecting highly classified information.

In other words, this amendment doesn't simply strike the immunity provisions but would also have this deleterious effect.

I want to quote from three other paragraphs of the bill, but I don't want to exceed 10 minutes. Therefore, I would ask how much time I have consumed.

The PRESIDING OFFICER. Five minutes has been consumed.

Mr. KYL. I thank the Chair.

Let me quote from three other paragraphs of the letter relating to this amendment. The authors are referring to the Intelligence Committee's extensive work on this particular aspect of the problem, and they say:

After reviewing the relevant documents, the Intelligence Committee determined that providers had acted in response to written requests or directives stating that the activities had been authorized by the President and had been determined to be lawful.

The letter goes on to note:

In its Conference Report, the committee ''concluded that the providers had a good faith basis'' for responding to the requests

for assistance they received. The Senate Intelligence Committee ultimately agreed to necessary immunity protections on a nearly unanimous bipartisan 13–2 vote. Twelve members of the committee subsequently rejected a motion to strike this provision.

The authors go on to note:

The immunity offered in S. 2248 applies only in a narrow set of circumstances.

They note, for example:

A court must review this certification before an action may be dismissed. This immunity provision does not extend to the government or government officials.

In other words, they can still be sued.

And it does not immunize any criminal conduct.

This is critical to understand what the amendment does not do.

Let me quote from the final paragraph relating to this particular amendment. Attorney General Mukasey and Admiral McConnell say:

Providing this liability protection is critical to the national security. As the Intelligence Committee recognized, ''the intelligence community cannot obtain the intelligence it needs without assistance from these companies.'' That committee also recognized that 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 committee concluded that: ''The possible reduction in intelligence that might result from this delay is simply unacceptable for the safety of our Nation.''

The authors then conclude:

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, the potential disclosure of classified information puts the facilities and personnel of electronic communication service providers at risk. For these reasons, we, as well as the President's other senior advisers, will recommend that he veto any bill that does not afford liability protection to these companies.

This is, I guess one could say, the definitive word of what the President is recommending and is willing to accept from the Congress. It comes from the two individuals in our Government who have the chief responsibility for our safety with respect to not only the protection of American civil liberties but also the gathering of foreign intelligence, and it extensively quotes from the report of the committee itself, the Intelligence Committee, which it notes acted in a bipartisan 13-to-2 vote to provide for this liability protection.

That is why it is so critical that when we have an opportunity to vote, I gather tomorrow or whenever we have an opportunity to vote on the amendment of the Senator from Connecticut, we reject that amendment on the grounds that it is contrary to the Intelligence Committee's actions, to the recommendations of the Attorney General and the Director of National Intelligence, and to the President with respect to the liability protection for these entities.

There is much we cannot discuss, because so much of this program is of a classified nature. But I think everybody understands the fundamental principle involved here, and that is: When citizens of the United States are asked by their Government to assist, and they agree to do that in good faith for the protection of citizens of the United States of America, they should be protected from lawsuits that have been filed. That is what the amendment of the Senator from Connecticut would do is to eliminate that protection, and it is why the amendment should be defeated.

I hope my colleagues are recognizing the seriousness of what these two authors of this letter have said when they recognize the seriousness of the potential consequences from failing to provide this kind of liability protection and that we will support the Intelligence Committee, we will support the intelligence community, and we will reject the amendment of the Senator from Connecticut.

EXHIBIT 1

FEBRUARY 5, 2008.

Hon. HARRY REID,
Majority Leader, U.S. Senate, Washington, DC.

DEAR SENATOR REID: This letter presents the views of the Administration on various amendments to the Foreign Intelligence Surveillance Act of 1978 (FISA) Amendments Act of 2008 (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.'' The letter also addresses why it is critical that the authorities contained in the Protect America Act not be allowed to expire. We have appreciated the willingness of Congress to address the need to modernize FISA and to work with the Administration to allow the intelligence community to collect the foreign intelligence information necessary to protect the Nation while protecting the civil liberties of Americans. We commend Congress for the comprehensive approach that it has taken in considering these authorities and are grateful for the opportunity to engage with Congress as it conducts an in-depth analysis of the relevant issues.

