regulated seller or regulated person, provided the distributor confirms within 7 business days of the distribution that such regulated seller or regulated person is on the list referred to under section 310(e)(1)(B)(v).''.

SEC. 5. NEGLIGENT FAILURE TO SELF-CERTIFY AS REQUIRED.

Section 402(a) of the Controlled Substances Act (21 U.S.C. 842(a)(10)) is amended by inserting before the semicolon the following: ''or negligently to fail to self-certify as required under section 310 (21 U.S.C. 830)''.

SEC. 6. EFFECTIVE DATE AND REGULATIONS.

(a) EFFECTIVE DATE.—This Act and the amendments made by this Act shall take effect 180 days after the date of enactment of this Act.

(b) REGULATIONS.—In promulgating the regulations authorized by section 2, the Attorney General may issue regulations on an interim basis as necessary to ensure the implementation of this Act by the effective date.

The bill (S. 2071), as amended, was ordered to be engrossed for a third reading, was read the third time, and passed.

RELATIVE TO THE DEATH OF REPRESENTATIVE TOM LANTOS

Mr. DURBIN. Mr. President, I ask unanimous consent that the Senate now proceed to the immediate consideration of S. Res. 446 submitted earlier today by Senators REID and MCCONNELL.

The PRESIDING OFFICER. The clerk will report the resolution by title.

The legislative clerk read as follows:

A resolution (S. Res. 446) relative to the death of Representative TOM LANTOS of California.

There being no objection, the Senate proceeded to consider the resolution.

Mr. DURBIN. I ask unanimous consent to have my name added as a cosponsor of the resolution.

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

Mr. DURBIN. Mr. President, it was a great honor to serve in the U.S. House of Representatives before coming to the Senate and, during that time, to serve with TOM LANTOS of California. His was an extraordinary story of a man who survived the Holocaust and came to the U.S. Congress representing a district in the State of California, rising to the rank of chairman of the Foreign Affairs Committee.

He was as inspiring a speaker as one could ever hear on many topics but especially on the Holocaust and the impact it had on so many innocent people. He was, more than any other person, a leader in acknowledging the bravery and courage of Raoul Wallenberg and so many others who resisted the Holocaust and fought to save the poor victims, including many Jewish people.

TOM LANTOS and his wife Annette traveled across the world, speaking on behalf of the United States and developing strong personal relationships with many leaders overseas. He was truly a great representative of the U.S. House of Representatives and of the U.S. Government.

A few weeks ago, we were surprised to learn that he was suffering from cancer and announced he would not be running for reelection. I didn't realize at the time how grave his condition was. His passing over the weekend brings a reminder of his service to our country, his service to the State of California, and the loss which those of us who counted him as a friend will endure in these days of mourning.

I am happy to join as a cosponsor of this resolution in tribute to Congressman LANTOS.

I ask unanimous consent that the resolution be agreed to, the motion to reconsider be laid upon the table with no intervening action or debate, and that any statements relating to the measure be printed in the RECORD.

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

The resolution (S. Res. 446) was agreed to, as follows:

S. RES. 446

Resolved, That the Senate has heard with profound sorrow and deep regret the announcement of the death of the Honorable Tom Lantos, late a Representative from the State of California.

Resolved, That the Secretary communicate these resolutions to the House of Representatives and transmit an enrolled copy thereof to the family of the deceased.

Resolved, That when the Senate adjourns or recesses today, it stand adjourned or recessed as a further mark of respect to the memory of the deceased Representative.

ORDERS FOR TUESDAY, FEBRUARY 12, 2008

Mr. DURBIN. Mr. President, I ask unanimous consent that when the Senate completes its business today, it stand adjourned until 10 a.m. Tuesday, February 12; that following the prayer and pledge, the Journal of proceedings be approved to date, the morning hour be deemed expired, the time for the two leaders be reserved for their use later in the day, and that the Senate then resume consideration of S. 2248, the Foreign Intelligence Surveillance Act, as under the previous order; and that the Senate recess from 12:30 to 2:15 p.m. to allow for the weekly caucus luncheons.

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

PROGRAM

Mr. DURBIN. Tomorrow, there will be no morning business. At approximately 10 a.m., the Senate will resume consideration of the FISA legislation and proceed to a series of votes on the remaining pending amendments to the bill.

ORDER FOR ADJOURNMENT

Mr. DURBIN. I ask unanimous consent that the Senate stand adjourned following the remarks of Senator SPECTER and Senator DODD, under the previous order, and the provisions of S. Res. 446, as a further mark of respect to the memory of deceased U.S. Representative TOM LANTOS of California.

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

The Senator from Pennsylvania.

FISA

AMENDMENT NO. 3927

Mr. SPECTER. Mr. President, I have sought recognition to comment on a pending amendment sponsored by Senator WHITEHOUSE and myself. I am delighted to see Senator WHITEHOUSE occupying the chair. I have a receptive, though a limited, audience.

I begin by thanking the Senate personnel for staying late. Monday is a day when I customarily travel the State—Scranton, Harrisburg—and arrive late in the day. I am pleased to see Senator DODD is also speaking so that my late arrival is not the sole cause. But we do have to work late because the majority leader has scheduled votes on these issues tomorrow. I wanted an opportunity to supplement earlier statements which I made on this issue because I believe it is an important issue on which the Senate needs to focus.

The legislation and oversight and judicial review since 9/11 have provided a historic confrontation among the three branches of Government on the basic doctrine of separation of powers. When I say it is historic, I do not believe that is an overstatement. There is no doubt that the events of 9/11 require a vigorous response by the United States to fight terrorism. The brutal, heinous murder of 3,000 Americans and the continuing threat of al-Qaida worldwide require that we fight terrorism with great vigor. At the same time, it is important that constitutional rights be maintained. The fact is that the Congress has been very ineffective in limiting the expansion of Executive power. Only the courts have been able to maintain a balance.

The specific issue involves the effort to give the telephone companies retroactive immunity and foreclose some 40 lawsuits in some Federal court which are pending at the present time. There is no doubt that the information reportedly obtained by the telephone companies for national security is vital and needs to be maintained. But there is a way to keep that information flowing and still maintain the constitutional balance by implementing the amendment which Senator WHITEHOUSE, the Presiding Officer, and I have introduced, the essence of which is to substitute the U.S. Government as the party defendant.

In that situation, the Government would have the identical defenses the telephone companies now have—no more, no less. For example, customarily the Federal Government has the defense of sovereign immunity. You can't sue the Federal Government unless the Government consents or unless the Congress of the United States says

you can sue the Government. The Congress of the United States is the final determiner of that; of course, with Presidential signature or with an override, if the President vetoes.

So in this situation, the Government being substituted for the telephone companies would not have the governmental immunity defense because the telephone companies do not have it. The Government would have the state secrets defense because it has intervened in the cases against the telephone companies to assert the defense of state secrets, so that if state secrets are involved, that may block the plaintiffs' cases. Under our amendment the Government would continue to have the availability of a state secrets defense.

I doubt very much there will be any monetary awards in these cases, but that is not for me to decide. That is for the judicial process to decide, to run its course.

When I say the legislative branch has not been successful in oversight in limiting the expansion of Executive power, I do so because of what has happened with the terrorist surveillance program.

The Foreign Intelligence Surveillance Act is an explicit statute which is the law of the land, explicitly stating that wiretapping can occur only with judicial authority. The tradition is for the Government to present an affidavit containing probable cause to warrant the wiretap that goes before a judge. The judge reviews it. If probable cause is present, then there may be an invasion of privacy under our Constitution with that constitutional safeguard of a neutral magistrate.

The President has taken the position that he does not have to be bound by the Foreign Intelligence Surveillance Act because of his article II powers under the Constitution. He is arguing that the statute cannot affect the President's constitutional authority, and he is correct as a principle of law. But the question is whether he has that authority. And the terrorist surveillance program was secret from the time it was put into effect shortly after 9/11/2001 until mid-December 2005, when the Senate was in the midst of the final day of debate on the PATRIOT Act reauthorization, which was to give the law enforcement authorities broader power.

I chaired the Judiciary Committee at that time and was arguing to move ahead with the PATRIOT Act re-authorization when that morning the news came across that there had been a secret program in effect. That scuttled our efforts to get the PATRIOT Act passed that day, with the comment being made that some were prepared to vote for the PATRIOT Act re-authorization until they found out about this secret program they hadn't known about.

A long time has passed since December 2005. That matter is still tied up in the courts. But the courts, at least, are available to make a decision on that ultimately—it may take some time, but to make a decision on it.

Similarly, the administration, the President has ignored the National Security Act of 1947 which explicitly states that the executive branch must give notice to the intelligence committees of the House and Senate where programs are carried out like the terrorist surveillance program. The President did not follow that statute. Again, the underlying contention is that he has power under article II so that he doesn't have to follow the statute.

Finally, he did make those matters available. He did so on the eve of the confirmation of General Hayden as head of the Central Intelligence Agency. So finally, under political pressure—he couldn't get General Hayden confirmed unless he made them available—he did so.

We have had other illustrations. We have had the signing statements where the President issues a statement when he signs legislation into law which modifies what Congress has passed.

I will be very specific. The Constitution provides that each House passes legislation. There is a conference submitted to the President. He either signs it or vetoes it. But when the President got the PATRIOT Act re-authorization with provisions which had been negotiated as to Judiciary Committee oversight on how those law enforcement powers could be carried out, the President issued a signing statement—and this had been negotiated between the Judiciary Committee and the President's employees—the President issued a signing statement and changed the thrust of the statute.

In a widely publicized matter involving interrogation techniques, the Senate passed, on a 90-to-9 vote, limitations on Executive power in the Detainee Treatment Act. There was a meeting between President Bush and Senator MCCAIN, author of the provision, limiting executive authority. We passed the bill, and the President signed it but with reservation that his executive authority under article II did not deprive him of authority to handle the situation as he chose. But in the midst of all this, the courts have been effective. The courts have limited Executive power.

In the case of Hamdan v. Rumsfeld, the Supreme Court held that the President's military commissions violated the Uniform Code of Military Justice and lacked any congressional authorization. In short, the Court held the President cannot establish a military commission to try Hamdan unless Congress granted him the authority to do so.

In Hamdi v. Rumsfeld, the Supreme Court said that due process requires a citizen held as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.

In the celebrated case of Rasul v. Bush, the Supreme Court held that the Federal habeas corpus statute gave district courts jurisdiction to hear challenges by aliens held at Guantanamo Bay.

In Doe v. Gonzales in September of last year, the U.S. District Court for the Southern District of New York struck down the permanent gag orders issued with national security letters as a violation of the First Amendment.

In Hepting v. AT&T, Chief Judge Vaughn Walker of the Northern District of California held that the publicly available information concerning the terrorist surveillance program was not subject to the state secrets defense.

In the very heavily publicized case of Padilla, the fourth circuit initially held that the executive had the authority to hold Padilla as an enemy combatant in September of 2005. Then when Padilla petitioned the Supreme Court for certiorari, it looked as if that might be overturned. The Government moved for authorization to transfer Padilla and to vacate the decision. They anticipated an unfavorable decision and they tried to moot it out; that is, render it meaningless. Judge Luttig, writing for the fourth circuit, was very strong in rejecting the Government's position, saying this:

> Because we believe that the transfer of Padilla and the withdrawal of our opinion at the government's request while the Supreme Court is reviewing this court's decision of September 9 would compound what is, in the absence of explanation, at least an appearance that the government may be attempting to avoid consideration of our decision by the Supreme Court, and also because we believe that this case presents an issue of such especial national importance as to warrant final consideration by that court—

That is, the Supreme Court—

> we deny both the motion and the suggestion.

Pretty strong language, telling the Government what they can and what they can't do.

The Government is not going to listen to the Congress, but the Government listens to the court.

When the issue arose as to the destruction of the CIA tapes, Senator LEAHY and I wrote the Attorney General asking for information as to what had happened, and the Attorney General wrote back and said: We are not going to give you any information at this time. But we got no information. Then the word was that it was political, what was being done. Then a Federal district court ordered the Government to file a report with the court as to what had happened on the destruction of the CIA tapes. Well, nobody said the court decision was political. You can't challenge the judicial decision except to take an appeal, and that is the process we follow.

I recently made a trip to Pakistan. Congressman PATRICK KENNEDY and I went to Pakistan to take a look at what was going on there because Pakistan is so important. The country has nuclear weapons but a very unstable government. We met with President Musharraf. We were scheduled to meet with Benazir Bhutto at 9 p.m. on December 27. While we were preparing for

the meeting—she had scheduled it at 9 o'clock in the evening because she had a full day of campaign activities. While we were preparing for the meeting, we found out about 6:30, 7 o'clock, she had been assassinated, which was a terrible blow, not only on a personal level. I had come to know her to some extent when she was Prime Minister of Pakistan. But she had the potential as an extraordinary political figure to unify Pakistan. She had a remarkable educational background. She was educated at Harvard, also at Oxford; very glamorous, movie star beautiful, a great political figure with a chance to unify the country. Now we start from scratch.

Congressman KENNEDY and I questioned President Musharraf about what he was doing. He had gotten $10 million since 9/11 to act against al-Qaida. Why hadn't Osama bin Laden been captured? There were a lot of indications that the money was not being used for the purpose for which it was appropriated. President Musharraf said to Congressman KENNEDY and me that he didn't like the conditionality, and we pointed out to him that is the way we function. We don't give $10 million for use by President Musharraf any way he likes. Then we raised a question about what President Musharraf was doing with the Supreme Court. He held the Chief Justice in house arrest. He dismissed many of the justices. He appointed a favorable Supreme Court. Well, the United States is not Pakistan. In Pakistan, the chief executive, President Musharraf, tells the Supreme Court what to do. He suspends the Chief Justice. He fires half of the court.

