FISA AMENDMENTS ACT OF 2007

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

The 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.

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.

Feinstein amendment No. 3910 (to amendment No. 3911), to provide a statement of the exclusive means by which electronic surveillance and interception of certain communications may be conducted.

Feinstein amendment No. 3919 (to amendment No. 3911), to provide for the review of certifications by the Foreign Intelligence Surveillance Court.

Specter-Whitehouse amendment No. 3927 (to amendment No. 3911), to provide for the substitution of the United States in certain civil actions.

Mr. KYL. Mr. President, today we are debating the amendments to the Foreign Intelligence Surveillance Act. I am going to say a few words about why Congress ought to provide legal relief to those private entities that have aided the United States in our war against al-Qaida and, in particular, one of the amendments that will be voted on tomorrow.

I begin by quoting a passage in an opinion by Justice Cardozo, from the time when he was the chief judge of the New York Court of Appeals. In the 1928 decision Baggington v. Yellow Taxi Corp., this is what Justice Cardozo had to say about the legal immunities that should be provided to private parties that assist law enforcement efforts:

The rule that private citizens acting in good faith to assist law enforcement are immune from suit ensures that the citizenry may be called upon to enforce the justice of the State, not faintly and with lagging steps, but honestly and bravely and with whatever implements and facilities are convenient and at hand.

We need to encourage citizen involvement in our efforts against al-Qaida. We know that good intelligence is the best way to win the war against those terrorists, and if we want to monitor al-Qaida, we need access to the information which is available through the telecommunications companies.

We asked them for help, and they provided that help at a critical time, after 9/11. We need to know, for example, whether al-Qaida terrorists are planning other attacks against us. When we ask parties to assist us, such as those telecommunications companies that assisted us after 9/11, we want them to reply not faintly and with lagging steps but, rather, in Justice Cardozo's words: We want them to answer the call honestly and bravely and with whatever implements and facilities are conveniently at hand.

In today's technological world, what that means is that when we ask these telecommunications companies for their support, they provide the incredibly intricate and advanced technology at their disposal to assist us in understanding what communications al-Qaida is having with each other.

Now, tomorrow we are going to be voting on some amendments which, in my view, weaken and in one case would actually strip the liability protections the Intelligence Committee bill provides to such private parties. I think these amendments are unwise.

Certainly, I urge my colleagues to reject them. Let me focus on one of them today, one that relates to a subject called substitution. The idea is that while it would be unfair to hold these telecommunications companies responsible for coming to the aid of the Government in its time of need, that they should be immune from liability, that we should somehow substitute the U.S. Government in their place and that would somehow balance the equities here of having the matter litigated and yet protecting the telecommunication companies.

There are several reasons why this simply does not work. In the first place, it would still be required to reveal the identity of the company involved. Part of this entire matter is protecting the identity of the company so it does not lose business around the world and so it is not subject to the kind of abuse that would otherwise occur.

In addition to that, full discovery could be conducted. In other words, depositions could be taken, interrogatories could be served. In every respect, the company is not protected from the legal process, it is simply not liable at the end of the day; it would only be the Government that would be liable.

But the individuals of the company and the company itself would still be subject to all the rigors of litigation which we are trying to protect them from. The litigation does not go away. In addition to that, a method has been set up to litigate this before the FISA Court, which misunderstands what the FISA Court is. The FISA Court is not like the Ninth Circuit Court of Appeals. The FISA Court is individual judges called upon primarily to issue warrants that permit the Government to engage in its intelligence operations.

So you do not have a court sitting the way you do in a typical Federal district court or a circuit court. This FISA Court would presumably have to litigate whether the companies are entitled to substitution, so it is not a free substantiation but, rather, if they can prove that they are entitled to the substitution.

Finally, the point of having this liability protection for the Government's purpose is first and foremost because of the need to protect its sources and methods of intelligence collection from the enemy or from the public at large. Of course, if you still have the litigation ongoing, if you still have the process, it is just that Party A is liable rather than Party B.

You still have the threat that sources and methods could be compromised, information relating to the activity could be disclosed, as it has in the current debate. We should remind ourselves that what we are debating publicly is a system of collection that has been, to some extent, defined by public discussion of matters that were and should have been totally classified.

We have given the enemy a great deal of information about how to avoid the kind of collection that is vital to our efforts. That is the kind of thing we are trying to prevent. So substitution, simply substituting the Government as a party for the phone companies does not solve that problem either. The bottom line is, that as with these other amendments, the so-called substitution amendment is not a good amendment, it should be rejected, and I hope at the end of the day we will have been able to vote it down.

Let me conclude by repeating some of the things the Statement of Administrative Policy stated in quoting the Intelligence Committee's conclusions in its report.

Al-Qaida has not ceased to exist in years since the September 11 attacks. It still exists and it still seeks the wholesale murder of American civilians. We know how devastating such attacks can be. And we know that once an attack is underway—once a plane has been hijacked, or a bomb has been assembled—it is too late. We need to stop al-Qaida attacks before they are executed, before they are being carried out. We need to act at a time when such attacks are still being planned or when al-Qaida terrorists are still being prepared.

To gather this type of intelligence—the intelligence needed to stop a terrorist attack—we will need the assistance of private parties. Information about al-Qaida's communications, its travel, and other activities often is in the hands of private parties. If we want to monitor al-Qaida we will need access to information. And when telecommunications companies or others are asked for their help in tracking, for example, an al-Qaida cell that may be operating in this country, we do not want those parties to reply ''faintly and with lagging steps.'' Rather, in

Justice Cardozo's words, we want them to answer the call for assistance ''honestly and bravely and with whatever implements and facilities are convenient at hand.''

The Senate Intelligence Committee bill contains provisions that ensure that results that future requests for assistance will be met ''honestly and bravely,'' rather than with fear of becoming embroiled in litigation. Tomorrow the Senate will be voting on amendments that seek to strip out or weaken the legal protections that the Intelligence Committee bill provides to private parties that assist anti-terrorism investigations. These amendments are unwise, and I would strongly urge my colleagues to reject them.

As the Statement of Administration Policy on the Judiciary Committee bill notes, the failure to provide strong legal protections to private parties would undermine U.S. efforts to respond to and stop al-Qaida in two ways: first, it allows the continuation of litigation that has already resulted in leaks that have done serious damage to U.S. counterterrorism efforts. This litigation is inherently and inevitably damaging to U.S. efforts to monitor al-Qaida's communications. As one Intelligence Committee aide aptly characterized the situation, allowing this litigation to go forward would be the equivalent of allowing the legality of the Enigma code-breaking system to be litigated during World War II.

In addition, the failure to provide protection to third parties who have assisted the United States would undermine the willingness of such parties to cooperate with the Government in the future. And such cooperation is essential to U.S. efforts to track al-Qaida. As the SAP on this bill further explains:

In contrast to the Senate Intelligence Committee bill, the Senate Judiciary Committee substitute would not protect electronic communication service providers who are alleged to have assisted the Government with communications intelligence activities in the aftermath of September 11th from potentially debilitating lawsuits. Providing liability protection to these companies is a just result. In its Conference Report, the Senate Intelligence Committee ''concluded that the providers . . . had a good faith basis for responding to the requests for assistance they received.''

The Committee further recognized that ''the Intelligence Community cannot obtain the intelligence it needs without assistance from these companies.'' Companies in the future may be less willing to assist the Government if they face the threat of private lawsuits each time they are alleged to have provided assistance.

The Senate Intelligence Committee concluded that: ''The possible reduction in intelligence that might result from this delay is simply unacceptable for the safety of our Nation.'' Allowing continued litigation also risks the disclosure of highly classified information regarding intelligence sources and methods. In addition to providing an advantage to our adversaries by revealing sources and methods during the course of litigation, the potential disclosure of classified information puts both the facilities and personnel of electronic communication service providers and our country's continued ability to protect our homeland at risk. It is imperative that Congress provide liability protection to those who cooperated with this country in its hour of need.

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

Many members of the Senate Majority insist that there be stringent congressional oversight of these intelligence-collection programs. No one disputes that point. All agree that we need oversight over the intelligence agencies. That is why this Congress and previous Congresses have agreed on a bipartisan basis to create robust oversight of U.S. intelligence gathering, even when such intelligence gathering is directed at foreign targets. The agencies executing wiretaps and conducting other surveillance must report their activities to Congress and to others, so that opportunities for domestic political abuse of these authorities are eliminated.

I conclude by asking: what is the Senate's goal? Do we want to allow our intelligence agencies to be able to obtain the assistance of telecommunications companies and other private parties when those agencies are investigating al-Qaida? If so, then we need to create a legal environment in which those companies will be willing to cooperate—an environment in which their patriotic desire to assist the United States does not conflict with their duties to their shareholders to avoid expensive litigation.

We need to write the laws to ensure against the domestic political abuse of surveillance authority, and we have done that. The question now is whether we want to give our intelligence agents the tools that they need to track al-Qaida. We should do so, and in order to do so, we must defeat amendments that would weaken the bill's legal protections for private parties who assist the government's efforts against al-Qaida.

To conclude, we obviously want to write our laws to ensure that in intelligence collection, and any kind of this activity, the rights of American citizens are fully protected, that we protect against domestic political abuse of surveillance authority. We have done that.

The question now is whether we want to give our intelligence agencies the tools they need to track al-Qaida and other terrorists. We should do so, and in order to do so, we have to defeat amendments that would weaken the Intelligence Committee bill, which lays out a good process for balancing the equities involved and ensuring that we have provided not only the Government agencies what they need to do the job we have asked them to do but also to protect the private parties whom the Government has asked to volunteer to help and which up to now they have been able to do because they felt that what they did would be protected from liability.

Without that liability protection, the kind of negative results would occur which I have identified.

So I hope that when this substantiation amendment comes before us, we will vote it down and that we will also reject the other amendments which are designed to weaken the Intelligence Committee FISA bill.

Mr. HATCH. Would the Senator from California yield for a unanimous consent request?

Mrs. FEINSTEIN. I will yield.

Mr. HATCH. I ask unanimous consent that I be permitted to speak immediately following the Senator from California.

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

AMENDMENT NO. 3910

Mrs. FEINSTEIN. Mr. President, I rise to speak on two of the amendments in the list of amendments to be voted on tomorrow. The first is amendment 3910. That relates to making the Foreign Intelligence Surveillance Act the exclusive authority for conducting electronic surveillance. This is cosponsored by Chairman ROCKEFELLER, Chairman LEAHY, by Senators NELSON of Florida, WHITEHOUSE, WYDEN, HAGEL, MENENDEZ, SNOWE, SPECTER, SALAZAR, and I ask unanimous consent to add Senator CANTWELL to that list.

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

Mrs. FEINSTEIN. For the information of my colleagues, I do not intend to modify this amendment, and so I will be seeking a vote on the amendment as it is currently drafted.

I voted in support of the FISA bill as a member of the Intelligence Committee. But I made clear in that committee, as well as in statements called additional views, which are attached to the report of the bill, that I coauthored with Senators SNOWE and HAGEL that changes were necessary.

In the Judiciary Committee, we were able to secure improvements to the Intelligence Committee's bill that I believed were needed. Most importantly,

the Judiciary Committee added strong exclusivity language similar to the amendment I have now before the Senate.

Unfortunately, the Judiciary package was not adopted on the floor. So the amendments we present are designed to restore the exclusivity language I believe is vital to FISA and goes to the heart of the debate on this bill, which is whether this President or any other President must follow the law.

With strong exclusivity language, which is what we try to add, we establish a legislative record that the language and the intent of the Congress compels a President now and in the future to conduct electronic surveillance of Americans for foreign intelligence purposes within the parameters and confines of this legislation.

The amendment makes the following important changes to the bill:

First, it reinforces the existing FISA exclusivity language in title 18 of the U.S. Code by restating what has been true in the statute since 1978—that FISA is the exclusive means for conducting electronic surveillance, period. So legislative intent is clear.

Second, the amendment answers the so-called AUMF; that is, the authorization to use military force loophole used by the President to circumvent FISA.

What is that? The administration has argued that the authorization of military force against al-Qaida and the Taliban implicitly authorized warrantless electronic surveillance. This is an argument embroidered on fiction, made up from nothing.

Nonetheless, the executive has chosen to use it.

Under our amendment, it will be clear that only an express statutory authorization for electronic surveillance in future legislation shall constitute an additional authority outside of FISA. In other words, if you are going to conduct surveillance outside of FISA, there has to be a law that specifically enables you to do so. Otherwise, you stay within FISA.

Third, the amendment makes a change to the penalty section of FISA. Currently, FISA says it is a criminal penalty to conduct electronic surveillance except as authorized by statute. This amendment specifies that it is a criminal penalty to conduct electronic surveillance except as authorized by FISA or another express statutory authorization. This means that future surveillance conducted under an AUMF or other general legislation would bring on a criminal penalty. So follow the law or else there is a criminal penalty.

Fourth, the amendment requires more clarity in a certification the Government provides to a telecommunications company when it requests assistance for surveillance and there is no court order. Henceforth, the Government will be required to specify the specific statute upon which the authority rests for a request for assistance.

I believe our amendment will strengthen the exclusivity of FISA. I believe it is critical. Without this strong language, we run the risk that there will be future violations of FISA, just as there have been present violations of FISA. History tells us that this is very possible.

Let me go into the history for a minute because it is interesting how eerily similar events of the past were to events of today. Let me tell this body a little bit about something called Operation Shamrock.

In its landmark 1976 report, the Church Committee disclosed, among other abuses, the existence of an Operation titled ''Shamrock.'' What was Shamrock? It was a program run by the NSA and its predecessor organizations from August of 1945 until May of 1975. That is, for 30 years, the Government received copies of millions of international telegrams that were sent to, from, or transiting the United States. The telegrams were provided by major communications companies of the day—RCA Global and ITT World Communications—without a warrant and in secret. A third company, Western Union International, provided a lower level of assistance as well.