In August, Congress took an important step toward modernizing FISA by enacting the Protect America Act of 2007. That 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 executive branch, congressional, and judicial oversight, to meet the country's foreign intelligence needs while protecting civil liberties. Indeed, the Foreign Intelligence Surveillance Court (FISA Court) recently approved the procedures used by the Government under the Protect America Act to determine that targets are located overseas, not in the United States.

The Protect America Act was scheduled to expire on February 1, 2008, but Congress has extended that Act for fifteen days, through February 16, 2008. In the face of the continued threats to our Nation from terrorists and other foreign intelligence targets, it is vital that Congress not allow the core authorities of the Protect America Act to expire, but instead pass long-term FISA modernization legislation that both includes the collection authority conferred by the Protect America Act and provides protection from private lawsuits against companies that are believed to have assisted the Government in the aftermath of the September 11th terrorist attacks on America. Liability protection is the just result for companies who answered their Government's call for assistance. Further, it will ensure that the Government can continue to rely upon the assistance of the private sector that is so necessary to protect the Nation and enforce its laws.

S. 2248, reported by the Senate Select Committee on Intelligence, would satisfy both of these imperatives. That bill was reported out of committee on a nearly unanimous 13–2 vote. Although it is not perfect, it contains many important provisions, and was developed through a thoughtful process that resulted in a bill that helps ensure that both the lives and the civil liberties of Americans will be safeguarded. First, it would establish a firm, long-term foundation for our intelligence community's efforts to track terrorists and other foreign intelligence targets located overseas. Second, S. 2248 would afford retroactive liability protection to communication service providers that are believed to have assisted the Government with intelligence activities in the aftermath of September 11th. In its report on S. 2248, 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 basic legal role officials should not be held liable for their actions. Thus, with the inclusion of the proposed manager's amendment, which would make necessary technical changes to the bill, we strongly support passage of S. 2248.

For reasons elaborated below, the Administration also strongly favors two other proposed amendments to the Intelligence Committee's bill. One would strengthen S. 2248 by expanding FISA to permit court-authorized surveillance of international proliferators of weapons of mass destruction. The other would ensure the timely resolution of any challenges to government directives issued in support of foreign intelligence collection efforts.

Certain other amendments have been offered to S. 2248, however, that would undermine significantly the core authorities and immunity provisions of that bill. After careful study, we have determined that those amendments would result in a final bill that would not provide the intelligence community with the tools it needs to collect effectively foreign intelligence information vital for the security of the Nation. If the President is sent a bill that does not provide the U.S. intelligence agencies the tools they need to protect the nation, the President will veto the bill.

I. LIMITATIONS ON THE COLLECTION OF FOREIGN INTELLIGENCE

Several proposed amendments to S. 2248 would have a direct, adverse impact on our ability to collect effectively the foreign intelligence information necessary to protect the Nation. We note that three of these amendments were part of the Senate Judiciary Committee substitute, which has already been rejected by the Senate on a 60–34 vote. We explained why those three amendments were unacceptable in our November 14, 2007, letter to Senator Leahy regarding the Senate Judiciary Committee substitute, and the Administration reiterated these concerns in a Statement of Administration Policy (SAP) issued on December 17, 2007. A copy of that letter and the SAP are attached for your reference.

Prohibition on Collecting Vital Foreign Intelligence Information (No amendment number available). This amendment provides that ''no communication shall be acquired under [Title VII of S. 2248] if the Government knows before or at the time of acquisition that the communication is to or from a person reasonably believed to be located in the United States,'' except as authorized under Title I of FISA or certain other exceptions. The amendment would require the Government to ''segregate or specifically designate'' any such communication and the Government could access such communications only under the authorities in Title I of FISA or under certain exceptions. Even for communications falling under one of the limited exceptions or an emergency exception, the Government still would be required to submit a request to the FISA Court relating to such communications. The procedural mechanisms it would establish would diminish our ability swiftly to monitor a communication from a terrorist overseas to a person in the United States—precisely the communication that the intelligence community may have to act on immediately. Finally, the amendment would draw unnecessary and harmful distinctions between types of foreign intelligence information, allowing the Government to collect communications under Title VII from or to the United States that contain information relating to terrorism but not other types of foreign intelligence information, such as that relating to the national defense of the United States or attacks, hostile actions, and clandestine intelligence activities of a foreign power.

