FOREIGN INTELLIGENCE SURVEILLANCE ACT

AMENDMENT NO. 3913

Mr. HATCH. Mr. President, I wanted to briefly mention my opposition to amendment No. 3913 offered by the Senator from Wisconsin. This amendment relates to reverse targeting, which is a theory that the Government could target a foreign person abroad when the real intention is to target a U.S. person, thus circumventing the need to get a warrant for the U.S. person. Quite simply, reverse targeting is already considered illegal under FISA. Going even further, the Intelligence Committee bill has a very explicit prohibition against reverse targeting. The amendment offered by the Senator from Wisconsin adds subjective language which completely alters the meaning of the original bipartisan provision.

I asked Attorney General Mukasey this during a hearing on Wednesday, and here is our exchange.

HATCH: Now the topic of reverse targeting has been mentioned often during the FISA reform debate. From an intelligence perspective, reverse targeting makes no sense. From an efficiency standpoint, if the government was interested in targeting an American, it would apply for a warrant to listen to all of that person's conversations, wouldn't it? Not just his conversations with terrorists overseas?

MUKASEY: Correct.

HATCH: Now, I asked General Wainstein about this during the Judiciary Committee hearing last October, and he reiterated the government's view that FISA itself makes reverse targeting illegal. Does the DOJ still consider reverse targeting illegal under FISA?

MUKASEY: Absolutely.

HATCH: Are you aware of any instances of intelligence analysts utilizing reverse targeting?

MUKASEY: I am not aware of any such instances.

We are enacting national security legislation, and it is our responsibility to ensure that this bill does not lead to unintended consequences which provide protections to terrorists. This amendment is absolutely unnecessary, and I urge my colleagues to oppose it.

AMENDMENT NO. 3920

Mr. President, I wish to say a few remarks with regard to my dear friend, Senator WHITEHOUSE's amendment to authorize the FISC, the Foreign Intelligence Surveillance Court, to assess compliance with minimization techniques. I rise to express my opposition to the Whitehouse amendment No. 3920.

My opposition to the Whitehouse amendment is related to the totality of this bill. This is an amendment that greatly expands the Foreign Intelligence Surveillance Court's jurisdiction. Keeping in mind that the bill before us already expands FISC jurisdiction of foreign collection to an unprecedented high historical level, this amendment tips the balance and could lead to real-life instances of intelligence analysts' operational decisions being second guessed by the court.

The original approach and goals of this legislation were simple and twofold. Goal No. 1: Wire communications taking place in 2008 should receive the same treatment as radio communications taking place in 1978; and goal No. 2: Our intelligence community's sources and methods should not be subject to exposure by litigation brought about by hearsay and innuendo.

I am pleased the legislation before us provides more protections to American citizens than any intelligence bill in my recent memory, and certainly more than the original FISA law.

Over the last several months, a great deal of attention has been given to the FISC, the Foreign Intelligence Surveillance Court. The FISC was created by the original FISA law, and its jurisdiction was extremely limited by that law. Here is what the FISC was created to do.

Foreign Intelligence Surveillance Court: ''A court which shall have jurisdiction to hear applications for and grant orders approving electronic surveillance.''

This jurisdiction is purposefully limited, as the task of reviewing applications to intercept electronic communications is among the most important tasks our Government can do to protect our country and its citizens. Terrorists have to communicate to plan and execute attacks, and our interception of these communications is paramount to stopping the next attack.

The jurisdiction of the FISC is greatly expanded by this legislation. Combined with other provisions in this bill, the new oversight created is prevalent and comprehensive. Since the breadth of this new oversight is critical when determining the necessity of the amendment we are debating, let's look at the oversight created by this legislation.

Let me read these five charts.

No. 1, for the first time the FISC will review and approve minimization procedures used by the intelligence community.

No. 2, for the first time the FISC will review and approve targeting procedures used by the intelligence community. The FISC will determine whether the procedures are reasonably designed to ensure targeting is limited to persons outside the United States.

No. 3, for the first time, a court order will be required to target U.S. persons regardless of where they are in the world—for the first time.

No. 4, for the first time the Attorney General and the Director of National Intelligence will be required to assess the intelligence community's compliance with court-approved targeting and minimization procedures. These assessments must be provided to the FISC and congressional Intelligence Committees.

No. 5, new congressional oversight—for the first time Congress is creating statutorily required inspector general—that is the Department of Justice and intelligence elements—semiannual assessments of compliance with court-approved targeting and minimization procedures. These assessments must be provided to congressional Intelligence Committees.

Now, given the staggering amount of new oversight, we should be very careful when creating mechanisms which could negatively impact our intelligence analysts, particularly when these mechanisms provide no benefit, in this case, to the privacy of American citizens.