In the United States, under our checks and balances, the President of the United States listens to what the Supreme Court of the United States says. A fundamental of our society is the separation of powers. That is the very basis of how we function in the United States, with the executive having certain powers, the Congress having certain powers, and the Court having certain powers. Regrettably, the evidence is conclusive that the Congress has been ineffective in congressional oversight. The protocol is the chairman of the Judiciary Committee and the ranking member are told about what is happening on serious constitutional issues. I was chairman of the Judiciary Committee when the terrorist surveillance program was in operation, and neither the ranking member, Senator LEAHY, nor I, were told about what was going on. The President is taking the position that he is not bound by statute, and he may be right. He may be right, but in our society, the courts have to make that decision.

I believe it would be a serious step to close down the courts where some 40 cases are pending. Let them go through the judicial process. Now if we had a choice of having the benefit of what the telephone companies are doing and closing down the courts, that might be one thing. But Senator WHITEHOUSE and I have structured an amendment, cosponsored by other Senators, to have both of those benefits operative. We can maintain the telephone companies providing whatever information they are providing, and at the same time keep the courts open by substituting the Government as the party defendant.

We are continuing in the midst of an historic confrontation. It is testing the mettle of our constitutional process. It is testing the mettle of our constitutional process because of the importance of being vigorous in fighting al-Qaida. The telephone companies have been good citizens and they ought not to be held liable for whatever it is they have done. But the Government can step in, and if there are verdicts which, as I say, I very much doubt, it is a cost of national defense. It ought to be paid by the Treasury of the United States, and the courts ought to be kept open.

Senator DODD is about to address the Chamber. I know he is opposed to granting retroactive immunity, and he has a very powerful argument, and may the RECORD show he is nodding in the affirmative. That is what we lawyers do when we have a little support, even if it is only a nod of the head or a gesture. I greatly admire what Senator DODD is doing here and what he has done since he was elected to the Senate in 1980. He and Senator Alan Dixon came to the Senate at the same time as two newly elected Senators on the Democratic side of the aisle. They were outnumbered by Republican Senators who were elected, 16 of us for that election, 16 to 2. But now Senator DODD has narrowed the odds and only Senator GRASSLEY and I remain of those 16, so it is only 2 to 1. Of course, when it was 2 to 16 it was a fair fight, and when it is 1 to 2, Senator DODD may have the advantage. Who knows. I say that only in jest. But we are about to hear some strong arguments and some real oratory on these issues.

But we don't have to make a choice between having the information and having the courts open. You can do both if the amendment which Senator WHITEHOUSE and I have offered is adopted.

I thank the Chair and yield the floor and defer to my distinguished colleague from Connecticut.

The PRESIDING OFFICER. The Senator from Connecticut is recognized.

Mr. DODD. Mr. President, first, let me thank my good friend from Pennsylvania, whom I always enjoy listening to. I enjoyed particularly hearing his comments about President Musharraf and Benazir Bhutto, who I had the privilege and pleasure of knowing for some time over the last 20 years. As do all of us here, I care deeply about what happens in Pakistan, and I admire remarkable leadership. I was stricken by her loss and the tragic way in which she lost her life in her effort to bring democracy to her country. So I associate myself with the remarks of Senator SPECTER who was there, I know. In fact, I listened with great interest to his comments and thoughts at the time when he and Congressman PATRICK KENNEDY were there on a mission together. So I once again thank him.

I know he talked about our arrival some 27 years ago, when the two of us arrived here, and it is true there were 16 Republicans and two Democrats. I always like to point out that there are two fine Republicans still here, Senator GRASSLEY and Senator SPECTER, and 50 percent of the Democrats who were elected that year are still in this Chamber. So I remain of the two of us, Alan Dixon being the other Member.

I look up and I see the Presiding Officer. Any time I get up to address this issue, the distinguished Senator from Rhode Island is the Presiding Officer. He has heard my thoughts on this issue now since December. I think it has been almost 20 hours I have spoken on the subject matter of the Foreign Intelligence Surveillance Act and the issue of retroactive immunity. I will be trying to convince my colleagues to vote against cloture tomorrow so we can force the committees to go back and adopt the Judiciary Committee approach rather than the one adopted by the Intelligence Committee which gives retroactive immunity to the telecom industry.

I note as well that the House, the other body, in its consideration of this matter, agreed with the Judiciary Committee and did not include retroactive immunity in their Foreign Intelligence Surveillance Act amendments. The House reached the conclusion that the retroactive immunity was not warranted, that the courts should be given the opportunity to decide the legality or illegality of the telecom industry's decision to agree to the administration's request to allow the unfettered surveillance of millions of telephone calls, faxes, and e-mails.

Senator FEINGOLD of Wisconsin and I have offered an amendment to strike section 2 of the bill, which would then put the legislation roughly on parity with the House-passed legislation and deliver that to the President. The President has said: If you do that, I will veto the bill, which I regret deeply. The idea that you veto all of the other amendments dealing with foreign intelligence because you didn't provide retroactive immunity to a handful of telephone companies is rather breathtaking when you consider the vulnerability that can pose and the inability of us to collect the important surveillance, the intelligence we need to keep our country secure and safe.

Mr. President, I am not normally accustomed to engaging in lengthy conversations about any subject. Certainly it is the privilege and right of every Senator to engage in extended debate on a subject about which they care passionately. I cannot think of another occasion in the last 20 years, 25 years, when I have engaged in extended debate on any subject matter. It doesn't suggest there haven't been moments

when I thought it was warranted, and others certainly provided that opportunity or we resolved the matters prior to using that tool that has been available to every Member of this Chamber since the founding of our Republic. But I care deeply about this issue. It is not just a passing issue; it is not just one section of a bill.

It goes far beyond the words or language of even the companies involved here. It goes to the very heart of who we are as a nation, as a people. Our willingness or ability to understand the value and importance of the rule of law is an issue that transcends any other issue we grapple with, the understanding of how important it is to protect and defend the rule of law, our Constitution, to guarantee the rights and liberties of every citizen of our country.

Tonight, I will engage in a rather lengthy conversation about this issue, with my apologies to the staff and others who have to spend time listening to this conversation. But I want people to know how important this issue is. This is very important. It doesn't get any more important than this one as to whether millions of Americans' telephone conversations, e-mails, and faxes over the past 5 years were listened to, eavesdropping that would still be ongoing were it not for disclosed reports by journalists and a whistleblower that revealed this program. It would still be ongoing, without a court order and without a warrant. That is dangerous.

The very rationale which gave birth to the FISA some three decades ago was specifically designed to deal with the very fact situation that causes me to rise and talk about this subject matter this evening. FISA intended to balance two legitimate issues—gathering information to keep us secure, while protecting the rights and liberties of every single American citizen against an unwarranted invasion of their privacy. It has never been easy to maintain that balance. It is never perfect, as I said earlier this afternoon, but it ought to be our common goal, regardless of party and ideology, to do our very best to strike that balance. That is what this issue is, and that is why it is so important.

If we set the precedent by a vote tomorrow that keeps this provision in the bill, and it remains so in the conference with the House of Representatives, we will be setting a precedent which, I suspect, future administrations may point to under a different fact situation, at a different hour, at a different time, when they may decide it is not in their interest to go to a FISA Court. The next request by an administration to provide information may be medical or financial or highly personal information, and they will point to a time when the Senate was given the opportunity to insist that a series of telephone companies go to the courts of this country to determine whether they did the legal thing by turning over information, and the Senate said: No, we are going to grant retroactive immunity.

We will never determine whether you had the right to do so, and implicitly it would sanction the activity by our refusal to strike the language granting the immunity. That is what is at stake in the vote tomorrow, if we are unable to defeat cloture.

That is why I am determined to do everything I can to convince my colleagues of an alternative course. So I urge my colleagues, in the strongest terms that I can, to vote to strip the retroactive immunity from this bill and, if it is not stripped, to vote against cloture.

Not only would this bill ratify a domestic spying regime that has already concentrated far too much unaccountable power in the President's hands, in its current form it places above the law the telecommunications companies that may have violated the privacy and trust of millions of American citizens.

In December, I opposed retroactive immunity on the Senate floor for some 10 hours in this Chamber. In the weeks since then, I have continued to speak out against it.

Unwarranted domestic spying didn't happen in a panic or short-term emergency—not for a week or a month or even a year. If it had, I might not be here this evening. But the spying went on, relentlessly, for more than five years. And if the press didn't expose it, I imagine it would still be happening today.

I might not be here either if it had been the first offense of a new administration. Maybe not if it even had been the second or third, I might add. I am here this evening because after offense after offense after offense, my frustration has found its breaking point. I am here this evening because of a pattern of continual abuses against civil liberties and the rule of law. When faced with that pattern, we should not act in the interest of the Democratic Party or the Republican Party. We should act in the interest of the Constitution of the United States because we are, above anything else, its temporary custodians. If these abuses had been committed by a President of my own party, I would have opposed them just as passionately as I do this evening.

I am here tonight because of the latest link in that long chain of abuse. It is alleged that giant telecom corporations worked with our Government to compile America's private domestic communications records into a database of enormous scale and scope. Secretly and without a warrant, these corporations are alleged to have spied on their own American customers.

Here is only one of the most egregious examples: According to the Electronic Frontier Foundation:

> Clear, firsthand whistleblower documentary evidence [states] . . . that for year on end, every e-mail, every text message, and every phone call carried over the massive fiber optic links of sixteen separate companies routed through AT&T's Internet hub in San Francisco—hundreds of millions of private, domestic communications—have been . . . copied in their entirety by AT&T and knowingly diverted wholesale by means of multiple ''splitters'' into a secret room controlled exclusively by the NSA.

The phone calls of millions of Americans diverted into a secret room controlled by the NSA. That allegation still needs to be proven in a court of law. But before that happens, there is an even simpler question: What do you see in it?

If you only see cables and computers there, the whole thing seems almost harmless. Certainly nothing to get worked up about—a routine security sweep and a routine piece of legislation authorizing it. If that is what you see in the NSA's secret room, I imagine you will vote to extend that immunity.

If you see a vast dragnet for millions of Americans' private conversations, conducted by a Government agency without a warrant, then I believe you will recognize what is at stake. You will see that what is at stake is the sanctity of the law and the sanctity of our privacy as American citizens. You will then oppose this retroactive immunity.

Maybe that sounds overdramatic to some of my colleagues. They will ask: What does it matter, at the end of the day, if a few corporations are sued? They will say: This is a small issue, an isolated case. The law is still safe and sound.

I find that view profoundly wrong. But I will give them this: As long as they keep this small, they win. As long as they keep this case isolated and technical, they win. As long as it is about a few lawsuits, and nothing more, they win. They are counting on the American people to see nothing bigger than that.

I am counting on them to see more and to fear less. So much more is at stake than a few phone calls, a few companies, and a few lawsuits. Mr. President, equal justice is at stake—justice that makes no exceptions. Openness is at stake—an open debate on security and liberty, and an end to warrantless, groundless spying. Retroactive immunity stands against those principles.

It doesn't say: I trust the American people; I trust the courts and judges and juries to come to just decisions. Retroactive immunity says: Trust me.

There are classified documents, we are told, that prove the case for retroactive immunity beyond a shadow of a doubt. But we are not allowed to see them. I have served in this body for more than a quarter century, and I am not allowed to see these documents at all. I am told to trust somebody, believe people when they stand up and tell you exactly what is here. Neither are the majority of my colleagues allowed to see them. We are left entirely in the dark to draw the conclusion that there is nothing to be concerned about. The courts don't need to look at this.

Obviously, I cannot speak for my colleagues, but I would never take ''trust

me'' for an answer—not even in the best of times.

''Trust me.'' It is the offer to hide ourselves in the waiting arms of the rule of men. I cannot put it better than this:

''Trust me'' government is government that asks that we concentrate our hopes and dreams on one man; that we trust him to do what's best for us. My view of government places trust not in one person or one party, but in those values that transcend persons and parties.

Those words were spoken by Ronald Reagan in 1980, the former President of the United States. Those words are every bit as true today, even if some have chosen to forget them. But times of threat and fear blur our view of transcendent values; and those who would exploit those times urge us to save our skins at any cost.

The rule of law has rarely been so fragile. It has really seemed less compelling. What, after all, does the law give us? It has no parades, no slogans; it lives in books and precedents. It cannot entertain us or captivate us or soothe our deepest fears. When set against everything the rule of men has to offer, the rule of law is mute.

That is the precise advantage seized upon, in all times, by the law's enemies.

It is a universal truth that the loss of liberty at home is to be charged to the provisions against danger . . . from abroad.

Those are the words of James Madison, and they are worthy of repetition.

It is a universal truth that the loss of liberty at home is to be charged to the provisions against danger . . . from abroad.

James Madison, the father of the Constitution, made that prediction more than two centuries ago. With the passage of this bill, his words would be one step closer to coming true. So it has never been more essential that we lend our voices to the law and speak on its behalf.

This is our defining question, the question that confronts every generation of Americans since the founding of our Republic: the rule of law, or the rule of men?

How many times must we get the wrong answer?

To those who say this is just about a few telecoms, I answer that this is about contempt for the rule of law, large and small.

This is about the Justice Department turning our Nation's highest law enforcement officers into patronage plums, and turning the impartial work of indictments and trials into the machinations of politics.

This is about Alberto Gonzales coming before Congress to give us testimony that was, at best, wrong, and, at worst, perjury.

This is about Congress handing the President the power to designate any individual he wants an ''unlawful enemy combatant,'' hold that individual indefinitely, and take away his or her rights to habeas corpus—the 700-year-old right to challenge your detention. If you think the Military Commissions Act struck at the heart of the Constitution, well, it struck at the Magna Carta while it was at it.

If you think this only threatens a few of us, you should understand that the writ of habeas corpus belongs to all of us. It allows anyone to challenge their detention. Rolling back habeas corpus endangers us all. Without a day in court, how can you prove that you are entitled to a trial? How can you prove that you are innocent? In fact, without a day in court, how can you let anybody know what you have been detained for at all?