It is estimated that at the height of the program, approximately 150,000 communications per month were reviewed by NSA analysts. So telegrams coming into the country and going out of the country all went through NSA.

According to the Church Committee report, the companies agreed to participate in the program, despite warnings from their lawyers, provided they received the personal assurance of the Attorney General and later the President that they would be protected from lawsuit.

The NSA analyzed the communications of Americans in these telegrams and disseminated intelligence from these communications in its reporting.

If all of this history sounds eerily familiar, it should. The parallels between Shamrock and the Terrorist Surveillance Program are uncanny, especially when one considers that FISA was passed in 1978 as a direct result of the Church Committee's report. Yet here we are, same place, again today.

Almost immediately after the Church Committee's report was unveiled, Congress went to work on what is now the Foreign Intelligence Surveillance Act to put an end to warrantless surveillance of Americans. FISA states that when you target surveillance on Americans, you need a court order, period.

Some of my colleagues argue that FISA was not the exclusive authority since 1978 and that the President has inherent article II authorities to go around FISA.

On the first point, the legislative history and congressional intent from 1978 is clear: Congress clearly intended for FISA to be the exclusive authority under which the executive branch may conduct electronic surveillance.

Let me read what the Congress wrote in 1978 in report language accompanying the bill:

> [d]espite any inherent power of the President—

That means despite any article II authority—

> to authorize warrantless electronic surveillance in the absence of legislation, by this bill and chapter 119 of title 18, Congress will have legislated with regard to electronic surveillance in the United States, that legislation with its procedures and safeguards, prohibits the President, notwithstanding any inherent powers, from violating the terms of that legislation.

That is the report language written in 1978.

The congressional debate also took on the Supreme Court's decision in the Keith case in which the Court ruled that since Congress hadn't enacted legislation in this area at that time, then it simply left the Presidential powers where it found them. Right? Wrong. In response to the Court's decision, the 1978 congressional report stated the following:

> The Foreign Intelligence Surveillance Act, however, does not simply leave Presidential powers where it finds them. To the contrary, this bill would substitute a clear legislative authorization pursuant to statutory, not constitutional, standards.

Clear. Distinct. Definitive.

It is important that the record here today clearly reiterates that in 1978 there was an unambiguous position that FISA was the exclusive authority under which electronic surveillance of Americans could be conducted. This was in the bill language and the report language as passed by the 95th Congress.

But FISA's exclusivity was recognized not just by the Congress. The executive branch also agreed that FISA was controlling and that any and all electronic surveillance would be conducted under the law.

President Carter at the time issued a signing statement to the bill. This wasn't a signing statement like we see today. It was not used to express the President's disagreement with the law or his intent not to follow part of the law. Rather, President Carter used his statement to explain his understanding of what the law meant.

Here it is in direct quote:

> The bill requires, for the first time, a prior judicial warrant for all electronic surveillance for foreign intelligence or counterintelligence purposes in the United States in which communications of U.S. persons might be intercepted.

Again, clear, distinct, definitive.

By issuing this statement, President Carter and the executive branch affirmed not only Congress's intent to limit when the executive branch could conduct surveillance, but it ratified that Congress had the power to define the parameters of executive authority in this area.

So there was an abuse—Operation Shamrock—similar to this incident with the telecoms today, followed by a clear act of Congress in passing FISA,

followed by a clear statement of the executive affirming the meaning of FISA. Together, these acts were taken to end the exercise of unchecked executive authority. Here we are, back in 1978 today.

Despite the 1978 language and Congress's clear willingness to amend FISA to make it apply to the new war against terrorism early in its tenure, the Bush administration decided that it would act outside the law. This was a conscious decision. Not one part of FISA was ever tried to be put under the auspices of the FISA law and the Foreign Intelligence Surveillance Court. That was both wrong and unnecessary.

To justify this mistake, the Department of Justice developed a new convoluted argument that Congress had authorized the President to go around FISA by passing the authorization for use of military force against al-Qaida and the Taliban. Can anybody really believe that? This, too, was wrong. I was there. I sat in most meetings. I defy anybody in this body to come forward and tell me privately or publicly that going around FISA was ever contemplated by the AUMF. In fact, it was not. It was never even considered.

Apparently not confident of its AUMF argument, the administration decided to also assert a broad theory of Executive power, premised on Article II of the Constitution. These are the powers of the President.

Under this argument, the Bush administration asserted that despite congressional action, the President has the authority to act unilaterally and outside of the law if he so chooses, simply by virtue of his role as Commander in Chief. While Presidents throughout history all tried to expand their power, this new twist would place the President of the United States outside the law. Taken to its logical conclusion, if the Congress cannot enact statutes that the President must follow, then he is above the law. I disagree with that position. I do not believe anyone can be above the rule of law. But I am not the only one.

Justice Jackson described it best in his Youngstown opinion. In 1952, against the backdrop of the Korean war, the Supreme Court addressed the issue of when congressional and executive authorities collide in the Youngstown Sheet and Tube Company v. Sawyer. The question presented in Youngstown was whether President Truman was acting within his constitutional powers when he issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation's steel mills. In other words, the Government was going to take over the steel mills.

The Truman administration argued that the President was acting within his inherent power as Commander in Chief in seizing the steel mills, since a proposed strike by steelworkers would have limited the Nation's ability to produce the weapons needed for the Korean war.

The Bush administration today is making the very same argument. It is asserting that the President's constitutional authorities as Commander in Chief trump the law. However, in a 6-to-3 decision in Youngstown, the Supreme Court held that President Truman exceeded his constitutional authority. Justice Jackson authored the famous concurring opinion, setting forth the three zones into which Presidential actions fall.

The first zone: When the President acts consistently with the will of Congress, the President's power is at its greatest.

Two: When the President acts in an area in which Congress has not expressed itself, there is an open question as to the scope of congressional and Presidential authority. So we know the first two.

The third zone: When the President acts in contravention of the will of Congress, Presidential power is at its lowest.

That is where we are right now. Clearly, President Bush acted outside of the scope of the law. According to Youngstown, his power is at its lowest. The only way to test that is to bring a case before the Supreme Court again. But the fact the Court ruled against Truman in a situation of war—in a situation where a strike would have shut down the steel mills, when Truman tried to use his commander in chief authority to seize the steel mills, the Court said: You cannot do that, and then it went on to define the different zones of Presidential authority. It is a big opinion, and it is one which is often quoted in our judicial hearings on Supreme Court nominees.

Justice Jackson also wrote:

> When the President takes measures incompatible with the expressed or implied will of Congress—

Which is this case—

> his power is at its lowest ebb, for then he can rely only on his constitutional powers, minus any constitutional powers of Congress over the matter.

Now, this is key, this last part: Although Justice Jackson's opinion was not binding at the time, the Supreme Court has since adopted it as a touchstone for understanding the dimensions of Presidential power. The Youngstown case is as important today as it was then.

That is why I am proposing this amendment. I want to make it crystal clear, and my cosponsors want to make it crystal clear, that Congress has acted to prohibit electronic surveillance on U.S. persons for foreign intelligence purposes outside of FISA, and this amendment does that.

One day this issue is going to be before the Court, and on that day I want the Justices to be able to go back and see the legislative intent; the legislative intent as it was in the Judiciary Committee, the legislative intent as it is here on the floor, and the legislative intent of this amendment to strengthen the exclusivity parts of FISA.

What we have here is a case of history repeating itself: abuse followed by a clear statement from Congress, then another abuse with the Terrorist Surveillance Program. It too should be followed by a clear statement from Congress.

Now is the time for the Congress of the United States to reassert its constitutional authorities and pass a law that clearly and unambiguously prohibits warrantless surveillance outside of FISA. Now is the time to say that no President, now or in the future, can operate outside of this law.

I mentioned that in 2001 the President chose to go outside of FISA. In January of 2007, after the Intelligence Committee learned about the full dimensions of the law, guess what. The executive branch brought it to the Court and bit by bit put the program under the Foreign Intelligence Surveillance Court. Today, the entire program is within the parameters of the Foreign Intelligence Surveillance Court.

What I am saying to this body is it was a terrible misjudgment not to do so in 2001, because I believe the Foreign Intelligence Surveillance Court would have given permission to the program. So I believe this amendment is absolutely crucial, and I very much hope it will pass tomorrow.

Now, if I may, I wish to speak in support of my amendment to replace the full immunity in the underlying bill with a system of FISA Court review. This is amendment No. 3919. I am joined in this amendment by Senators BILL NELSON, BEN CARDIN, and KEN SALAZAR. I ask unanimous consent to add Senator WHITEHOUSE as a cosponsor, and I know that Senator WHITEHOUSE wishes to come to the floor to speak to this amendment.

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

Mrs. FEINSTEIN. This amendment is about allowing a court to review the request for immunity for the telecommunications companies, but in a way that is carefully tailored to meet this unique set of suits. It allows for the good faith defense if the companies reasonably believed the assistance they provided the Government was legal.

As Members know, the FISA Court comprises 11 Federal district court judges appointed by the Chief Justice. It has heard thousands of applications for FISA warrants and has recently made determinations on the executive's procedures under the Protect America Act. In January of 2007, the Court put the entire Terrorist Surveillance Program under its jurisdiction. Its judges and its staff are experts in surveillance law, and the Court protects national security secrets.

Let me describe the amendment briefly. Under this amendment, the FISA Court is directed to conduct a tailored, three-part review.

Part one: The FISA Court will determine whether a telecommunications company actually provided the assistance to the Federal Government as

part of the Terrorist Surveillance Program. If not, those cases are dismissed. So if you didn't give help and you have litigation pending, the case is dismissed, period.

Second: If assistance was provided, the Court would review the request letters sent from the Government to the companies every 30 to 45 days. The FISA Court would then have to determine whether these letters, in fact, met the requirements of the applicable law. There is law on this. It is part of FISA. It is 18 U.S.C. 2511. If they met the requirements, the cases against the companies are dismissed.

Now, let me tell my colleagues what the law says. Sections 2511(2)(a)(ii)(A) and (ii)(B) state that companies are allowed to provide assistance to the Government if they receive a certification in writing by a specified person (usually the Attorney General or a law enforcement officer specifically designated by the Attorney General).

The certification is required to state that no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required by the Government. Now that is what the law says. It is short, it is succinct, it is to the point.

The question is: Do the specifics of the actual documents requesting assistance meet the letter of this law with respect to contents and timing. If they did, the companies would be shielded from lawsuits. Why? Because that is the law. That is what the law says. No one would want us not to follow the law.

Finally, in any case where the defendant company did provide assistance but did not have a certification that complied with the requirements I have read, the FISA Court would assess whether the company acted in good faith, as has been provided under common law.

There are several cases of common law that describe what is called the good faith defense—the U.S. v. Barker, Smith v. Nixon, Halperin v. Kissinger, and Jacobson v. Bell Telephone. So there is common law on the subject.

There would be at least three lines of defense for defendant companies in this situation. They could argue that the assistance was lawful under the statutes other than 18 U.S.C. 2511—the law I have cited; that they believed, perhaps wrongly, that the letters from the Government were lawful certifications; or that complying with the request for assistance was lawful because the President had article II authority to conduct this surveillance. They could make their arguments, and the plaintiffs, against the defendant companies, could make their arguments.

In this case, the FISA Court would then determine whether the company acted in good faith and whether it had an objectively reasonable belief that compliance with the Government's written request or directives for assistance were lawful. If the Court finds that the company met this standard, the lawsuits would be dismissed.

I believe this very narrow three-part test strikes the right balance between the competing interests in the immunity debate. This amendment neither dismisses the cases wholesale, nor does it allow the cases to proceed if the companies had an objectively reasonable belief that their compliance was lawful.

Let me point out for a moment some of the history relevant to this issue.

First: Requests for assistance from the Government to the telecoms came about 1 month following the worst terrorist attack against our Nation. That is fact. There was an ongoing acute national threat. That is a fact. The administration was warning that more attacks might be imminent. That was fact. And we now know that there was a plot to launch a second wave of attacks against the west coast.

Two: Certain telecom companies received letters every 30 to 45 days from very senior Government officials. That is fact. I have read them. The letters said the President had authorized their assistance. That is fact. They also said the Attorney General had confirmed the legality of the program. That is fact. These assurances were from the highest levels of the Government.

Third: Only a very small number of people in these companies had the security clearances to be allowed to read the letters, and they could not consult others with respect to their legal responsibility, nor are these telecommunication company executives expert in separation of powers law—either article II legal arguments or the flawed AUMF argument.

Fourth: As I mentioned, common law has historically provided that if the Government asks a private party for help and makes such assurances that help is legal, the person or company should be allowed to provide assistance without fear of being held liable. That is true. Common law does this. One would think this would be especially true in the case of protecting our Nation's security.

Fifth, taking no legislative action on the pending cases ignores the fact that these companies face serious, potentially extraordinarily costly litigation but are unable at the present time to defend themselves in court. The Government has invoked the state secrets defense.

Now, this is a sort of insidious defense. It places the companies in a fundamentally unfair place. Individuals and groups have made allegations to which companies cannot respond. They cannot answer charges, nor can they respond to what they believe are misstatements of fact and untruths.

Bottom line, they cannot correct false allegations or misstatements, they cannot give testimony before the court, and they cannot defend themselves in public or in private.

While I have concerns about striking immunity altogether or substituting the Government for the companies, I don't believe full immunity is the best option without having a court review the certification and the good-faith defense.

