fighting for freedom in Iran. Some are still in Iran. We need to figure out a way to connect with Iranian voices, with dissidents in Iran and around the world, to let them know we are there to support freedom, we are there to support democracy.

I urge passage of Senator SANTORUM's bill. It is a step in the right direction.

Finally, I would note that March 20 and 21 is the Iranian new year. I say that because the regime is repressing the celebration of the Iranian new year. I want to conclude my comments by wishing the Iranian people a happy new year, one in which, hopefully, they will be closer to freedom, closer to freedom in the year to come. And we will take those steps necessary to help make that happen.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Texas.

Mrs. HUTCHISON. Mr. President, I commend the Senator from Minnesota. I think he is right on target. He is putting the burden where it should be, and that is directly on the United Nations to do what is right with regard to Iran.

Our President has tried to put the Europeans out front to negotiate with the Iranians. I believe they have been less than forthcoming about what they were doing the last 2 years with nuclear capabilities. Now it is time for us to all step in as world leaders and say to Iran: You must stop making nuclear weapons. And further, if you do not, there will be repercussions.

But it will take the entire world community, led by the United Nations, to make an impact on Iran. The United States cannot do this alone. We do not trade with Iran. We need the people who are trading with Iran to say there will be consequences if a nuclear weapon is produced in that country.

So I thank the Senator from Minnesota. I hope very much the United States will step forward with the other leaders of the world to say we are of one mind.

Mr. President, I wish to take a moment because today is Texas Independence Day.

The PRESIDING OFFICER. Time for morning business has expired.

Mrs. HUTCHISON. Mr. President, I ask unanimous consent that I be allowed to speak for 5 minutes in morning business.

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

170TH ANNIVERSARY OF TEXAS INDEPENDENCE DAY

Mrs. HUTCHISON. Mr. President, I wish to take a moment to read the letter of William Barret Travis from the Alamo. This is a tradition I continue that was started by Senator John Tower to commemorate Texas Independence Day, and that is today, March 2.

Today is the 170th anniversary of the signing of the Texas Declaration of Independence, a document that was signed by, among others, my great-great-grandfather, Charles S. Taylor, and also his friend, Thomas J. Rusk, who first held the Senate seat I now hold. They both hailed from Nacogdoches, which is the oldest town in Texas—the town in which my mother grew up and the town in which I now own the home my grandfather built.

It is a very historic time for Texas. We celebrate Texas Independence Day every single year because we know that fighting for freedom has made a difference in what Texas is. We love our history. We fought for freedom. We were a republic for 10 years, and then we came into the United States as a State.

The defense of the Alamo by 189 courageous men, who were outnumbered 10 to 1, was a key battle of the Texas Revolution. The sacrifice of COL William Barret Travis and his men made possible GEN Sam Houston's ultimate victory at San Jacinto, which secured independence for Texas.

From the Alamo, Colonel Travis wrote to his countrymen the following:

> Fellow citizens and compatriots: I am besieged by a thousand or more of the Mexicans under Santa Anna—I have sustained a continual bombardment and cannonade for 24 hours and have not lost a man—the enemy has demanded a surrender at discretion, otherwise, the garrison is to be put to the sword, if the fort is taken—I have answered the demands with a cannon shot, and our flag still waves proudly from the wall—I shall never surrender or retreat.
>
> Then, I call on you in the name of liberty, of patriotism and of everything dear to the American character, to come to our aid, with all dispatch. The enemy is receiving reinforcements daily and will no doubt increase to three or four thousand in four or five days. If this call is neglected, I am determined to sustain myself as long as possible and die like a soldier who never forgets what is due to his own honor and that of his country—Victory or Death.
>
> William Barret Travis, Lt. Col, Commander.

Colonel Travis's are the words of a true patriot. And his letter did inspire Texans to ultimate victory. In fact, his holding of the Alamo for so long did allow Sam Houston to muster his troops for the last stand at San Jacinto.

To show you one other example of how Texans love their history, the minister who opened our Senate today with prayer from Lovers Lane Methodist Church in Dallas, TX, showed me, at breakfast this morning, the ring he wears which is a replica of the ring of William Barret Travis that he wore at the Alamo. He put the ring around the neck of the daughter of one of those who was able to survive and leave the day before the onslaught that killed all of those men at the Alamo. So Susanna Dickinson's daughter had that ring around her neck—she was about 8 years old at the time—and that is why we know what the ring signified.

Another example of how history continues to inspire us: I, just 2 weeks ago, commissioned the newest amphibious ship of the U.S. Navy. It is an amphibious assault ship, the first of its class, the USS *San Antonio*. The USS *San Antonio* has in its motto the words from William Barret Travis's letter ''Never surrender, never retreat.''

That is a great ship which is going to carry marines into battle. It will carry our marines with the very best of technology, the very best safety measures we can possibly give them. And the quote ''Never surrender, never retreat'' will carry them into battle to help protect the freedom of Americans for years to come.

I am proud to be the sponsor of the ship the USS *San Antonio*. It represents the spirit of our armed services today, just as 170 years ago when we fought for our independence from Mexico and later became a great State of the United States of America.

Mr. President, I yield the floor.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

CONCLUSION OF MORNING BUSINESS

The PRESIDING OFFICER. Morning business is closed.

USA PATRIOT TERRORISM PREVENTION REAUTHORIZATION ACT OF 2005—CONFERENCE REPORT

The PRESIDING OFFICER. Under the previous order, the Senate will resume consideration of the conference report to accompany H.R. 3199, which the clerk will report.

The assistant legislative clerk read as follows:

> Conference report to accompany H.R. 3199, an act to extend and modify authorities needed to combat terrorism, and for other purposes.

The PRESIDING OFFICER. Under the previous order, the time until 2:30 p.m. shall be equally divided, with 1 hour of the time controlled by the minority to be under the control of the Senator from Wisconsin, Mr. FEINGOLD.

Mr. VITTER. Mr. President, I ask unanimous consent that I be permitted to speak as in morning business for up to 15 minutes and that the time be charged to the Republican side. I further ask that Senator STEVENS be recognized at 12:15 for up to 5 minutes and Senator BYRD then be recognized for up to 35 minutes.

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

LOBBYING REFORM

Mr. VITTER. Mr. President, I rise to speak on the very important subject of lobbying reform. When you think of our role in our constitutional system and how important it is that that role

be held in high regard and confidence by the American public, this issue certainly takes center stage as a very important one that we need to address. Again, it goes to the heart of who we are and what we are about and the heart of the crucial task of having the confidence of the American people in our system.

Obviously, in the last year, in particular, that has been shaken—shaken by some very real and serious scandals that have touched the Congress. Because of that, we need to address these issues of lobby reform, campaign finance reform, and other related issues very boldly and very directly.

Again, why do we need to do this? For a very simple reason. This goes to the heart of our credibility, the heart of the central issue: Do the American people have confidence in our integrity, in our ability to put their interests ahead of the interests of narrow or special interests?

I come to this set of issues with quite a bit of experience from Louisiana. These sorts of issues have been at the center of our political debate for quite some time because, quite frankly, we have fought our own challenges in terms of integrity and credibility. We have had a political culture and a political history riddled with corruption and cronyism. Many of us are working very hard to get beyond that. Before I came to the House of Representatives in 1999, I served in the Louisiana legislature. While I was there for about 7 years, these sorts of issues—reform issues, lobby reform, campaign finance reform—were at the very top of my agenda because, again, what could be more important than building the confidence of citizens in the integrity of their Government? Certainly, when I stepped into the Louisiana legislature in January 1992, that credibility and that integrity absolutely needed bolstering.

When I first went to the legislature in 1992, we had a Governor named Edwin Edwards. We had an explosion of legalized gambling issues and legalized gambling concerns. That only fueled the need to address these central, ethical lobby and related issues. Issues such as the influence of gambling and gambling contributions came to the floor, and the influence of gambling entities on elected officials. Because of all this, I filed several formal ethics complaints against our then-Governor, Edwin Edwards. Many of those were successful to help draw attention to the very real problems that were persistent. And then several years later, that was actually followed by Federal prosecution of then-former Governor Edwards on gambling-related charges, and he now still serves a significant sentence in Federal prison.

Other issues came before us, such as gambling contributions. We had an infamous incident of the president of the State Senate handing out gambling contribution checks on the floor of the Senate. This caught everybody's attention, and the good part of the incident—the only good part—is that it ushered in more reform, more cleaning house, if you will.

So I was very involved in those issues for exactly the same reason. They went to the heart of what we are about. They went to the heart of voters' and citizens' confidence. They went to the heart of the question of our integrity.

In part, because of that background and that experience, I was very interested in being involved in these ethics reform and lobby reform efforts on Capitol Hill. Very early on, I joined the working group in the Senate that was focused on these important issues. The group consisted of Senators SANTORUM, MCCAIN, LOTT, KYL, LIEBERMAN, OBAMA, ISAKSON, DODD, FEINGOLD, and COLLINS. It was a very strong, very sincere bipartisan working group to look hard at these crucial questions and to come up with a strong package that could gain bipartisan consensus support, and that we could pass through the Senate.

In working with this group, we discussed a lot of issues and tried to hone in on the key abuses and, therefore, the key reforms we thought we needed to address. That led to our releasing a statement in favor of meaningful lobby reform, particularly with regard to the following areas: The revolving door between private lobbying and public service; privately funded travel, which has clearly been abused in the past; gifts from lobbyists; improved lobbying disclosure; earmarks and the abuse of earmarks and the need for transparency and some limit in terms of those earmarks; strengthened ethics guidelines, training, and enforcement.

Again, I compliment all of my fellow Senators who worked on that important group—Senators SANTORUM, MCCAIN, LOTT, KYL, LIEBERMAN, OBAMA, ISAKSON, DODD, FEINGOLD, and COLLINS. We all worked together in a very aggressive and sincere way. I think we have made a lot of headway. That headway is being exhibited this week and even more next week.

This past Tuesday, the Senate Rules Committee, chaired by Senator LOTT, voted out a consensus package of important reforms. Now, today, the other committee of jurisdiction, the Committee on Homeland Security and Governmental Affairs, chaired by Senator COLLINS, will take a look at their side of these matters—those matters in this general category that fall under their jurisdiction. I think they are going to come out today with a strong and significant package in terms of matters that come from their jurisdiction. Of course, as I said, Senators LOTT and COLLINS were very active, very forceful, and contributing members to the working group.