The Military Commission Act also gave President Bush the power some say he wanted most of all: the power to get information out of suspected terrorists—by almost any means. The power to use evidence potentially gained from torture.

This is about torture—officially sanctioned torture. As a result of decisions made at the highest levels of our Government, America is making itself known to the world with stories like this one: A prisoner at Guantanamo—to take one example out of hundreds—was deprived of sleep for over 55 days, a month and 3 weeks. Some nights he was doused with water or blasted with air conditioning. After week after week of this delirious, shivering wakefulness, on the verge of death from hypothermia, doctors strapped him to a chair—doctors, healers who took the Hippocratic oath to ''do no harm''—pumped him full of three bags of medical saline, brought him back from death, and sent him back to his interrogators.

To the generation coming of age around the world in this decade, that is America. Not Normandy, not the Marshall Plan, not Nuremberg. Guantanamo.

This is about the CIA destroying tapes containing the evidence of harsh interrogations—about the administration covering its tracks in a way more suited to a banana republic than to the home of freedom.

This is about waterboarding, a technique invented by the Spanish Inquisition, perfected by the Khmer Rouge, and in between, banned—originally banned for excessive cruelty—by the Gestapo!

Waterboarding's not torture? Listen to the words of Malcolm Nance, a 26-year expert in intelligence and counterterrorism, a combat veteran, and former Chief of Training at the U.S. Navy Survival, Evasion, Resistance and Escape School.

To those who say that this is just about a few telecoms, I answer: This is about contempt for the law, large and small.

This is about the Justice Department turning our Nation's highest law enforcement offices into patronage plums, and turning the impartial work of indictments and trials into the machinations of politics.

This is about Alberto Gonzales coming before Congress to give us testimony that was at best, wrong—and at worst, perjury.

This is about Congress handing the President the power to designate any individual he wants an ''unlawful enemy combatant,'' hold him indefinitely, and take away his right to habeas corpus—the 700-year-old right to challenge your detention. If you think that the Military Commissions Act struck at the heart of the Constitution, you would be understating things—it struck at the Magna Carta while it was at it.

And if you think that this only threatens a few of us, you should understand that the writ of habeas corpus belongs to all of us—it allows anyone to challenge their detention. Rolling back habeas rights endangers us all: Without a day in court, how can you prove that you are entitled to a trial? How can you prove that you are innocent? In fact, without a day in court, how can you let anyone know that you have been detained at all?

While training American soldiers to resist interrogation, he writes:

I have personally led, witnessed and supervised waterboarding of hundreds of people. . . . Unless you have been strapped down to the board, have endured the agonizing feeling of the water overpowering your gag reflex, and then feel your throat open and allow pint after pint of water to involuntarily fill your lungs, you will not know the meaning of the word. . . .

It does not simulate drowning, as the lungs are actually filling with water. The victim is drowning. How much the victim is to drown depends on the desired result . . . and the obstinacy of the subject.

Waterboarding is slow motion suffocation . . . usually the person goes into hysterics on the board. . . . When done right it is controlled death.

In spite of all that, last week the White House declared that waterboarding is not torture, that waterboarding is legal, and that, if it chooses, America will waterboard again.

This is about Michael Mukasey coming before the Senate and defending the President's power to openly break the law. When he came to the Senate before his confirmation, Mr. Mukasey was asked bluntly and plainly: Is waterboarding constitutional? Mr. Mukasey replied with a head-scratching tautology:

If waterboarding is torture, torture is not constitutional.

Surely we can expect a little more insight from someone so famously well versed in national security law. But Mr. Mukasey pressed on with the obstinacy of a witness pleading the Fifth:

If it's torture. . . . If it amounts to torture, it is not constitutional.

And that is the best this noted jurist, this legal scholar, this longtime judge had to offer on the defining moral issue of this Presidency: claims of ignorance. Word games.

And again last month, he refused categorically to denounce waterboarding. In fact, Mr. Mukasey was asked the easiest question we have in a democracy: Can the President openly break

the law? Can he—as we know he has done already—order warrantless wiretapping, ignore the will of Congress, and then hide behind nebulous powers he claims to find in the Constitution?

Mr. Mukasey's response: The President has ''the authority to defend the country.''

And in one swoop, the Attorney General conceded to the President nearly unlimited power, as long as he finds a lawyer willing to stuff his actions into the boundless rubric of ''defending the country.'' Unlimited power to defend the country, to protect us as one man sees fit, even if that means listening to our phone calls, even if that means holding some of us indefinitely.

This is about extraordinary rendition—outsourced torture. It is about men this administration prefer we did not know exist. But we do know.

One was a Syrian immigrant raising his family in Canada as a citizen. He wrote computer code for a company called Math Works. He was planning to start his own tech business. On a trip through New York's JFK Airport, he was arrested by U.S. Federal agents. They shackled him and bundled him into a private CIA plane which flew him across the Atlantic Ocean to Syria.

This man spent the next 10 months and 10 days in a Syrian prison. His cell was 3 feet wide, the size of a grave. Some 300 days passed alone in that cell, with a bowl for his toilet and another bowl for his water, and the door only opened so he could go wash himself once a week, though it may have been more or less because the cell was dark and he lost track of time.

The door only opened for one reason: for interrogators who asked him, again and again, about al-Qaida. Here is how it was described:

> The interrogator said, ''Do you know what this is?'' I said, ''Yes, it's a cable,'' and he told me, ''Open your right hand.'' I opened my right hand, and he hit me like crazy. It was so painful, and of course I started crying, and then he told me to open my left hand, and I opened it, and he missed, then hit my wrist. And then he asked me questions. If he does not think you are telling the truth, then he hits again.

The jail and the torturers were Syrian, but America sent this man there with full knowledge of what would happen to him because it was part of a longstanding secret program of ''extraordinary rendition.'' America was convinced that he was a terrorist and wanted the truth beaten out of him.

No charges were ever filed against him. His adopted nation's government—Canada, one of our strongest NATO allies—cleared him of all wrongdoing after a yearlong investigation and awarded him more than $10 million in government compensation for his immense pain and suffering—but not before he was tortured for 10 months in a cell the size of a grave. Our own Government, I note, has refused to even acknowledge that his case exists.

It is about a German citizen living in the city of Ulm with his wife and four children. On a bus trip through Eastern Europe, he was pulled off at a border crossing by armed guards and held for 3 weeks in a hotel room where he was beaten regularly. At the end of 3 weeks, he was drugged and shipped on a cargo plane to Kabul, Afghanistan.

For 5 months he was held in the Salt Pit, a secret American prison staffed by Afghan guards. All he had to drink was stagnant water from a filthy bottle. Again and again, masked men interrogated him about al-Qaida. And finally, he says, they raped him.

He was released in May of 2004. Scientific testing confirmed his story of malnourishment, and the Chancellor of Germany publicly acknowledged that he was wrongfully held. What was his crime? Having the same name as a suspected terrorist. Again, our own Government has refused to even acknowledge this case exists.

There are not enough words in the world to cover the facts. If you would like to define torture out of existence, be my guest. If you would rather use a Washington euphemism—''tough questioning,'' ''enhanced interrogation''—feel free. Feel free to talk about ''fraternity hazing'' such as Rush Limbaugh did, or to use a favorite term of Vice President CHENEY, ''a dunk in the water,'' as he described waterboarding. Call it whatever you like. And when you are through with all of your evasions, the facts will still be waiting for you—the fact of waterboarding, ''controlled death,'' the fact of ''outsourced torture,'' the fact of secret prisons, the fact of month-long sleep deprivation, the fact of the President's personal power to hold whomever he likes for as long as he would like.

Have I gone wildly off the topic? Have I brought up a dozen unrelated issues? I don't think, Mr. President—I don't think I have at all.

We are deceiving our ourselves when we talk about the U.S. attorneys issue, the habeas issue, the torture issue, the rendition issue, the secrecy issue. As if each one were an isolated case! As if each one were an accident! When we speak of them as isolated, we are keeping our politics cripplingly small, and as long as we keep them small, the rule of men is winning. There is only one issue here—only one. It is the law issue, the rule of law. Does the President serve the law or does the law serve the President?

Each insult to our Constitution comes from the same source. Each springs from the same mindset. And if we attack this contempt for the law at any point, we will wound it at all points.

That is why I am here this evening. Retroactive immunity is on the table today, but also at issue is the entire ideology that justifies it, the same ideology behind torture and executive lawlessness. Immunity is a disgrace in itself, but it is far worse in what it represents. It tells us that some believe in the courts only so long as the verdict goes their way. It puts secrecy above sunshine and fiat above the law.

Did the telecoms break the law? That I don't know. Pass immunity and, of course, we will never know. A handful of favored corporations will remain unchallenged. Their arguments will never be heard in a court of law. The truth behind this unprecedented domestic spying will never see the light of day.

''Law'' is a word that we barely hear from the supporters of immunity. They offer neither a deliberation about America's difficult choices in an age of terrorism nor a shared attempt to set for our times the excruciating balance between security and liberty. They merely promise a false debate on a false choice: security or liberty, but never both.

I think differently, and I hope others do as well. I think that America's founding truth is unambiguous: security and liberty, one and inseparable, and never one without the other.

Secure in that truth, I offer a challenge to immunity supporters. You want to put a handful of corporations above the law. Could you please explain how your immunity makes any one of us any safer at all?

The truth is that a working balance between security and liberty has already been struck. In fact, it has been settled for decades. For three decades, in fact, FISA, the Foreign Intelligence Surveillance Act, has prevented executive lawbreaking and protected Americans, and that balance stands today.

In the wake of the Watergate scandal, the Senate convened the Church Committee, a panel of distinguished members determined to investigate executive abuses of power. Unsurprisingly, they found that when Congress and the courts substitute ''trust me'' for real oversight, massive lawbreaking can result.

They found evidence of U.S. Army spying on the civilian population, Federal dossiers on citizens' political activities, a CIA and FBI program that had opened hundreds of thousands of Americans' letters without warning or warrant. In sum, Americans had sustained a severe blow to their fourth amendment rights ''to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . .''

But at the same time, the Senators of the Church Committee understood that surveillance needed to go forward to protect the American people. Surveillance itself was not the problem. Unchecked, unregulated, unwarranted surveillance was. What surveillance needed, in a word, was legitimacy. And in America, as the Founders understood, power becomes legitimate when it is shared, when Congress and the courts check that attitude which so often crops up in the executive branch—''if the President does it, it's not illegal.''

The Church Committee's final report, ''Intelligence Activities and the Rights of Americans,'' put the case powerfully

indeed. Allow me to quote from that final report:

The critical question before the Committee was to determine how the fundamental liberties of the people can be maintained in the course of the Government's effort to protect their security.

The delicate balance between these basic goals of our system of government is often difficult to strike, but it can, and must, be achieved.

We reject the view that the traditional American principles of justice and fair play have no place in our struggle against the enemies of freedom. Moreover, our investigation has established that the targets of intelligence activity have ranged far beyond persons who could properly be characterized as enemies of freedom. . . .

We have seen segments of our Government, in their attitudes and action, adopt tactics unworthy of a democracy, and occasionally reminiscent of the tactics of totalitarian regimes.

We have seen a consistent pattern in which programs initiated with limited goals, such as preventing criminal violence or identifying foreign spies, were expanded to what witnesses characterized as ''vacuum cleaners,'' sweeping in information about lawful activities of American citizens.

The Senators concluded:

Unless new and tighter controls are established by legislation, domestic intelligence activities threaten to undermine our democratic society and fundamentally alter its nature.

What a strange echo, what an incredibly strange echo, we hear in those words. The words I just read could have been written yesterday. Three decades ago our predecessors in this Chamber understood that when domestic spying goes too far, it threatens to kill just what it promises to protect: an America secure in its liberty. That lesson was crystal clear more than 30 years ago. Why is it so cloudy tonight? Why is it so cloudy on the eve of an important vote?

And before we entertain the argument that ''everything has changed'' since those words were written, remember: The men who wrote them had witnessed World War and Cold War. They had seen the Nazi and Soviet threats and were living every day under the cloud of a nuclear holocaust.

Mr. President, I ask this: Who will chair the commission investigating the secrets of warrantless spying years from today? Will it be a young Senator sitting in this body today? Will it be someone not yet elected? What will that Senator say when he or she comes to our actions, reads in the records of 2008 how we let outrage after outrage after outrage slide with nothing more than a promise to stop the next one? I imagine that Senator will ask of us: Why didn't they do anything? Why didn't they fight back? Why didn't they stand up? Why didn't they vote down retroactive immunity? What were they thinking? What more do you need to know? How many instances of abuse do you have to learn about? When do you stop? When do you say enough is enough? In February of 2008, when no one could doubt any more what the administration was doing, why did they sit on their hands? Why did they sit on their hands? Why did they pass by as if nothing had ever happened and grant retroactive immunity?

Since the time of the Church Commission the threats facing our Nation have multiplied and grown in complexity, but the lesson has been immutable: Warrantless spying threatens to undermine our democratic society, unless legislation brings it under control. In other words, the power to invade privacy must be used sparingly, guarded jealously, and shared equally between the branches of Government.

Or the case can be made pragmatically, as my friend Harold Koh, dean of Yale Law School, recently argued:

The engagement of the three branches tends to yield not just more thoughtful law, but a more broadly supported public policy.

Three decades ago, Congress embodied that solution in the Foreign Intelligence Surveillance Act, or FISA. FISA confirmed the President's power to conduct surveillance of international conversations involving anyone in the United States, provided—provided—that the Federal FISA Court issued a warrant ensuring that wiretapping was aimed at safeguarding our security and nothing else.

The President's own Director of National Intelligence, Mike McConnell, explained the rationale in an interview this summer. The United States, he said:

. . . did not want to allow the intelligence community to conduct electronic surveillance of Americans for foreign intelligence unless you had a warrant, so that was required.