Currently, under FISA there is a procedure that allows the Government to receive assistance from telecommunications companies. As I have already described, title 18 of the U.S. Code, section 2511, states that the Government must provide a court order or a certification in writing that states:

> No warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required, setting forth the period of time during which the provision of the information, facilities, or technical assistance is authorized and specifying the information, facilities, or technical assistance required. . . .

That is it. Under the law, these are the circumstances under which a telecommunications company may provide information and services to the Government. Unfortunately, the administration chose not to go to the FISA Court in the fall of 2001 for a warrant. I will never understand why. Instead, it asserted that Article II of the Constitution allowed the President to act outside of FISA.

However, as I said, by January of 2007—more than 5 years later—the entire Terrorist Surveillance Program was, in fact, brought under the FISA Court's jurisdiction. So, ultimately, the administration agreed that the program can and should be conducted under the law.

Senators NELSON, CARDIN, SALAZAR, WHITEHOUSE, and I believe the question of whether telecommunications companies should receive immunity should hinge on whether the letters the Government sent to these companies met the requirements of 18 U.S.C. 2511 or, if not, if the companies had an objectionably reasonable belief their assistance was lawful, and what that objective belief was.

In other words, we should not grant immunity if companies were willingly and knowingly violating the law.

So the best way to answer this question is to allow an independent court, skilled in intelligence matters, to review the applicable law and determine whether the requirements of the law or the common law principle were, in fact, met. If they were, the companies would receive immunity; if not, they would not. But a court would make that decision, not a body, some of whom have seen the letters but most of whom have not. But it would be a court that is skilled in this particular kind of law.

I want to briefly comment on procedure. I very much regret that this amendment faces a 60-vote threshold when the other two amendments relating to telecom immunity face majority votes. Clearly, someone was afraid this might get a majority vote and, therefore, they put on a 60-vote requirement.

This, I believe, is prejudicial, and it places a higher burden on this amendment. And the irony is, this amendment could be an acceptable solution

for the other House, which has passed a bill that doesn't contain any provisions for immunity and has said they would not provide any provision for immunity. This is the way to handle that particular issue.

I, therefore, urge my colleagues to support this amendment both on the merits and so that we can finish the FISA legislation. I hope the conferees will take a strong vote on this amendment—whether it reaches 60 Senators to vote aye or not—as a signal that it is a good solution when the legislation goes to conference.

Mr. President, I ask for the yeas and nays on both of these amendments.

The ACTING PRESIDENT pro tempore. Is there objection to asking for the yeas and nays on the two amendments at this time?

Without objection, it is so ordered.

Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

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

Mr. HATCH. Mr. President, for the last 6 months I have come to the floor on numerous occasions to offer my support of the limited immunity provisions in the Rockefeller-Bond bill.

In addition to my views on this subject, there are countless Americans who have expressed their support for the immunity provision.

In fact, I ask unanimous consent to have printed in the RECORD a letter sent to the Senate leadership last month, which is signed by 21 State attorneys general, which expresses their strong support for the immunity provision included in this bill.

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

DECEMBER 11, 2007.

RE FISA Amendments Act of 2007 (S. 2248).

Hon. HARRY REID,
Senate Majority Leader,
Washington, DC.
Hon. MITCH MCCONNELL,
Senate Minority Leader,
Washington, DC.

DEAR MAJORITY LEADER REID AND MINORITY LEADER MCCONNELL: We understand that the Senate will soon consider S. 2248, the FISA Amendments Act of 2007, as recently reported by the Senate Select Committee on Intelligence. Among other things, the bill would directly address the extensive litigation that communications carriers face based on allegations that they responded to requests from the government regarding certain intelligence-gathering programs. For a number of reasons, we support these carefully crafted provisions of the bill that the Intelligence Committee adopted on a bi-partisan basis.

First, protecting carriers from this unprecedented legal exposure is essential to domestic and national security. State, local and federal law enforcement and intelligence agencies rely heavily on timely and responsive assistance from communications providers and other private parties; indeed, this assistance is utterly essential to the agencies' functions. If carriers and other private parties run the risk of facing massive litigation every time they assist the government or law enforcement, they will lack incentives to cooperate, with potentially devastating consequences for public safety.

Second, the provisions of the bill are consistent with existing, long-standing law and policy. Congress has long provided legal immunity for carriers when, in reliance on government assurances of legality or otherwise in good faith, they cooperate with law enforcement and intelligence agencies. But because the government has invoked the ''state secrets privilege'' with respect to the subject matter of the cases, the carriers are disabled from mounting an effective defense, they are not permitted to invoke the very immunities written into the law for their benefit, and they cannot rebut the media storm that has damaged the companies' reputations and customer relationships. The immunity provisions of S. 2248 would overcome this paradox, but not simply by dismissing the pending cases outright. Instead, they would establish a thoughtful, multi-step process involving independent review by the Attorney General and the courts that, only when completed, would lead to dismissal of the claims.

Third, cases against the carriers are neither proper nor necessary avenues to assess the legality of the government's intelligence-gathering programs. Government entities or officials are already parties in over a dozen suits challenging the legality of the alleged programs, and the immunity provisions in S. 2248 would have no impact on these claims. In short, Congress should not, in a rush to hold the government accountable for alleged wrongdoing, burden these carriers with the substantial reputational damage and potentially ruinous liability that could flow from these suits. If these alleged programs were legally infirm, the government, not private actors who acted in good faith and for patriotic reasons, should answer for them.

For these reasons, we urge that any FISA-reform legislation adopted by the Senate include the carrier-immunity provisions currently contained in S. 2248.

Hon. W.A. Drew Edmondson, Attorney General of Oklahoma; Hon. J.B. Van Hollen, Attorney General of Wisconsin; Hon. John Suthers, Attorney General of Colorado; Hon. Patrick Lynch, Attorney General of Rhode Island; Hon. Bill McCollum, Attorney General of Florida; Troy King, Attorney General of Alabama; Hon. Dustin McDaniel, Attorney General of Arkansas; Hon. Thurbert E. Baker, Attorney General of Georgia; Hon. Paul Morrison, Attorney General of Kansas; Hon. Kelly Ayotte, Attorney General of New Hampshire.

Hon. Jon Bruning, Attorney General of Nebraska; Hon. Wayne Stenehjem, Attorney General of North Dakota; Hon. Roy Cooper, Attorney General of North Carolina; Hon. Henry McMaster, Attorney General of South Carolina; Hon. Tom Corbett, Attorney General of Pennsylvania; Hon. Greg Abbott, Attorney General of Texas; Hon. Larry Long, Attorney General of South Dakota; Hon. Bob McDonnell, Attorney General of Virginia; Hon. Mark Shurtleff, Attorney General of Utah; Hon. Darrell McGraw, Attorney General of West Virginia; Hon. Bob McKenna, Attorney General of Washington.

Mr. HATCH. Mr. President, here is the list of the attorneys general who signed this letter endorsing the immunity provision in the original Rockefeller-Bond bill. They are attorneys general from the States of Wisconsin, Rhode Island, Oklahoma, Colorado, Florida, Alabama, Arkansas, Georgia, Kansas, Utah, Texas, New Hampshire, Virginia, North Dakota, North Carolina, South Carolina, Pennsylvania, South Dakota, Nebraska, West Virginia, and Washington.

In addition, I ask unanimous consent to have printed in the RECORD four letters sent from law enforcement organizations, all in support of the immunity provision of the bill.

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

NATIONAL SHERIFF'S ASSOCIATION,
Alexandria, VA, November 13, 2007.

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

DEAR CHAIRMAN LEAHY AND RANKING MEMBER SPECTER: On behalf of the National Sheriffs' Association (NSA), I am writing to urge you to support Section 202 of the FISA Amendments Act of 2007 (S. 2448). This extension of retroactive immunity under the terms referenced in this section would have a significant impact on the cooperative relationship between the government and the private companies to safeguard public safety.

As you know, the electronic surveillance for law enforcement and intelligence functions depends in great part on the cooperation of the private companies that operate the nation's telecommunication system. Section 202 would provide much needed liability relief to electronic communication service providers that assisted the intelligence community to implement the President's surveillance program in the aftermath of September 11, 2001. The provision of retroactive immunity would help ensure that these providers who acted in good faith to cooperate with the government when provided with lawful requests in the future.

The nation's sheriffs recognize the critical role that electronic communication service providers play in assisting intelligence officials in national security activities. However, given the scope of the current civil damages suits, we are gravely concerned that, without retroactive immunity, the private sector might be unwilling to cooperate with lawful government requests in the future. The possible reduction in intelligence that might result from protracted litigation is unacceptable for the security of our citizens.

As the Senate considers the FISA Amendments Act of 2007, we strongly urge you to help preserve the cooperative relationship between law enforcement and the private sector by supporting Section 202.

Sincerely,

SHERIFF CRAIG WEBRE,
President.

THE NATIONAL TROOPERS COALITION,
Washington, DC, November 12, 2007.

Hon. PATRICK J. LEAHY,
Chairman, Senate Judiciary Committee, Washington, DC.
Hon. ARLEN SPECTER,
Ranking Member, Senate Judiciary Committee, Washington, DC.

DEAR CHAIRMAN LEAHY AND RANKING MEMBER SPECTER: As the Senate Judiciary Committee gets set to consider legislation that would update the Foreign Intelligence Surveillance Act (FISA), the National Troopers Coalition wishes to express its support for Section 202 of the FISA Amendments Act of 2007. This section is of particular importance to the NTC and law enforcement in general

because it will have a significant impact on the cooperative relationship between government and the private sector in relation to public safety.

Section 202 provides much needed relief from mass tort litigation relief to telecommunications companies that helped protect our nation after the horrific attacks of September 11, 2001. Should this narrow provision not be adopted, we believe that all levels of law enforcement will suffer by losing the cooperation of vital allies in our ongoing fight againt crime. The chilling effect will be that businesses may feel compelled to avoid the risk of litigation by declining to cooperate with law enforcement even though they have every reason to believe the request is lawful.

In the weeks following the 9/11 attacks, some telecommunications companies were apparently asked by the President for their assistance with intelligence activities, aimed at preventing similar attacks in the future. These companies were assured that their compliance was necessary and deemed lawful by the Attorney General. Upon complying with the government's request, and providing information that would keep the American people safe, these companies now face the prospect of years of litigation, even though they cannot defend themselves in court due to the highly classified nature of the governmental program they were assured was legal. This is disheartening, to say the least.

The nation's State Troopers understand the vital role that private businesses play in emergency situations and criminal investigations, and we are concerned that if these companies continue to be dragged through costly litigation for having responded in these circumstances, it will deter their voluntary cooperation with law enforcement authorities in the future. When it comes to protecting the public from terrorists, sophisticated international gangs and on-line predators, government counts on its private sector partners for help. We cannot afford to send the message that if you cooperate with law enforcement you will be sued.

As the Senate considers this legislation, we strongly urge you to help preserve the cooperative relationship between law enforcement and private businesses by supporting Section 202.

Sincerely,

DENNIS J. HALLION,
Chairman.

NATIONAL NARCOTIC OFFICERS' ASSOCIATION'S COALITION,
West Covina, CA, November 14, 2007.

Re Support for Section 202 of the FISA Amendments Act of 2007

Hon. PATRICK LEAHY,
Chairman, Senate Committee on the Judiciary, Washington, DC.
Hon. ARLEN SPECTER,
Ranking Member, Senate Committee on the Judiciary, Washington, DC.

DEAR CHAIRMAN LEAHY AND RANKING MEMBER SPECTOR: I am writing on behalf of the forty-four state narcotic officers' associations and the more than 69,000 law enforcement officers represented by the National Narcotic Officers' Associations' Coalition (NNOAC) to encourage your strong support for Section 202 of the FISA Amendments Act of 2007.

Section 202 provides much-needed relief from mass tort litigation towards telecommunications companies that helped protect our nation after the horrific attacks of September 11, 2001. Should this provision not be adopted, we believe that federal, state and local law enforcement will suffer by losing important voluntary cooperation of allies in our national fight against crime. Private corporations and business may decide to avoid the risk of litigation by declining to cooperate with law enforcement—even if they have every reason to believe the request for their help is lawful and just.

The NNOAC understands and appreciates the vital role that private businesses play in emergency situations and criminal investigations. Our membership is very concerned that if these corporate entities continue to be dragged through costly litigation for having responded during dire circumstances—like the terrorist attacks occurring on September 11, 2001—it will have a chilling effect on the private sector's voluntary cooperation with law enforcement in the future. The United States government cannot afford to send the message to corporate America that if you cooperate with law enforcement and the office of the United States Attorney General, you will get sued.

Thank you for your consideration of this important provision and your continued support towards law enforcement. I am happy to discuss this issue further.

Sincerely,

RONALD E. BROOKS,
President.

INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE,
Alexandria, VA, November 15, 2007.

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

DEAR CHAIRMAN LEAHY: As President of the International Association of Chiefs of Police (IACP), I am writing to express my support for Section 202 of the FISA Amendments Act of 2007. This section is of particular importance to law enforcement because it will have a significant impact on the vital cooperative relationship between government and the private sector that is necessary to promote and protect public safety.

As you know, Section 202 provides relief from litigation to telecommunications companies that responded to the government's request for assistance following the horrific attacks of September 11, 2001. It is my belief that failure to adopt this provision could jeopardize the cooperation of vital allies in our ongoing fight against crime and terrorism. Businesses often feel compelled to avoid the risk of litigation by declining to cooperate with law enforcement even though they have every reason to believe the request is lawful.

Police chiefs understand the vital role that private businesses often play in emergency situations and criminal investigations, and we are concerned that if these companies are faced with the threat of litigation for responding in these circumstances, it will have a chilling effect on their voluntary cooperation with law enforcement authorities in the future.