I look forward to supporting these two packages that will come together next week on the Senate floor. But as I do, I also look forward to strengthening the package, perhaps here on the Senate floor, perhaps through separate legislation, on other crucial questions, which I truly believe we also need to address in a bold and direct and forceful way to gain the confidence of the American people.

I want to highlight three of those additional issues today. The first has to do with a very important matter of Indian tribe campaign contributions. Now, this, as everyone knows, is not some theoretical concern. This issue has been at the heart of the recent scandals that have plagued the Congress and the country with regard to lobby reform and campaign contributions. So this is not a theoretical or abstract concern.

What is the problem? The fundamental problem, as I see it, is that the rules are very different and very tilted for Indian tribes, as opposed to other entities such as corporations. How is that true? Let me give you a few examples. The first is that Indian tribes are treated as ''persons'' under Federal campaign finance law, and because of that they are allowed to contribute up to $2,100 per election to a candidate. But they are not considered what are called ''individuals'' under the law. For that reason, there is no aggregate limit in terms of how much money they can give to Federal political campaigns overall in an election cycle.

For other entities, such as corporations, there is absolutely an overall limit of $101,400. That is a lot of money but understand that tribes have no such limit, so they can go beyond that and give absolutely as much as they want, without limit, to Federal campaigns.

The second area of difference I think is even more significant, and that is because most Indian tribes are unincorporated, they are not subject to any rules or ban on using corporate treasury funds to fund all of this or to any rules with regard to mandatory disclosure of the source of the funds they use and where they go. That is a huge difference.

Corporate PACs, of course, have to collect money in very certain ways. They cannot write a check out of the corporate treasury. An Indian tribe can and, in doing so, doesn't have to disclose in any meaningful way where the money came from or where it is going.

The second issue I want to highlight is the ability of some incumbents, some Members of Congress, in the House and Senate, to pay their spouses or dependent children for work on their own political campaign. Why is that a problem? It is a fundamental problem, in my opinion, because it gives Members of Congress the ability to increase their salary if they want to abuse that right to write checks to their own personal bank account from their campaign account by ''hiring'' a spouse or even a dependent child or both.

Again, this is not a theoretical concern; this has been a practice in the past and is, to at least a limited extent, a practice now. There may be some spouses or some kids who do a lot

of work for that paycheck, who do a full day's work for a full day's paycheck. But, clearly, this is an area that is wide open to abuse and, in fact, in my opinion, has been abused in the past.

So how do we fix it? I think it is pretty simple. I think to gain the confidence of the American people and to do ourselves a favor, we fix it in a very simple and direct way, which is by completely banning spouses or dependent children from being on the payroll of a Member's campaign or on the payroll of a Member's leadership PAC.

The final issue that I quickly want to highlight is the issue of Members' spouses being able to lobby Congress. Again, I think in the real world, in the heartland of America, this causes average citizens and average voters a lot of concern. The concern, again, is obvious. A Member's spouse has a unique ability to lobby, No. 1. No. 2, that relationship, if a Member's spouse is on the payroll of a lobbying firm, means that the lobbying firm is writing a check, which basically goes directly into the family banking account of that Member.

How do we address this? We need to be very careful to address it responsibly and carefully and also to take into account the fact that some spouses may have been a true lobbyist with true expertise, earning an honest day's work, before they were ever spouses of a Member of Congress. So I believe the way to address it is to ban that activity if the spouse was not a registered lobbyist a year or more before the Member was elected to Congress or the marriage between the spouse and the Member occurred.

I think that is a responsible, fair way to address a very real concern, a very real issue in the hearts and minds of the American people.

I close by again saying I appreciate all of the work of my fellow members of the working group on which I serve. I look forward to that legislation coming to the floor next week, and I also look forward to us addressing other crucial issues that may not be in that underlying package, such as campaign contributions of Indian tribes, such as spouses and dependent children being on the payrolls of campaigns, and such as lobbying by Member spouses.

Mr. President, I yield the floor.

The PRESIDING OFFICER (Mr. ENSIGN). Who yields time? The Senator from Alaska.

PERMANENT POSTPONEMENT OF S. 1977

Mr. STEVENS. Mr. President, I have come to the floor today to ask a request of the joint leadership. Last year, I introduced S. 1977 to repeal a provision of the 1977 reauthorization of the Marine Mammal Protection Act of 1972. My bill was designed to address the concerns on the west coast about the impact of high energy prices on their economies, their businesses, and their consumers.

Upon its introduction, S. 1977 was immediately met with press releases condemning it. I believe the purpose of my legislation was deliberately misinterpreted. By repealing this provision, this bill would ensure that the Cherry Point refinery in the State of Washington could maintain its current capacity.

The Cherry Point refinery processes 225,000 barrels of crude oil per day. About 60 percent of the crude oil processed at the refinery comes from my State of Alaska, and 70 percent of its refined product is consumed by businesses, vehicles, and industries located in Washington State.

S. 1977 deals solely with the construction or expansion of marine terminals and docks in Puget Sound specifically at Cherry Point. It has nothing to do with the number or size of tankers in Puget Sound. The Coast Guard controls that through regulation. The existing provision of law under consideration limits the expansion of docks which is vital to the area's economy. If this provision is enforced, it will eventually reduce crude oil delivery at the Cherry Point refinery by about 10 percent, reducing fuel capacity for the entire region by about 704,000 gallons per day of refined product.

My intention on introducing this legislation was to ensure stable supplies of fuel for the Pacific Northwest at the existing capacity. It would not have increased capacity at all.

Some have litigated this issue in the press, politicized this issue, and leveraged it for personal political publicity. Some Washingtonians have appealed to me because they don't like to see a conflict between our State and their State. They contacted me privately and sought to work this out.

In particular, one letter convinced me that despite my good intentions, the bill may not be the best policy for the people of Washington right now. But they contacted me.

Because of my private consultation with the author of the letter, which I do appreciate very much, I have come to the floor to ask that the joint leadership institute procedures to bring about the permanent postponement of this legislation and indicate we will never take it up.

It is my understanding that this is the only procedure available as it is not possible for me to ask to withdraw it. I have never, in my 38 years in the Senate, asked to pull legislation or have any bill I introduced be permanently postponed. But that is my intention now.

For years, I have fought for Alaska's right to determine our State's future and to develop our own energy resources, particularly in the Alaska Coastal Plain. I defer to this policy now, and I believe the people of Washington will have to make this decision. It is a decision that will have to be made. But based on the private conversations and the letter I mentioned, I yield to the concerns of Washingtonians on this legislation. I still believe S. 1977 is the right policy, but I respect the rights of those living in Washington State to make the decision as to when that policy should be pursued. Consistent with my personal philosophy, again I ask that the leadership find a way to permanently postpone consideration of S. 1977.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

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

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

APPOINTING CONFEREES

Mr. President, still another day has gone by. It is now Thursday, and we have been unable to appoint conferees for the pension reform bill. This is a shame. Up to 40 million Americans are concerned about what we do in the Senate. They may not wake up every morning thinking about it, but there are millions of Americans who are worried about their pensions, and they should be.

It is so important that we get this matter to conference and come back with a bill that will help those 40 million Americans. We passed a bill out of this body on a bipartisan basis; 97 of the Senators voted for it. Not only was it a bipartisan vote, it was a bipartisan effort to get it to the floor. We need to do things on a bipartisan basis. This pension reform bill is an indication of how we can work together, but it shouldn't break down now.

There is a dispute over whether the conference should have seven Republicans or eight Republicans. That is what it amounts to, whether it has seven Republicans going to conference or eight Republicans. There is a two-vote difference. Because of the majority, 55 to 45, we have agreed to a two-vote difference, but it is not right that we are not going to conference because the majority doesn't want an extra Senator.

I need an extra Senator. I need 8 to 6. I have Senators who are heavily engaged in this matter and who have worked hard: Senator KENNEDY, Senator HARKIN, Senator MIKULSKI, and, of course, Senator BAUCUS who does the finance aspect of this and has worked very hard. Senator ROCKEFELLER has worked hard on this. There isn't anything unreasonable about saying: Mr. Leader, instead of going for seven Republicans, go with eight, go with nine. They have already agreed to go with nine, they just wanted the difference to be 9 to 6. They wanted a difference of three. I can't do that. I will go with nine. If they want nine Senators from the current seven, fine, I will go along with that.

In yesterday's Congress Daily the majority said they didn't want an 8-to-6 ratio because, ''How do you break a tie?'' I took my math training at Searchlight Elementary School. We

had one teacher who taught all eight grades and it wasn't that great, I am sure. But I even know that really doesn't make sense. Remember, how do you break the tie if the vote is 8 to 6?

We know that can't be the real reason for the delay because we know the majority's first proposal was 7–5. You would have to have the same concerns about 7–5, so that can't be the reason.

I understand another reason for the delay could be the majority's insistence that they get a three-vote margin conference. We can't start something like that around here. There are five Republicans, and I understand and appreciate that. We have agreed to a two-vote margin. That is fair. We have never had a conference committee that I am aware of with a three-vote margin, certainly not in this session of Congress. I am hard pressed to remember that it ever happened, so that can't be the reason.

So there must be something else going on. There must be pressure coming from people downtown, as we refer to the special interest groups that are interested in legislation. There must be pressure coming from these special interest groups to appoint particular Members to this conference, to ensure that they get the result they seek at the end of the conference. It is like fixing a jury. Sometimes you work too hard and you wind up with a bad result.

I had a case once where I represented the North Las Vegas Police Department. They had been accused of false arrest. So we go to pick the jury, and the plaintiff's attorney—I was representing the defendant—used up all their voir dire during the voir dire examination of the jury, and then we have a period of time after that wherein you can peremptorily challenge a juror. You don't have to have a reason, you just get rid of them. He used all of his peremptory challenges, and somebody stood and talked who had been a police officer. He didn't want that guy on the jury, but he had used up all of his challenges. He couldn't get rid of a juror who was a police officer, who would tend to side with me. He worked a little too hard in coming up with a jury that he thought would be OK and wound up trying too hard. So sometimes you try to play with the jury too long and you wind up being hurt.