This amendment would eviscerate critical core authorities of the Protect America Act and S. 2248. Our prior letter and the Statement of Administration Policy explained how this type of amendment increases the danger to the Nation and returns the intelligence community to a pre-September 11th posture that was heavily criticized in congressional reviews. It would have a devastating impact on foreign intelligence surveillance operations; it is unsound as a matter of policy; its provisions would be inordinately difficult to implement; and thus it is unacceptable. The incidental collection of U.S. person communications is not a new issue for the intelligence community. For decades, the intelligence community has utilized minimization procedures to ensure that U.S. person information is properly handled and ''minimized.'' It has never been the case that the mere fact that a person overseas happens to communicate with an American triggers a need for court approval. Indeed, if court approval were mandated in such circumstances, there would be grave operational consequences for the intelligence community's efforts to collect foreign intelligence. Accordingly, if this amendment is part of the bill that is presented to the President, we, as well as the President's other senior advisors, will recommend that he veto the bill.

Imposition of a ''Significant Purpose'' Test (No. 3913). This amendment, which was part of the Judiciary Committee substitute, would require an order from the Foreign Intelligence Surveillance Court (FISA Court) 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 actual target, an order from the FISA Court is required. Indeed, S. 2248 codifies this longstanding Executive Branch interpretation of FISA.

The amendment 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. The introduction of this ambiguous ''significant purpose'' standard would raise unacceptable operational uncertainties and problems, making it more difficult to collect intelligence when a foreign terrorist overseas is calling into the United States—which is precisely the communication we generally care most about. Part of the value of the Protect America Act, 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.

In addition, the proposed amendment would create uncertainty by focusing on whether the ''significant purpose . . . is to acquire the communication'' of a person in the United States, not just to target the person here. To be clear, a ''significant purpose'' of intelligence community activities that target individuals outside the United States is to detect communications that may provide warning of homeland attacks, including communications between a terrorist overseas and associates in the United States. A provision that bars the intelligence community from collecting these communications is unacceptable. If this amendment is part of the bill that is presented to the President, we, as well as the President's other senior advisors, will recommend that he veto the bill.

Imposition of a ''Specific Individual Target'' Test (No. 3912). This amendment, which was part of the Judiciary Committee substitute, would require the Attorney General and the Director of National Intelligence to certify that any acquisition ''is limited to communications to which any party is a specific individual target (which shall not be limited to known or named individuals) who is reasonably believed to be located outside the United States.'' This provision could hamper United States intelligence operations that currently are authorized to be conducted overseas and that could be conducted more effectively from the United States without harming the privacy interests of United States persons. For example, the intelligence community may wish to target all communications in a particular neighborhood abroad before our armed forces conduct an offensive. This amendment could prevent the intelligence community from targeting a particular group of buildings or a geographic area abroad to collect foreign intelligence prior to such military operations. This restriction could have serious consequences on our ability to collect necessary foreign intelligence information, including information vital to conducting military operations abroad and protecting the lives of our service members, and it is unacceptable. Imposing such additional requirements to the carefully crafted framework provided by S. 2248 would harm important intelligence operations without appreciably enhancing the privacy interests of Americans. If this amendment is part of the bill that is presented to the President, we, as well as the President's other senior advisors, will recommend that he veto the bill.

Limits Dissemination of Foreign Intelligence Information (No. 3915). This amendment originally was offered in the Senate Intelligence Committee, where it was rejected on a 10–5 vote. The full Senate then rejected the amendment as part of its consideration of the Judiciary Committee amendment. The proposed amendment 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 relevant databases and extract certain 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. The effect of this burden would be to divert analysts and other resources from their core mission-protecting the Nation-to search for information, including information that does not concern United States persons. This requirement also stands at odds with the mandate of the September 11th Commission that the intelligence community should find and link disparate pieces of foreign intelligence information. Finally, the requirement would actually degrade—rather than enhance—privacy protections by requiring analysts to locate and examine United States person information that would otherwise not be reviewed. Accordingly, if this amendment is part of the bill that is presented to the President, we, as well as the President's other senior advisors, will recommend that he veto the bill.