As originally written in 1978, and as amended many times since, FISA has accomplished its mission. It has been a valuable tool for conducting surveillance of terrorists and those who would harm our beloved Nation. And every time Presidents have come to Congress openly to ask for more leeway under FISA, Congress has worked with them. Congress has negotiated it together. Congress and Presidents have struck a balance that safeguards America while doing its utmost to protect Americans' privacy.

This summer, Congress made a technical correction to FISA, enabling the President to wiretap without a warrant conversations between two foreign targets, even if those conversations are routed through American corporate computers. For other reasons, I felt this summer's legislation went too far, and I opposed it, but the point is Congress once again proved its willingness to work with the President on foreign intelligence surveillance.

Isn't that enough?

This past October and November, as we have seen, the Senate Intelligence and Judiciary Committees worked with the President to further refine FISA and ensure, in a true emergency, the FISA Court would do nothing to slow down intelligence gathering.

Isn't that enough?

As for the FISA court? Between 1978 and 2004, according to the Washington Post, the FISA Court approved 18,748 warrants and rejected 5. Let me repeat that. The FISA Court, according to the Washington Post, approved 18,748 warrants and rejected 5. The FISA Court has sided with the executive branch 99.9 percent of the time.

Isn't that enough?

Is anything lacking? Have we forgotten something? Isn't all this enough to keep us safe?

We all know the answer we received. This complex, fine-tuned machinery, crafted over three decades by 3 branches of Government, 4 Presidents, and 12 Congresses was ignored. It was a system primed to bless nearly any eavesdropping a President could conceive, and spying still happened illegally.

If the shock of that decision has yet to sink in, think of it this way: President Bush ignored not just a Federal court but a secret Federal court. Not just a secret Federal court but a secret Federal court prepared to sign off on his actions 99.9 percent of the time. A more compliant court has never been conceived. Still, that wasn't good enough.

So I will ask the Senate candidly, and candidly it already knows the answer: Is this about security or about power? Why are some fighting so hard for retroactive immunity? The answer, I believe, is immunity means secrecy, and secrecy means power.

It is no coincidence to me that the man who proclaimed ''If the President does it, it is not illegal''—Richard Nixon—was the same man who raised executive secrecy to an art form. The Senators of the Church Committee expressed succinctly the deep flaw in the Nixonian executive: ''Abuse thrives on secrecy.'' And in the exhaustive catalogue of their report, they proved it.

In this push for immunity, secrecy is at its center. We find proof in immunity's original version: a proposal to protect not just telecoms but everyone involved in the wiretapping program. In their original proposal, that is what they wanted, to immunize themselves and absolutely everyone involved in this program. Not just the companies but everyone from the executive branch on down. They wanted to immunize every single human being.

Think about it. It speaks to their fear and perhaps their guilt—their guilt that they had broken the law and their fear in the years to come they would be found liable or convicted. They knew better than anyone else what they had done, and they must have had good reason to be afraid. Thankfully, immunity for the President is not part of the bill before us, and on previous occasions I have commended Senator ROCKEFELLER and Senator BOND and the committee members for not agreeing to the administration's request for granting immunity for every single person. But remember, they made the request. That is what they wanted. While it is not in the bill, it ought to be instructive. If anybody

wonders what this is all about, when you go back and remember that this administration requested of this committee that every single human being involved in the surveillance program be immunized and protected by the act of Congress, that is instructive. That is enlightening as to what the true intent of this administration has been when it comes to this program.

As I said: Thankfully, immunity for the executive branch is not part of the bill before us, but the original proposal tells us something very important. This is, and always has been, a self-preservation bill. Otherwise, why not have a trial and get it over with? If the proponents of retroactive immunity are right, the corporations would win in a walk. After all, in the official telling, the telecom industry was ordered to help the President spy without a warrant and they patriotically complied. We have even heard on this floor the comparison between the telecom corporations to the men and women laying their lives on the line in Iraq.

But ignore that. Ignore for a moment the fact that in America we obey the laws, not the President's orders. Ignore that not even the President has the right to secure a bully into breaking the law. Ignore that the telecoms were not unanimous; one, Qwest, wanted to see the legal basis for the order, never received it, and so refused to comply. Ignore that a judge presiding over the case ruled:

> AT&T cannot seriously contend that a reasonable entity in its position could have believed that the alleged domestic dragnet was legal.

Ignore all of that. If the order the telecoms received was legally binding, then they have an easy case to prove. The corporations only need to show a judge the authority and the assurances they were given and they will be in and out of court in less than 5 minutes.

If the telecoms are as defensible as the President says, why doesn't the President let them defend themselves? If the case is so easy to make, why doesn't he let them make it? It can't be that he is afraid of leaks. Our Federal court system has dealt for decades with the most delicate national security matters, building up expertise and protecting classified information behind closed doors—ex parte, in camera. We can expect no less in these cases. No intelligence sources need be compromised. No state secrets need to be exposed. After litigation, at both the district court and circuit court level, no state secrets have been exposed.

In fact, Federal District Court Judge Vaughn Walker, a Republican appointee, I might add, has already ruled the issue can go to trial without putting state secrets in jeopardy. He reasonably concluded that the existence of a terrorist surveillance program is hardly a secret at all, and I quote him.

> The government has already disclosed the general contours of the ''terrorist surveillance program,'' which requires the assistance of a telecommunications provider.

As the state secrets privilege is invoked to stall these high-profile cases, it is useful to consider that privilege's history. In fact, it was tainted at its birth by a President of my own party, Harry Truman. In 1952, President Truman successfully invoked the new privilege to prevent public exposure of a report on a plane crash that killed three Air Force contractors.

When the report was finally declassified some 50 years later, decades after anyone in the Truman administration was within its reach, it contained no secrets at all; only facts about repeated maintenance failures that would have seriously embarrassed some important people. And so the state secrets privilege began its career not to protect our Nation but to protect the powerful.

In his opinion, Judge Walker argued that, even when it is reasonably grounded:

> the state secrets privilege still has its limits. While the court recognizes and respects the executive's constitutional duty to protect the Nation from threats, the court also takes seriously its constitutional duty to adjudicate the disputes that come before it. To defer to a blanket assertion of secrecy here would be to abdicate that duty, particularly because the very subject matter of this litigation has been so publicly aired. The compromise between liberty and security remains a difficult one. But dismissing this case at the outset would sacrifice liberty for no apparent enhancement of security.

And that ought to be the epitaph for the last 6 years—sacrificing liberty for no apparent enhancement of security. Worse than selling our soul, we are giving it away for free.

It is equally wrong to claim that failing to grant this retroactive immunity will make the telecoms less likely to cooperate with surveillance in the future. The truth is, that since the 1970s, the Foreign Intelligence Surveillance Act has compelled telecommunications companies to cooperate with surveillance, when it is warranted. What is more, it immunizes them. It has done that for 25 years.

So cooperation in warranted wiretapping is not at stake today. Collusion in warrantless wiretapping is. The warrant makes all the difference in the world because it is precisely the court's blessing that brings Presidential power under the rule of law.

In sum, we know that giving the telecoms their day in court, giving the American people their day in court, would not jeopardize an ounce of our security. And it could only expose one secret: The extent to which the rule of law has been trampled upon. That is the choice at stake this evening and tomorrow when we vote on this matter: Will the secrets of the last years remain closed in the dark or will they be open to the generations to come, to our successors in this Chamber, so they can prepare themselves to defend against future outrages of power and usurpations of law from future Presidents, of either party, as certainly they will come? As certainly they will come.

Thirty years after the Church Committee, history repeated itself. Even though I probably thought in those days, this will never happen again. Well, here we are again. As certain as I am standing here this evening, at some future time, there will be an executive, a President, who will seek to compromise the very same principles. And just as we reached back 30 years ago during this debate to a hallowed time when another Senate, faced with similar challenges, reached entirely different conclusions than we are about to make, some future generation will reach back to ours and ask: What did they say? What did they do? How did they feel about this? What actions did they take?

The idea that this body would grant retroactive immunity in the face of these challenges and deny the courts an opportunity to determine whether, at the mere request of a President, major companies, for years on end, can sweep up, vacuum up—to use the Church Committee's language—every telephone conversation, every fax, every e-mail of millions and millions of Americans, is a precedent I don't think we want as part of our heritage for coming generations.

And believe me, they will look back to it. If those who come after us are to prevent it from occurring again, they need the full truth.

Constitutional lawyer and author Glenn Greenwald expressed the high stakes this way:

> The Bush administration will be gone in 11 months. But—in the absence of some meaningful accountability—all of this will remain . . . If . . . these theories remain undisturbed and unchallenged, and . . . all of these crimes go uninvestigated and unpunished, that will have a profound impact on changing our national character, in further transforming the type of country we are.

That is why we must not see these secrets go quietly into the good night. I am here this evening because the truth is no one's private property. It belongs to every one of us, and it demands to be heard.

''State secrets,'' ''patriotic duty'': Those, as weak as they are, are the arguments the telecoms' advocates use when they are feeling high-minded. When their thoughts turn baser, they make their arguments as amateur economists.

Here is how Director of National Intelligence Mike McConnell put it.

> If you play out the suits at the value they're claimed, it would bankrupt these companies. So . . . we have to provide liability protection to these private sector entities.

That is an incredible statement. It is amazing that a person in high Government would suggest that no matter how warranted this investigation may be, there is a higher calling, that we should not put these companies in any kind of financial jeopardy, that we have to provide liability protection to these private sector entities because it might bankrupt them.

To begin with, it is a clear exaggeration. First and foremost, we are talking about some of the most successful

companies in the United States, not only today but ever. Some of these companies have continued to earn record profits and sign up record numbers of subscribers at the same time as this very public litigation, totally undermining the argument, I might add, these lawsuits are doing the telecoms severe reputational damage.

Remember, the discussion about these telecoms has now gone on for months. And yet in the public debate about whether the courts ought to be able to examine these issues, there are reports that these companies have been accumulating record profits. Companies that size could not be completely wiped out by anything but the most exorbitant and unlikely judgment. To assume that the telecoms would lose and that the judges would hand them down such back-breaking penalties is already to take several leaps.

The point, after all, has never been to finally cripple our telecommunications industry. That is not the point here at all. In fact, some have said: Look, I will support you striking this immunity, provided you put a cap on damages these companies would suffer if in fact the plaintiffs prove to be correct. And I am more than happy to entertain that. I do not believe it is necessary, but if that is the argument, a damages cap would answer all of Mike McConnell's concerns, without even having to bring up immunity. I am prepared to agree to any kind of a cap you want—because the point to me is not the damages they pay, but the damage they have done.

But to suggest somehow that there is a pricetag companies would have to pay which is more valuable than protecting people's privacy is a stunning, breathtaking comment from a high Government official, in my view. It is extremely troubling that our Director of National Intelligence even bothers to pronounce on ''liability protection for private sector entities.'' How did that even begin to be relevant to letting this case go forward? Since when do we throw entire lawsuits out because the defendant stood to lose too much? In plain English, here is what Admiral McConnell is arguing: Some corporations are too rich to be sued. Even bringing money into the equation puts wealth above justice, above due process. Rarely in public life in the years I have served here have I ever heard an argument as venal as that on a matter as serious as this one. It astounds me that some can speak in the same breath about national security and the bottom line. Approve immunity and Congress will state clearly: The richer you are, the more successful you are, the more lawless you are entitled to be. A suit against you is a danger to the Republic! And so, at the rock bottom of its justifications, the telecoms' advocates are essentially arguing that immunity can be bought.

The truth is exactly, of course, the opposite. The larger the corporation, frankly, the greater the potential for abuse. Not that success should make a company suspect at all; companies grow large, and essential to our economy because they are excellent at what they do. I simply mean that size and wealth open the realm of possibilities for abuse far beyond the scope of the individual.

After all, if everything alleged is true, we are talking about one of the most massive violations of privacy in American history. If reasonable search and seizure means opening a drug dealer's apartment, the telecoms' alleged actions would be the equivalent of strip-searching everyone in the building, ransacking their bedrooms, prying up all the floorboards. The scale of these cooperations opens unprecedented possibilities for abuse, possibilities far beyond the power of any one individual.

If the allegation against the telecoms is true, it constitutes one of the most massive violations of privacy in American history. And it would be inconceivable without the size and resources of a corporate behemoth, the same size that makes Mike McConnell fear the corporations' day in court. That is the massive scale we are talking about, and that massive scale is precisely why no corporation must be above the law.

On that scale, it is impossible to plead ignorance. As Judge Walker ruled:

> AT&T cannot seriously contend that a reasonable entity in its position could have believed that the alleged domestic dragnet was legal.

Again, from a Republican appointee to the Federal bench. But the arguments of the President's allies sink even lower. Listen to the words of a House Republican leader spoken on Fox News. Candidly, they are shameful.

> I believe that [the telecoms] deserve immunity from lawsuits out there from typical trial lawyers trying to find a way to get into the pockets of American companies.

Of course, some of the ''typical greedy trial lawyers'' bringing these suits work for a nonprofit. And the telecoms that some want to portray as pitiful little Davids actually employ hundreds of attorneys, retain the best corporate law firms, and spend multimillion dollar legal budgets.

But if the facts actually matter to immunity supporters, we would not be here. For some, the prewritten narrative takes precedence far above the mere facts; and here, it is the perennial narrative of the greedy trial lawyers.

With that, some can rest content. They conclude that we were never serious about the law, or about privacy, or about checks and balances; it was about the money all along.

But we will not let them rest content. We are extremely serious. There can no longer be any doubt: One by one the arguments of the immunity supporters, of the telecoms' advocates, fail.

I wish to spend a few minutes and detail these claims and their failures, if I may. The first argument from immunity supporters says:

> The President has the authority to decide whether or not telecoms should be granted immunity.

That is the first argument. The President has that implicit authority. But the facts in this case belong in the courts. The judiciary should be allowed to determine whether the President has exceeded his powers by obtaining from the telecoms wholesale access to the domestic communications of millions of ordinary Americans.