In that case, I got a defense verdict. I won the case. I don't know if that was the reason, but I am sure it didn't hurt me to have a former police officer during that jury deliberation.

So I really don't know how to explain this deadlock. The downtown interests, the special interests say they obviously can't have that Republican or that Democrat on this conference because they don't agree with whomever it is on this issue.

This bill passed the Senate by a vote of 97 affirmations. Ninety-seven Senators said it is a good bill. This is not a Republican conference; it is a Senate conference. Is it going to make that much difference if it is 8–6 or 9–7, compared to 7–5? I don't think so.

In the past, we would appoint conferees based strictly on seniority. If the majority leader doesn't want to do that, then have him pick based on some other principle. We will probably stick with the seniority rule over here, but not necessarily. There is little consideration of how anyone would vote. I haven't asked those I would like to be on the conference committee—Senator KENNEDY, Senator BAUCUS, Senator ROCKEFELLER, Senator HARKIN, Senator MIKULSKI—how they are going to vote. I do know that Senator HARKIN and Senator MIKULSKI both believe there should be pension reform, but they are experts in different areas of this very complex piece of legislation that is so important that we complete. We will appoint people to this conference and let them do what they think is right. We need to move on.

It should not have taken 9 months to consider the bill in the first place, and it shouldn't take us 2 months to go to conference. Democrats have cooperated on this every step of the way—Senators BAUCUS and GRASSLEY, KENNEDY and ENZI—the chairman and ranking members of the committees. We are ready to go to conference 5 minutes from now. If the majority leader walked through these doors and said: I move that we go to conference, the ratio will be 8–6, 9–7, it is done. They could start meeting today. We are not delaying this legislation.

I don't understand all the reasons that we are not going forward with the conference, but I have to tell you, it looks somewhat suspicious to me when they are saying, instead of having seven Republican Senators, we want eight, for some reason. That is wrong. We need to stop playing around with this. Up to 40 million Americans, I repeat, are counting on us to do this the right way and to do it quickly.

Mr. President, I note the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

Mr. FEINGOLD. Mr. President, I ask unanimous consent that I be recognized at 2:15 p.m. for up to 15 minutes to make some final remarks on this bill.

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

Mr. FEINGOLD. Mr. President, yesterday the Senate took further steps to reauthorize the PATRIOT Act without the fundamental checks and balances that so many of us believe are needed. To bring us back to first principles, I read aloud the Constitution and the Bill of Rights. And to remind us of the broad, bipartisan support for amending the PATRIOT Act all over this country, I read the eight statewide resolutions that have passed in the last few years expressing concerns about the PATRIOT Act. I also read some of the nearly 400 local resolutions that have passed—the four resolutions from my own State of Wisconsin. Today I want to continue by reading some additional items to take my colleagues back to how hard we fought in November and December to stop the flawed conference report, and how many Americans wanted us to do better than we have done this week.

Let me start with a few editorials. The resolutions passed by State and city governments that I read here on the floor yesterday are not the only way by which Americans have expressed their concerns about the PATRIOT Act. The Fourth Estate has weighed in too, with many newspapers running editorials or columns criticizing the PATRIOT Act's effect on Americans' freedom. And not just a few newspapers, but dozens and dozens, from all across the United States. From major national newspapers to small, local newspapers. Papers in big cities and small towns. All concerned about the erosion of civil liberties under the PATRIOT Act. I am going to read just a few representative editorials.

From the Orlando Sentinel, August 17, 2005; headline: Fighting the terrorists.

Our position: Patriot Act changes need to be tough but protect against abuse of power.

The U.S. House and Senate have taken different approaches to renewing the USA Patriot Act, the sweeping anti-terrorism law that otherwise would expire at year's end. The Senate's more thoughtful, bipartisan approach deserves to prevail when members begin meeting next month to reconcile their competing proposals.

The House proposal leaves the Patriot Act's expanded surveillance and law-enforcement powers largely intact. It does not accommodate legitimate concerns raised by both liberals and conservatives about inadequate checks on those powers.

The Senate proposal, passed unanimously, includes what Judiciary Chairman Arlen Specter called ''responsible changes to safeguard civil liberties.'' It would continue to let the government obtain secret court orders to seize medical, financial, library and other records, but only records tied to suspected terrorists or spies, or people in contact with them. It would require the government to notify targets of secret search warrants after seven days, though a judge could extend that deadline.

Also under the Senate proposal, two of the most controversial Patriot Act provisions—to seize records secretly and conduct roving wiretaps—would expire in 2009 unless renewed. That would encourage Congress to reevaluate those provisions in four years.

The Senate proposal would not stop the government from using the powers in the Patriot Act to go after terrorists. But its changes would better protect ordinary Americans from possible abuse of those powers.

Next, The Los Angeles Times; editorial, ''Checks on the Patriot Act,'' from November 21, 2005.

The Patriot Act, a 4-year-old federal law that gave investigators unprecedented power to search for and chase terrorists, is a case study in bad lawmaking. Angry and anxious to respond to the atrocities of 9/11, Congress

hastily approved a measure that exposed an indeterminable number of Americans to unreasonable searches and intrusive snooping for the sake of the war on terror. The law provided few of the legal system's usual checks to protect against investigators abusing the new capabilities.

The measure eventually generated outrage on both sides of the political spectrum, as well as from corporations, libraries and retailers forced to report secretly on the activities of employees and customers. Nevertheless, in their haste to wrap up business before the Thanksgiving recess, lawmakers were poised last week to reauthorize the Patriot Act, which is due to expire at the end of the year, with only minor changes.

That was the outcome sought by the White House and its allies in the House. A bipartisan group of six senators stopped the bill, however, by threatening a filibuster. They demanded that House and Senate negotiators produce a reauthorization bill with more of the safeguards that the Senate had approved earlier this year.

The senators' demands are modest, recognizing that law enforcement agencies do need enhanced powers to battle elusive and technologically sophisticated groups of terrorists. But the public also needs to be able to review how those powers have been used. And people need more assurance that the information vacuumed up by their government is actually connected to a suspected terrorist or spy.

In particular, the bill should do away with the automatic, permanent gag orders that allow investigators to hide forever their demands for records from banks, libraries, doctors and other sources. And the most controversial provisions of the Patriot Act should be extended for a much shorter period than the seven years suggested by House and Senate conferees.

When Congress approved the Patriot Act, it put its trust in prosecutors and investigators to use their expanded powers responsibly. It now appears that trust was misplaced. Authorities have gone on a snooping frenzy since 2001, issuing more than 30,000 secret demands for records per year, according to the Washington Post. And unless the law is changed, no one will ever know whether those records should have been gathered, or what has been done with them.

Americans want to trust their government. It is their government's foundation, its system of checks and balances, that enables that trust.

Now, from The Pittsburgh Post-Gazette, entitled, ''True patriots: Some in Congress won't let terror limit freedom,'' from November 30, 2005.

Long before the 9/11 terrorist attacks and the so-called Patriot Act that was passed in reaction and fear, a man with stellar patriotic credentials who championed the cause of liberty had words of wisdom for his fellow Americans: ''They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.''

What Benjamin Franklin said in his own day remains a telling commentary for our time. Indeed, these words could have been written specifically about the Patriot Act, which went too far in trying to accomplish a legitimate goal: to remove some of the bureaucratic and legal barriers that stood in the way of hunting down terrorists.

But increasing government power while decreasing judicial oversight was a troubling exercise in a free country, and Congress realized as much when it passed the Patriot Act, including sunset provisions that could be considered in calmer days. That time has come and plenty of true patriots have stood up and offered suggestions that would make the Patriot Act more respectful of civil liberties and the American ideal of freedom.

This is one issue that provides common ground for liberals and conservatives. When a government has the power to search a suspect's premises without his knowledge and can retrieve personal business and library records of people without showing any connection to terrorism, then the alarms that go up are for Americans regardless of party. That is why, for example, former Republican Rep. Bob Barr, the scourge of President Clinton, finds himself on the same side of the fight as the American Civil Liberties Union.

Despite the bipartisan qualms about reauthorizing the Patriot Act without proper amendment, the Bush administration has not been sympathetic. Trust us, it says implicitly. But because paranoia animates policy for this White House, the use of the Patriot Act is bound to go too far and impinge on basic civil liberties. This is an administration, after all, that feels threatened when Sen. John McCain and others want to outlaw torture.

Sadly, ordinary Americans can't naively trust their freedom to such hands. The Patriot Act needs to have reasonable checks and balances written into it. Of the two bills to reauthorize the act, the Senate version accomplishes this better than the House measure. A tentative agreement has been reached on reconciling the bills, but principled opposition remains.

Six senators—three Republicans (Larry Craig of Idaho, John Sununu of New Hampshire and Lisa Murkowski of Alaska) and three Democrats (Richard Durbin of Illinois, Russell Feingold of Wisconsin and Ken Salazar of Colorado)—have emerged to resist accepting a version of the Patriot Act that doesn't meet their legitimate concerns.

This isn't about being pro-terror but pro-American. It is possible to keep essential liberty and obtain safety. For Americans to deserve both, the true patriots on Capitol Hill need support.

From the New York Times, just recently, on February 11, 2006, entitled, ''Another Cave-In on the Patriot Act.''

The Patriot Act has been one of the few issues on which Congress has shown backbone lately. Last year, it refused to renew expiring parts of the act until greater civil liberties protections were added. But key members of the Senate have now caved, agreeing to renew these provisions in exchange for only minimal improvements. At a time when the public is growing increasingly concerned about the lawlessness of the Bush administration's domestic spying, the Senate should insist that any reauthorization agreement do more to protect Americans against improper secret searches. When the Patriot Act was passed after Sept. 11, 2001, Congress made some of its most far-reaching provisions temporary so it would be able to reconsider them later on. Those provisions were set to expire last December, but Congress agreed to a very short extension so greater civil liberties protections could be added. This week, four key Republican senators—later backed by two Democrats—said that they had agreed to a deal with the White House. It is one that does little to protect Americans from government invasions of their privacy.

One of the most troubling aspects of the Patriot Act is the ''gag order'' imposed by Section 215, which prohibits anyone holding financial, medical and other private records of ordinary Americans from saying anything when the government issues a subpoena for those records. That means that a person whose records are being taken, and whose privacy is being invaded, has no way to know about the subpoena and no way to challenge it. Rather than removing this gag order, the deal keeps it in place for a full year—too long for Americans to wait to learn that the government is spying on them. Even after a year, someone holding such records would have to meet an exceedingly high standard to get the gag order lifted. It is not clear that this change has much value at all.