II. LIABILITY PROTECTION FOR TELECOMMUNICATIONS COMPANIES

Several amendments to S. 2248 would alter the carefully crafted provisions in that bill that afford liability protection to those companies believed to have assisted the Government in the aftermath of the September 11th attacks. Extending liability protection to such companies is imperative; failure to do so could limit future cooperation by such companies and put critical intelligence operations at risk. Moreover, litigation against companies believed to have assisted the Government risks the disclosure of highly classified, information regarding extremely sensitive intelligence sources and methds. If any of these amendments is part of the bill that is presented to the President, we as well as the President's other senior advisors, will recommend that he veto the bill.

Striking the Immunity Provisions (No. 3907). This amendment would strike Title II of S. 2248, which affords liability protection to telecommunications companies believed to have assisted the Government following the September 11th attacks. This amendment also would strike the important provisions in the bill that would establish procedures for implementing existing statutory defenses in the future and that would preempt state investigations of assistance provided by any electronic communication service provider to an element of the intelligence

community. Those provisions are important to ensuring that electronic communication service providers can take full advantage of existing immunity provisions and to protecting highly classified information.

Affording liability protection to those companies believed to have assisted the Government with communications intelligence activities in the aftermath of September 11th is a just result and is essential to ensuring that our intelligence community is able to carry out its mission. After reviewing the relevant documents, the Intelligence Committee determined that providers had acted in response to written requests or directives stating that the activities had been authorized by the President and had been determined to be lawful. In its Conference Report, the Committee ''concluded that the providers . . . had a good faith basis'' for responding to the requests for assistance they received. The Senate Intelligence Committee ultimately agreed to necessary immunity protections on a nearly-unanimous, bipartisan, 13–2 vote. Twelve Members of the Committee subsequently rejected a motion to strike this provision.

The immunity offered in S. 2248 applies only in a narrow set of circumstances. An action may be dismissed only if the Attorney General certifies to the court that either: (i) the electronic communications service provider did not provide the assistance; or (ii) the assistance was provided in the wake of the September 11th attacks, and was described in a written request indicating that the activity was authorized by the President and determined to be lawful. A court must review this certification before an action may be dismissed. This immunity provision does not extend to the Government or Government officials, and it does not immunize any criminal conduct.

Providing this liability protection is critical to the national security. As the Intelligence Committee recognized, ''the intelligence community cannot obtain the intelligence it needs without assistance from these companies.'' That committee also recognized that 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 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, the potential disclosure of classified information puts the facilities and personnel of electronic communication service providers at risk.

For these reasons, we, as well as the President's other senior advisors, will recommend that he veto any bill that does not afford liability protection to these companies.

Substituting the Government as the Defendant in Litigation (No. 3927). This amendment would substitute the United States as the party defendant for any covered civil action against a telecommunications provider if certain conditions are met. The Government would be substituted if the FISA Court determined that the company received a written request that complied with 18 U.S.C. §2511(2)(a)(ii)(B), an existing statutory protection; the company acted in ''good faith . . . pursuant to an objectively reasonable belief'' that compliance with the written request was permitted by law; or that the company did not participate.

Substitution is not an acceptable alternative to immunity. Substituting the Government would simply continue the litigation at the expense of the American taxpayer. Substitution does nothing to reduce the risk of the further disclosure of highly classified information. The very point of these lawsuits is to prove plaintiffs' claims by disclosing classified information regarding the activities alleged in the complaints, and this amendment would permit plaintiffs to participate in proceedings before the FISA Court regarding the conduct at issue. A judgment finding that a particular company is a Government partner also could result in the disclosure of highly classified information regarding intelligence sources and methods and hurt the company's reputation overseas. In addition, the companies would still face many of the burdens of litigation—including attorneys' fees and disruption to their businesses from discovery—because their conduct will be the key question in the litigation. Such litigation could deter private sector entities from providing assistance to the intelligence community in the future, Finally, the lawsuits could result in the expenditure of taxpayer resources, as the U.S. Treasury would be responsible for the payment of an adverse judgment. If this amendment is part of the bill that is presented to the President, we, as well as the President's other senior advisors, will recommend that he veto the bill.