Whatever the arguments may be, let us assume for a second they are going to make this argument. Well, you can make an argument. Where is the place you make that argument? Here in the legislative body or in the courts? I think the simple answer is, if you have been to law school for a week, the courts.

We are a government of three parts, coequal: executive, legislative, and judicial. The executive branch says: I have the right to do this. The Congress can debate and certainly discuss it. But only in the courts can we determine the constitutionality of that action.

Neither this body nor the other that comprise the legislative branch are charged with the responsibility of determining constitutionality. When Congress passes a law, the courts decide whether it is constitutional. When the President acts, the courts decide whether it is constitutional. The executive branch does not decide whether we have acted constitutionally, and we do not decide whether the President has acted constitutionally. That is what the courts are for. This is basic 101 stuff. This is basic stuff. You go to the courts to determine this question. And yet if we pass retroactive immunity—gone.

That is a great precedent. That is what future Congresses will look to, when deciding when some future President overreaches: What did the previous Congresses do? And you will hear the argument in this Chamber years hence: Well, back in 2008, when confronted with that question, the Senate said that, frankly, the courts had no business with that, in effect, sanctioning what had occurred.

How else can you read this but as a sanction? If a majority of Senators here decides that retroactive immunity is warranted, what other conclusion can history draw from that, except we agreed with the President that he had the right to do what he did, and we will never know the legal answer to the question. We will deprive the courts of the opportunity to decide it.

We are overstepping our bounds incredibly by doing this, and hence the reason for the first time in my more than a quarter century in this body I am engaging in extended debate, because this is that important.

To allow a President, any President of any party, to mandate or require a public or private entity to invade the privacy of Americans to the extent that has occurred here, one of the most massive alleged violations of privacy in

history, and not challenge it and have the courts determine the legality or illegality of it, is an incredible precedent of historic proportions. It is not a small vote tomorrow. It is not a minor issue. It is about as important and as basic and as fundamental as anything we can ever do.

Remember that the administration's original immunity proposal protected everyone. That is what they wanted. And executive immunity is not in this bill only because JAY ROCKEFELLER and KIT BOND and the other members of the committee said No. But do not forget that is what they wanted. The administration came to the committee, and said: We want you to grant immunity to everyone—the executive branch, the telecoms, Justice Department, anyone else involved.

The committee turned them down. But they asked for it. They asked for it. And that has to be a part of this debate and discussion. It is not irrelevant. It is not insignificant that the President of the United States asked the Intelligence Committee of the Senate to grant them and everyone else involved in this issue total immunity. What more do you need to know about what the motives are? How much more do you need to find out? The origin of immunity tells us a great deal about what is at stake here. It is self-preservation.

I have my own opinions about warrantless surveillance, about what went on. But my opinions should not bear the weight of law. I think what these companies did was wrong. But I would be a fool to stand before you this evening and say I have the right to make that determination. But they should have not the right, either, to decide if it was legal. And that is what we are doing, in effect, by granting retroactive immunity.

The second argument is that only foreign communications are targeted.

Immunity supporters claim that only foreign communications were targeted, not Americans' domestic calls. But the fact is that clear firsthand evidence authenticated by these corporations in court contradicts that claim. ''Splitters'' at AT&T's Internet hub in San Francisco diverted into a secret room controlled by the NSA every e-mail, every text message, every phone call, foreign or domestic, carried over the massive fiber optic lines of 16 separate companies for over 5 years.

Third, the Senate Intelligence Committee has preserved the role of the judiciary so there is ample oversight. But the fact is, the role would be empty. The Intelligence version of the bill before us would require the cases to be dismissed at a word from the Attorney General. The central legal questions raised by these cases would never be heard. The cases would never be fully closed. We would never really truly know what happened in these matters. So from a mere word of the Attorney General, that is the end of it.

The fourth argument we have been hearing over the last number of months: A lack of immunity would compromise future cooperation between the U.S. Government and the telecom industry. But remember: Since the 1970s the Foreign Intelligence Surveillance Act has compelled telecoms to cooperate with warranted surveillance, and it has immunized them entirely. They don't have a choice, in effect. If you are compelled by a warrant to turn over the evidence, you don't have the choice of cooperating or not. The idea that the companies will say: We are just not going to share that information with you—you don't have that luxury. When a court order comes and says: Turn over the evidence, you have to turn it over. But, of course, the companies say: We don't want to because we will end up with a lot of lawsuits. To handle that very legitimate issue raised initially by AT&T, which was part of drafting FISA in 1978, we said: Don't worry about that. We will immunize you so there won't be any lawsuits that can be brought against you for doing what you are compelled to do by court order and a warrant.

So the argument that somehow we won't be cooperative with you is just on its face factually wrong. You don't have the choice not to cooperate. What we do grant to you with that warrant is the fact that you cannot be sued, which is a legitimate request to make.

That is not, of course, what happened here. The decision was made to turn over the evidence without a warrant, without a court order.

I pointed out before that according to the Washington Post, since 1978 there have been over 18,700 court orders requested of the FISA Court, and only 5 have been rejected in 30 years; 18,700-plus cases before the court, that secret, private Federal court, and in 99.9 percent of the cases, they have been approved. Only five have been rejected. But when you are receiving a court order, when the warrant arrives and you are complying with it, as you are required, you also receive immunity from legal prosecution or from lawsuits. So the argument somehow that these companies won't be as cooperative, if it weren't so sad, would almost be amusing.

This was a pay deal, by the way. It wasn't just patriotic duty. There was a cost involved. We were writing checks to the telecommunications industry. For whatever reason, when the Government stopped paying the checks to the telecom industry, these great patriotic institutions decided to stop the surveillance. Were they under a court order, had there been a warrant insisting upon their compliance, they wouldn't have the luxury of deciding not to comply. Only under this fact situation we are debating this evening would these corporations have any ability to all of a sudden stop complying with the law or complying with the request. So the irony of the argument is that the reverse is actually true. If you don't have a warrant and a court order, it is less likely you are apt to get that continual cooperation from these very companies that can provide the information we need to keep us more secure.

The fifth argument immunity supporters make is that telecoms can't defend themselves because of the state secrets provision. I made this case a while ago, but let me repeat it. The fact is that Federal district court Judge Vaughn Walker has already ruled that the issue can go to trial without putting state secrets in jeopardy. Judge Walker pointed out that the existence of the warrantless surveillance program is hardly a secret at all.

I will quote him again. He said:

> The Government has [already] disclosed the general contours of the ''terrorist surveillance program,'' which requires the assistance of a telecommunications provider.

So the argument that they can't defend themselves without exposing state secrets has already been debunked.

The sixth argument that is made by those who support immunity is that defendants are already shielded by common law principles. This is an interesting one. Immunity supporters claim that telecoms are protected by common law principles, but the fact is that common law immunities do not trump specific legal duties imposed by statute such as the specific duties Congress has long imposed on telecoms to protect customer privacy and records.

In the pending case against AT&T, the judge already has ruled unequivocally that ''AT&T cannot seriously contend that a reasonable entity in its position could have believed that the alleged domestic dragnet was legal.'' Even so, the communications company defendants can and should have the opportunity to present these defenses to the courts and the courts—not the Congress preemptively—should decide whether they are sufficient.

The seventh argument that is being made by the supporters of immunity is that information leaks may compromise state secrets and national security. I have heard this argument over and over and over again. The fact is, our Federal court system, in decade after decade of dealing with delicate national security matters, has built up the expertise it takes to secure that information behind closed doors. If we are still concerned about national security being threatened as a result of these cases, we can simply get the principals a security clearance.

We can be increasingly confident that these cases will not expose state secrets or intelligence sources, because after the extensive litigation that has already taken place at both the district court and circuit court level, no sensitive information has been leaked.

This is a red herring issue. It is one that they are going to fall back on over and over again. But it is no secret about what has been going on. It has been widely reported. The only thing we are talking about is methods and means. Yet, over the decades, our Federal courts, in very sensitive matters,

have protected that information. So this is a phony argument and ought not to carry the day.

The eighth argument from those who support immunity: A lack of immunity will harm the telecom companies. This is not unlike Admiral McConnell's argument about finances. There will be reputational damage to the telecom industry. The fact is, there is no evidence that this litigation has reduced or will reduce the defendant companies' bottom lines or customer base. These companies can only be harmed if they have done something wrong. If they have not, they have nothing to worry about. But the suggestion somehow that we should not go forward because your reputation may be damaged is an insulting argument. It is offensive to suggest that we should harm the people's right to privacy because to prevent some reputational damage—they should be embarrassed to make that argument. After all, there is nothing to be damaged if you have done nothing wrong. If you have done something wrong, then, of course, there will be some damage. And why shouldn't there be, if you have done wrong? The courts are the ones to properly determine that.

The ninth argument: The magnitude of liability will bankrupt the telecoms. I have addressed this already, but I will briefly respond to it as well.

As we have seen, huge corporations could only be wiped out by most enormous penalties and also the most unlikely penalties that could be imposed. It would take several leaps to assume that the telecoms would lose and that they will be slapped with huge judgments. But on another level, immunity supporters are staking their claim on a dangerous principle, that a suit can be stopped solely on the basis of how much the defendant stands to lose. If we accept that premise, we could conceive of a corporation so wealthy, so integral to our economy, that its riches place it outside of the law altogether. That is a deeply flawed argument.

We see that none of these arguments for immunity stand. There is absolutely no reason to halt the legal process and to bar the courthouse door.

I think it is important at this moment to share with those who may be following this discussion, how we got to this point. How did we find out about all of this? I said earlier that we would not be here debating this this evening had it not been for a whistleblower, had it not been for reports in the media about what was going on, that a 5-year violation of privacy rights would have now turned into a 7- or 8-year violation, unabated, unstopped—every phone conversation, fax, e-mail being literally swept up, from millions and millions of people.

But we got knowledge of this because of a gentleman by the name of Mark Klein who was a former AT&T telecommunications technician who came forward to provide evidence of the company's collaboration with the NSA. Mark Klein is a remarkable individual, a person of knowledge and ability when it comes to these matters. Let me read from Mark Klein's testimony because I think it is important. This is all from him. These are not my words. These are words from Mark Klein, a person who worked at AT&T for more than 20 years as an employee and a technician who came forward to provide this information. Let me read his comments, if I may, and put them into this debate.

For about 5 years, the Bush administration's National Security Agency, with the help of the country's largest telecommunications companies, has been collecting your e-mail, accumulating information on your Web browser, and gathering details about your Internet activity, all without warrants and in violation of the U.S. Constitution and several Federal and State laws. Even after the program was exposed by the New York Times in December of 2005, the President and other government officials consistently defended the NSA's activities, insisting that the NSA only collects communications into or from the United States where one party to the communication is someone they believe to be a member of al Qaeda or an associated terrorist organization. But these claims are not true. I know they are not true, because I have firsthand knowledge of the clandestine collaboration between one giant telecommunications company and the NSA to facilitate the most comprehensive spying program in history. I have seen the NSA's vacuum cleaner surveillance infrastructure with my own eyes. It is a vast government-sponsored, warrantless spying program.

For over 22 years, I worked as a technician for AT&T. While working in San Francisco in 2002, I learned that a management level technician, with AT&T's knowledge, had been cleared by the NSA to work on a special but secret project, the installation and maintenance of Internet equipment in a newly constructed secure room in AT&T's central office in San Francisco. Other than the NSA-cleared technician, no employees were allowed in that room.

In October of 2003, I was transferred to that office and was in particular assigned to oversee AT&T operations. As part of my duties, I was required to connect circuits carrying data to optical splitters which made a copy of the light signal. But the splitters weakened the light signal causing problems I had to troubleshoot. After examining engineering documents given to the technicians which showed the connections to the splitters, I discovered that there they were hard wired to the secret room. In short, an exact copy of all traffic that flowed through critical AT&T cables—e-mails, documents, pictures, Web browsing, voiceover Internet phone conversations—everything was being diverted to equipment inside the secret room. In addition, the documents revealed the technological gear used in their secret project, including a highly sophisticated search component capable of quickly sifting through huge amounts of digital data, including text, voice, and images in real-time, according to preprogrammed criteria. It is important to understand that the Internet links which were connected to the splitter contained not just foreign communications, but vast amounts of domestic trafficking all mixed together.

Furthermore, the splitter has no selective abilities. It is just a dumb device which copies everything to the secret room. And the links going through the splitter are AT&T's physical connections to many other Internet providers; e.g., Sprint, Qwest, Global Crossing Cable and Wireless, and the critical west coast exchange point known as Mae West. Since these networks are interconnected, the government's surveillance affects not only AT&T customers, but everyone else—millions of Americans.

I repeat again, I am reading the testimony of Mark Klein who was the whistleblower who revealed this 5-year-long warrantless surveillance program. Mark Klein goes on:

I also discovered in my conversations with other technicians that other secret rooms were established in Seattle, San Jose, Los Angeles and San Diego. One of the documents I obtained also mentioned Atlanta, and the clear inference and the logic of this setup and the language of the documents is that there are other such rooms across the country to complete the coverage—possibly 15 to 20 more. So when reports of the government's extensive wiretapping program surfaced in December of 2005, after I had left AT&T, I realized two things. First, that I had been a witness to a massive spying effort that violated the rights of millions of Americans; and second, that the government was not telling the public the truth about the extent of their unconstitutional invasion of privacy.

In the spring of 2006, I became a witness for the Electronic Frontier Foundation's lawsuit against AT&T. The New York Times on April 13 of 2006 reported that four independent technical experts who examined the AT&T documents all said that the documents showed that AT&T had an agreement with the Federal Government to systematically gather information flowing on the Internet.

That is the testimony of Mark Klein.