At this critical time in history, when federal, state, tribal and local law enforcement agencies are striving to protect the public from terrorists, sophisticated international gangs, online predators, and other violent criminals, it is extremely important that we be able to rely on the private sector for much needed assistance.

Therefore, as the Senate considers this legislation, I urge you to help preserve the cooperative relationship between law enforcement and private businesses by supporting Section 202.

Thank you for your attention to this important matter and for your efforts on behalf of law enforcement.

Sincerely,

RONALD C. RUECKER,
President.

Mr. HATCH. Mr. President, The first letter is from the National Sheriffs Association on behalf of 20,000 nationwide sheriffs. It states in part:

The Nation's sheriffs recognize the critical role that electronic communication service providers play in assisting intelligence officials on national security activities. We are gravely concerned that, without retroactive immunity, the private sector might be unwilling to cooperate with lawful Government requests in the future. The possible reduction in intelligence that might result from protracted litigation is unacceptable to the security of our citizens. We strongly urge you to help preserve the cooperative relationship between law enforcement and the private sector by supporting the immunity provision of this bill.

The other letters include one from the National Troopers Coalition, on behalf of its 40,000 members, one from the International Association of Chiefs of Police, on behalf of its 21,000 members, and one from the National Narcotics Officers' Association's Coalition on behalf of its 69,000 members. All of these letters support the retroactive immunity provision.

I have to tell you, when 150,000 law enforcement personnel with tremendous experience and expertise say they support telecom retroactive immunity, we should be listening and we should be giving this great weight. They know firsthand the dangers we face and they know what is at stake.

Let me talk a little about the Feinstein amendment No. 3910 on exclusive means. S. 2248 already has an exclusive means provision that is identical to the first part of the distinguished Senator's amendment. That provision simply restates Congress's intent back in 1978, when FISA was enacted, to place the President at his lowest ebb of authority in conducting warrantless foreign intelligence surveillance.

The current provision in S. 2248 was acceptable to all sides in the Intelligence Committee because it maintains the status quo with respect to the dispute over the President's constitutional authority to authorize warrantless surveillance.

Unfortunately, the amendment of the distinguished Senator from California is a significant expansion of the bipartisan provision that we enacted in the Intelligence Committee bill. Her amendment goes further by stating that only an express statutory authorization for electronic surveillance, other than FISA or the criminal wiretap statutes, shall constitute additional exclusive means.

This attempts to prohibit the President's exercise of his judicially recognized article II authority to issue warrantless electronic surveillance directives.

During the next attack on our country or in the face of an imminent threat, the Congress may not be in a position to legislate an express authorization of additional means. We may get intelligence information about an imminent threat during a lengthy recess, over a holiday. Air travel may be inhibited.

The bottom line is, we don't know what tomorrow will bring. Yet this

provision of the distinguished Senator from California would raise unnecessary legal concerns that might impede effective action by the executive branch to protect this country.

This amendment would also make members of the intelligence community who conduct electronic surveillance at the direction of the President subject to the FISA criminal penalty provisions of a $10,000 fine and imprisonment for not more than 5 years.

Virtually all of these people are not partisan people. They are people who continue on regardless of what administration is involved. They are there to do the job to protect us. They are not partisans. We should not treat them as such, and certainly we should not be saying that if they make a mistake, they are subject to a criminal provision of a $10,000 fine or imprisonment of not more than 5 years. Also, it is likely these criminal penalties would apply to any service provider who assisted the Government in conducting such electronic surveillance. That makes it even tougher to get their cooperation. Up until now they have been willing to cooperate because they realize how important this work is, and they have the request of high-level officials in the Government. That should be enough to protect them. They are doing it patriotically, to protect our country. They should not be hampered nor should their general counsels have to make a decision that the U.S. Government will have to go to court, with all of the delays involved in that, in order to do what it takes to protect the people in this country.

Regardless of what the skeptics and critics have said about the President's Terrorist Surveillance Program, the Constitution trumps the FISA statute. If a Government employee acts under the color of the President's lawful exercise of his constitutional authority, that employee should not be subject to a criminal penalty.

In my opinion, the current restatement of exclusive means is fair and keeps the playing field level, and it is enough. Ultimately, the Supreme Court may decide whether Congress has the authority to limit the President's authority to intercept enemy communications. Until then, it is my hope that we don't try to tilt the balance in a way that we may someday come to regret.

I urge my colleagues to vote against this exclusive means amendment.

The next Feinstein amendment is No. 3919. This amendment alters the immunity provision of the Rockefeller-Bond bill. I will oppose this amendment.

As has been said countless times, the immunity provision in this legislation was created after months of extensive debate and negotiation between the Congress and the intelligence community.

I cannot emphasize enough the painstaking work that the Intelligence Committee undertook in order to create this immunity provision. The chairman of the Senate Select Committee on Intelligence stated the following in the Intelligence Committee report:

> The [Intelligence] Committee did not endorse the immunity provision lightly. It was the informed judgment of the Committee after months in which we carefully reviewed the facts in the matter. The Committee reached the conclusion that the immunity remedy was appropriate in this case after holding numerous hearings and briefings on the subject and conducting a thorough examination of the letters sent by the U.S. Government to the telecommunications companies.

The administration wanted more than what is in this bill, and they did not get it. In a bipartisan way, we came together to come up with this bill, and it should not be tampered with now on the floor.

Let's look at what this means in relation to ongoing litigation. Since this immunity compromise provides no immunity for Government agencies or officials, the following seven cases will continue to be unaffected by this legislation. The immunity provision of the Senate Select Committee on Intelligence bill still allows TSP challenges in the al-Haramain Islamic Foundation, Inc. v. George W. Bush case, the ACLU v. National Security Agency case, the Center for Constitutional Rights v. George W. Bush case, the Guzzi v. George W. Bush case, the Henderson v. Keith Alexander case, the Shubert v. George W. Bush case, and the Tooley v. George W. Bush case.

I wish to draw attention to the first case. The al-Haramain Islamic Foundation has been designated by the Department of the Treasury as a ''specially designated global terrorist'' for providing support to al-Qaida and was similarly designated by the United Nations Security Council. If there ever was a case that should be dismissed, this is it—a terrorist organization providing support to al-Qaida sues the President for listening to their terrorist conversations. Unbelievable. And yet since the immunity provision in this bill is silent on the issue, the case will go on.

I highlight this case to remind people the provision in the bill already represents a compromise. The provision in the original bill passed by a 13-to-2 bipartisan vote out of the Intelligence Committee on which I serve. Despite repeated attempts to tweak this compromise, it remains the most appropriate and just mechanism for the resolution of this issue.

Just like the faulty ideas of Government indemnification and Government substitution, the Foreign Intelligence Surveillance Court review of certifications is yet another alternative that fails to improve on the original bipartisan immunity compromise we have in the bill before us.

I will oppose any provisions which weaken the immunity compromise. This amendment we are debating will do exactly that. Rather than rely on the carefully crafted language, this amendment introduces radically new ideas which completely change the dynamics of the immunity provision of the bipartisan bill. Rather than allowing the presiding district judge to review the Attorney's General certification called for in this bill, this amendment unnecessarily expands the Foreign Intelligence Surveillance Court jurisdiction into areas unheard of when this court was created nearly 30 years ago and equally unheard of in the year 2008.

Let's remember what it is that the Foreign Intelligence Surveillance Court was created to do:

> A court which shall have jurisdiction to hear applications for and grant orders approving electronic surveillance.

That is the mission of the FISC. So the FISC hears applications for and grants orders approving electronic surveillance. That is it. That is all they were created to do and rightly so. These are judges from all over the country who serve on the FISC at special times and do read these briefs, do read these legal matters that come before them, and then do exactly that, ''a court which shall have jurisdiction to hear applications for and grant orders approving electronic surveillance.''

Yet this legislation will completely alter the nature of this court by transforming it into a trial court for adversarial litigation. This completely alters the intention of FISA from 1978 which carefully created this court. The role of the FISC, or Federal Intelligence Surveillance Court, has been greatly misunderstood during this debate.

I suggest we pay close attention to the recent opinion from the FISC, which is only the third public opinion in the history of the FISC, and that is over a 30-year period. The importance of this quote has been emphasized many times by Senator BOND, and this 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 not be equal to that of the executive branch which is constitutionally entrusted with protecting the national security.

I understand there are certain Senators in this body who dislike President Bush. That is their right. But on the other hand, there may come a time when a President of their party may have to protect our country. They ought to think it through because they are taking away the tools that are necessary to protect our country in a zeal to go beyond what the FISC was ever designated to do.

Going beyond the fact this amendment would turn the role of the FISA Court on its head, let's look at what the FISC is asked to do in this amendment. According to the language, liability protection would only occur in three limited instances: One, the statutory defense in 18 U.S.C. 2511(2)(a)(ii)

has been met. Two, the assistance of electronic surveillance service providers was undertaken on good faith and pursuant to an ''objectively reasonable belief'' that compliance with the Government's directive was lawful. And three, assistance was not provided.

Regarding the first instance in which litigation would be dismissed, we need to realize 18 U.S.C. 2511 is not the only statute that allows the Government to receive information from telecommunications companies. There are numerous statutes which authorize the Government to receive information from private businesses. Here is a list not meant to include all such statutes. Look at this list:

18 U.S.C. 2516; 18 U.S.C. 2518, 18 U.S.C. 2512(2)(a)(ii), 18 U.S.C. 2511(3)(b)(iv), 50 U.S.C. 1802(a), 50 U.S.C. 1804, 50 U.S.C. 1805, 50 U.S.C. 1811, 50 U.S.C. 1861, 18 U.S.C. 2702(b)(5), 18 U.S.C. 2702(c)(5), 18 U.S.C. 2702(b)(8), 18 U.S.C. 2702(c)(4), 18 U.S.C. 2703(a), 18 U.S.C. 2709, 50 U.S.C. 1842, 18 U.S.C. 3127, 50 U.S.C. 1843, and 50 U.S.C. 1844, to mention a few.

Regarding the second narrow instance of dismissal of litigation, the phrase ''objectively reasonable belief'' is not defined in the legislation. What does this mean? How can it not be given a definition if the court is supposed to rely on it? Are we going to turn it over to the court to define it? Again, that is not the mission of the court. The court is not skilled in intelligence matters, except to the extent they have to know about it to be able to approve the various requests that are made of them, and there is no way it is going to be as skilled as the intelligence community.

So this amendment would grant the FISC new jurisdiction to review past conduct of private businesses utilizing a standard which did not exist at the time of the supposed activity and a standard which is not even defined in the legislation which creates it. Wow.

In addition, this amendment would allow plaintiffs and defendants to appear before the Federal Intelligence Surveillance Court. But we should know the FISC is not a trial court. It has never had plaintiffs in ongoing civil litigation appear before it in its nearly 30 years of existence.

There are approximately 40 civil cases which are ongoing out of this matter. Would all these plaintiffs appear before FISC? How would classified information, therefore, be protected? This amendment would create an entirely new role for the FISC, thus abandoning the very formula by which the FISC was created in the first place. Remember, the FISC was created to be a specialized court. Yet the expansion of FISC jurisdiction and duty required by this amendment brings us down a road where the FISC could be transformed from a specialized court to an appendage of the Federal district court. That precedent set by this amendment could forever alter the role of the FISC.

Quite simply, the FISC is not a trial court, nor should it be. Quite simply, the FISC is not a forum for adversarial litigation, nor should it be.

This amendment extends the rationale that the answer to any question during this debate is ''have the FISC look at it.'' The role of the FISC is vitally important, but the FISC is not the answer to every question during this debate. Misguided attempts to expand the FISC to be the purported solution to any alleged problem with terrorist tracking are impractical, imperceptive, and inappropriate.

We are long past the time for guesswork, and we need to support the tried-and-true bipartisan immunity provision as appropriate remedy to a critical problem. I reiterate my strenuous objection to this amendment, and I urge my colleagues not to support an amendment which introduces far too many unanswered questions into a debate which needs none.

AMENDMENT NO. 3912

With regard to amendment No. 3912 regarding bulk collection, this amendment did pass out of the Judiciary Committee, but it passed on a 10-to-9 party-line vote after only four minutes of discussion. This Judiciary substitute was tabled by the full Senate by a 60-to-36 vote, and this amendment is one of the reasons it was.

There is confusion about the need for this amendment. Does it preclude bulk collection or not? The text of the amendment seems to indicate that no bulk collection is permitted. Yet the author of the amendment states there is an exception for military operations. I have read the amendment, and I don't see any exception listed. Perhaps he is referencing comments in the Judiciary Committee report. But committee reports are not law.

The Attorney General and Director of National Intelligence have carefully reviewed this amendment, and they have stated that if this amendment is in a bill which is presented to the President, they will recommend that the President veto the bill, and I agree with that recommendation.

AMENDMENT NO. 3979

With regard to the Feingold amendment No. 3979 on sequestration of U.S. person communications, I am very concerned about the substance of this amendment, as are many of my colleagues. In addition, the Attorney General and Director of National Intelligence have thoroughly reviewed this amendment, and they recently sent a letter to the Senate stating:

> This amendment would eviscerate critical core authorities of the Protect America Act and S. 2248. Our prior letter and 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 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 consequences for the intelligence communities' efforts to collect foreign intelligence.

The last part of this has been underlined.

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

Unlike many of the amendments we have debated here on the Senate floor, this amendment did not receive a vote in either the Intelligence or Judiciary Committees. Not that that is limiting, but the amendment itself is not a healthy one on its face. Yet this amendment is among the most drastic in terms of affecting the efficiency and effectiveness of our intelligence collection processes. This amendment imposes tremendous restrictions in which the intelligence community is limited in what information they can receive and how this information can be shared.