FISA Court Involvement in Determining Immunity (No. 3919). This amendment would require all judges of the FISA Court to determine whether the written requests or directives from the Government complied with 18 U.S.C. §2511(2)(a)(ii), an existing statutory protection; whether companies acted in ''good faith reliance of the electronic communication service provider on the written request or directive under paragraph (1)(A)(ii), such that the electronic communication service provider had an objectively reasonable belief under the circumstances that the written request or directive was lawful''; or whether the companies did not participate in the alleged intelligence activities.

This amendment is not acceptable. It is for Congress, not the courts, to make the public policy decision whether to grant liability protection to telecommunications companies who are being sued simply because they are alleged to have assisted the Government in the aftermath of the September 11th attacks. The Senate Intelligence Committee has reviewed the relevant documents and concluded that those who assisted the Government acted in good faith and received written assurances that the activities were lawful and being conducted pursuant to a Presidential authorization. This amendment effectively sends a message of no-confidence to the companies who helped our Nation prevent terrorist attacks in the aftermath of the deadliest foreign attacks on U.S. soil. Transferring a policy decision critical to our national security to the FISA Court, which would be limited in its consideration to the particular matter before them (without any consideration of the impact of immunity on our national security), is unacceptable.

In contrast to S. 2248, this amendment would not allow for the expeditious dismissal of the relevant litigation. Rather, this amendment would do little more than transfer the existing litigation to the full FISA Court and would likely result in protracted litigation. The standards in the amendment also are ambiguous and would likely require fact-finding on the issue of good faith and whether the companies ''had an objectively reasonable belief'' that assisting the Government was lawful—even though the Senate Intelligence Committee has already studied this issue and concluded such companies did act in good faith. The companies being sued would continue to be subjected to the burdens of the litigation, and the continued litigation would increase the risk of the disclosure of highly classified information.

The procedures set forth under the amendment also present insurmountable problems. First, the amendment would permit plaintiffs to participate in the litigation before the FISA Court. This poses a very serious risk of disclosure to plaintiffs of classified facts over which the Government has asserted the state secrets privilege and of disclosure of these secrets to the public. The FISA Court safeguards national security secrets precisely because the proceedings are generally ex parte—only the Government appears. The involvement of plaintiffs also is likely to prolong the litigation. Second, assembling the FISA Court for en banc hearings on these cases could cause delays in the disposition of the cases. Third, the amendment would purport to abrogate the state secrets privilege with respect to proceedings in the FISA Court. This would pose a serious risk of harm to the national security by possibly allowing plaintiffs access to highly classified information about sensitive intelligence activities, sources, and methods. The conclusion of the FISA Court also may reveal sensitive information to the public and our adversaries. Beyond these serious policy considerations, it also would raise very serious constitutional questions about the authority of Congress to abrogate the constitutionally-based privilege over national security information within the Executive's control. This is unnecessary, because classified information may be shared with a court in camera and ex parte even when the state secrets privilege is asserted. Fourth, the amendment does not explicitly provide for appeal of determinations by the FISA Court. Finally, imposing a standard involving an ''objectively reasonable belief'' is likely to cause companies in the future to feel compelled to make an independent finding prior to complying with a lawful Government request for assistance. Those companies do not have access to information necessary to make this judgment. Imposition of such a standard could cause dangerous delays in critical intelligence operations and put our national security at risk. As the Intelligence Committee recognized in its report on S. 2248, ''the intelligence community cannot obtain the intelligence it needs without assistance from these companies.'' For these reasons, existing law rightly places no such obligation on telecommunications companies.

If this amendment is part of the bill that is presented to the President, we, as well as the President's other senior advisors, will recommend that he veto the bill.

III. OTHER AMENDMENTS

Imposing a Short Sunset on the Legislation (No. 3930). This amendment would shorten the existing sunset provision in S. 2248 from six years to four years. We strongly oppose it. S. 2248 should not have an expiration date at all. The threats we face do not come with an expiration date, and our authorities to counter those threats should be placed on a permanent foundation. They should not be in a continual state of doubt. Any sunset provision withholds from our intelligence professionals and our private partners the certainty and permanence they need 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 also allows the intelligence community and our private partners to invest resources appropriately. Nor is there any need for a sunset. There has been extensive public discussion, debate, and consideration of FISA modernization and there is now a lengthy factual