The intelligence community has a great deal of experience in the techniques used to minimize incidental communications, and very detailed procedures for handling these communications are contained in the United States Signals Intelligence Directive 18, which has been in effect for over 28 years.

Remember, the Government is gathering information relating to foreign intelligence in order to protect national security, not necessarily for criminal prosecution. That is why different procedures are necessary. Otherwise, all national security information gathering would be changed to fit within the procedures of title III criminal wiretaps, which is impossible.

Minimization techniques deal not just with retention and dissemination, but with acquisition. Analysts make decisions up front whether to acquire, keep, or share U.S. person information based on whether it has foreign intelligence value.

This means if a judge is reviewing compliance with minimization procedures, this review is much more than a factual check. The judge is not limited to simply making sure that technical and administrative guidelines are followed. Rather, this amendment could allow a judge to question specific decisions by intelligence analysts on why they chose to acquire, keep, or share certain communications.

Now this begs the question: Are judges better trained in intelligence collection than the intelligence analysts whose job it is to repeatedly perform this task? Not only do I think the answer is no, but we should remember what the FISC said in their recently publicly released opinion, which is only the third public opinion released in the history of the Foreign Intelligence Surveillance Court.

Here is what the FISC said:

> Although the FISC handles a great deal of classified material, FISC judges do not make classification decisions and are not intended to become national security experts. Furthermore, even if a typical FISC judge had more expertise in national security matters than a typical district court judge, that expertise would still not equal that of the Executive Branch, which is constitutionally entrusted with protecting the national security.

Enactment of this amendment could result in judges making foreign intelligence determinations in place of trained intelligence analysts. Based on this unjustified scrutiny, our intelligence analysts could become overly cautious when determining whether to

deem information as having intelligence value in order to avoid unwarranted judicial scrutiny. This could result in less foreign intelligence information being accumulated, and thus could mean we may miss a vital piece of information. Do we want to take this chance? That is what this amendment would do. Should we risk this type of unintended result?

In October of 2007, I asked Assistant Attorney General Wainstein if putting the FISC judges in the position of assessing compliance would effectively put the judge in the role of an analyst. Here is what he said in response:

> And that is the problem, that it would get the FISC in the position of being operational to the extent that it's not when it assesses compliance for, let's say, the minimization procedures in the typical or traditional FISA context where you're talking about one order, one person. Here, some of our orders might well be programmatic, where you're talking about whole categories of surveillances, and that would be a tall order for the FISA Court to assess compliance.

The Whitehouse amendment also contains language which lets the FISC fashion remedies it determines are necessary to enforce compliance. This is very broad language and gives the court the ability to come up with whatever methods it chooses to enforce compliance. Does this mean that the FISC could shut down collection of information from foreign targets overseas while the Government addresses technical issues which have little to do with the privacy of American citizens? We do not know, since this amendment does not answer this question. Remember, we are talking about targeting foreign terrorists to prevent terrorist attacks. This is not the same thing as wiretapping a cocaine dealer in Los Angeles for criminal prosecution. If we approve an amendment which creates numerous unanswered questions, we are putting Americans at risk in unprecedented ways.

Given that the Government has adequately utilized minimization procedures for many years, what is the pressing need for FISC expansion into this area? There is no need to continue unlimited expansion of the FISC into unsuitable areas.

If this amendment does not pass, it does not mean that American citizens are not protected. Incidental communications of Americans will continue to be minimized, and the minimization procedures will have been approved by the FISC. But if the Whitehouse amendment passes, we will be taking a great risk that the unnecessary judicial oversight will cause very harmful unintended consequences that I have already mentioned. We are too far along to introduce guesswork into the carefully crafted compromise bill before us. I will oppose this amendment, and I urge my colleagues to do the same.

AMENDMENT NO. 3930

Now, Mr. President, there is one other amendment I wish to refer to. In October of last year, the Intelligence Committee passed a bipartisan compromise bill which would modernize our foreign intelligence surveillance activities. Unfortunately, this bipartisan bill contained a 6-year sunset provision which would automatically curtail our ability to protect our homeland unless Congress acted.

Let me be clear, I am opposed to any sunset in this legislation. While I believe the inclusion of this sunset provision was not appropriate, it was a result of the bipartisan negotiations in the Intelligence Committee. Now this serves as yet another example that not all of us who support this bill are happy with every provision, and every Senator will need to make concessions to get this bill passed and signed into law.

Given my opposition to any sunset, I will oppose the Cardin amendment No. 3930, which would change the sunset from 6 to 4 years. Proponents of this amendment have propounded several arguments, none of which justifies this change. I am going to discuss three of those arguments today.