That is what I think we were shocked to find when 9/11 occurred, that our various intelligence community organizations—FBI, CIA, et cetera—were not sharing information. Now that we have solved that problem, why go back?

The massive reorganization of our collection techniques which would be required by this amendment is certainly obvious. The author of the amendment has recognized this as well, previously stating:

> I do understand this amendment imposes a new framework that may take some time to implement.

We need to remember the purpose of this bill is, and always has been, to enable the intelligence community to target foreign terrorists and spies overseas. But in order to make sure we are not missing valuable intelligence, we need to get all of a target's communications, not only when that target is talking with other people overseas, and that may mean intercepting calls with people inside the United States. In fact, those may be the most important calls to try to prevent an attack in the United States.

I understand there is concern about the impact of foreign targeting on U.S. persons. But we have a lot of protections built into this new bill that came out of the Intelligence Committee on a 13-to-2 bipartisan vote. I have been to this floor on numerous occasions and highlighted how the Foreign Intelligence Surveillance Court's role in all aspects of foreign intelligence collection is being greatly expanded by this bill, far beyond the 1978 FISA statute.

In addition, the Senate agreed to an amendment by Senator KENNEDY that would make it clear you cannot use authorities in this bill to require communications where the sender and all intended recipients are known to be in the United States. We shouldn't go any farther.

The intelligence community must use minimization procedures. Our analysts are familiar with these procedures. They have used them for a long

time without any known abuses. Yet the scope of this amendment seems to represent no confidence in the minimization procedures used by the U.S. Government. Keep in mind, these minimization procedures were enacted over 30 years ago, and this bill will authorize the FISC to review and approve them for the first time.

This bill goes farther than ever before in our history in striking a balance between intelligence collection and protection of civil liberties. Personally, I am proud of this bill. I think all in the Intelligence Committee should have stuck with it, and we should not be trying to amend it at this point, especially with amendments that aren't going to work and will diminish our ability to get the intelligence we need to protect our citizens. Now I believe that in this bill we are protecting the civil liberties of ordinary Americans, but we also need to make sure our intelligence community isn't blind to information which may ultimately prove to be critical.

Section (a)(1) of this amendment would not allow the collection of certain communications if the Government knows before acquisition a communication is to or from a person reasonably believed to be in the United States. The Government knows when it targets foreign citizens in foreign countries that they might call or be called by U.S. persons. These are called ''incidental communications.'' Under the limitations in this amendment, the Government could not initiate the collection in the first place under many circumstances. This essentially undoes the authority granted in section 703 of this bill and will cause us to go deaf to our enemies.

The Director of National Intelligence has told us before that speed and agility are essential in tracking terrorists and preventing terrorist attacks. Yet even if collection could somehow begin under the dangerous restrictions in this amendment, analysts would have to go through hoop after hoop after hoop to use information that has foreign intelligence value. Remember, if it doesn't have foreign intelligence value, any U.S. person information would already have been minimized.

I do not understand why we would set up unnecessary roadblocks and slow this process down when we already have so many substantial protections in place. The Director of National Intelligence has stated this amendment would cause significant operational problems for the intelligence community that could lead to intelligence gaps. I affirm this statement. Knowing this, it would be irresponsible to handcuff our intelligence community with these additional restrictions.

I urge my colleagues to join me in opposing this dangerous amendment.

I emphasize again: We have brilliant, knowledgeable, well-trained, decent, honorable people who are here, no matter who is President, in the business of protecting our citizens from terrorist acts. And this bill, which passed 13 to 2 on a bipartisan vote out of the Intelligence Committee, provides more checks on these good people than the FISA Act of 1978 did, and that act has worked very well through all those years. The reason we are doing this bill is because we are in a new age, with new methods of communication that simply were not covered by the 1978 act, to put it in simple terms.

This is a complex thing, and I think we have to be very careful if we go beyond what the Intelligence Committee bill has said we should do. It was a bill worked out after months of hearings and work by the Intelligence Committee. I believe, in the Senate, I have probably been on the Intelligence Committee longer than anybody else, and I want to protect our people too. I want to protect them in a multiplicity of ways. But one of the most important ways we can protect them in this day of Islamic fascism is to give them the tools to do it and not restrict and hamper them from doing it—keeping in mind that they are honest, non-partisan citizens who are more interested in protecting Americans and getting the information we need to protect everybody than the partisans and sometimes uninformed people make them out to be.

Yes, any administration can put the top-level people in, but it is those who collect this information on a daily basis, minimize this information when it needs to be minimized, and work to do it in an honorable fashion who do the work. We should not be tying their hands and hampering them from getting the work done in this day and age when we have so many problems, and it looks to me as if we are going to have them for many years to come.

Mr. President, I yield the floor.

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

AMENDMENT NO. 3919

Mr. WHITEHOUSE. Mr. President, I am glad to have had the occasion to be on the floor and hear the words of the very distinguished Senator from Utah, who has served with such distinction on the Intelligence Committee for so long, but I would respond to him first that this much-touted 13-to-2 vote in the Intelligence Committee, as shown by the record of the additional views of the members of the Intelligence Committee, reflected the consensus of the Intelligence Committee that this was a work in progress; that it should go on to the Judiciary Committee, which was its next stop, and then to the floor. There was no sense that the work on the bill should stop at the time it left the Intelligence Committee.

Indeed, in the 13-to-2 vote, there were 9 Senators who offered additional views suggesting changes or differences in the legislation. So I don't think it would be wise or appropriate for this body to take a look at what the Intelligence Committee did and say that because the number appears to be 13 to 2 on the surface that we are not going to do our job of continuing to work on this work in progress.

In that spirit, I rise today to support amendment No. 3919, on good faith determinations, offered by Senators FEINSTEIN and NELSON. In the divisive debate we are having over immunity, Senator FEINSTEIN's amendment is a commendable effort to find middle ground, to which Senator FEINSTEIN has brought great diligence and care. Senator SPECTER and I have offered a broader approach, but I also support the Feinstein-Nelson amendment.

This amendment goes forward with the first half of Specter-Whitehouse. It provides for an independent judicial review of the companies' good faith. Specter-Whitehouse then provides for substitution of the Government in place of the companies, which would protect plaintiffs' legitimate rights to continue legitimate litigation, including the right to conduct discovery.

Substitution also avoids the problem of uncompensated congressional termination of ongoing litigation—a separation of powers problem. Senator FEINSTEIN's alternative at least provides for the bare minimum of a judicial determination whether the defendant companies were acting in compliance with the law or with the reasonable good faith belief that they were in compliance. I would note this is probably the lowest possible standard. We don't even require companies to have been acting within the law. All we require in this amendment is that they have a reasonable and good faith belief they were acting within the law.

As I have said before, both of the all-or-nothing approaches we are presented with here are flawed. Full immunity would strip the plaintiffs of their day in court and take away their due process rights without any judicial determination that the companies acted in good faith. That is not fair. Nothing suggests this isn't legitimate litigation, and it is wrong to take away a plaintiff's day in court without a chance to show why doing so may not be warranted.

I hope in this Chamber we can all agree that if the companies did not act reasonably and in good faith they shouldn't get protection. If we agree on that, the question becomes where the good faith determination should be made. I think it should be in court, and that is where Senator FEINSTEIN's amendment puts it—in this case, the FISA Court. First, it should not be here. We in Congress are not judges, and good faith is a judicial determination. We should leave this key determination to the judicial branch of Government. The companies have, of course, asserted that they acted in good faith. But we surely should not rely on one side's assertions in making a decision of this importance.

Moreover, most Senators have not even been read into the classified materials that would allow them to reach a fair conclusion. This body is literally incapable of forming a fair opinion

without access by most Members to the facts. So this is the wrong place to have it. We need to provide a fair mechanism for a finding of good faith by a proper judicial body with the proper provisions for secrecy, which the FISA Court has. If we do not do this, we are simply acting by brute political force, and doing so in an area where there are significant constitutional issues. Congress cutting off the ongoing work of the judicial branch may well violate the boundary that keeps the legislative and judicial branches separate—a cornerstone of our Constitution.

In an opinion written by Justice Scalia, the U.S. Supreme Court said that the Framers of the Federal Constitution had what they called ''the sense of a sharp necessity to separate the legislative from the judicial power, prompted by the crescendo''—was the word they used—''of legislative interference with private judgments of the courts.''

If there were ever a case of legislative interference with private judgment of the courts, this is it. On the other hand, consider the fact that the Government has forbidden these defendants to defend themselves. By invoking the state secrets privilege, the Government has gagged the companies. In my view, that is not fair either, particularly if the Government put these companies in this mess in the first place. So both of the all-or-nothing approaches are flawed.

I think Senator SPECTER and I have come up with the best answer: substitution. But Senator FEINSTEIN's amendment at least requires the FISA Court to make an initial determination that the companies either did not provide assistance to the Government—obviously, if they did not do anything, they should not be liable—or were actually complying with the law. Clearly, if they complied with the law, they should not be liable—or were at least acting with a reasonable good-faith belief that they were complying with the law—again, the lowest possible standard. If we cannot agree on this, then we have really taken our eyes off of our duties. The difference then becomes that once that good-faith determination is made, the Specter-Whitehouse amendment would lead to substitution, whereas the Feinstein-Nelson amendment would lead to a termination of the claims.

Both of these approaches are better than the all-or-nothing alternative we otherwise face, and both share the same goal: to use existing procedures and existing rules and existing courts to unsnarl this litigation and move it toward a just and a proper conclusion.

I urge my colleagues to support both the Specter-Whitehouse and the Feinstein-Nelson amendments.

I make one final point. Senator HATCH pointed out that the people who serve us in our intelligence community are honorable, are well trained, are intelligent, are decent, and are trying to do the right thing. I do not challenge any of that.

As the U.S. attorney, I worked with FBI agents day-in and day-out, Secret Service agents, Drug Enforcement Administration agents, Alcohol, Tobacco and Firearms agents—all decent, honorable, hard working, well trained, trying to do the right thing. In that environment, they are all very comfortable that the structure we have put in place for domestic surveillance, to protect American's rights, is a useful thing, it is important infrastructure of Government.

I see what we are trying to do now not as a criticism of the people in the intelligence community but, rather, as being an attempt to build out the infrastructure, the infrastructure that balances freedom and security in this new area of international surveillance, in just the same way we put restrictions on our agents at home.

As attorney general, I actually had to personally get the wiretaps for the State of Rhode Island from the presiding judge of the superior court. I would say the same thing about the Rhode Island State troopers with whom I worked in those cases.

Agents and police officers who have this responsibility do not resent the fact that they are given a structure to work within. I doubt that the intelligence community would resent a sensible measure that would allow a judicial determination before an American company has a finding of good faith made about it.

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

The PRESIDING OFFICER (Ms. KLOBUCHAR). The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. FEINGOLD. I ask unanimous consent that the order for the quorum call be rescinded.

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

AMENDMENT NO. 3979

Mr. FEINGOLD. Madam President, today I want to address several of the pending amendments to the FISA legislation, and I will indicate the amendment number of each one as I discuss it. First is what we call the Feingold-Webb-Tester amendment No. 3979. I wish to address some of the arguments that have been made in opposition to Feingold-Webb-Tester and to set the record straight about what the amendment does. The Senator from Missouri has suggested it would cut off all foreign intelligence collection because the Government would not be able to determine in advance whether communications are foreign to foreign. This is preposterous. The whole point of the amendment is to allow the Government to acquire all communications of foreign targets when it does not know in advance whether they are purely foreign or have one end in the United States.

The administration also argues we should not pass the Feingold-Webb-Tester amendment because it would be difficult and time consuming to implement. That is no reason to oppose the amendment. I understand the amendment imposes a new framework, and that is precisely why the amendment grants the Government up to a year before it goes into effect.

I also wish to make clear that the amendment does not force the Government to determine the location of every person and every e-mail the Government acquires, contrary to what has been suggested. The amendment only requires that the Government determine whether one end of a communication is in the United States where reasonably practicable, based on procedures approved by the FISA Court. In some instances, that would be easy to do, while in others it would not be feasible at all. The court-approved procedures will take those differences into account.

It is also not true that the amendment would harm our nonterrorism foreign intelligence operations. This amendment leaves intact the warrantless acquisition of any foreign-to-foreign communications and any communications where the Government doesn't know in advance whether they are to or from people in the United States. Even for communications where the Government knows they involve Americans in the United States, no court order is actually required for communications relating to terrorism or anyone's safety.

This is much broader than the pre-Protect America Act law. None of this would have been possible 7 months ago. Let's not forget the justification for this legislation has always been about terrorism and foreign-to-foreign communications. Last month, the Vice President defended the Protect America Act by talking about ''one foreign citizen abroad making a telephone call to another foreign citizen abroad about terrorism.'' The Feingold-Webb-Tester amendment allows those calls to be monitored without a warrant.

The Feingold-Webb-Tester amendment allows the Government to get the information it needs about terrorists and about purely foreign communications, while providing additional checks and balances for communications between people in the United States and their overseas family members, friends, and business colleagues. I urge my colleagues to support the Feingold-Webb-Tester amendment.

Let me next turn to Amendment No. 3912, which has been referred to as the bulk collection amendment. I wish to again stress the importance of my amendment prohibiting the bulk collection of Americans' international communications. The bill we are debating is supposedly intended to permit monitoring of foreign-to-foreign communications and the tracking of terrorists overseas without a warrant. It is not supposed to allow the Government to collect all communications into or out of the United States, but

that is exactly what the Government could seek to do with these authorities, which is why this amendment is critical. I have yet to hear any real arguments against it.