record on the need for this legislation. Indeed, Administration officials have been working with Congress since at least the summer of 2006 on legislation to modernize FISA. There also has been extensive congressional oversight and reporting regarding the Government's use of the authorities under the Protect America Act. In addition, S. 2248 includes substantial congressional oversight of the Government's use of the authorities provided in the bill. This oversight includes provision of various written reports to the congressional intelligence committees, including semiannual assessments by the Attorney General and the Director of National Intelligence, assessments by each relevant agency's Inspector General, and annual reviews by the head of any agency conducting operations under Title VII. Congress can, of course, revisit these issues and amend a statute at whatever time it chooses. We therefore urge Congress to provide a long-term solution to an out-dated FISA and to resist attempts to impose a short expiration date on this legislation. Although we believe that any sunset is unwise and unnecessary, we support S. 2248 despite its six-year sunset because it meets our operational needs to keep the country safe by providing needed authorities and liability protection.

Imposes Court Review of Compliance with Minimization Procedures (No. 3920). This amendment, which was part of the Judiciary Committee 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. We strongly oppose this amendment. It 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 for collection targeting individuals outside the United States.

Congress is aware of the substantial oversight of the use of the authorities contained in the Protect America Act. As noted above, S. 2248 significantly increases such oversight by mandating semiannual assessments by the Attorney General and the Director of National Intelligence, assessments by each relevant agency's Inspector General, and annual reviews by the head of any agency conducting operations under Title VII, as well as extensive reporting to Congress and to the FISA Court. The repeated layering of overlapping oversight requirements on one aspect of intelligence community operations is both unnecessary and not the best use of limited resources and expertise.

Expedited FISA Court Review of Challenges and Petitions to Compel Compliance (No. 3941). This amendment would require the FISA Court to make an initial ruling on the frivolousness of a challenge to a directive issued under the bill within five days, and to review any challenge that requires plenary review within 30 days. The amendment also provides that if the Constitution requires it, the court can take longer to decide the issues before it. The amendment sets forth similar procedures for the enforcement of directives (i.e., when the Government seeks to compel an electronic communication service provider to furnish assistance or information). This amendment would ensure that challenges to directives and petitions to compel compliance with directives are adjudicated in a manner that avoids undue delays in critical intelligence collection. This amendment would improve the existing provisions in S. 2248 pertaining to challenges to directives and petitions to compel cooperation by electronic communication service providers, and we strongly support it.

Proliferation of Weapons of Mass Destruction (No. 3938). This amendment, which would apply to surveillance pursuant to traditional FISA Court orders, would expand the definition of ''foreign power'' to include groups engaged in the international proliferation of weapons of mass destruction. This amendment reflects the threat posed by these catastrophic weapons and extends FISA to apply to individuals and groups engaged in the international proliferation of such weapons. To the extent that they are not also engaged in international terrorism, FISA currently does not cover those engaged in the international proliferation of weapons of mass destruction. The amendment would expand the definition of ''agent of a foreign power'' to include non-U.S. persons engaged in such activities, even if they cannot be connected to a foreign power before the surveillance is initiated. The amendment would close an existing gap in FISA's coverage with respect to surveillance conducted pursuant to traditional FISA Court orders, and we strongly support it.

Exclusive Means (No. 3910). We understand that the amendment relating to the exclusive means provision in S. 2248 is undergoing additional revision. As a result, we are withholding comment on this amendment and its text at this time. We note, however, that we support the provision currently contained in S. 2248 and to support its modification, we would have to conclude that the amendment provides for sufficient flexibility to permit the President to protect the Nation adequately in times of national emergency.

IV. EXPIRATION

While it is essential that any FISA modernization presented to the President provide the intelligence community with the tools it needs while safeguarding the civil liberties of Americans, it is also vital that Congress not permit the authorities of the Protect America Act not be allowed simply to expire. As you are aware, the Protect America Act, which allowed us temporarily to close gaps in our intelligence collection, was to sunset on February 1, 2008. Because Congress indicated that it was ''a legislative impossibility'' to meet this deadline, it passed and the President signed a fifteen-day extension. Failure to pass long-term legislation during this period would degrade our ability to obtain vital foreign intelligence information, including the location, intentions, and capabilities of terrorists and other foreign intelligence targets abroad.