The most common argument cited is that this legislation is too technical and too complex to have a 6-year sunset. This is certainly a complex bill, but this is not the first time the 110th Congress has tackled complex issues. We have already waded through several different and complex bills, such as immigration reform, ethics and lobbying legislation, and even a vast energy bill.

We are not reinventing the wheel with surveillance law, as this is a FISA modernization bill. But it is important to note how Congress has previously legislated in this area. The 1978 FISA law made dramatic changes to our surveillance laws and oversight mechanisms. While FISA has been discussed extensively, what has not been stated nearly enough is that the 1978 FISA had no sunset. Given that FISA had no sunset, let's look at how Congress has previously legislated FISA amendments with regard to sunsets.

Sunsets are not common in previous laws amending FISA. Other than the PATRIOT Act and the PATRIOT Act reauthorization, seven of the eight public laws amending FISA had no sunsets on FISA provisions, and the remaining public law had a sunset on only one of those provisions.

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

A second reason I have heard that some support the Cardin amendment is that this sunset will keep Congress more engaged. One of my colleagues previously stated that a sunset ''gives Congress the ability to stay involved.'' Congress should not need sunsets to stay involved. We do not need legislative alarm clocks to go off in 4 years in order to address national security. I wake up every day thinking about how we might protect our fellow Americans. I certainly do not need a sunsetting bill to remind me about national security and oversight, and neither should my colleagues.

The final reason I have heard for a 4-year sunset is the idea that the next administration should be given an opportunity to address this issue and that a sunset fosters cooperation between Congress and the White House. Along these lines, one of my colleagues previously stated: Having a sunset gives us a much better chance to get cooperation . . . between the Congress and the White House. Once again, the next President can weigh in on this topic whenever and however he or she wants to. And regarding the idea that we should include a 4-year sunset to foster cooperation between two branches of Government—do we need a statute to influence the separation of powers? I say to my colleagues that the relationship between the branches of Government should be fostered by natural restrictions contained in the Constitution of the United States, not by an artificial sunset provision in an intelligence bill.

The very idea of a 4-year sunset understates the importance of timeline implementation of new legislation. It takes a great deal of time to ensure that all of our intelligence agencies and personnel are fully trained in new authorities and restrictions brought about by congressional action. This is not something that happens overnight. We cannot wave a magic wand and have our Nation's intelligence personnel instantaneously cognizant of every administrative alteration imposed by Congress. Like so many other things in life, adjusting for these new mechanisms takes time and practice.

While certain modifications are necessary, do we want to make it a habit of consistently changing the rules? Don't we want our analysts to spend their time actually tracking terrorists, or is their time better spent navigating administrative procedures that may be constantly in flux?

I know my preference is that our analysts be given the time to use the lawful tools at their disposal to keep our families safe.

I do not want to see them spending all their time burying their heads in administrative manuals which change from day to day whenever the political winds blow.

After all of the efforts by many in this body to write a bill that provides a legal regime to govern contemporary technological capabilities, I am certainly not alone in my opposition to a sunset provision. In fact, my views are completely in line with what the Senate has done in the past when amending FISA. The administration strongly opposes a sunset, and Attorney General Mukasey confirmed this opposition during last week's oversight hearing here in the Senate.

The fact is that this administration will not be here to see this sunset occur. Why would they care if there is a sunset in the bill or not? Their opposition demonstrates that those who are in charge of protecting our country know that a sunset is a bad idea and their opposition is based in logic and practical application. The administration knows that they will not be here, but the intelligence analysts who protect our country will. These analysts are not politically appointed, and do their job regardless of who the President is or what party the President represents. They need the stability of our laws to effectuate long term operations to prevent terrorist attacks, not guesswork which could hinder intelligence gathering practices.

We have already had a trial run with the 6-month sunset of the Protect America Act. Enough of the quick fixes, let's have confidence in the work product created by the nearly 10 months we have spent on this issue. A shorter sunset gives us an excuse to not legislate with conviction, and this is an excuse we should not make.

The 95th Congress had the ability to decipher complex problems and pass FISA with no sunset, and the 110th Congress can certainly modernize it without second guessing our capabilities by approving the Cardin amendment. I will oppose this amendment, and I urge my colleagues to do the same.

I yield the floor.

The PRESIDING OFFICER. The Senator from Pennsylvania is recognized.

ECONOMIC STIMULUS

Mr. CASEY. Mr. President, in the remaining moments of morning business, I wish to highlight a couple important points about our economic stimulus efforts in the Senate.