The compromise also fails to address another problem with Section 215: it lets the government go on fishing expeditions, spying on Americans with no connection to terrorism or foreign powers. The act should require the government, in order to get a subpoena, to show that there is a connection between the information it is seeking and a terrorist or a spy.

But the deal would allow subpoenas in instances when there are reasonable grounds for simply believing that information is relevant to a terrorism investigation. That is an extremely low bar.

One of the most well-publicized objections to the Patriot Act is the fact that it allows the government to issue national security letters, an extremely broad investigative tool, to libraries, forcing them to turn over their patrons' Internet records. The wording of the compromise is unclear. If it actually says that national security letters cannot be used to get Internet records from libraries, that would be an improvement, but it is not clear that it does.

In late December, it looked as if there was bipartisan interest in the Senate for changing the worst Patriot Act provisions and standing up for Americans' privacy rights. Now the hope of making the needed improvements has faded considerably.

Clearly the PATRIOT Act touched a nerve, and has continued to do so for 4 years now. While I support a strong fight against terrorism, we cannot sacrifice our citizens' basic liberties in that fight. To do so would weaken this country.

Next I want to turn back to some PATRIOT Act resolutions. It was not just State and city governments that passed resolutions these past several years. Colleges and universities across the United States have become actively involved in the PATRIOT Act debate as well. Across the country, 53 resolutions have been passed on 44 campuses advocating for substantial changes to the PATRIOT to protect the civil liberties of the American people. From Mt. Holyoke, a small private all-women's liberal arts school in South Hadley, MA, to the University of Texas at Austin, one of the largest public universities in the United States, students and faculties alike are coming together to pass these resolutions. Resolutions have been passed on college campuses in states from California to Kentucky. I will now read a few of these campus resolutions.

A resolution concerning the protection of students' civil rights in the wake of the passage of the USA PATRIOT Act.

UNIVERSITY OF TEXAS AT AUSTIN STUDENT GOVERNMENT

WHEREAS: The United States Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act; Public Law 107–56) on October 25, 2001, championed by U.S. Attorney General John Ashcroft;

WHEREAS: The 4th amendment of the Bill of Rights establishes: The right of the people

to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. WHEREAS: According to Mayor Pro Tem Jackie Goodman's Austin City Council resolution regarding the PATRIOT Act, ''fundamental rights granted by the United States Constitution are threatened by actions taken at the Federal level, notably by passage of certain sections of the 'U.S.A. P.A.T.R.I.O.T. Act,' other acts and executive orders which, among other things:

Grant potential unchecked powers to the Attorney General and the U.S. Secretary of State to designate legal domestic groups as ''terrorist organizations'' by overly broad definitions, and implying restrictions to Constitutionally protect First Amendment rights of speech and assembly by reference, such as political advocacy or the practice of a religion; while lifting administrative regulations on covert, surveillance counter-intelligence operations;

Violate the First and Fourth Amendments to the Constitution through the expansion of the government's ability to wiretap telephones, monitor e-mail communications, survey medical, financial and student records, and secretly enter homes and offices without customary administrative oversight or without showing probable cause;

Give law enforcement expanded authority to obtain library records, and prohibits librarians from informing patrons of monitoring or information requests;

Violate the Fifth, Sixth and Fourteenth Amendments to the Constitution in establishing secret military tribunals, and in subjecting citizens and non citizens to indefinite detention without being allowed an attorney, without being brought to trial, and without even being charged with a crime;

Authorize eavesdropping on confidential communications between lawyers and their clients in federal custody;''

WHEREAS: In the October 1997 edition of Global Issues, available as Vol. 2, No. 4 of the USIA Electronic Journal, then Senator John Ashcroft (R–MI) wrote in an article entitled, ''Keep Big Brother's Hands Off the Internet,''

The FBI wants access to decode, digest and discuss financial transactions, personal e-mail, and proprietary information sent abroad—all in the name of national security. . . This proposed policy raises obvious concerns about American's privacy. . . The protections of the Fourth Amendment are clear. The right to protection from unlawful searches is an indivisible American value. Two hundred years of court decisions have stood in defense of this fundamental right. The state's interest in crime-fighting should never vitiate the citizens' Bill of Rights. . .

The administration's interest in all e-mail is a wholly unhealthy precedent, especially given this administration's track record on FBI files and IRS snooping. Every medium by which people communicate can be subject to exploitation by those with illegal intentions. Nevertheless, this is no reason to hand Big Brother the keys to unlock our e-mail diaries, open our ATM records, read our medical records, or translate our international communications. . .

WHEREAS: Eva Poole, President of the Texas Library Association, the oldest and largest organization representing Texas libraries, including university and academic libraries, stated in a personal e-mail by request:

The USA PATRIOT Act is just one of several troubling policies that compromise the public's privacy rights. Enhanced surveillance powers permitted under the provisions of the Act license law enforcement officials to peer into Americans' most private reading, research, and communications. Several of the Act's provisions not only violate the privacy and confidentiality rights of those using public libraries, but take no consideration of constitutional checks and balances as it authorizes intelligence agencies to gather information in situations that may be completely unconnected to a potential criminal proceeding.

Librarians do not know how the USA PATRIOT Act and related measures have been applied in libraries because the gag order bars individuals from making that information public. Equally troubling is the fact that librarians are not allowed to comment on FBI visits to examine library users' Internet surfing and book-borrowing habits. I oppose any use of governmental power to suppress the free and open exchange of knowledge and information.

WHEREAS: The Student Governments of the University of California at Berkeley and Santa Barbara, University of Alaska Fairbanks, University of Washington, Washington State University, University of Wisconsin and Southern Oregon University have passed resolutions denouncing the USA PATRIOT Act;

THEREFORE BE IT RESOLVED that the Student Government of the University of Texas at Austin has been, and remains, absolutely committed to the protection of civil rights and civil liberties for all of its students and affirms its commitment to embody democracy and to embrace, defend, and uphold the inalienable rights and fundamental liberties granted to students under the United States and Texas Constitutions;

BE IT FURTHER RESOLVED that the Student Government of the University of Texas at Austin firmly calls upon the Austin Police Department, University of Texas Police Department, Federal Bureau of Investigation and Joint Terrorism Task Force to refrain from and, in certain cases, discontinue the surveillance of individuals, groups of individuals, and organizations based solely on their participation in activities protected by the First Amendment to the United States Constitution, such as political advocacy or the practice of a religion without reasonable and particularized suspicion of criminal conduct unrelated to the activity protected by the First Amendment of the United States Constitution;

BE IT FURTHER RESOLVED that Student Government respectfully requests that Dr. Fred Heath, Vice Provost of General Libraries, direct all UT libraries to post in a prominent place within the library a notice as follows:

''WARNING: Under Section 215 of the federal USA PATRIOT Act (Public Law 107–56), records of books and other materials you borrow from this library may be obtained by federal agents. This law also prohibits librarians from informing you if records about you have been obtained by federal agents. Questions about this policy should be directed to Attorney General John Ashcroft, Department of Justice, Washington, DC 20530.'';

BE IT FURTHER RESOLVED that the Student Government of the University of Texas at Austin commits to organizing a forum addressing student privacy concerns consisting of a panel of relevant administrators and community members;

BE IT FURTHER RESOLVED that the Student Government of the University of Texas at Austin firmly calls upon UTPD to preserve and uphold students' freedom of speech, assembly, association, and privacy, the right to counsel and due process in judicial proceedings, and protection from unreasonable searches and seizures, even if requested to do otherwise in accordance with new federal law, which infringes upon such rights granted to federal or state law enforcement agencies under powers assumed by the USA PATRIOT Act by Executive Order;

BE IT FURTHER RESOLVED that the Student Government of the University of Texas at Austin calls upon the Austin City Council to do everything in its power to protect and defend the rights and liberties of University of Texas at Austin students who reside within jurisdiction of the City of Austin.

Next:

ASSOCIATED STUDENTS OF MOUNT HOLYOKE COLLEGE

A RESOLUTION AFFIRMING CIVIL RIGHTS AND LIBERTIES IN LIGHT OF THE USA PATRIOT ACT

WHEREAS, Mount Holyoke College has a diverse student and faculty body, including many students from outside the United States, and many students with diverse cultural backgrounds whose contributions to this community are vital to the culture and civic character of Mount Holyoke College; and

WHEREAS, the preservation of civil rights and civil liberties is a pillar of American society and is essential to the well-being of any democracy, particularly during times of conflict when such rights and liberties, especially those of immigrants and ethnic minorities, may be threatened, intentionally or unintentionally; and

WHEREAS the preservation of civil rights and liberties is essential to the well-being of a democratic society; and

WHEREAS, The community of Mount Holyoke College denounces terrorism, and acknowledges that federal, state and local governments have a responsibility to protect the public from terrorist attacks in a rational, deliberative and lawful fashion to ensure that any new security measure enhances public safety without impairing constitutional rights or infringing upon civil liberties; and

WHEREAS, Mount Holyoke College as a private institution, is also responsible to protect its community, including all faculty, staff, and students, whether they be residents or non-residents; and

WHEREAS, the United States Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act; Public Law 107-56) on October 26, 2001; and

WHEREAS, some provisions of the USA PATRIOT Act and other related federal orders and measures may pose a threat to the civil rights and civil liberties of all students, staff and faculty at Mount Holyoke College, including natural citizens of the United States, and particularly, but not limited to, those who are of Middle Eastern, Muslim or South Asian descent; by:

a. Reducing judicial supervision of telephone and Internet surveillance.

b. Expanding the government's power to conduct secret searches without warrant.

c. Granting power to the Secretary of State to designate domestic groups, including political and religious groups, as ''terrorist organizations''.

d. Granting power to the Attorney General to subject non-citizens to indefinite detention or deportation even if they have not committed a crime.

e. Granting the Federal Bureau of Investigation (FBI) access to sensitive medical, mental health, financial and educational records about individuals without having to show evidence of a crime.