First, the expiration of the authorities in the Protect America Act would plunge critical intelligence programs into a state of uncertainty which could cause us to delay the gathering of, or simply miss, critical foreign intelligence information. Expiration would result in a degradation of critical tools necessary to carry out our national security mission. Without these authorities, there is significant doubt surrounding the future of aspects of our operations. For instance, expiration would create uncertainty concerning:

The ability to modify certifications and procedures issued under the Protect America Act to reflect operational needs and the implementation of procedures to ensure that agencies are fully integrated protecting the Nation;

The continuing validity of liability protection for those who assist us according to the procedures under the Protect America Act;

The continuing validity of the judicial mechanism for compelling the assistance needed to protect our national security;

The ability to cover intelligence gaps created by new communication paths or technologies. If the intelligence community uncovers such new methods, it will need to act to cover these intelligence gaps.

All of these aspects of our operations are subject to great uncertainty and delay if the authorities of the Protect America Act expire. Indeed, some critical operations will likely not be possible without the tools provided by the Protect America Act. We will be forced to pursue intelligence collection under FISA's outdated legal framework—a framework that we already know leads to intelligence gaps. This degradation of our intelligence capability will occur despite the fact that, as the Department of Justice has notified Congress, the FISA Court has approved our targeting procedures pursuant to the Protect America Act.

Second, expiration or continued short-term extensions of the Protect America Act means that an issue of paramount importance will not be addressed. This is the issue of providing liability protection for those who provided vital assistance to the Nation after September 11, 2001. Senior leaders of the intelligence community have consistently emphasized the critical need to address this issue since 2006. See, ''FISA for the 21st Century'' hearing before the Senate Judiciary Committee with Director of the Central Intelligence Agency and Director of the National Security Agency; 2007 Annual Threat Assessment Hearing before the Senate Select Committee on Intelligence with Director of National Intelligence. Ever since the first Administration proposal to modernize FISA in April 2007, the Administration had noted that meeting the intelligence community's operational needs had two critical components—modernizing FISA's authorities and providing liability protection. The Protect America Act updated FISA's legal framework, but it did not address the need for liability protection.

As we have discussed above, and the Senate Intelligence Committee recognized, ''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.'' As it concluded, ''[t]he possible reduction in intelligence that might result from this delay is simply unacceptable for the safety of our Nation.'' In short, if the absence of retroactive liability protection leads to private partners not cooperating with foreign intelligence activities, we can expect more intelligence gaps.

Questions surrounding the legality of the Government's request for assistance following September 11th should not be resolved in the context of suits against private parties. By granting responsible liability protection, S. 2248 ''simply recognizes that, in the specific historical circumstances here, if the private sector relied on written representations that high-level Government officials had assessed the [the President's] program to be legal, they acted in good faith and should be entitled to protection from civil suit.'' Likewise, we do not believe that it is constructive—indeed, it is destructive—to degrade the ability of the intelligence community to protect the country by punishing our private partners who are not part of the ongoing debate between the branches over their respective powers.

The Protect America Act's authorities expire in less than two weeks. The Administration remains prepared to work with Congress towards the passage of a 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. Passage of S. 2248 and rejection

of those amendments that would undermine it would be a critical step in this direction. We look forward to continuing to work with you and the Members of the Senate 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. KYL. Mr. President, I ask unanimous consent that during the quorum call, which I am about to invoke, we not have time counted against either side as it runs.

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

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. BROWN. 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. BROWN. I ask unanimous consent to speak as in morning business and that the time I use not be counted against debate on the pending amendments.

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

ECONOMIC STIMULUS

Mr. BROWN. My home State of Ohio is deep into a foreclosure crisis. Gas prices are going up, and all energy prices and transportation costs are going up. More Americans are living paycheck to paycheck, hand to mouth, some not even that lucky. Congress is now working on an economic stimulus package, one that is desperately needed. Let me tell the story about something that happened last month in my home State of Ohio to illustrate how this recession, which has clearly already swept across my State, has had an impact on families, on middle-class families, on families who consider themselves middle class and sometimes do not—a couple of stories.