I think it is important as well to share with my colleagues the testimony of Brian Ried, currently the Director of Engineering and Technical Operations at Internet Systems Consortium, a nonprofit organization devoted to supporting a nonproprietary Internet. This is a person of extensive knowledge. I am going to read his testimony about the technical arrangements. This is clearly above my pay grade to understand all of this with this gray head of hair I have, but to those who are listening or watching any of this, this will explain how this actually worked. So I am going to read this as if I actually know what I am talking about. So let me read exactly the words of Brian Ried, the statement of telecommunications expert Brian Ried, an AT&T whistleblower, about Mark Klein's revelations.

I am a telecommunications and data networking expert.

That is again Brian Ried speaking here who has been involved in the development of several critical Internet technologies.

I was a professor of electrical engineering at Stanford University and of computer sciences at Carnegie Melon University West. I have carefully reviewed the AT&T authenticated documents and declaration provided by Mark Klein and the public redacted version of the expert declaration of Jay Scott Marcus, both filed in the Hepting v. AT&T litigation. Combining the information contained in those declarations and documents with my extensive knowledge of the international telecommunications infrastructure and the technology regularly used for lawful surveillance pursuant to warrants

and court orders, I believe Mr. Klein's evidence is strongly supportive of widespread, untargeted surveillance of ordinary people, both AT&T customers and others.

The AT&T documents describe a technological setup of the AT&T facility in San Francisco. This setup is particularly well suited to wholesale dragnet surveillance of all communications passing through the facility, whether international or domestic. These documents describe how the fiberoptic cables were cut and splitters installed at the cut point. Fiberoptic splitters work just like ordinary TV splitters. One cable feeds in and two cables feed out. Both cables carry a copy of absolutely everything that is sent, and if the second cable is connected to a monitoring station, that station sees all traffic going over the cable.

Mr. Klein stated that the second cable was routed into a room at the facility which access was restricted to AT&T employees having clearances from the National Security Agency. The documents indicate that similar facilities were being installed in Seattle, San Jose, Los Angeles, and San Diego. The documents also reference a somewhat similar facility in Atlanta. This infrastructure is capable of monitoring all traffic passing through the AT&T facility, some of it not even from AT&T customers, whether voice or data or fax, international, or domestic. The most likely use of this infrastructure is wholesale, untargeted surveillance of ordinary Americans at the behest of the NSA. NSA involvement undermines arguments that the facility is intended for use by AT&T in protecting its own network operations.

This infrastructure is not limited to, nor would it be especially efficient for targeted surveillance or even an untargeted surveillance aimed at communications where one of the ends is located outside of the United States. It is also not reasonably aimed at supporting AT&T operations and security procedures. There are 3 main reasons. The technological infrastructure is far more powerful and expansive than that needed to do targeted surveillance or surveillance aimed at only international or one end foreign communications. For example, it includes a Narus 6400, a computer that can simultaneously analyze huge amounts of information based on rules provided by the machine operator, analyze the content of messages and other information—not just headers or routing information—conduct the analysis in real-time rather than after a delay, correlate information from multiple sources, multiple formats, over many protocols and through different periods of time in that analysis.

The documents describe a secret private backbone network separate from the public network where normal AT&T customer traffic is carried and transmitted. A separate backbone network would not be required for transmission of the smaller amounts of data captured by a targeted surveillance. You don't need that magnitude of transport capacity if you are doing targeted surveillance.

The San Francisco facility is not located near an entry-exit point for international communications that happened to be transmitted through the United States either through under sea cable or via satellite. As a result, it would not be a sensible place to locate aimed at simply monitoring traffic to or from foreign countries.

I apologize for reading these technical documents, but I think they shed some light. We are talking about very knowledgeable, expert people describing technically what was done, the magnitude of it, the capacity of it, the effort that was made, obviously, to see to it, as Mr. Klein calls it, a dumb machine that would not discriminate between information that might only be used to protect us from al-Qaida, and wholesale invasion of privacy.

But putting aside all that—had they sought a warrant and a court order, as they should have done, then arguably AT&T and others involved would be protected today and be immunized against lawsuits, if it had been done under the FISA legislation. The fact that the administration decided to totally disregard 30 years of legislation, of working courts that have provided, in over 18,700 examples, approval of such requests, rejecting only 5, shows an arrogance that shouldn't be ignored.

So again, tomorrow when the votes occur on cloture and the votes occur on these amendments, we will may sanctioning this activity—setting the unprecedented precedent of a Congress actually providing immunity from the courts even examining whether warrantless spying is legal and right. Hence, in future years, this will be cited, I am confident, by those who want to undermine the FISA Courts, deprive the courts the opportunity to make sure there is a justification, an argument, a legal basis for granting these warrants. The argument will be made: You don't need the courts, because back in 2008, telecommunications companies, at the mere request of a President, were able to go forward and spend more than 5 years invading the privacy of millions of Americans, and when the Senate had an opportunity to sanction that activity, it decided to do so, rather than allow the court to determine whether that action was legal.

The word of the Senate should be a valued—I can hear the argument years hence. They listened to the debates, they listened to that fellow DODD get up and talk for hours about the issue of immunity and why it shouldn't be granted retroactively and they turned him down. That will be the precedent cited when faced with similar allegations involving future administrations that may decide that financial information, medical information, highly private, personal, family information may be the subject of unwarranted surveillance to allegedly protect our country and keeping us safe. If that is the case, I am confident this debate and these votes will be cited as a justification for allowing that kind of activity to go forward without receiving the legal authority to do so. We will have denied the courts the opportunity to decide whether this activity that was the most serious invasion of privacy ever maybe in our country was legal or illegal. By granting retroactive immunity, we will have made a decision to deprive the courts of that responsibility.

Ultimately, all I am asking for is a fair fight. To reject immunity would mean to grab hold of the closest thread of lawlessness we have at hand and to pull until the whole garment unravels. But ensuring a day in court is not the same as ensuring a verdict. When that day comes, I have absolutely no investment in the verdict, either way. It may be the Federal Government broke the law when they asked the telecoms to spy but that the telecoms' response was an innocent one. It may be the Government was within the law and that the telecoms broke it. Maybe they both broke the law. Maybe neither did.

But just as it would be absurd to declare the telecoms clearly guilty, it is equally absurd, I would argue, to close the case in Congress without a decision. That is what immunity does: It closes the case without a decision. Throughout this debate, the telecoms' advocates have needed to show not just that they are right but that they are so right and that we are so far beyond the pale that we can shut down the argument right here, today. That is a burden they have clearly not met, and they cannot expect to meet it when a huge majority of Senators who will make the decision have not even seen the secret documents that are supposed to prove the case for retroactive immunity.

My trust is in the courts, in the cases argued openly, in the judges who preside over them, and in the juries of American citizens who decide them. They should be our pride, not our embarrassment, and they deserve to do their jobs.

As complex, as diverse, as relentless as the assault on the rule of law has been, our answer to it is a simple one. Far more than any President's lawlessness, the American way of justice remains deeply rooted in our character; that no President can disturb or should be allowed to do so.

So I am full of hope. Even on this dark evening, I have faith that we can unite security and justice because we have already done it for 30 years. My father, Senator Tom Dodd, was the number two American prosecutor at the famous Nuremburg trials, which may have something to do with the passion I feel about this issue—the rule of law.

I have never forgotten the example he and Justice Robert Jackson and others set at Nuremberg more than 60 years ago.

As Justice Robert Jackson said in the opening statement at Nuremberg—in fact, I have written it down, but I memorized this years and years ago. Robert Jackson's opening statement, speaking to the court, talking about the Soviet Union, the British, the French, and America, he made the following argument:

> That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submitting their captive enemies to the judgment of the law is one of the most significant tributes that power ever paid to reason.

That is a great sentence when you think of it. Here we are staying the hands of vengeance and power, paying tribute to reason. At Nuremberg, there were 21 initial defendants. Madam President, 55 million people had died, 6

million Jews were incinerated, and 5 million others had the same fate befall them because of their politics, religion, or sexual orientation. These were some of the greatest crimes in recorded history. Winston Churchill wanted to summarily execute every one of them. The Soviets wanted a show trial for a week and then to kill them all. Robert Jackson, Harry Truman, Henry Stinton, the Secretary of War in Roosevelt's Cabinet—this handful of people said: The United States is different. We are going to do something no one else has ever done before. We are going to give these defendants, as great violators of human rights as they are, a day in court. It was unprecedented.

Here they are, the war still raging in the Pacific, gathering in Nuremberg, Germany, which had 30,000 people buried in the rubble of the city. Prosecutors, judges, and lawyers for these individuals gathered together and gave them a day in court that went on for a year.

And the United States gained the moral high ground. Never before in history had the victors given those guilty of the worse atrocities imaginable a day in court.

I cannot believe this country, at this hour, would walk away from the rule of law when we stood for it so proudly in the 20th century. In fact, that experience at Nuremberg gave birth to a half-century of moral authority. It paved the way for the Marshall Plan and for the international structures that gave the world relative peace for more than a half century. For so many years, both Republican and Democratic administrations stood up for them and defended them. The international criminal courts and others—none of these institutions would have existed were it not for the United States leading.

Today, when we find ourselves at this moment in this body—of all places—walking away from the rule of law, I think it is a dark hour. Again, my hope is that by tomorrow reason will prevail here, and we will arrive at a different decision and reject this idea that retroactive immunity is warranted.

What is the tribute that power owes to reason? That when America goes to war, it doesn't fight for land or for treasure or for dominance but for a transcendent idea—the idea that laws should rule and not men; the idea that the Constitution does not get suspended for vengeance; the idea that this great Nation should never tailor its eternal principles to the conflict of the moment because, if we did, we would be walking in the footsteps of the enemies we despised.

The tribute that power owes to reason: More than ever before, that tribute is due today. If we cannot find the strength to pay it, we will have to answer for it.

There is a famous military recruiting poster that comes to mind. A man is sitting in an easy chair with his son and daughter on his lap, in some future after the war has ended. His daughter asks him: Daddy, what did you do in the war?

His face is shocked and shamed, because he knows he did nothing.

My daughters, Grace and Christina, are 3 and 6 years old. They are growing up in a time of two great conflicts: one between our Nation and enemies, and another between what is best and worst in our American soul. Someday soon I know I am going to hear the question: What did you do?

I want more than anything else to give the right answer to that question. That question is coming from every single one of us in this body. Every single one of us will be judged by a jury from whom there is no hiding: our sons and daughters and grandchildren. Someday soon they will read in their textbooks the story of a great nation, one that threw down tyrants and oppressors for two centuries; one that rid the world of Naziism and Soviet communism; one that proved that great strength can serve great virtue, that right can truly make might. Then they will read how, in the early years of the 21st century, that Nation lost its way.

We don't have the power to strike that chapter. We cannot go back. We cannot undestroy the CIA's interrogation tapes. We cannot unpass the Military Commissions Act. We cannot unspeak Alberto Gonzales' disgraceful testimony. We cannot untorture innocent people. And, perhaps, sadly, shamefully, we cannot stop retroactive immunity. We cannot undo all that has been done for the last 6 years for the cause of lawlessness and fear. We cannot blot out that chapter. But we can begin the next one, even today.

Let the first words read: Finally, in February 2008, the Senate said: Enough is enough.

I implore my colleagues to write it with me. I implore my colleagues to vote against retroactive immunity. I implore them to reject it, and if we fail to do that, to vote against cloture.

I have shared my thoughts and views at some length now. But there are others who have spoken eloquently on this subject. I think their words deserve to be heard because they state far more eloquently than I could the importance of all of this and why this is such a compelling case and deserving of our attention. Let me share a few of these words from the New York Times:

Even by the dismal standards of what passes for a national debate on intelligence and civil liberties, last week was a really bad week.

The Senate debated a bill that would make needed updates to the Foreign Intelligence Surveillance Act—while needlessly expanding the president's ability to spy on Americans without a warrant and covering up the unlawful spying that President Bush ordered after 9/11.

The Democrat who heads the Senate Intelligence Committee, John Rockefeller of West Virginia, led the way in killing amendments that would have strengthened requirements for warrants and raised the possibility of at least some accountability for past wrongdoing. Republicans declaimed about protecting America from terrorists—as if anyone was arguing the opposite—and had little to say about protecting Americans' rights.

We saw a ray of hope when the head of the Central Intelligence Agency conceded—finally—that waterboarding was probably illegal. But his boss, the 'director of national intelligence, insisted it was legal when done to real bad guys. And Vice President Dick Cheney—surprise!—made it clear that President Bush would authorize waterboarding whenever he wanted.

The Catch–22 metaphor is seriously overused, but consider this: Attorney General Michael Mukasey told Congress there would be no criminal investigation into waterboarding. He said the Justice Department decided waterboarding was legal (remember the torture memo?) and told the C.I.A. that.

So, according to Mukaseyan logic, the Justice Department cannot investigate those who may have committed torture, because the Justice Department said it was O.K. and Justice cannot be expected to investigate itself.

As it was with torture, so it was with wiretaps.

After the 2001 terrorist attacks, the President decided to ignore the Foreign Intelligence Surveillance Act, or FISA, and authorized wiretaps without a warrant on electronic communications between people in the United States and people abroad. Administration lawyers ginned up a legal justification and then asked communications companies for vast amounts of data.

According to Mr. Rockefeller, the companies were ''sent letters, all of which stated that the relevant activities had been authorized by the President'' and that the Attorney General—then John Ashcroft—decided the activity was lawful. The legal justification remains secret, but we suspect it was based on the finely developed theory that the government cannot be sued for doing so if they were obeying a warrant—or a certification from the Attorney General that a warrant was not needed—and all federal statutes were being obeyed.

When Mr. Bush started his spying program, FISA allowed warrantless eavesdropping for up to a year if the president certified that it was directed at a foreign power, or the agent of a foreign power, and there was no real chance that communications involving United States citizens or residents would be caught up. As we now know, the surveillance included Americans and there was no ''foreign power'' involved.