f. Granting the FBI the power to compel libraries and bookstores to produce circulation or book purchase records of their patrons, and forbidding disclosure that such

records have been requested and produced; and

WHEREAS, law enforcement and security measures that undermine fundamental constitutional rights do irreparable damage to the American institutions and values of equal justice and freedom that the students staff and faculty of Mount Holyoke College hold dear; and

WHEREAS, the Senate of the Associated Students of Mount Holyoke College believes that there is not and need not be conflict between security and the preservation of liberty, and that students of Mount Holyoke College can maintain their privacy and be both safe and free;

BE IT RESOLVED BY THE SENATE OF THE ASSOCIATED STUDENTS OF MOUNT HOLYOKE COLLEGE THAT the SGA Senate supports the fundamental, constitutionally-protected civil rights and civil liberties of all members of Mount Holyoke College; and THAT the SGA Senate opposes those measures that infringe upon such civil rights and liberties, or that single out individuals for legal scrutiny or enforcement activity based solely on their country of origin, religion, ethnicity or immigration status; and THAT the SGA Senate urges all students, staff, and faculty of Mount Holyoke College to respect the civil rights and civil liberties of all members of this community, regardless of citizenship or heritage; and THAT the SGA Senate urges the Mount Holyoke College Department of Public Safety and all other applicable departments, except when required by law, to refrain from:

a. utilizing race, religion, ethnicity or national origin as a factor in selecting which individuals to subject to investigative activities except when seeking to apprehend a specific suspect whose race, religion, ethnicity or national origin is part of the description of the suspect,

b. participating in a joint search of the property or residence, with any law enforcement agency absent the assurance that simultaneous notice of the execution of a search warrant to such member of Mount Holyoke College,

c. any practice of stopping drivers or pedestrians for the purpose of scrutinizing their identification documents without particularized suspicion of criminal activity, and

THAT the SGA Senate urges the Mount Holyoke College Department of Public Safety not to subject any individual to the custody of the South Hadley Police Department, who may be placed in federal custody, to military detention, secret detention, secret immigration proceedings, or detention without access to counsel; and

THAT the SGA Senate urges the Mount Holyoke College administration to provide notice to all individuals whose education records have been obtained by law enforcement agents pursuant to Section 507 of the USA PATRIOT Act (Disclosure of Educational Records).

Mr. President, I ask unanimous consent to have printed in the RECORD the resolution passed by the United Council of Students at the University of Wisconsin Madison.

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

UNIVERSITY OF WISCONSIN STUDENT RESOLUTION (2/19/2004)

MC1201–01: RESOLUTION IN RESPONSE TO USA PATRIOT ACT

Whereas the Fourth Amendment of the United States Constitution states;

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized, and;

Whereas the Fifth Amendment of the United States Constitution states;

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be put twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use, without just compensation, (emphasis added), and;

Whereas Section 1 of the Fourteenth Amendment of the United States Constitution states;

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws* (emphasis added), and;

Whereas the United Council of University of Wisconsin Students Policy Platform in regards to Student/Civil/Legal Rights states the following two points;

United Council opposes discrimination based on but not limited to race, ethnicity, creed, gender, gender identity, sexual orientation, religious belief or lack thereof, veteran status, marital/familial/parental status, age, physical appearance, disability, political affiliation, national origin, income level or source, residency status, or geographic disadvantage for any reason including but not limited to educational opportunity, employment, housing, physical or emotional well being, and social attitudes; and;

United Council supports the student campaign for the statistical accounting and documentation of Racial Profiling in the UW System, the state of Wisconsin, and the United States of America;

Whereas the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism, USA PATRIOT, Act of 2001 (H.R. 3162, S. 1510) of the title officially introduced: 'To deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes' became Public Law No. 107–56 on October 26, 2001;

Whereas Senator Russ Feingold (D–WI) was the only member of the United States Senate to vote against this bill;

Whereas Laura Murphy, Director the American Civil Liberties Union Washington National Office stated that, ''Included in this bill are provisions that would allow for the mistreatment of immigrants, the suppression of dissent and the investigation and surveillance of wholly innocent Americans;''

Whereas the USA PATRIOT Act overrides civil liberties such as those encompassed within the Fourth, Fifth and Fourteenth Amendments of the United States Constitution;

Be it resolved that United Council appreciates the support of Senator Russ Feingold for voting against the USA PATRIOT Act;

Be it further resolved that United Council upholds Civil Liberties such as those encompassed within the Fourth, Fifth and Fourteenth Amendments of the United States Constitution;

Be it finally resolved that United Council urges UW institutions to both officially state that they will protect students, citizens and non citizens alike, and their rights, and inform students that they are entitled to legal advice before cooperating with Federal law enforcement agencies.

Mr. FEINGOLD. Mr. President, every day children across this country learn about the role of their Government and how it is intended to function. I have also collected a handful of textbooks used by children from elementary school up through high school to see what they have to say about the role of Government. In looking at these books, I notice that each of them at different reading levels discuss the Government as a whole, the importance of the Constitution as the foundation of our Government, and the importance of checks and balances and separation of powers. Each of these books, at whatever learning level or reading level, teaches that the Government does not have endless, unchecked powers over the people it is intended to protect.

I started my presentation after cloture was invoked by reading the Constitution of the United States. I wish to conclude for now by reading a very brief portion of one of these books. It is entitled ''National Government, a Kids' Guide.'' ''Separation of Powers.''

The people who wrote the U.S. Constitution wanted to make sure that the leaders of the government did not have too much power. The writers spread the power among three separate branches of government that work together to govern the country. This is called separation of powers.

The executive branch is lead by the president of the United States. This part of the government is responsible for making sure the laws are carried out, or executed.

The legislative branch is made up of the people in the Senate and the House of Representatives. Together, the Senate and the House of Representatives are called the United States Congress. The legislative branch makes the laws.

The third branch is the judicial branch, which is led by the Supreme Court. The judges—called justices—of the Supreme Court explain the laws and decide if any laws are not fair.

Each branch of the government has its own job to do, but the three branches have to work together. The people who wrote the Constitution were very careful to make sure that each branch of the government could check up on the others. A system called checks and balances keeps different parts of the government from having too much power.

Mr. President, I ask unanimous consent that Senator BYRD be recognized at 12:30 p.m. today.

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

Mr. FEINGOLD. Mr. President, I reserve the remainder of my time.

I yield the floor.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

Mr. KYL. Mr. President, I ask unanimous consent that I be allowed to speak until 12:30, with the time to be charged to the Republican side.

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

Mr. KYL. Mr. President, the hour has almost arrived. I understand that in a little less than 3 hours, we will finally be voting for the final time on the reauthorization of the PATRIOT Act. This is critical for the defense of our country, the security of our Nation.

I am pleased we have the opportunity now to approve it, and I predict it will be approved overwhelmingly. The question is, What took us so long? We could have done this at least 2 weeks ago. Indeed, we could have done it 2 months ago. Such is the process in the Senate that sometimes the wheels grind slowly.

The problem is the war on terror. Our enemy does not treat the war necessarily the same way some people in this country do. They are very flexible. They are very agile. They do not tell us what they are going to do in advance. Sometimes they are very patient and wait a long time to strike, and when they do strike, it can be with great speed and lethalness, which means that our ability to fight the terrorists has to be equally agile.

Good intelligence has a short shelf life. Yet that is basically our main weapon in the war on terror. This is not a war we fight with planes, tanks, and ships, but with good intelligence to find out where the terrorists are, who they are, what they are up to, and, if we can, find out whether we are able to stop their terrorist attacks before they occur. That takes good intelligence. It takes agility to be able to get that intelligence, cooperate among the various law enforcement and intelligence agencies.

Before September 11, several of us had provisions of law we believed were important to amend in our statutes to provide tools to fight terrorists. Little did we know how important those would soon become. Senator FEINSTEIN and I have been ranking member and chairman of the Subcommittee on Terrorism, Technology and Homeland Security for many years, since I came to the Senate. We held a lot of hearings on the subject. We had a lot of ideas about what we wanted to propose.

Shortly after September 11, a lot of these things made their way into the PATRIOT Act which we were able to approve. Some Members said the PATRIOT Act was approved hastily. Actually, a lot of the ideas of the PATRIOT Act had been around for some time, had a lot of debate and hearings, but there did not seem to be a reason to get them passed; that is, until September 11, and then, indeed, we did act quickly. But I submit there is a difference between acting hastily and acting quickly.

Nevertheless, some of the provisions were sunsetted. Regarding things we did then and some subsequent amendments to statute, we wanted to take another look down the road to make sure we did not act too hastily. Our action today will make it clear that by reauthorizing these provisions, we intended them to be in effect. We know the terrorists have not stopped their war on terror, and therefore we dare not stop the tools to fight terrorism, many of which are embodied in the PATRIOT Act. So it is important to reauthorize these provisions and not have them expire or sunset.

There is a certain amount of pride of authorship I confess to since a lot of the provisions we are reauthorizing today are provisions which I wrote or helped to write in coauthorship with some of my colleagues. Let me mention some of these because these are important, one of which has been known as or has come to be known as the Moussaoui fix, which is named after Zacarias Moussaoui, sometimes referred to as the 20th hijacker. In the 108th Congress, Senator SCHUMER and I introduced the Moussaoui fix, which allows the FBI to obtain FISA warrants to monitor and search suspected lone wolf terrorists such as Zacarias Moussaoui.

Now, lone wolf terrorists exist because in today's world, you do not get a little card that says: I am a proud member of al-Qaida. It is a very loose-knit organization. Some have likened it to a franchise where all over the world there are little bands of people—cells—who would do harm to the West generally and the United States in particular and who share the same goals and ideals of al-Qaida, frequently have communication with members of al-Qaida, train in the same way, and conduct the same kinds of terrorist activities, sometimes in consultation or concert with al-Qaida. But it is not like a club, it is not like you are a member of the KGB of the Soviet Union, which is what the threat was when we wrote the FISA act.

Because the FISA act refers to foreign intelligence organizations or terrorist organizations, we found that with people such as Zacarias Moussaoui, who we could not prove was a card-carrying member of any particular terrorist group but we figured he was a terrorist and up to no good, we did not have an ability under FISA to seize and search his computers even though we had the ability to arrest him. This was 2 weeks before September 11. Had we been able to get into the computer, we might well have discovered the information we later found that could have pointed us in the direction of an attack on September 11.