One is from Tim in Cleveland. Tim told us that for some time, he and his wife had volunteered at a food bank. They donated money to this food bank. Over time, as his budget got tighter, his pay wasn't keeping up with the cost of gasoline, heating, the increasing cost of food, and he no longer contributed to the food bank, but he and his wife kept working there. More recently, Tim said that he began to go to the food bank for food. He said he was a bit embarrassed by that, which he should not have been, and said: I used to consider myself middle class. Now I do not. He has held the same job, worked the same long hours, but he is simply not able to keep up with an economy under the rules of globalization, where wages are stagnant and prices continue to go up.

Perhaps a more tragic story, only because it involves a larger number of people, perhaps, than Tim: In Hocking County in Logan, OH, a community about halfway between Columbus, in the center of the State, the capital in Athens, the home of Howard University, a city on the Ohio River, a town of Logan in the County of Hocking, a county of about 30,000 people, at 3:30 in the morning on a cold December night, the people began to line up at the United Methodist Church to go to a food pantry. The doors opened at 8. People in cars were snaked around the whole area in Logan, and by 1 in the afternoon, 2,000 people—7 percent of the population of Hocking County, an Appalachian county where people work hard, have raised their kids proudly, have taken care of themselves and their neighbors—2,000 people in this community of 30,000 had visited this food bank, many of them driving 25 or 30 minutes to get there.

Congress, in response, is working on an economic stimulus package that is desperately needed. The Finance Committee has passed a proposal that puts cash in the hands of working Americans and doesn't turn its back on those in need.

A stimulus package is two things: One, it is to stimulate the economy by putting money in the hands of people who will spend it. Second, it is helping those people most victimized, hardest hit by the recession. That is why the Finance Committee, better than the President's version and the House version, will do those two things. It will stimulate the economy better, and it will put money in the hands of those who have suffered, who have been hardest hit. I applaud the committee for taking the plight of every American, retirees and disabled veterans, into consideration.

The Finance Committee package aims at jump-starting this stalled economy. For those who are facing in too many cases heat or eat, whether they can afford food or paying the heating bills, it will provide immediate assistance.

Importantly, the Finance Committee package provides relief to 20 million seniors and 250,000 disabled Americans who were left out of the other package under consideration, the package most of my Republican friends are supporting, the one without help for 250,000 disabled and 20 million seniors. Some Republicans, those who are a bit more courageous and more willing to break with the President and their Senate leadership, are supporting the package that includes 20 million seniors and 250,000 disabled Americans.

The Finance Committee package includes an extension of unemployment insurance, which is a crucial and commonsense response in an economic downturn. An awful lot of Ohioans, in Toledo and Lima and Dayton and Hamilton and Middletown, have seen their unemployment compensation run out. They have been unemployed for 26 weeks or longer—a situation they didn't ask to be in, a situation where they involuntarily were laid off. They haven't been able to find a job in this economy. Many of them now are in those food banks in Dayton and Cleveland and Toledo, and many of them are looking for help. That is why it is so important that we put money directly into the pockets of people, through seniors, disabled Americans, and with the extension of unemployment compensation benefits.

About a week ago, I met with seven or eight religious leaders representing several Christian denominations, a rabbi and a leader in the Muslim community who came to my office to talk about what we need to do to answer the call for social justice, the call that preaches that regardless of one's faith, we have a responsibility, those who are more privileged, to those who are less privileged. This economic stimulus package does this. These leaders from the faith community who visited me last week spoke passionately about how, with the LIHEAP program, the program for the elderly indigent who can't afford their heating bills, with food banks and food stamps and the extension of unemployment benefits, what we need to do in this stimulus package, putting money in the pockets of middle-class Americans, including 20 million seniors and 250,000 disabled, how that is so very important to celebrate American values. As these religious leaders were discussing with me, to celebrate our Nation's values and to celebrate our faith, it is particularly important that we pass a stimulus package that not just stimulates the economy but helps those people most in need who have most been hurt by this recession.

I yield the floor and suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

RECOVERY REBATES AND ECONOMIC STIMULUS FOR THE AMERICAN PEOPLE ACT OF 2008—MOTION TO PROCEED

Mr. REID. Mr. President, I ask unanimous consent that the Senate resume consideration of the motion to proceed to H.R. 5140, the economic stimulus bill.

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

Is there further debate?

If not, the question is on agreeing to the motion.

The motion was agreed to.