The law then, and now, also requires the attorney general to certify ''in writing under oath'' that the surveillance is legal under FISA, not some fanciful theory of executive power. He is required to inform Congress 30 days in advance, and then periodically report to the House and Senate intelligence panels.

Congress was certainly not informed, and if Mr. Ashcroft or later Alberto Gonzales certified anything under oath, it's a mystery to whom and when. The eavesdropping went on for four years and would probably still be going on if The Times had not revealed it.

So what were the telecommunications companies told? Since the administration is not going to investigate this either, civil actions are the only alternative.

The telecoms, which are facing about 40 pending lawsuits, believe they are protected by a separate law that says companies that give communications data to the government cannot be sued for doing so if they were obeying a warrant—or a certification from the attorney general that a warrant was not needed—and all federal statutes were being obeyed.

To defend themselves, the companies must be able to show they cooperated and produce that certification. But the White House does

not want the public to see the documents, since it seems clear that the legal requirements were not met. It is invoking the state secrets privilege—saying that as a matter of national security, it will not confirm that any company cooperated with the wiretapping or permit the documents to be disclosed in court.

So Mr. Rockefeller and other senators want to give the companies immunity even if the administration never admits they were involved. This is short-circuiting the legal system. If it is approved, we will then have to hope that the next president will be willing to reveal the truth.

Mr. Rockefeller argues that companies might balk at future warrantless spying programs. Imagine that!

This whole nightmare was started by Mr. Bush's decision to spy without warrants—not because they are hard to get, but because he decided he was above the law. Discouraging that would be a service to the nation.

This debate is not about whether the United States is going to spy on Al Qaeda, it is about whether it is going to destroy its democratic principles in doing so. Senators who care about that should vote against immunity.

Madam President, if I can, I will read from the USA Today, which also had a good editorial on this subject matter, dated October 22, 2007. It is entitled, ''Our View On Your Phone Records: Immunity Demand For Telecoms Raises Questions.''

As history shows, mass snooping can sweep up innocent citizens.

Anyone who has ever watched TV's Law & Order: SVU knows how easy it is for police to get the bad guys' LUDs—''local usage details,'' better known as telephone calling records. They only need to get a prosecutor to sign a subpoena.

Eavesdropping on calls or reading e-mails is a bit tougher. A warrant must come from a judge, and stronger evidence is needed. Even so, it is an efficient process that serves law enforcement's needs while guarding against arbitrary intrusions into the privacy of innocent people.

But whether those protections still exist in national security cases is very much in doubt.

Since Sept. 11, 2001, the Bush administration has repeatedly bypassed the special court set up to preserve balance. Now, with Congress threatening to restore some level of protection, the administration is insisting on legal immunity for telecommunications companies that might have turned over records improperly. Last week, a key Senate committee agreed.

The request alone is enough to raise suspicion, particularly given the nation's history.

In the 1960s and '70s when law enforcement and spy agencies launched mass snooping against U.S. citizens, some of the data ended up being used for nefarious purposes, such as IRS tax probes, that had nothing to do with protecting the nation.

That is the danger when an administration can tap into phone records without court oversight, and it is what's at issue now.

The administration has repeatedly bypassed the special national security court, arguing that the urgency of the war on terrorism justified its actions.

In one particularly troubling intrusion, the National Security Agency (NSA), a Pentagon-run spy agency, built a database—with cooperation from some telecom companies—that includes America's domestic calls. The extent of the program remains hidden, one reason many in Congress are reluctant to grab the company's immunity.

According to the account of one former CEO, the NSA foray has already led to abuse. When Qwest, one of the nation's largest telecom companies, refused to go along with the NSA program—because Qwest lawyers considered it illegal—the NSA allegedly retaliated by denying Qwest other lucrative government contracts. Further, the requests to participate, according to former Qwest chief executive Joseph Nacchio, came six months before the 9/11 attacks. Nacchio's allegations are in court findings unsealed this month that are part of his battle over a conviction of insider trading.

If the Senate measure becomes law, telecom companies will get immunity from nearly 40 lawsuits without the public knowing what the companies or the government did. Never mind that six of the lawsuits were brought by state officials—from New Jersey to Missouri—concerned about possible violation of citizens' privacy.

There might be some valid reason to grant immunity. The Senate committee agreed after seeing details. But even if there is, the companies should be compelled to tell the public the precise nature and reach of the program, and the program should be put firmly under court review.

The Senate measure also would place minimal court supervision over future surveillance ventures. A far more sensible House Democratic measure would give the Foreign Intelligence Surveillance Court a greater role.

That system works well, even in emergencies. In the harrowing minutes after the Pentagon was attacked on 9/11, the court's chief judge, stuck in his car, granted five surveillance warrants from his cell phone.

Speed, obviously, is important. Nevertheless, it can be achieved without discarding protections that long ago proved their worth.

The Dallas Morning News had a good article as well on Friday, October 19, of last year, entitled ''Beck and Call: Verizon too eager to surrender phone records'':

Verizon's willingness to turn over customer telephone records when the government asks—even though investigators often make such requests without a court order—is a troubling practice.

The company may be motivated by a desire to help—or to avoid government confrontation. But Verizon's approach, disclosed in a letter to Congress this week, is the wrong way to go about this.

The burden of proof rests with the federal government to prove its need for the records. Except in rare instances, investigators must take their records requests to a judge who then can determine whether to issue a warrant. The Constitution intends just that, in language that fairly balances privacy fears and law enforcement.

Yet the Bush administration insists on continuing to push the post-9/11 civil liberties vs. security debate in the wrong direction. Because telecom companies that have complied with its requests now face huge lawsuits from citizens-rights groups, the administration wants a law to grant immune businesses sued for disclosing information without court authorization.

Congress is right to look at the immunity proposal with a skeptical eye, especially since the administration has been reluctant to explain details of its controversial surveillance program to lawmakers. The law would further erode the privacy firewall and remove another layer of checks and balances.

The phone companies, meanwhile, have refused to tell relevant congressional committees whether they participated in the National Security Agency's domestic eavesdropping program. Their silence is based on concerns that they might illegally divulge classified information if they talk to Congress in too much detail.

Yet Congress and the courts have legitimate oversight roles in issues of privacy and national security. Due process is necessary to promote transparency and accountability in a democracy. These are foundational principles, even in the more dangerous post-9/11 world.

There is a further piece I think is worthy of reading, written in December of 2005 by a former majority leader of this great body, Tom Daschle. It's called ''Power We Didn't Grab.'' Tom Daschle was deeply involved, I should point out, in the negotiations dealing with many of these matters, particularly in the wake of the resolution that was drafted granting the President the authority to go after al-Qaida in Afghanistan. Alberto Gonzales later argued that with the adoption of that resolution, Congress was granting the President authority to conduct the warrantless surveillance that is the subject of our discussion this evening.

That resolution was the subject of some negotiation over several days before it was presented for a final vote in this body. So it is worthy of consideration that Tom Daschle would write a piece in the Washington Post when Alberto Gonzales made the argument that the President's authority to require the phone companies to comply with his request without a court order was, in fact, never the subject of those negotiations.

I will read Tom Daschle's words on December 23, 2005:

In the face of mounting questions about news stories saying that President Bush approved a program to wiretap American citizens without getting warrants, the White House argues that Congress granted it authority for such surveillance in the 2001 legislation authorizing the use of force against al Qaeda. On Tuesday, Vice President Cheney said the president ''was granted authority by the Congress to use all means necessary to take on the terrorists, and that's what we've done.''

As Senate majority leader at the time, I helped negotiate that law with the White House counsel's office over two harried days. I can state categorically that the subject of warrantless wiretaps of American citizens never came up. I did not and never would have supported giving authority to the president for such wiretaps. I am also confident that the 98 senators who voted in favor of authorization of force against al Qaeda did not believe that they were also voting for warrantless domestic surveillance.

On the evening of Sept. 12, 2001, the White House proposed that Congress authorize the use of military force to ''deter and pre-empt any future acts of terrorism or aggression against the United States.'' Believing the scope of this language was too broad and ill defined, Congress chose instead, on Sept. 14, to authorize ''all necessary and appropriate force against those nations, organizations or persons [the president] determines planned, authorized, committed, or aided'' the attacks of Sept. 11. With this language, Congress denied the president the more expansive authority he sought and insisted that his authority be used specifically against Osama bin Laden and al Qaeda.

Just before the Senate acted on this compromise resolution, the White House sought one last change. Literally minutes before the Senate cast its vote, the administration sought to add the words ''in the United States and'' after ''appropriate force'' in the agreed-upon text. This last-minute change would have given the president broad authority to exercise expansive powers not just overseas—where we all understand he wanted authority to act—but right here in the United States, potentially against American citizens. I could see no justification for Congress to accede to this extraordinary request for additional authority. I refused.

The shock and rage we all felt in the hours after the attack was still fresh. America was reeling for the first attack on our soil since Pearl Harbor. We suspected thousands had been killed, and many who worked in the World Trade Center and the Pentagon were not yet accounted for. Even so, a strong bipartisan majority could not agree to the administration's request for an unprecedented grant of authority.

The Bush administration now argues those powers were inherently contained in the resolution adopted by Congress—but at the time, the administration clearly felt they weren't or it wouldn't have tried to insert the additional language.

All Americans agreed that keeping our nation safe from terrorists demands aggressive and innovative tactics. This unity was reflected in the near-unanimous support for the original resolution and the Patriot Act in those harrowing days after Sept. 11. But there are right and wrong ways to defeat terrorists, and that is a distinction this administration has never seemed to accept. Instead of employing tactics that preserve Americans' freedoms and inspire the faith and confidence of the American people, the White House seems to have chosen methods that can only breed fear and suspicion.

If the stories in the media over the past week are accurate, the president has exercised authority that I do not believe is granted to him in the Constitution, and that I know is not granted to him in the law I helped negotiate with his counsel and that Congress approved in the days after Sept. 11. For that reason, the president should explain the specific legal justification for his authorization of these actions, Congress should fully investigate these actions and the president's justification for them, and the administration should cooperate fully with that investigation.

In the meantime, if the president believes the current legal architecture of our country is sufficient for the fight against terrorism, he should propose changes to our laws in the light of day.

That is how a great democracy operates. And that is how this great democracy will defeat terrorism.

Those were eloquent words from our former majority leader who was, as I said, deeply involved in the negotiations crafting the resolution that was adopted almost unanimously, allowing us to attack al-Qaida, to defeat them in Afghanistan. Regrettably, Osama bin Laden and too many of his operatives are still on the loose. But that language gave the President the authority to act against them. He specifically wanted more authority at home. The majority leader and those who worked with him rejected that argument and that resolution adopted in 2001, 48 hours after the attack, specifically excluded the kind of activity that Alberto Gonzales and Vice President CHENEY claimed was granted in that resolution.

It was worthy to note the language of Senator Daschle during that debate.

I am going to read one more piece, if I may, again going back to October. It is ''Immunity for Telecoms May Set Bad Precedent, Legal Scholars Say. Retroactive problems could create problems in the future.'' This is by Dan Eggen. This was written in October of 2007.

I made the argument earlier that I was concerned about the precedent-setting nature of what we are doing. This evening I have been reaching back 30 years to language used by our predecessors in this Chamber, Republicans and Democrats, who were part of the Church Commission that crafted the FISA legislation and the language they used, which easily could have been written yesterday and describing the debate we are having these days. We are calling upon them to guide us as we make our decisions about how to proceed in this day's work with the different threats we face, but the threats our predecessors faced were not small threats—the Soviet Union, a nuclear holocaust, significant problems of surveillance. They had the courage and the wisdom to step back and to create a structure that allowed us to maintain that balance between security and liberty.

So it is important because I am concerned that at some future date that the votes tomorrow may give a strong precedent to those who have never liked the idea of Federal courts granting warrants to conduct surveillance but prefer this be done at the mere request of an American President.

I made the case that when the Framers fashioned this Republic of ours, had efficiency been their goal, they never would have established a written system that had so many inefficiencies in it. In fact, requiring the checks and balances of an executive, judicial, and legislative branch with all of the requirements that we insist upon make this system terribly inefficient in many ways. But the Founders of this Republic were not only concerned about what we did but how we did things. It is terribly important to be mindful of that in these debates. Clearly, we need to gather information, and we need to be able to do it in an expeditious fashion. But we also need to make sure that how we do that is not going to violate more than 220 years of history, of guaranteeing the rights and liberties of individual citizens.

Thirty years ago, a previous Senate found a way to do that with the establishment of the secret Federal courts. These courts are established by the Chief Justice of the United States, who appoints sitting Federal judges anonymously to serve on these courts. None of us ever get to know who they are. But as I pointed out earlier, even on 9/11, a cell phone one of these secret FISA judges was able to respond instantaneously to the request being made to conduct surveillance necessary in the minutes after 9/11.

So it is important not only what we do about today's problem but the message we send, the precedent we set for future Congresses when confronted in their day, as they will be, with challenges regarding the balance between security and liberty.

So this article, written by Dan Eggen, I think has value, talking about how retroactive protection could create problems in the future.

When previous Republican administrations were accused of illegality in the FBI and CIA spying abuses of the 1970s or the Iran Contra affair of the 1980s, Democrats in Congress launched investigations or pushed for legislative reforms.

But last week, faced with admissions by several telecommunication companies that they assisted the Bush administration in warrantless spying on Americans, leaders of the Senate Intelligence Committee took a much different tack, opposing legislation that would grant those companies retroactive immunity from prosecution or lawsuits.

The proposal marks the second time in recent years that Congress has moved toward providing legal immunity for past actions that may have been illegal. The Military Commissions Act, passed by the GOP-led Congress in September of 2006, provided retroactive immunity for CIA interrogators who could have been accused of war crimes for mistreating detainees.

Legal experts say the granting of such retroactive immunity by Congress is unusual, particularly in a case involving private companies. Congress, on only a few occasions, has given some form of immunity to law enforcement officers, intelligence officials, or others within the government, or to some of its contractors, experts said. In 2005, Congress also approved a law granting firearms manufacturers immunity from lawsuits by victims of gun violence.