Well, that is what the object of the Zacarias Moussaoui fix was: to enable us to add the lone wolf terrorist to the other situations in which a FISA warrant could be obtained. And it filled a gap in our laws that, as I said, might well have uncovered the September 11 conspiracy had it been in place at the time.

It was reported out of a unanimous Judiciary Committee and passed out of the Senate 90 to 4 in 2003. In 2004, it was added to the Intelligence Reform and Terrorism Prevention Act, with the general PATRIOT Act sunset applied to it. Like the other PATRIOT provisions, the Moussaoui fix was set to expire at the end of last year. Today, we will extend the sunset on that critical provision of law for another 4 years.

Another was the material support enhancements. In 2004, I introduced a bill that, among other things, clarified and expanded the statute prohibiting the giving of material support to a designated foreign terrorist organization. These changes helped address perceived ambiguities in the law that had led the Ninth Circuit Court of Appeals to strike down parts of it as unconstitutionally vague. The changes also expanded the law to bar giving any type of material aid whatsoever—including providing one's self—to a terrorist group.

This legislative proposal also was enacted into law later that year as part of the intelligence reform bill, and also was subjected to a sunset. Again, today, with the PATRIOT Act reauthorization conference report, we repeal that sunset. We make the 2004 material support enhancements permanent features of our law, as they should be.

Another part of the original PATRIOT Act I helped author was the so-called pen registers and trap-and-trace authority. Now, the authority for pen registers and trap and trace is critical for antiterror investigations. It has been around for years in connection with other kinds of investigations, and it obviously was an important tool to fight terrorism.

What these authorities do is allow investigators to discover what telephone numbers are being dialed into and out of a suspect's telephone. As I said, they already had this authority in connection with other kinds of crimes. It certainly made sense to have it track terrorists. An important feature here was to get one court order from a judge in one place and not have to hop all around the country wherever the telephone was used and get a separate court order in that State. That requirement made it totally useless.

So this one court warrant for trap and trace and pen registers was enacted. I am very glad to see the conference report repeals the sunset on this authority—in other words, the automatic ending of the authority—and makes permanent for antiterror investigations this pen register and trap-and-trace authority, another critical tool to fight terrorism.

For the past 2 years, I have also been a cosponsor of legislation that my colleague, Senator FEINSTEIN, helped to coauthor on seaport security and mass transportation security. This is especially interesting in view of the debate and concern right now about seaport security with which we are all familiar.

This particular legislation increases the penalties for and, by the way, also the scope of the criminal offenses for attacks on seaports and shipping. It also consolidates and updates the laws with regard to attacks on railroads and other mass transportation facilities.

Now, these proposals also had been amended into the intelligence reform bill in 2004 by the House of Representatives but have been dropped in conference. Today these important provisions, which I helped to coauthor, are enacted into law through the conference report of the PATRIOT Act.

There is another rather interesting, rather esoteric—one of the things lawyers debate about—but an interesting and important provision of the PATRIOT Act we are going to be dealing with today. When the final draft of the PATRIOT Act reauthorization was introduced in the Judiciary Committee the night before the committee acted on it, for the first time a proposed three-part test was inserted into the bill—a test for determining whether a section 215 order is relevant to a terrorism investigation. There has been a lot of debate about these section 215 orders, but these are critical to obtain records that might help in the investigation of a potential terrorist.

Several of us expressed reservations about this three-part test and whether it would impede the use of these section 215 warrants and impede important investigations and thought it required further study.

Well, during the next weeks and months, we became persuaded essentially that this three-part test would simply either make impossible or certainly delay needed investigations and, therefore, should not be enacted. It raised more questions than it answered, complicated this investigative tool that was being used, after all, at the very preliminary stages of an investigation—not the stage at which you ought to be proving probable cause to introduce evidence into the trial.

Well, the test remains in the conference report, but with changed language. I think it is much better in its current form. The form of the test remains in the conference report, but investigators are no longer required to use that test. Instead, they are simply permitted to use that test to obtain a presumption that a 215 order is relevant to a terror investigation, which is fine.

Usually, when we create a legal presumption that a standard has been met, it is easier to satisfy the presumption than it is to satisfy the underlying legal test. I do not believe that is the case here. Relevance is a simple and well established standard of law. Indeed, it is the standard for obtaining every other kind of subpoena, including administrative subpoenas, grand jury subpoenas, and civil discovery orders.

So I cannot imagine that investigators will ever bother using the complicated three-part test in order to get a presumption when they can simply plead relevance and that will suffice for their investigation. I might be wrong, and they might find this test useful. It is there should they decide they can use it. But I am pleased to see the conference report is not impeding investigations by mandating the use of that test.

We are not betting important antiterror investigations on the issue, I guess, is another way to say it. I think it would have been clearer just to eliminate the test, but it does not—other than, in my view, cluttering up section 215 of the PATRIOT Act because it is not mandatory, I do not think it is going to cause any harm. Investigators are not going to be impeded in their investigations because of it. I think that is an important change we made.

The conference report also does something that is important for States, like my own State of Arizona, that have attempted to improve the ability to prosecute and defend against certain kinds of serious crimes. In the 1996 Antiterrorism and Effective Death Penalty Act, Congress made an offer to the States in effect saying: If you will provide qualified counsel, lawyers, in capital cases to the defendants in those cases during the stage of the case after conviction but during appeal—it is the so-called postconviction review stage of litigation—then the Federal Government would apply a streamlined and expedited procedure to review the habeas corpus petitions that are normally filed during that period of time from the conviction in the State court.

The Federal courts would be required to abide by timelines in ruling on these cases, and they would be barred from staying Federal petitions to allow further exhaustion or broadly exempting claims from procedural default requirements on the grounds of the perceived inadequacy or lack of independence of the State's procedural rules. The bottom line is that if the defendants are represented by good counsel, by good lawyers, then they should be able to comply with the provisions of the law and not plead, in effect, they have to delay the law as they are having their appeals reviewed.

Arizona did its part to comply with this statute. It enacted a system to provide qualified counsel to capital defendants on State postconviction review. It spent a lot of money doing it. But to date, it has not received the benefits of the system. It is because the decision about whether a State is entitled to the benefits of this chapter 154 relief—including the time deadlines—is made by the same Ninth Circuit Court of Appeals that would be bound by those deadlines. And it has repeatedly refused to extend to Arizona the benefits of the 1996 law's special habeas chapter. By the way, it has also been very slow in many of these cases, and that has been a real problem.

The good thing about today's conference report is that it includes a provision that would shift the decision of whether a State is eligible for this expedited review of capital cases away from the regional courts of appeals to the U.S. Attorney General, with a review of his decision in the U.S. Circuit Court for the District of Columbia. That court hears no habeas cases; therefore, it has no conflict of interest as the other circuit courts would. This will allow the Federal Government to keep its end of the bargain that it made with the States back in 1996 and will allow States like Arizona to finally take advantage of the streamlined and expedited procedures to which it is entitled.

I will conclude in this fashion. I think that by what I have just said it is clear there are a variety of important provisions in this conference report, this PATRIOT law we are reauthorizing. In some cases we are saying this is now going to be permanent law. We do not need to come back and reauthorize it every 4 years. In other cases, we are saying there are important provisions of other laws that need to be put in the PATRIOT Act and made permanent law. And we have done that. In other cases, as I mentioned, we wrote particular provisions into the PATRIOT Act, and it is important that we reauthorize those provisions. And there were other provisions, in addition to pen registers and trap and trace that I mentioned before, as well as the material support, which were parts of the original act.

We established several crimes as part of the PATRIOT Act that would serve as predicate crimes for further investigation, and these were very important because in the early stages of an investigation into a terrorist you may not have all of the scope of the activity of this individual well in mind. You may know he has been guilty of what you think of one particular crime, but you need to be able to use that as a predicate to expand your investigation into other things he may have done.

So, for example, we establish that violations of the Federal terrorism statutes could serve as a predicate offense allowing the Department of Justice to apply to courts for authorization to intercept wire or oral communications pursuant to title III when investigating such offenses. We establish that the felony violations of the Federal computer crimes statutes, the so-called hacking statutes, might serve as a predicate offense, allowing the Department of Justice to apply to courts for authorization to intercept wire or oral communications pursuant to title III when investigating such offenses.

We provide for the detention, for up to 7 days, of aliens the Attorney General has reasonable grounds to believe were engaged in conduct that threatened the security of the United States or aliens who are inadmissible; that is to say, they are not supposed to be coming into the United States or are deportable from the United States on the grounds of terrorism, espionage, sabotage, or sedition.

There are a variety of other provisions that are included in the PATRIOT Act. The key thing to remember here is, as I said before, our law enforcement and intelligence officials need to have adequate tools to fight terrorism because we provide those tools when we send the military into harm's way. We have an obligation to do that. And they fight important fronts in the war on terror. But so much of this war on terror relates to intelligence gathering and law enforcement activity, investigating potential crimes of these individuals. We have to give them the tools they need to fight these terrorists.

The PATRIOT Act does that. It is one of our tools. The FISA law is another one of those tools, the Surveillance Act. The Foreign Intelligence Surveillance Act is what FISA stands for. We have activities such as the NSA surveillance that is another important tool that deals with al-Qaida terrorists who are calling into or out of a foreign country. There are other mechanisms we are using to fight the terrorists.

But one of the bedrock laws now that we use is the PATRIOT Act. That law passed not long after 9/11 because we understood this world had changed and that it was time to apply to terrorism many of the same kinds of techniques in law enforcement authorities that we already deemed very useful in investigating other kinds of crimes. Our idea was, if it is good enough to investigate money laundering or drug dealing, for example, we sure ought to use those same kinds of techniques to fight terrorists. We have done that.

Today, actually, is a very important day because many of the provisions of the PATRIOT Act go into permanent law. Others are reauthorized for 4 more years. They provide critical support to the people we want to protect us in this war on terror. I am delighted we will be adopting the PATRIOT Act conference report today. My only regret, as I said, is we could not have done it before now. But we can at least celebrate the fact that the Senate has done its duty for the American people to help make them secure in the future.

The PRESIDING OFFICER (Mr. ISAKSON). The majority leader is recognized.