The DNI's recent letter opposing the amendment fails to come up with any substantive arguments. Instead, it describes hypothetical situations that clearly wouldn't be affected by the amendment. In order to protect the international communications of innocent Americans at home, the amendment simply requires that the Government is seeking foreign intelligence information from its targets. In the only examples cited in the letter—a neighborhood or group of buildings or geographic area that the U.S. military is about to invade—clearly, the Government has that purpose. The notion that the Government could not make a good-faith certification to the court that it is seeking foreign intelligence, which is all this amendment requires, is simply ludicrous. What is telling about the DNI's letter, besides that it includes no real arguments against the amendment, is what it does not say. It does not refute the danger this amendment is intended to address: the bulk collection of all communications between the United States and Europe or Canada or South America or, indeed, the world.

The DNI has testified that the PAA would authorize that kind of massive, indiscriminate collection of Americans' communications, and the administration has never denied that this bill could, too, unless we pass this amendment. In fact, this letter does nothing to reassure the American people the Government could not and would not collect all their international communications. Worse, the letter argues that a prohibition on that kind of massive collection would not ''appreciably enhanc[e] the privacy interests of Americans.'' If the DNI does not think the privacy interests of Americans would be affected by the collection of all their international communications, potentially vacuuming up their communications not just with foreigners overseas but with Americans overseas as well, then that is all the more reason to be concerned.

Serious constitutional issues are at stake. The administration is effectively telling us it intends to ignore them.

Let me also respond to a statement by the chairman of the Intelligence Committee last week that a dragnet of all international communications of Americans would probably violate the fourth amendment. I am pleased to hear the chairman acknowledge that the surveillance the administration would like to conduct would violate the constitutional rights of Americans, but how could we possibly expect this administration—an administration that has already demonstrated indifference to Americans' privacy and has already said that bulk collection would be ''desirable''—to hold back. Nor should we rely on the FISA Court to stop this, as the chairman has suggested. If Congress believes something is unconstitutional, we have absolutely no business authorizing it. We have been warned, and now we need to act by passing my modest bulk collection amendment.

I reserve the remainder of my time on amendment No. 3902.

As to the Dodd-Feingold immunity amendment No. 3907, I am pleased to join my colleague in offering this amendment to strike the immunity provision. I ask unanimous consent that I be yielded 15 minutes to speak on the Dodd amendment and that the time be charged to the proponents of the amendment.

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

Mr. FEINGOLD. I thank the Senator from Connecticut.

AMENDMENT NO. 3907

I strongly support Senator DODD's amendment to strike the immunity provision from this bill. I thank him for his leadership on the issue. I offered a similar amendment in the Judiciary Committee, and I supported a similar amendment in the Intelligence Committee when it was offered by the Senator from Florida, Mr. NELSON. Congress should not be giving automatic retroactive immunity to companies that allegedly cooperated with the President's illegal NSA wiretapping program. This provision of the bill is both unnecessary and unjustified, and it will undermine the rule of law. Retroactive immunity is unnecessary because current law already provides immunity from lawsuits for companies that cooperate with the Government's request for assistance, as long as they receive either a court order or a certification from the Attorney General that no court order is needed and the request meets all statutory requirements.

Companies do not need to do their own analysis of the court order or the certification to determine whether the Government is, in fact, acting lawfully. But if requests are not properly documented, FISA instructs the telephone companies to refuse the Government's request and subjects them to liability if they instead decide to cooperate. This framework, which has been in place for 30 years, protects companies that act at the request of the Government, while also protecting the privacy of Americans' communications. Some supporters of retroactively expanding this provision argue that the telephone companies should not be penalized if they relied on high-level Government assurance that the requested assistance was lawful. As superficially appealing as that argument may sound, it utterly ignores the history of the FISA statute.

Telephone companies have a long history of receiving requests for assistance from the Government. That is because telephone companies have access to a wealth of private information about Americans, information that can be a very useful tool for law enforcement. But that very same access to private communications means telephone companies are in a unique position of responsibility and public trust. Yet before FISA, there were basically no rules to help the phone companies resolve this tension, between the Government's request for assistance in foreign intelligence investigations and the companies' responsibilities to their customers. This legal vacuum resulted in serious Government abuse and overreaching.

The Judiciary Committee has heard testimony about this system from Mort Halperin, a former Nixon administration official who was himself the subject of a warrantless wiretap and was involved in the drafting of the FISA law in the 1970s. He testified that before FISA:

> Government communication with the telephone company . . . could not have been more casual. A designated official of the FBI called a designated official of [the company] and passed on the phone number. Within minutes all of the calls from that number were being routed to the local FBI field office and monitored.

Not surprisingly, this casual ad hoc system failed to protect Americans' privacy. The abuses that took place are well documented and quite shocking. With the willing cooperation of the telephone companies, the FBI conducted surveillance of peaceful antiwar protesters, journalists, steel company executives, and even Martin Luther King, Jr., an American hero whose life we recently celebrated.

So Congress decided to take action. Based on the history of and potential for Government abuses, Congress decided it was not appropriate for telephone companies to simply assume that any Government request for assistance to conduct electronic surveillance was legal.

Let me repeat that. A primary purpose of FISA was to make clear once and for all that the telephone companies should not blindly cooperate with Government requests for assistance. At the same time, however, Congress did not want to saddle telephone companies with the responsibility of determining whether the Government's request for assistance was a lawful one. That approach would leave the companies in a permanent state of legal uncertainty about their obligations. So Congress devised a system that would take the guesswork out of it completely. Under that system, which is still in place today, the companies' legal obligations and liability depends entirely on whether the Government has presented the company with a court order or a certification stating that certain basic requirements have been met.

If the proper documentation is submitted, the company must cooperate with the request and will be immune from liability. If the proper documentation has not been submitted, the

company must refuse the Government's request or be subject to possible liability in the courts.

AT&T, which was the only telephone company in existence at the time in the 1970s, was at the table when FISA was drafted. As Mr. Halperin described in his testimony, the company:

received the clarity that it sought and deserved. The rule, spelled out clearly in several places in the legislation and well understood by all, was this: If [the phone company] received a copy of a warrant or certification under the statute, it was required to cooperate. If it did not receive authorization by means outlined in the statute, it was to refuse to cooperate and was to be subjected to state and federal civil and criminal penalties for unlawful acquisition of electronic communications.

The telephone companies and the Government have been operating under this simple framework for 30 years. Companies have experienced, highly trained and highly compensated lawyers who know this law inside and out. In view of this history, it is inconceivable that any telephone companies that allegedly cooperated with the administration's warrantless wiretapping program did not know what their obligations were. It is just as implausible that those companies believed they were entitled to simply assume the lawfulness of a Government request for assistance. This whole effort to obtain retroactive immunity is based on an assumption that does not hold water.

Quite frankly, the claim that any telephone company that cooperates with a Government request for assistance is simply acting out of the sense of patriotic duty doesn't fare much better. Recently, we learned that telecommunications companies actually have cut off wiretaps when the Government failed to promptly pay its bills.

The Department of Justice Office of Inspector General released a report last month finding that ''late payments have resulted in telecommunications carriers actually disconnecting phone lines established to deliver surveillance to the FBI, resulting in lost evidence.'' Since when does patriotic duty come with a price tag? Evidently, assisting the Government's criminal intelligence investigation efforts fell somewhere below collecting a paycheck on the companies' lines of priorities.

Some of my colleagues have argued the telephone companies alleged to have cooperated with the program had a good-faith belief their actions were in accordance with the law. But there is an entire statute in addition to the certification provision that already provides telephone companies with a precisely defined good-faith defense. Under this provision, which is found in section 2520 of title 18, if the company is relying in good faith on a court order or other statutory legislative authorization, they have a complete defense to liability. This is a generous defense, but as generous as it is, it is not unlimited. The court must find that the telephone company determined in good faith that there was a judicial, legislative, or statutory authorization for the requested assistance.

I also wish to address the argument that retroactive immunity is necessary because the telephone companies can't defend themselves in court. When I hear this argument, I can't help but think that this administration has staged the perfect crime: enlist private companies to allegedly provide assistance in an illegal Government program, then prevent any judicial inquiry into the program by claiming a privilege—the so-called state secrets privilege—that not only shields your own actions from scrutiny but enables the companies to evade judicial scrutiny as well by claiming that they are defenseless. All the administration needs to get away with this is Congress's blessing.

That is exactly why immunity is the wrong solution. Think about what we would be doing. We would be saying that in matters of national security, you can break the law with impunity because the courts can't handle national security materials. This is outrageous. Do we really want to create a law-free zone for crimes that involve national security matters? If the Government's use of the state secrets privilege is interfering with holding companies accountable for alleged violations of the law, the solution isn't to shrug and just give up on accountability; the solution is to address the privilege head-on and make sure it doesn't become a license to evade the laws we have passed.

In any event, the notion that the Federal courts can't handle national security matters is insulting to the judges this body has seen fit to confirm, and it is contrary to the facts. Cases involving classified information are decided routinely by the Federal courts. That is why we have a statute—the Classified Information Procedures Act—to govern how courts handle classified materials. Pursuant to that statute, courts have in place procedures that have successfully protected classified information for many years. There is no need to create a ''classified materials'' exception to our justice system.

That brings me to another issue. I have been discussing why retroactive immunity is unnecessary and unjustified, but it goes beyond that. Granting companies that allegedly cooperated with an illegal program this new form of automatic retroactive immunity undermines the law that has been on the books for decades, a law that was designed to prevent exactly the type of actions that allegedly occurred here. Remember, telephone companies already have absolute immunity if they complied with the applicable law, and they have an affirmative defense if they believed in good faith that they were complying with that law. So the retroactive immunity provision we are debating here is necessary only if we want to extend immunity to companies that did not comply with the applicable law and did not even have a good-faith belief that they were complying with it. So much for the rule of law. Even worse, granting retroactive immunity under these circumstances will undermine any new laws we pass regarding Government surveillance. If we want companies to follow the law in the future, it certainly sends a terrible message, and sets a terrible precedent, to give them a ''get out of jail free'' card for allegedly ignoring the law in the past.

I find it particularly troubling when some of my colleagues argue that we should grant immunity in order to encourage the telephone companies to cooperate with the Government in the future. Let's take a close look at that argument.

Telephone companies are already legally obligated to cooperate with a court order, and as I have mentioned, they already have absolute immunity for cooperating with requests that are properly certified. So the only thing we would be encouraging by granting immunity here is cooperation with requests that violate the law. That is exactly the kind of cooperation FISA was supposed to prevent.

Let's remember why: These companies have access to our most private conversations, and Americans depend on them to respect and defend the privacy of these communications unless there is clear legal authority for sharing them. They depend on us to make sure the companies are held accountable for betrayals of that public trust. Instead, this immunity provision would invite the telephone companies to betray that trust by encouraging cooperation with a legal Government program.

Since 9/11, I have heard it said many times that what separates us from our enemies is respect for the rule of law. Unfortunately, the rule of law has taken it on the chin from this administration. Over and over, the President and his advisers have claimed the right to ignore the will of Congress if and when they see fit. Now they are claiming the same right for any entity that assists them in that effort. It is time for Congress to state clearly and unequivocally: When we pass a law, we mean what we say, and we except the law to be followed. That goes for the President, it goes for the Attorney General, and it goes for the telephone companies. The rule of law is not less important after 9/11. We can and we must defeat al-Qaida without breaking the law or sacrificing Americans' basic rights.

We have a choice. The Senate can stand up for the rule of law and let these cases go forward in the courts or we can decide to give our blessing to an administration that broke the law and the companies that allegedly helped it, and we can signal that we stand ready to bail them out the next time they decide to ignore the law. I urge my colleagues not to take that step. Support the rule of law by voting in favor of the Dodd-Feingold amendment No. 3907.

I again thank my colleague from Connecticut for his tremendous leadership on this issue. It has been extremely helpful in this effort. I sincerely thank him.

I ask unanimous consent that my remaining time be reserved.

Madam President, I yield the floor.

The PRESIDING OFFICER. The Senator from Connecticut is recognized.

Mr. DODD. Madam President, before our colleague from Wisconsin leaves the floor, let me thank him for his leadership on this issue, along with many others associated with this piece of legislation: the reverse targeting and the bulk collection issues which he has raised, which seem so obvious and so clear that you wonder why they even have to be a subject of debate. The clear reaction, in fact, from leading authorities, including those of the intelligence agencies, has been to state categorically that the very actions he wants to exclude from this legislation are prohibited under law. Reverse targeting is unconstitutional, and bulk collection is unattainable. But some in the administration have said: Were bulk collection possible, we believe we have the right to do it. The idea of bulk collection without following the rule of law should violate the sensibilities of every single Member of this body.

This debate and this discussion are very important. This has gone on now since back in December—actually, before then. The Senator from Wisconsin sits on both the Judiciary Committee and the Intelligence Committee, and so he has been deeply involved in these issues for a long time.

What I wish to state at the outset is that these amendments we are offering should not be the subject of some sort of political divide between Democrats, Republicans, liberals, conservatives, moderates, or whatever definitions one wants to apply to the people who serve here. This is about the rule of law. It is about the Constitution of the United States, and the idea that this issue and debate should somehow be divided along those lines ought to be offensive to every single Member of this body. Every single one of us, on the day we raise our right hand and take the oath of office, swear to uphold the Constitution of the United States. That is nothing less than what we are engaged in with this debate.

We have been asked to subscribe to the false dichotomy that in order for us to be more secure as a nation, we must give up some of our rights. The Senator from Wisconsin and the Senator from Connecticut believe very firmly that quite the opposite is true: that if you begin to give up rights, you become less secure, as a people and as a nation. Our deep concern is that that is exactly the path we seem to be following these days with the refusal to adopt the Feingold amendments in dealing with reverse targeting and bulk collections. It is what I am fearful may be the case when we try to strike title II of the Foreign Intelligence Surveillance Act and prohibit the retroactive immunity being sought by the administration and by a handful of telephone companies.