We have had an opportunity over the last couple weeks to analyze carefully what the American people expect in terms of a jolt to our economy and what they expect this body to do. Unfortunately, we have been stymied by a lot of politics. I think it is important to point out very briefly the elements of what the Senate is trying to do, at least on the Democratic side and, secondly, to highlight its importance to the American people.

First of all, with regard to the basic elements—I will not go into a long discussion—in order to stimulate this economy, we have to invest in strategies we know will work. One of those is unemployment insurance. We know that. All the economists say that. It is not because Democrats assert that; economists say one of the only ways that is proven to jolt our economy is to invest in unemployment insurance. This proposal on the Democratic side does that. The House proposal doesn't do that in the area of unemployment insurance. It doesn't address that.

The package this side of the aisle has been pushing is a $500 rebate. It is across the board for everyone and obviously for those who are married it is double that. But significantly, in this proposal 20 million American senior citizens are provided some relief. That wasn't addressed in the House proposal. I think that is an important omission. In order to get this right, in order to jolt our economy, we need to help seniors. We also need to make sure a quarter of a million disabled veterans are helped as well. That is an important feature.

Thirdly, avoiding foreclosure; doing everything we can in this stimulus package in a short-term way to help families avoid foreclosure is another critically important element.

Home heating costs: In my home State of Pennsylvania—and I know the same is true in Ohio and across the country—there has been a 19-percent increase in the costs that families have to heat their homes, in 1 year. So if that is happening in Pennsylvania, we know it prevails around the country. This proposal in this Chamber does that. It adds $1 billion for home heating costs.

Finally, helping businesses and energy: As to the cost to businesses, I think small businesses should get help in this rough economy, and this proposal helps our businesses. It also makes investments we should have—or I should say implements strategies we should have done months ago when it comes to incentivizing energy efficiency and other tactics to move toward a more energy independent economy.

So whether it is energy, whether it is helping businesses, whether it is making sure our seniors get relief, that our families get relief and that we focus on unemployment insurance, home heating costs, all these elements are critically important. It is not perfect. The Presiding Officer knows—and he shares this view with me—we wanted to do more with regard to food stamps. We are still going to try on that. But if that doesn't happen and some other things don't happen that I want, we still have to move this forward. I wish the other side of the aisle would allow us to go forward in a way that addresses these basic problems. We have seen a lot of talk on the other side but not nearly enough action to say we are going to support a proposal, not just what the House sent us but an improved and a much more significant proposal to hit this economy in the way we should hit it: With a stimulus to get the economy moving, to create jobs, to provide relief for our families, and to move into the future together. We can do that here. We should do it this week and make sure we don't pass something which is watered down and which would not do the job.

I yield the floor.

CONCLUSION OF MORNING BUSINESS

The PRESIDING OFFICER. Morning business is closed.

FISA AMENDMENTS ACT OF 2007

The PRESIDING OFFICER. Under the previous order, the Senate will resume consideration of S. 2248, which the clerk will report.

The bill 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.

Feingold amendment No. 3913 (to amendment No. 3911), to prohibit reverse targeting and protect the rights of Americans who are communicating with people abroad.

Feingold-Dodd amendment No. 3912 (to amendment No. 3911), to modify the requirements for certifications made prior to the initiation of certain acquisitions.

Dodd amendment No. 3907 (to amendment No. 3911), to strike the provisions providing immunity from civil liability to electronic communication service providers for certain assistance provided to the Government.

Bond-Rockefeller modified amendment No. 3938 (to Amendment No. 3911), to include prohibitions on the international proliferation of weapons of mass destruction in the Foreign Intelligence Surveillance Act of 1978.

Bond-Rockefeller modified amendment No. 3941 (to Amendment No. 3911), to expedite the review of challenges to directives under the Foreign Intelligence Surveillance Act of 1978.

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

Mr. ROCKEFELLER. Mr. President, I wish to make a few comments on the amendment of the Senator from Wisconsin and what he referred to as the ''bulk collection'' amendment which he discussed yesterday and which is amendment No. 3912. I would ask that this time be taken from the opponents of the amendment, if that is all right with my vice chairman.

The Senator from Wisconsin is offering an amendment that he argues will prevent what he calls ''bulk collection''. The amendment is intended, as described by the Senator from Wisconsin, to ensure that this bill is not used by the Government to collect the contents of all the international communications between the United States and the rest of the world. The Senator argues that the amendment will prevent ''bulk collection'' by requiring the Government to have some foreign intelligence interest in the overseas party to the communications it is collecting.

I regret to say I must oppose this amendment strongly. I do not believe it is necessary. I do believe, as drafted, the amendment will interfere with legitimate intelligence operations that