APPOINTMENT OF PENSION CONFEREES

Mr. FRIST. Mr. President, this morning the minority leader came to the floor to once again call into question our good faith efforts on the pensions bill. He now claims our longstanding offer of a 7–5 ratio on the conference committee ''looks suspicious.'' I can't help but feel that what is beginning to look suspicious is this continuing pattern of obstruction on ground that seems to be ever shifting.

We originally considered proposing a 5–3 ratio but, to accommodate his caucus, we ultimately offered a 7–5 ratio. After a 2-month delay, this was rejected. The Democratic leader was unable to make a decision among members of his caucus. I understand those challenges, but that is what leadership is all about. Now he wishes to further delay with an arbitrary dispute over the ratio of conferees and this new, equally disingenuous charge of ''fixing the jury,'' which is absurd.

As the minority leader well knows, I have been working for years to fix the pensions problem. The American people deserve it. People don't understand why these games are being played.

The clock is ticking. People's lives are at stake. The first quarter of the physical year ends on March 31, 31 days from now. Within 2 weeks of that happening, companies have to make contributions to their pension plans. The pensions of millions of hard-working Americans are at stake. That is why these games don't make sense.

We have two committees with an equal stake in this bill. They should have an equal number of conferees on the committee. The conference committee should fairly represent the two committees of jurisdiction. The minority leader knows his proposals won't allow for that. I am for a fair conference but, equally importantly, I am for getting to conference so that we can address these challenges. The American people are waiting.

I know the Democratic leader says he wants to move forward as well. But remember, we passed this bill in November of last year, and we are still trying to do something very simple; that is, to get to conference so that we can pass the legislation.

I am baffled by the minority leader's inability to decide which five Senators from his caucus could join with our seven Senators so that we can appoint a conference and do the Nation's business. I am equally confused about why, in refusing to make that decision, he instead feels that he should decide on his own, unilaterally, the ratio of conferees with no regard for treating the two committees of jurisdiction fairly. If anyone is trying to fix the jury, it appears to be the minority leader by having one committee with more representatives than the other. We go back and forth every day, and that clock is ticking.

The airline provisions of the bill are necessary to keep additional pension obligations from being terminated and left at the doorstep of the Pension Benefit Guaranty Corporation. As Chairman GRASSLEY has suggested, in remarks that I will include in the RECORD, if we cannot make some progress shortly, we may need to look at pulling these provisions out and moving them on some other vehicle. That should not be necessary, but continued obstruction would leave us with no other choice. We are simply running out of time.

I plead with the Democratic leader to put forth his five. We have been ready for the last 2 months to put forth our 7 so we can get to conference and provide answers and a resolution to what millions of Americans are waiting for.

I ask unanimous consent to print in the RECORD the above-referenced document.

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

[From Dow Jones Newswires]

U.S. SENATOR GRASSLEY: SENATOR REID UNDERMINING PENSION TALKS

(By Rob Wells and John Godfrey)

WASHINGTON (Dow Jones).—A top U.S. Senate Republican on Thursday accused Senate Minority Leader Harry Reid, D-Nev, of undermining talks for a final pension overhaul bill, thereby helping the bill's critics.

''It's playing right into the hands of Ford (F) and General Motors (GM), because they negotiated benefits, both health and savings, they can't keep their promise to,'' said Senate Finance Chairman Charles Grassley, R-Iowa, at the National Summit on Retirement Savings, an industry and government seminar.

He said these companies ''don't want these reforms because they're going to have to pay up'' through higher pension contributions.

The bill would change pension funding rules and increase premiums paid by companies to the Pension Benefit Guaranty Corporation. The measure has divided business and labor groups, many of whom argue that it would be too strict.

The Senate has been attempting to name negotiators since December to a House and Senate conference to write a final pension overhaul bill.

Grassley accused Reid of delaying final pension talks by not formally naming Democratic negotiators. Part of the delay, however, stemmed from internal Republican disagreements over who would lead negotiations.

Reid and Senate Majority Leader Bill Frist, R-Tenn., have been in a standoff over the number of Democrats who will be part of the talks.

Grassley, departing from his prepared remarks, sharply criticized Reid for the delay. ''They're being held up because one person in U.S. Senate can't make up his mind which two or three Democrats ought to be on a conference committee,'' Grassley said.

If Congress fails to act on the pension bill, companies will have to begin using the relatively pessimistic benchmark of the 30-year Treasury bond in pension calculations. The 30-year bond rate would begin to apply after April 15, although higher payments wouldn't occur until January 2007. Currently companies are using a blend of corporate bond rates in such calculations.

The airline industry also has a major stake in the bill since the Senate version would give a special break from pension funding rules for underfunded airline pension plans.

Grassley and other bill advocates say it's vital Congress completes work on the bill by the April 15 deadline.

Without action by then, ''it's putting into jeopardy airlines being able to fly'' Grassley said, which would ''ruin the economy if we don't get something done.''

Further delays may force negotiators to move pieces of the bill, such as the airline provision, in separate tax legislation to meet the April 15 deadline, he said.

A telephone call to Reid's office wasn't immediately returned.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

Mr. DEMINT. I ask unanimous consent to speak for 5 minutes as in morning business and that this time be counted against the Republican time in the debate.

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

PORT SECURITY

Mr. DEMINT. Mr. President, I have had a chance to listen to the debate on the PATRIOT Act in my office. I had not planned to speak. But hearing continued attacks on the President on security issues, particularly port security, while some from the other side seem intent on stopping one of the most important security pieces of legislation we have, the PATRIOT Act, compelled me to come to the floor to straighten out the facts.

It is important that we have an honest and fair debate. I appreciate those on the other side who have participated in the debate in an honest way. But I have heard enough of my colleagues from the other side use information and perhaps take different positions than they did only a year or so ago. I am compelled to point some of these things out.

I will give one example. This week in a Commerce Committee hearing, we were talking about port security. Senator BOXER said:

> Our ports are a soft target. Al Qaida told us that when we found that out through [their] documents. . . . . So you take the Dubai situation plus our lack of action on security. . . . . And I'm going to oppose this deal.

That is fair enough unless we put it in perspective. This week, Senator BOXER actually voted to filibuster the PATRIOT Act, which is dedicated in large part to security in our ports. An entire title of the PATRIOT Act is focused on port security. Originally introduced as the bipartisan Reducing Crime and Terrorism in America's Seaports Act of 2005, title III strengthens criminal sanctions and takes a number of steps to improve our Nation's ability to secure our ports and to thwart terrorism. Yet Senator BOXER voted to filibuster the enactment of this essential port security provision the day after lamenting the vulnerability of American ports.

The truth is, to anyone who has watched this over time, very often our Democratic colleagues, with all due respect, block the very thing they blame Republicans for—in this case, blaming the President. Not only did Senator BOXER vote to filibuster the PATRIOT Act, but after the 9/11 attacks, Senator BOXER was one of four Democratic cosponsors of a bill that would have specifically permitted noncitizens to serve as airport security screeners. Senator BOXER cosponsored legislation to allow noncitizens to do for air travel what essentially the Coast Guard does for port security. Now she wants to block foreign companies from using American workers to manage our port terminals. It is difficult to reconcile the two positions.

Republicans want a fair and nonpartisan 45-day security review and a good but honest debate. It is not fair or honest to take a position this week that was very different than one that had been taken before. To Republicans, port security is not a passing political issue but a cornerstone of our commitment to protect the American people. That is why Republicans are working to pass the PATRIOT Act. We demand a fair and impartial 45-day security review of the proposed acquisition of the P&O Navigation Company of Britain by the Dubai Ports World.

I don't mean to be unfair to Senator BOXER, but it is an example of folks maybe taking a different position, trying to blame the President for something, in fact, that they have blocked in the past.

This is from an editorial in the Los Angeles Times, February 26:

> . . . Now there is a Republican in the White House, and of all the grandstanding surrounding the Dubai Ports World deal, none tops Boxer's performance. She said last week that she would support legislation preventing any foreign firm, state-owned or not, from buying port operations. Memo to Boxer: 13 of the 14 container terminals at the ports of [Los Angeles] and Long Beach, the biggest port complex in the United States, are run by foreign-owned companies. She later told The Times that she meant such deals should get greater scrutiny, not be banned. Still, this is the sort of proposal one would expect from a Senator from a landlocked state like Vermont, not one where international trade plays a vital role in the economy.

The article goes on to talk about the 180-degree switch of opinions. Again, I don't mean to pick on one Senator. My plea to the other side, and my side as well, as we look at this vital issue of security in our country, don't look for political opportunities to blame one side for something we actually created ourselves. On the security issue, there is no better example of colleagues who have blocked security in many ways and now are attempting to suggest the President is not strong on security. President George Bush is the world leader in the war on terror and has probably done more to secure the borders of our homeland than any President or any Member of Congress. It is time we give him that respect.

Mr. President, I thank you for the time, and I yield the floor.

The PRESIDING OFFICER. The minority leader is recognized.

Mr. REID. Mr. President, yesterday, the Senate passed a bill negotiated by the junior Senator from New Hampshire, Mr. SUNUNU, to strengthen civil liberties protections in the PATRIOT Act. In light of the improvements contained in the Sununu bill, I will now vote in favor of the pending conference report.

As I have emphasized many times, Democrats support the basic authorities contained in the PATRIOT Act. We voted for the original act in 2001. We unanimously supported the reauthorization bill that passed the Senate last summer. In recent months, we have been vigilant to ensure that no provision of the act would expire during ongoing negotiations over a long-term extension of the law. But our support for the PATRIOT Act doesn't mean a blank check for the President.

Last December, a bipartisan group of Senators joined together to insist that the reauthorization bill which had been returned from the House-Senate conference be improved. We defeated that conference report, we did it purposefully, and it was done on a bipartisan basis.

I note that some of my ''admirers''—I use that caustically—have run ads in the State of Nevada trying to embarrass me, saying that I and the Democrats are not for the PATRIOT Act. That was raw politics at its worst. What we tried to do, on a bipartisan basis, was to have a better conference report. That is what is happening. Some would say it has not been improved enough. I could argue that, but it has been improved.

Republicans and Democrats declared back then that Congress can provide the Government with the powers it needs to protect Americans and, at the same time, ensure sufficient checks and oversight to prevent abuses of these powers. Security and liberty are neither contradictory nor mutually exclusive.