Let me remind our colleagues that when this proposal was first made to the Intelligence Committee, the proposal was to grant immunity to anyone involved in the collection of this information, including those who allegedly authorized it at the executive branch. So while I am critical of what is in the Intelligence Committee bill that has been brought to us by my friend from West Virginia and my friend from Missouri, Senator ROCKEFELLER and Senator BOND, I wish to begin by thanking them for having rejected the administration's earlier request that there be broad-based immunity granted to everyone involved in warrantless wiretapping. But it is instructive to know what the administration wanted at the outset: complete immunity for everyone associated with this vacuum-cleaning operation, who eavesdropped on millions of phone conversations, e-mails, and faxes over the last 5 years.

Why were they seeking immunity for everyone involved in this? I think the answer becomes abundantly clear. There is a great concern that the courts may conclude that, in fact, what was done was illegal and that those who participated in it might be held liable.

Again, I thank the Intelligence Committee for narrowing this request. However, title II of this bill would still provide telecommunications corporations retroactive immunity for their warrantless and possibly—possibly—illegal spying on their very customers.

Much more than a few companies and a few lawsuits are at stake. Equal justice is at stake—justice that does not place some corporations outside of the rule of law.

Openness is at stake—an open debate on security and liberty, and an end to warrantless wiretapping of Americans.

Senator FEINGOLD laid out the history of FISA in eloquent terms this afternoon, going back to the 1970s and describing the genesis of this law that has been amended, I might add, many, many times over the last 30 years. It has been amended periodically to conform to the emerging technologies, the emerging abilities of those who would do us harm, and the emerging strategies that would allow us to collect the information that would minimize their ability to do just that.

So over the years, this body has been asked to modify that law. Almost without exception, I think it is important to point out, this body has amended that law almost unanimously, because all of us recognize that it is critically important that we have the ability to determine who would do us harm, how they would do that harm, and to stop it before it happens. There is not a single Member of this body who is not deeply committed to that goal. We all understand and are deeply committed to the idea that we ought to do everything we can to protect ourselves. But we also understand, and have since the 1970s, the importance not only of gathering the information from those who would do us injury but simultaneously doing that which is also critical for our survival as a nation; that is, protecting the liberties and rights of this country.

They are what makes us unique as a nation. We were really the first Nation that insisted that we were a nation of laws and not men. It was a unique idea in the annals of recorded history; but at the founding of this great Republic, we declared that we were going to do things differently. In fact, many have argued over the years that if we were looking for pure efficiency, this is the last form of government we would have designed. But the Framers of our Constitution were interested in other things than just efficiency. Had efficiency been the goal, they certainly would have thought of a more streamlined system. But they set up a system that not only determined what we did but how we did things: establishing coequal branches of Government—an executive, legislative, and judicial branch—coequal branches of Government, and insisting that there be checks and balances, because the Framers had been through a system in which a king and a handful of people decided the fate of not only their own nation but the colonies they controlled. So they set up this cumbersome, less efficient system because they were deeply determined to protect the rule of law that never allowed one individual or a handful of individuals decide the fate of a nation.

So it is important to understand the genesis of this tension which has existed in our country for more than 200 years: protecting our security and protecting our liberties. I am not suggesting that it is always easy to strike the perfect balance, but over the years we have tried as a nation, from one generation to the next, to try to keep that balance, that tension, in place so that not one side or the other would dominate. In our time, the challenge is to balance our need to gather information with the protection of privacy and the rights that all Americans seek, regardless of geography or ideology.

That has been the tension that confronts us and that is what brings me to this debate, calling upon my colleagues to support the amendment Senator FEINGOLD is offering to strike title II of this legislation.

Retroactive immunity stands against the very principles Senator FEINGOLD has outlined, which I have tried to describe. Under retroactive immunity, the law will forbid some of our fellow citizens from having their day in court.

On what basis are we asked to pass retroactive immunity? On trust. There are classified documents, we are told, that prove the case beyond the shadow of a doubt; but, of course, we are in the allowed to see them. I have served in

this body for 27 years. Yet I am not allowed to see these documents. Retroactive immunity allows the President to stand up and say: Trust me, I know what I am talking about, and you don't.

There is only one way to settle the issue at stake today. Not simply on trust, not the opinion of a handful of individuals—as much as we may admire or like them—but in our courts. We are not judges. We are members of a legislative body.

Real judges and juries—whose courts ought to be our pride, not our embarrassment—deserve to do their jobs and decide these cases. By striking this title of the bill, we would allow them to.

That is all we are asking. Let's have the courts decide. We are not here to assign guilt or innocence. That is not our job as legislators. We are here to hold open the courthouse door, to ensure a fair hearing to American citizens seeking redress. I, for one, will accept whatever verdict results.

This is not a Democratic or Republican issue; this is a rule-of-law issue. It is about striking the right balance between liberty and security. I have absolutely rejected, as I said a few moments ago, the false dichotomy that tells us to choose one over the other. And If a Democratic President were seeking to grant retroactive immunity, I would object as stridently and passionately as I am this afternoon. This should not be a partisan issue. We should all be in favor of allowing our courts to perform their constitutional responsibility to determine whether these companies should be held accountable.

I believe that when surveillance is fully under the rule of law, Americans will only be more secure. To claim otherwise is an insult to our intelligence, our common sense, and our proud tradition of law.

I don't know how many colleagues have seen the movie called ''A Man For All Seasons.'' It is the story of St. Thomas More, who was the only individual in history that I know of who achieved the trifecta of being a lawyer, a politician, and a saint—a rare combination in any generation. In the movie, St. Thomas More was asked if he would be willing to cut down every law in England to get his hands on the devil. More answered: Absolutely not. He said:

> When the last law was down, and the Devil turned 'round on you, where would you hide, the laws all being flat? This country is planted thick with laws, from coast to coast—Man's laws, not God's! And if you cut them down . . . do you really think you could stand upright in the winds that would blow then?

Those laws know no secrecy, Madam President, they know no distinctions for power or wealth. They live, that is, in openness. And when that openness has been defended, when the facts are in light, where they belong, I welcome all my colleagues' ideas in the great and ongoing debate on security and liberty in this century—a debate in the open, and open to us all.

It can begin by adopting this amendment striking retroactive immunity. We can allow the courts to do their jobs to determine whether what happened was legal.

There are those who would argue the telecoms' actions were legal—but none of us know that for sure. If we don't adopt this amendment, we will never know. Whatever happened will be buried for all of history. We will have set the precedent that on the mere word or request of the administration—or any future administration—that telecommunications companies, or others who can collect millions of volumes of data about us, will be allowed to turn it over to the federal government. Maybe the next time it will be medical records or financial records that all of us would like to think are held private—maybe those records, under some argument, will be handed over.

When does this stop? When do we say there is a legal means by which we do this? That has been what FISA has tried to establish for the last three decades—to strike that balance between liberty and security. If we set a precedent with the rejection of this amendment, we open the door, regretfully, for not only this administration but future ones to engage in the very practice that would deprive us of that balance between liberty and security.

So when the vote occurs tomorrow on this amendment that Senator FEINGOLD and I have offered, I urge my colleagues to step out of their partisan roles and consider the example we are setting.

I am also deeply disappointed that the President suggested he would veto the FISA legislation if this amendment passes. The idea that an American President would suggest that we ought to put aside the Foreign Intelligence Surveillance Act merely to protect a handful of companies who seek immunity, and to deny us the opportunity to determine whether what they did was legal, seems to go far beyond what we need to be doing at this hour, where our security is at risk, as we all know.

The best way to handle this, in my view, is to accept and adopt this amendment and send the FISA bill to the President for signature. I believe that despite his warnings to the contrary, he will sign this into law. I don't want to believe an American President would put us at risk and deny these courts the ability to grant warrants and court orders to gather the information we need to keep us secure, all to protect a few corporations from lawsuits.

I have said this repeatedly over the past several months, but it deserves repeating. Not all the telephone companies complied with that request. If they all had, it might strengthen their arguments. But in the end, this is a Republic: the President cannot order us to break the law. And the argument that orders from on high excuse illegal behavior has been thoroughly debunked.

Remember, when one telecom, Qwest, asked for a court order to justify cooperation with the President's surveillance program, it never received one. That ought to be instructive. Why wasn't the court order forthcoming? Why didn't the Administration go to the FISA Courts, which were created exactly for that purpose? Why did some companies say no when others said yes?

For all of these reasons, and the ones eloquently posed by Senator FEINGOLD, we urge our colleagues to accept this amendment. Let the courts do their work and determine the legality or illegality of these actions.

If we are able to do that, I think we will strengthen our country and come closer to maintaining that balance between security and the rule of law that generations throughout our Nation's history have struggled with, doing their utmost to maintain that healthy balance.

To reject this amendment, I think, destroys that balance, does great damage to it. I think we will regret that in the years to come.

With that, I yield the floor to others who may want to be heard on this amendment. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

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

The PRESIDING OFFICER (Ms. STABENOW). Without objection, it is so ordered.

AMENDMENT NO. 3927

Mr. LEVIN. Madam President, one of the amendments before us is the Specter-Whitehouse amendment to title II of the FISA Amendments Act of 2007. I urge our colleagues to support the Specter-Whitehouse amendment for the following reasons:

Title II of the bill, as currently written, provides retroactive immunity for telecommunications providers who disclosed communications and other confidential information about their customers at the behest of administration officials. These provisions in the bill before the Senate require the immediate dismissal of any lawsuit against a telecommunications provider based on such disclosure if the Attorney General certifies that an appropriate Government official indicated in writing to the provider that the activity was, one, authorized by the President, and, two, determined to be lawful. It is the words ''determined to be lawful'' that create the problem. Determined by whom?

The way the bill is written, a determination of the Department of Justice or intelligence community officials is sufficient to ensure immunity even if the courts would conclude that the activity was illegal. Dismissal would be

required even if a court would conclude that the disclosure violated the constitutional rights of individuals whose personal information was illegally disclosed. It would be required even if innocent American citizens were damaged by the disclosure or by the compromise of confidential personal information.

The provision in the bill before us granting retroactive immunity is not necessary, it is not wise, and it is not fair. Retroactive immunity is not necessary to ensure the future cooperation of the telecommunications providers who receive legitimate requests for information from the intelligence community. In fact, Congress has already ensured such cooperation in the Protect America Act adopted last August which authorizes the Attorney General or the Director of National Intelligence to direct telecommunications providers to disclose certain information, and that law provides prospective immunity to telecommunications who cooperate with such directives.

Title I of the bill before us appropriately continues to provide prospective immunity to telecommunications providers. Title I states:

> Notwithstanding any other law, no cause of action shall lie in any court against any electronic communication service provider for providing any information, facilities, or assistance in accordance with a directive issued by the Attorney General or the Director of National Intelligence pursuant to the act.

In light of this prospective immunity, which is appropriately in the bill, retroactive immunity is not necessary to ensure the future cooperation of telecommunications providers with legitimate requests for information from the intelligence community.

A retroactive immunity is not wise either because it precludes any judicial review of these important issues. If private parties engaged in illegal activities at the request of senior executive branch officials, that may be an appropriate mitigating factor to be considered in the courts. But to simply grant immunity retroactively may encourage others to engage in illegal activities in the future. That is a bad precedent because it should never be an excuse in a free society that you acted illegally because Government officials asked you to do so.

That leaves the question of equity for telecommunications providers who may have cooperated with administration officials in good faith with the assurance that such cooperation was legal and that they were helping to safeguard our national security.

If one had to choose between a known equitable interest of the telecommunications providers who was prevailed upon in the aftermath of 9/11 to assist the Government by disclosing private customer communications without first conforming with the clear requirement of the FISA law for a warrant approved by the FISA Court before doing so, if—if—one had to choose between that equitable interest and the perhaps uncertain claims of plaintiffs whose conversations may have been eavesdropped upon without their knowledge and with little, if any, provable damage, one might reach the conclusion that retroactive immunity was an appropriate remedy for the telephone companies.

But we do not have to make that choice. We can recognize both the equitable interest of the companies and the possible claims of our citizens, and we can also avoid the terrible precedent of giving retroactive immunity to law violators. We can do that by adopting the Specter-Whitehouse amendment.

How can we protect the telecommunications providers from legal liability if they acted in good faith at the request of the administration without taking the extraordinary step of retroactively eliminating any remedy for possible violations of the Constitution and the laws of the United States? The Specter-Whitehouse amendment before us would accomplish that by immunizing telecommunications providers who acted in good faith based on the assurances of appropriate administration officials from legal liability and at the same time substituting the United States for the telecommunications providers as the defendant in lawsuits based on the actions of those providers. That substitution would safeguard telecommunications providers from liability just as effectively as the retroactive immunity language in title II of the bill.

But unlike the retroactive immunity language of title II the Specter-Whitehouse amendment would not leave persons who can prove they were victims of unlawful or unconstitutional actions without a remedy. On the contrary, the Specter-Whitehouse amendment would ensure that any such innocent victims retain whatever legal rights they have under applicable law, except that the U.S. Government would be substituted for the telecommunications providers as the defendant in such lawsuits. And it is appropriate that the Government be liable rather than the telecommunications providers since the disclosures were allegedly made by the providers in these cases at the request of senior executive branch officials based on appeals to help safeguard U.S. security and assurances that the providers would be protected from liability regardless of the requirements of law.

The argument has been made that we must provide retroactive immunity to the telecommunications providers to ensure the cases against them are immediately dismissed because if the cases are permitted to proceed, vital national security information will be disclosed. Some have even taken the position that the mere existence of this litigation, even without the disclosure of any information, will somehow help the terrorists. But the President has already disclosed the existence of the collection program at issue. It has been discussed in Congress and in the press. The Director of National Intelligence has publicly discussed the program.