''It's particularly unusual in the case of the telecoms, because you don't really know what you are immunizing,'' said Louis Fisher, a specialist in constitutional law with the Law Library of the Library of Congress. ''You don't know what you are cleaning up.''

As part of a surveillance package approved Thursday by the Senate Intelligence Committee, some telecommunications companies would be granted immunity from about 40 pending lawsuits that allege they violated Americans' privacy and constitutional rights by aiding a warrantless wireless surveillance program instituted after the September 11, 2001, attacks.

I might point out here—and I will digress for a second—that we heard earlier testimony that this program may have actually started prior to the attacks of 9/11. There has been testimony submitted in courts by one of the telecoms, Qwest's CEO, that in fact a request was made of them to actually provide warrantless surveillance in January of 2001, when the administration took office, long before the attacks of 9/11. So it seems to me that alone ought to be the subject of some inquiry.

We have all accepted the notion that immediately after 9/11, whether we liked it or not, it was understandable how in the emotions of the moment, that companies, at the request of an administration, even here an administration requesting warrantless surveillance, might have acted. Not that we

would agree or like it but most would understand it.

My objection, as I said earlier, is not that it went on but that it went on for the next 5 years and would still be ongoing were it not for the whistleblower and the reports in the media. But what is troubling to me is we are assuming this all began after 9/11. There may now be some evidence it began before 9/11, which would debunk a lot of arguments given on why we should grant retroactive immunity. I merely point this out because we read earlier in testimony here that suggested this might have been done earlier.

At any rate, I will continue from Mr. Eggen's article talking about the provision we are talking about here.

The provision is a key concession to the administration and the companies, which lobbied heavily for it.

Referring to the retroactive immunity.

Supporters argue the legislation is needed to avoid unfair punishment of private firms that took part in good-faith efforts to assist the government.

In arguing in favor of such protections earlier this month, President Bush said any legislation ''must grant liability protection to companies who are facing multibillion dollar lawsuits only because they are believed to have assisted in the efforts to defend our Nation following the 9/11 attacks.''

The head of the intelligence panel, Sen. John D. Rockefeller, made a similar argument after the bill was approved last week. ''The onus is on the administration, not the companies, to ensure that the request is on strong legal footing,'' he said.

Jeffrey H. Smith, a CIA general counsel during the Clinton administration who now represents private companies in the national security area, said the risk of litigation poses an unfair threat to government officials or others who have good reason to believe they are acting legally. He noted that many intelligence officers now feel obliged to carry liability insurance.

''It seems to me that it's manifestly unfair for the officers that conducted that program and the telecoms to now face prosecution or civil liability for carrying out what was on its face a totally lawful request on the part of the government,'' Smith said. ''It's not the same as Abu Ghraib or a CIA officer who beats someone during an interrogation.''

But civil liberties groups and many academics argue that Congress is allowing the government to cover up possible wrongdoing and is inappropriately interfering in disputes the courts should decide. The American Civil Liberties Union last campaigned against the proposed Senate legislation, saying in a news release Friday that ''the administration is trying to cover its tracks.''

Sen. Russell Feingold said in a statement last week that classified documents provided by the White House ''further demonstrate that the program was illegal and that there is no basis for granting retroactive immunity to those who allegedly cooperated.'' His office declined to elaborate on the records, which were reviewed by a Feingold staffer.

Retired Rear Adm. John Hutson, dean and president of the Franklin Pierce Law Center in Concord, N.H., said he is concerned about the precedent a new immunity provision might set.

The article quotes him.

''The unfortunate reality is that once you've done it, once you immunize interrogators or phone companies, then it's easy to do it again in another context. It seems to me that as a general rule retroactive immunity is not a good thing . . . It's essentially letting Congress handle something that should be handled by the Judiciary.''

These are, I think, very good articles that shed light on some of the important issues we need to be looking at.

Let me, if I can, go back and talk about the Church Commission. I think it is important because we are relying so heavily on the work they have done and the establishment in the immediate aftermath of the Church Commission of the FISA Courts. I have quoted from some of them earlier this evening, but I think it is worthwhile to go back and listen to their words. Again, I want you to know these words were written 30 years ago, but I think people can appreciate how timely the language is when you consider the debate we are having. It is hard not to wonder how these words weren't prepared less than 24 hours ago, in preparation for this debate. I think their warnings and admonitions have a timeliness to them that are worthy of including in this discussion at this moment. So let me quote from the Church report:

Americans have rightfully been concerned since before World War II about the dangers of hostile foreign agents likely to commit acts of espionage. Similarly, the violent acts of political terrorists can seriously endanger the rights of Americans. Carefully focused intelligence investigations can help prevent such acts.

But too often intelligence has lost its focus and domestic intelligence activities have invaded individual privacy and violated the rights of lawful assembly and political expression. Unless new and tighter controls are established by legislation, domestic intelligence activities threaten to undermine our democratic society and fundamentally alter its nature.

A tension between order and liberty is inevitable in any society. A government must protect its citizens from those bent on engaging in violence and criminal behavior or in espionage or other hostile foreign intelligence activity. Intelligence work has, at times, successfully prevented dangerous and abhorrent acts, such as bombings and foreign spying, and aided in the prosecution of those responsible for such acts.

But intelligence activity in the past decades has, all too often, exceeded the restraints on the exercise of governmental power which are imposed by our country's constitution, laws, and traditions.

We have seen segments of our government, in their attitudes and action, adopt tactics unworthy of a democracy, and occasionally reminiscent of the tactics of totalitarian regimes. We have seen a consistent pattern in which programs initiated with limited goals, such as preventing criminal violence or identifying foreign spies, were expanded to what witnesses characterized as ''vacuum cleaners,'' sweeping in information about lawful activities of American citizens.

That these abuses have adversely affected the constitutional rights of particular Americans is beyond question. But we believe the harm extends far beyond the citizens directly affected.

Personal privacy is protected because it is essential to liberty and the pursuit of happiness. Our constitution checks the power of government for the purpose of protecting the rights of individuals, in order that all our citizens my live in a free and decent society. Unlike totalitarian states, we do not believe that any government has a monopoly on truth.

When government infringes on these rights instead of nurturing and protecting them, the injury spreads far beyond the particular citizens targeted to untold number of other American citizens who may be intimidated.

Abuse thrives on secrecy. Obviously, public disclosure over matters such as the names of intelligence agents or the technological details of collection methods is inappropriate. But in the field of intelligence, secrecy has been extended to inhibit review of the basic programs and practices themselves.

Those within the executive branch and the Congress who would exercise their responsibilities wisely must be fully informed. The American people as well should know enough about intelligence activities to be able to apply its good sense to the underlying issues of policy and morality.

Knowledge is the key to control. Secrecy should no longer be allowed to shield the existence of constitutional, legal and moral problems from the security of all three branches of government or from the American people themselves.

Those are incredible words that could. None of us could say it more eloquently than our colleagues did 30 years ago.

I can't tell you all the names of the Republicans and Democratic Senators who wrote this language, but they came from all parts of the country. They were, many of them, veterans of World War II, had served in Korea. DAN INOUYE was here. I know that. Senator BYRD, whom I sit next to, was here. Senator TED KENNEDY was here. Senator TED STEVENS was here for those debates. Those are the Members I can think of off the top of my head who were probably Members back in 1978 when this was written. JOE BIDEN was here as part of that debate. PATRICK LEAHY was here in 1978. I think CARL LEVIN and JOHN WARNER had just arrived. I think they had been elected that year. I am not sure.

But these are wonderful Members who sat and realized we needed to set up that balance between security and liberty and gave us the FISA Courts, the Foreign Intelligence Surveillance Act. Tonight, as we consider whether to grant immunity to the telecom companies and close the door on determining the legality or illegality of their actions, I think these words have tremendous relevance. Every Member ought to take them and read them and think about them.

I hear the words of the President, and I am disappointed he said he would veto the bill if we strip immunity. I have listened to Senator MCCONNELL, my good friend from Kentucky, saying we have to adopt this because the President will veto the bill otherwise. That is not the basis upon which the Congress ought to act. I have rarely heard that argument made here. You can raise it, certainly, as a point, but the suggestion that Congress or this body ought to act differently because the President is going to veto something or threatens a veto is not the basis upon which we ought to make decisions, particularly when it comes to

matters involving the rule of law and the Constitution of the United States.

Those issues of the Constitution and the rule of law ought to trump the reputational damage. The issues of the Constitution and the rule of law ought to trump the arguments somehow that the telecom companies will be less willing to step forward and help conduct the surveillance of our country when we are threatened by outsiders.

I cannot undo some of the things that have been done already. I wish I could undo the Military Commissions Act. I wish I could the outrages that occurred at Abu Ghraib. I wish I could undo what has happened at Guantanamo Bay. I wish I could undo secret prisons and extraordinary renditions. But there is a pattern here. It is not just the one event or two, it has been a pattern of behavior almost from the very beginning that ought to be deeply troubling to every single one of us.

So while I cannot undo those actions, why would I then add to that list by granting this retroactive immunity? What more do we need to know? Why are we being asked to do this? Why did this administration ask this committee to grant broad-based immunity to every single individual in our Government and our agencies, as well as to the telecom companies? What was behind that request? What did they fear when they sought that kind of unprecedented immunity, for both the private companies and every official involved in the decision to grant or insist upon this compliance? Why were they asking us to do that?

So I know, while others have written about this here, I find it deeply troubling that we can once more add this to the destruction of tapes and the CIA, the U.S. attorneys scandal involving the Department of Justice and U.S. attorney's offices. All of these matters, again, are in and of themselves individual cases, and yet, when you step back and think about the totality of them, why would this Congress, at this hour, decide we are going to yet once again say: OK, we'll let you get away with it one more time.

I wish I could go back and undo all of those abuses. I cannot. But we have the opportunity not to do this. All it will take is 39 other Senators.

All it will take is 40 of us here decide that at this moment in our history that we are going to stand up for the rule of law, we are going to stand up for the Constitution. No other issue we can get to is as important as the Constitution of the United States, no other issue is as important to me, ought to be to all Members, as the rule of law. And as I have done on five separate occasions since January 3, 1981, when as a 36-year-old I stood over here on the floor of the Senate, with Lowell Weicker standing beside me—I raised my right hand and took an oath to defend and uphold the Constitution of the United States. I am proud to have done it five different times, as every Member here has done at least once. What matter, what issue, would be more important than defending the Constitution of the United States?

So tomorrow we may have the chance—40 of us—to not invoke cloture and to insist that we are going to fight for this principle of the rule of law and not add to this litany that is going to be revisited over and over again: the Military Commissions Act, waterboarding, Abu Ghraib, Guantanamo Bay, secret prisons, extraordinary renditions, U.S. attorneys scandal, Scooter Libby, destruction of CIA tapes. How many more do you need? Why not add this: retroactive immunity to the telecom industry, at the request of a President who did not want the courts to determine the legality or illegality of the actions?

During a critical moment in American history, I for one am not going to allow that to happen.

I realize I have been talking a long time here. May I inquire how long I have been speaking?

The PRESIDING OFFICER (Ms. KLOBUCHAR.) Two hours 25 minutes.

Mr. DODD. As I say, I have already spent over 20 hours on this. And as I say, I have never engaged in extended debate in my 27 years because the matters were handled by others or because we came up with a resolution of issues. But I stand here tonight, as I have over the last several months—as many of my colleagues know, I interrupted a Presidential campaign to come back and spend 10 hours on the floor here when this matter came up in December, to raise my concerns about this issue. I do not want to try the patience of the staff and others, including my colleague who is patiently sitting in the Presiding Officer's chair with little or no relief. So more than 20 hours of making my case here is probably more than most people can tolerate. But I want people to know how much I care about this and how much I wish and hope and pray that this evening, Members, regardless of party, will stand up tomorrow for the rule of law.

So tonight, my fervent prayer and hope is that when this vote occurs, first of all, that I will be surprised and that 50 of our colleagues here will join with Senator FEINGOLD and myself and vote to strike this language from the Intelligence Committee bill. That would be the best result of all, and then we can send this bill to the other body and have it resolved and sent to the President, hopefully, for his signature. If that doesn't occur, then I hope 38 others would join Senator FEINGOLD and me in voting against cloture in a historic moment and send this bill back to be revised to comply with the Judiciary Committee's decision excluding the retroactive immunity. That would be the second best result.

With that, Madam President, after almost 2½ hours and the hours before, I yield the floor.

ADJOURNMENT UNTIL 10 A.M. TOMORROW

The PRESIDING OFFICER. The Senate stands in adjournment until 10 a.m. tomorrow, February 12, pursuant to S. Res. 446, and does so as a mark of further respect to the memory of Tom Lantos, late a Representative from the State of California.

Thereupon, the Senate, at 10:09 p.m., adjourned until Tuesday, February 12, 2008, at 10 a.m.

NOMINATIONS

Executive nominations received by the Senate:

IN THE MARINE CORPS

THE FOLLOWING NAMED OFFICER FOR APPOINTMENT AS THE ASSISTANT COMMANDANT OF THE MARINE CORPS AND APPOINTMENT TO THE GRADE INDICATED WHILE ASSIGNED TO A POSITION OF IMPORTANCE AND RESPONSIBILITY UNDER TITLE 10, U.S.C., SECTIONS 601 AND 5044:

To be general

LT. GEN. JAMES F. AMOS, 0000

THE FOLLOWING NAMED OFFICER FOR APPOINTMENT TO THE GRADE OF LIEUTENANT GENERAL IN THE UNITED STATES MARINE CORPS WHILE ASSIGNED TO A POSITION OF IMPORTANCE AND RESPONSIBILITY UNDER TITLE 10, U.S.C., SECTION 601:

To be lieutenant general

LT. GEN. KEITH J. STALDER, 0000