Nor will the continuation into the future of cases against telecommunications providers or the U.S. Government, should the Government be substituted as the Specter-Whitehouse amendment would provide as a defendant, that would not make public sensitive collection methods. That is because the courts have numerous tools at their disposal to safeguard sensitive classified information from disclosure during the course of a trial and courts have used these tools throughout our history. Federal courts utilize these tools without compromising the national security when our Government chooses to prosecute terrorists or spies.

Indeed, the recently enacted Military Commissions Act provides the same tools for the protection of classified information in cases brought against alleged terrorists in the military justice system. U.S. citizens who are allegedly damaged at the Government's behest surely should be given as much protection as alleged terrorists.

The administration's willingness to utilize these procedures to safeguard sensitive classified information in the prosecution of alleged terrorists, but not in suits brought for the protection of the rights of American citizens, gives the appearance that retroactive immunity is being sought under this bill as it now stands, not to protect classified information but, rather, to protect the administration itself.

The bottom line is we can protect telecommunications providers from liability for unlawful or unconstitutional disclosures made in good faith reliance on written assurances by high-ranking executive branch officials without retroactively depriving alleged victims of such disclosures of any remedy, if they can demonstrate they have been damaged by illegal practices. The Specter-Whitehouse amendment would enable us to deal fairly with both telecommunications providers and with persons who can prove they were damaged by illegal disclosures of their personal information. I urge our colleagues to support the Specter-Whitehouse amendment as the fair way of protecting both telecommunications providers but also protecting what should be a very basic principle of our Constitution—you cannot and should not needlessly remove a remedy from people who have been injured. To do that retroactively runs contrary to everything we believe in this Constitution about the rights of American citizens to be protected and to have remedies when they are wronged.

AMENDMENT NO. 3941

Mr. FEINGOLD. Madam President, last week the Senate adopted, by voice vote, amendment No. 3941 offered by the vice chairman of the Intelligence Committee, which would require the FISA Court to rule on challenges to the Government's directives within a specified timeframe. I opposed the

amendment because it unnecessarily restricts the court's ability to consider important constitutional and statutory issues related to this legislation. The amendment limits the time for the court's consideration of challenges to directives issued under this law to a mere 30 days, unless ''necessary to comport with the due process clause of the Fifth Amendment.'' There would be no other basis for the court to extend its deliberations to a 31st day.

This amendment could have serious unintended consequences. There may be many decisions that the court can, in fact, make in a relatively short period of time. But there may also be issues that the court will have to consider that could take longer. There have been many questions raised about the meaning of many of the provisions of this bill. The court will certainly be required to address some of these complex statutory interpretation issues. There have also been serious constitutional concerns raised about this bill that the court will need to consider.

This is new legislation that radically changes how surveillance is conducted, and there are numerous complex issues that the court will be called on to resolve. And, unlike this body, the court will have to consider in detail the legality and constitutionality of the law as it is implemented, which could involve extensive factual development, as well as review of relevant precedent.

There are many other reasons why the court would want to extend its deliberations that would not implicate fifth amendment due process rights. A party may seek more time to prepare its pleadings. The court may request more information. The Government may wish to prioritize other more pressing issues or may have a host of strategic reasons for seeking delay; or a crisis or national emergency could require the immediate attention of the intelligence personnel and lawyers assigned to present the Government's case to the court and could occupy the court's time and attention. Under those circumstances, we would surely want the court to focus its attention on the emergency at hand. But if there were also a pending challenge to a directive that the court must decide in just 30 days, it could be faced in a terrible dilemma. And only permitting the court to extend its consideration of a challenge if a refusal to do so rises to the level of a violation of the fifth amendment is far too restrictive.

I would also think there might be some concern that if the court does not have enough time to decide whether to enforce a directive issued by the Government, it could very well simply decide not to.

The Judicial Conference of the United States has made many of these same arguments in a letter sent today to Senators REID and MCCONNELL. The conference warns that the amendment could limit the court's ability to consider complex issues or could force the court to divert its attention from other pressing matters. Indeed, the letter warns that ''the national security significance of the cases before the FISC means there is a chance this provision could force the FISC by statute to forego consideration of another matter of paramount importance.''

This amendment could seriously shortchange the court's ability to determine whether the Government is acting legally or whether the bill is constitutional, on its face or as implemented in a particular situation. For that reason, I opposed this amendment.

AMENDMENT NO. 3913

Mr. LEAHY. Madam President, the bill we are now considering will provide an enormous expansion of the government's ability to conduct warrantless surveillance. I support providing our intelligence agencies with the flexibility they need to surveil foreign targets that may be intending us harm, but we must be similarly vigilant in making certain that this surveillance is limited to its intended scope.

I commend Senator FEINGOLD in crafting an amendment that would prohibit what is known as ''reverse targeting'' and would ensure that this new surveillance is directed only toward its overseas targets and not toward surveillance of innocent Americans without a court order. The Intelligence Committee's bill, S. 2248, requires the government to seek an order from the FISA Court only when ''the'' purpose of the government's acquisition is the targeting of Americans inside of the United States. I fear that the government will read into this language a loophole and it may justify eavesdropping on American's private communications, without any court order, as long as they have some interest in an overseas ''target,'' even if a significant purpose of the interception is to collect the communications of a person in the United States. Is this fear legitimate? I think so, given this administration's history of convoluted, disingenuous legal interpretation. We must be clear in our language, because we know what they will do if we are not.

Senator FEINGOLD's provision would clarify that if the government intercepts the communications of a person overseas but ''a significant purpose'' of the surveillance is to collect the communications of the U.S. person with whom the person overseas is communicating, the government must get a court order. This is an important distinction. In light of the sweeping powers we are granting to the government to conduct surveillance without up front court review, we must also cabin the scope of the government's power to eavesdrop on the communications of innocent Americans.

AMENDMENT NO. 3915

The authorities and procedures in S. 2248 would permit the FISA Court to review government targeting and minimization procedures. If, however, the Court finds certain aspects of those procedures to be inadequate—even grossly inadequate—S. 2248 provides no authority to restrict the use of information already collected using those procedures. That means that the government would be free to access, use, and share information about private communications that was collected in violation of the law.

Senator FEINGOLD's amendment would ensure that the Court has the authority to stop a continuation, and perhaps escalation, of the harm caused by the government's use of illegal procedures. This provision would limit the government's use and dissemination of illegally obtained information if the FISA Court later determines that the procedures were not reasonably designed to target people outside of the United States or to adequately minimize the use of information about U.S. persons. It is important to note that, under this provision, if the government acts to address the Court's concerns and correct these procedures it would then be free to use and disseminate the information it acquired.

This is not a novel application of law under FISA. FISA's existing emergency provision holds that if the government begins emergency surveillance without a warrant, and the FISA Court then determines the surveillance to be unlawful, the government cannot use and disseminate the information it acquired except under very limited circumstances. Senator FEINGOLD's amendment simply applies these reasonable safeguards to the new and broadly expanded authority we are now giving to the government. This provision represents a crucial safeguard for the protection of Americans' privacy rights.

AMENDMENT NO. 3927

I strongly oppose the blanket grant of retroactive immunity in the Intelligence Committee bill. This administration violated FISA by conducting warrantless surveillance for more than 5 years. They got caught. If they had not, they would probably still be doing it. In the wake of the public disclosure of the President's illegal surveillance of Americans, the administration and the telephone companies are being sued by citizens who believe their privacy and constitutional rights have been violated. Now, the administration is trying to force Congress to terminate those lawsuits in order to insulate itself from accountability. We should not allow this to happen.

The administration knows that these lawsuits may be the only way that it will ever be called to account for its flagrant disrespect for the rule of law. In running its illegal program of warrantless surveillance, the administration, relying on legal opinions prepared in secret and shown to only a tiny group of like-minded officials, ensured the administration received the advice they wanted. Jack Goldsmith, who came in briefly to head the Justice Department's Office of Legal Counsel described the program as a ''legal

mess.'' This administration does not want a court to have the chance to look at this legal mess. Retroactive immunity would assure that they get their wish.

The Judiciary Committee and Intelligence Committee tried for well over a year and a half to obtain access to the information that our members needed to evaluate the administration's arguments for immunity. Indeed, over a year ago Chairman SPECTER was prepared to proceed to subpoena information from the telephone companies in light of the administration's stonewalling. It was only just before the Intelligence and Judiciary Committees' consideration of this bill that committee members finally obtained access to a limited number of these documents. Senators who have reviewed the information have drawn very different conclusions.

Now this matter is before all Senators and it is well past time for all Members to have access to the information they need to make informed judgments about the provisions of these bills. The majority leader wrote to the administration stating that Members of the Senate need that access. We have had no response—the administration has ignored the request. It is clear that they do not want to allow Senators to appropriately evaluate these documents and draw their own conclusions.

There are reports in the press that at least one telecommunications carrier refused to comply with the administration's request to cooperate with the warrantless wiretapping. All Senators should have the opportunity to know these facts, so they can make an informed judgment about whether there were legitimate legal concerns that other cooperating telecommunications companies should have raised. Indeed, if other carriers had been more careful in their legal analysis, and had raised these concerns, would the administration have had a greater incentive to come to the Congress and get the law changed? Would we have been spared five long years of illegal behavior by this administration?

I have drawn very different conclusions than Senator ROCKEFELLER about retroactive immunity. I agree with Senator SPECTER and many others that blanket retroactive immunity, which would end ongoing lawsuits by legislative fiat, undermines accountability. Senator SPECTER has been working diligently first as the chairman of the Judiciary Committee and now as its ranking member to obtain judicial review of the legality of the warrantless wiretapping of Americans from 2001 into last year. The check and balance the judiciary provides in our constitutional democracy has an important role to play and should be protected. Judicial review can and should provide a measure of accountability.

We hear from the administration and some of our colleagues that we must grant immunity or the telephone companies will no longer cooperate with the Government. Senators should understand that even if we do not grant retroactive immunity, telecommunications carriers will still have immunity for actions they take in the future. Their cooperation in the future will still be required by legal orders and they will not be subject to liability for doing what the law requires. If they follow the law, they have immunity.

We have heard some people argue that the telephone companies should get immunity because they complied with the Government's requests to engage in warrantless surveillance out of patriotism. I do not doubt the patriotism of the executives and employees of these companies, but this month we learned that these companies cut off wiretaps, including wiretaps of terrorists, because the FBI failed to pay its telephone bills. How can this administration talk repeatedly, on the one hand, about the importance of FISA surveillance, and on the other hand, fail to pay its phone bills and jeopardize this critical surveillance. But beyond that, the fact that carriers were willing to cut off surveillance when they were not paid—presumably some of the same carriers that agreed to conduct warrantless surveillance—undercuts the argument about their patriotic motives.

As one former FBI special agent has said, ''It sounds as though the telecoms believe it when the FBI says the warrant is in the mail, but not when they say the check is in the mail.''

I believe the rule of law is important in protecting the rights of Americans from unlawful surveillance. I do not believe that Congress can or should seek to take those rights and those claims from those already harmed. Moreover, ending ongoing litigation eliminates perhaps the only viable avenue of accountability for the Government's illegal actions. Therefore, I say again: I oppose blanket retroactive immunity.

I do support and will vote for the amendment that Senators SPECTER and WHITEHOUSE will offer on ''substitution.'' This amendment would place the Government in the shoes of the private defendants that acted at its behest and let it assume full responsibility for illegal conduct. The Specter-Whitehouse amendment contains an explicit waiver of sovereign immunity, which will allow the lawsuits to proceed against the United States, and it makes other changes designed to assure that the Government does not have advantages as a defendant that the carriers would not have. While I see no need to deal with the issue of lawsuits against the providers in this Congress, I believe that substitution is a fairer means of dealing with these lawsuits than full retroactive immunity, because it would give the plaintiffs their day in court, and it would allow for a measure of accountability for the administration's actions in the years following 9/11.

This administration violated FISA by conducting warrantless surveillance for more than 5 years. They got caught, and the telecommunications carriers got sued. Now, the administration insists that those lawsuits be terminated by Congress, so that it does not have to answer for its actions. Retroactive immunity does more than let the carriers off the hook. It shields this administration from any accountability for conducting surveillance outside of the law. It would stop dead in their tracks the lawsuits that are now working their way through the courts, and leave Americans whose privacy rights have been violated with no chance to be made whole. These lawsuits are perhaps the only avenue that exists for an outside review of the Government's actions. That kind of assessment is critical if our Government is to be held accountable. That is why I do not support legislation to terminate these legal challenges and I will vote to strike it.

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

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

INTELLIGENCE AUTHORIZATION ACT FOR FISCAL YEAR 2008—CONFERENCE REPORT

Mr. REID. Mr. President, I ask unanimous consent that the Senate now proceed to the conference report to accompany H.R. 2082, the Intelligence authorization conference report.

The PRESIDING OFFICER. Without objection, it is so ordered. The clerk will report.

The bill clerk read as follows:

The committee of conference on the disagreeing votes of the two houses on the amendment of the Senate to the bill (H.R. 2082), to authorize appropriations for fiscal year 2008 for intelligence and intelligence-related activities of the United States Government, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective houses this report, signed by a majority of the conferees.

The PRESIDING OFFICER. Without objection, the Senate will proceed to the consideration of the conference report.

(The conference report is printed in the House proceedings of the RECORD of December 6, 2007, beginning at page H14462.)

CLOTURE MOTION

Mr. REID. Mr. President, I send a cloture motion to the desk.

The PRESIDING OFFICER. The cloture motion having been presented under rule XXII, the Chair directs the clerk to read the motion.

The legislative clerk read as follows:

CLOTURE MOTION

We, the undersigned Senators, in accordance with the provisions of Rule