Our insistence that the PATRIOT Act be improved has borne fruit. We stood up to the White House to demand a more balanced approach to antiterror tactics, and we have succeeded. Some say we didn't improve it enough, but there is no question that we improved it. Thanks to the courageous stand of Senator SUNUNU and a handful of other Republicans, along with the longstanding efforts of Chairman SPECTER, Senator LEAHY, and other Democrats on the Judiciary Committee, the Senate will soon pass a stronger, better PATRIOT Act.

The current bill is far from perfect. It falls short of the unanimously supported Senate bill we passed last summer. I would have preferred additional improvements in the conference report, but the version of the PATRIOT Act we will soon reauthorize is a vast improvement over the law we passed hastily in 2001.

For example, under the original PATRIOT Act, people who received a Government request for business records under section 215 were barred from discussing the request with anyone—their wives, sons, daughters, business partners—no one. But now, for the first time, recipients of such a gag order will be able to challenge it before a judge.

In addition, the new bill will restrict Government access to library records. The bill makes it clear that libraries operating in the traditional role, including providing Internet access, are not subject to national security letters.

Finally, under the Sununu bill we passed yesterday, individuals or businesses that receive a national security letter will not be required to tell the FBI the identity of a lawyer they may consult to obtain advice or assistance. It seems so obvious that it is the right thing to do, but we had to fight for that.

Even before the Sununu improvements, the conference report included a number of crucial provisions to ensure congressional and public oversight of the Government's expansive powers under the PATRIOT Act. We insisted that the House accept 4-year sunsets instead of 7-year sunsets on the most controversial provisions of the act. In the original bill, we set sunsets. It is so important, as we look back and recognize why we did that. It is so important that we did that. Because of that, we were forced to improve this legislation. I again say that maybe it is not to the satisfaction of some, but it is certainly improved.

The conference report also requires extensive congressional public reporting and mandates audits by an independent inspector general. That wasn't there before.

I will continue to work for additional improvements in the act.

I wish to say at this time that Senator RUSS FEINGOLD is a person for whom I have great admiration. We are so fortunate that he is a Senator. Academically, no one in the Senate has a record that is superior to his. He is a Rhodes scholar, someone who stands for principle. I disagree with him on this legislation. I can support this legislation not going with all of the improvements that he, as a matter of principle, has caused the Senate to review.

I believe it is unfortunate that this good man, the Senator from Wisconsin, was not able to offer even two amendments. We asked the majority leader: How about two amendments? Don't fill the tree. He will take 15 minutes on each amendment. We were turned down. That is why I voted against cloture yesterday. That is a bad way, in my opinion, to run this Senate.

So I want the record to be spread with my words that RUSS FEINGOLD is a fine lawyer. I congratulate and applaud him for his work on this issue and other issues.

I will continue to work with him to seek additional improvements to the act. For example, I know he worked hard on an issue that is so important. Let's go back to the Senate-passed version of section 215, under which a Government request for medical records and other sensitive personal information must have a more direct connection to a suspected terrorist or spy.

Second, I remain extremely concerned about the lack of meaningful checks on Government overuse or abuse of national security letters. The Washington Post reported last November that the FBI issues more than 30,000 such letters in a year, with no judicial supervision. So we need more oversight of the Government's power to issue these secret subpoenas—30,000 of them. How many is that a day? How many is that a week? How many is that a month? It is unfortunate that we were unable to get ahold of this and change this.

Third, I still don't believe it was appropriate to include in the conference report sections not included in either the House or Senate bills limiting the right of habeas corpus in cases having nothing to do with terrorism. I will oppose any further weakening of the great writ.

There is a hue and cry out there that we have to do something about earmarks. What they always talk about are appropriations earmarks, which include a fraction of a percentage of the spending of this Government.

I do not back away or apologize for the earmarks I have placed in appropriations bills. I have a responsibility. I know better than some bureaucrat in Washington, DC, how the Forest Service should spend its money on the forests in Nevada. I know better than some bureaucrat from the Bureau of Land Management how money should be spent in Nevada. And 80 percent of the Federal lands controlled by the Bureau of Land Management are in Nevada. I know better than some bureaucrat in Washington, DC, how the money should be spent on roads and highways and bridges and dams in my State.

I believe in the Constitution. I believe the Constitution sets forth three separate but equal branches of Government, and by our folding on this earmark procedure and not doing our jobs, we are caving in and not following the Constitution. There are ways we can improve the way earmarks are placed on bills, and I am happy to work on that. I have worked with the distinguished ranking member of the Appropriations Committee and his staff to make sure this earmarking legislation that will be on the floor is not going to hurt what this body does. But my point is that earmarking is more than the Appropriations Committee. Is this an earmark that they stick in a conference report, where it is not in the House or Senate bill, that changes one of the basic rights Americans have guaranteed by our Constitution—a writ of habeas corpus? Yes. It is wrong. So if you want something about earmarks, let's not just focus on the Appropriations Committee.

I have talked about the flaws, and I am satisfied, in spite of them, that the conference report, as improved by Senator SUNUNU, is a step in the right direction and certainly better than the original PATRIOT Act.

Let me say a word about the relationship between the current debate on the PATRIOT Act and the continuing controversy over unlawful eavesdropping by the National Security Agency. On the same day we voted on the PATRIOT Act conference report last December, when the conference report wasn't allowed to go forward, the New York Times reported that the President had authorized a secret program to eavesdrop on American citizens without warrants required by the Foreign Intelligence Surveillance Act. That story had a clear impact on the vote that day, as it well should have. There was some question why we were even having this protracted debate over the PATRIOT Act, since the President seemed to believe he was free to ignore the laws we enact anyway. But, in fact, no one is above the law—not even the President of the United States. One lesson of the NSA spying scandal is that Congress must stand up to the President and must insist on additional checks on the powers exercised by the executive branch. That is what we are doing today with this PATRIOT Act.

In addition to what we have here with the PATRIOT Act and NSA spying, now we have this Dubai port security, I think, scandal, on which the final decision was made by the Secretary of the Treasury, not the Secretary of Homeland Security. Whenever this administration is faced with a decision that affects the business community or the national security, the homeland security of this country, they always go with business.

Why wasn't the Secretary of Homeland Security the one who signed off on that? These companies control the perimeters of these facilities; they decide who does the background checks. The debate over the PATRIOT Act and over NSA wiretapping and the Dubai port situation is all about checks and balances. That is what this is about. They go to the heart of our system of separation of powers.

Today, we give the Government the tools it needs to help protect our national security, while placing sensible checks on the arbitrary exercise of Executive power.

So today, when this bill passes, I hope everybody will understand that I am saying that I am voting for this conference report because I think it improves the original PATRIOT Act, not because it is perfect. It is far from perfect.

I hope this administration—even though the President is in faraway India—gets the word that what is going on in this country with what I believe are constitutional violations is inappropriate. We need to get back to doing what is right for this country, following the Constitution and reestablishing the legislative branch of Government as a separate and equal branch of Government.

Mr. BYRD. Mr. President, how long am I recognized for?

The PRESIDING OFFICER (Mr. VITTER). The Senator from West Virginia is recognized for up to 35 minutes.

Mr. BYRD. I thank the Chair.

(The remarks of Mr. BYRD pertaining to the introduction of S. 2362 are printed in today's RECORD under ''Statements on Introduced Bills and Joint Resolutions.'')

PRESCRIBED PSE

Mr. TALENT. Mr. President, I rise today to engage the distinguished chairman of the Judiciary Committee, Senator SPECTER, in a colloquy regarding the intent of the Combat Methamphetamine Act of 2005.

Section 701 of the PATRIOT Act of 2005 establishes restrictions on the sales of precursor chemicals used to manufacture methamphetamine. As you know, the methamphetamine abuse and trafficking problem is growing in our country, and this legislation will help to combat the epidemic.

The methamphetamine control provisions of the act are intended to address those precursor chemicals sold without a prescription.

I know that Chairman SPECTER and I agree that exempting pseudoephedrine products provided via a legitimate prescription is critical. Physicians and other health care providers sometimes prescribe pseudoephedrine products in amounts that could violate the daily and monthly limits included in this legislation.

Patients who need more pseudoephedrine than the law would allow need the option of getting pseudoephedrine under a prescription, and Senator SPECTER and I agree that the methamphetamine provisions should not impede the care of legitimate patients. Our new requirements focus on products purchased outside the current prescription process. We are seeking to stop the bad actors from manufacturing and trafficking methamphetamine and have no desire to prevent proper patient care. Many States that have enacted laws to combat the methamphetamine epidemic have also included this type of exemption. It just makes sense.

Mr. SPECTER. Mr. President, I would say to my colleague from Missouri that physicians should not be forced to change what are common and appropriate prescribing patterns in an effort to stop the manufacturing and trafficking of methamphetamine.

The Senator from Missouri is correct. The Combat Methamphetamine Act provisions in the PATRIOT Act are intended to address over-the-counter sales, not pseudoephedrine products provided under a valid prescription. It is my expectation that these new restrictions apply only to pseudoephedrine products provided to consumers without a prescription.

Mr. TALENT. I thank the distinguished chairman for this clarification.

Mr. KERRY. Mr. President, over the course of this week, the Senate has had a series of votes on the PATRIOT Act conference report as well as on a bill amending the conference report introduced by Senators SUNUNU, CRAIG, MURKOWSKI, and HAGEL.

Last December, I voted against cloture on the PATRIOT Act reauthorization conference report. I did not cast that vote because I oppose reauthorizing the PATRIOT Act—I supported the PATRIOT Act then just as I do now. I voted against cloture on the conference report because I believed that it did not adequately protect our civil rights and liberties. Supporters of the conference report believed that you had to choose between two extremes: taking a tough stand on terror and protecting our fundamental constitutional rights. I thought you could accomplish both at the same time.

On February 28, 2006, I voted against cloture on the Sununu compromise bill, S. 2271, vote No. 22, because of procedural measures taken by the majority to prevent Senator FEINGOLD—or any other Senator—from offering amendments. Senator FEINGOLD's four proposed amendments would have improved the Sununu compromise and addressed more of the concerns I had with the conference report. They would have, No. 1, ensured that section 215 orders to produce sensitive library, medical, and other business records would be limited to individuals who had some connection to terrorism; No. 2, ensured that judicial review of section 215 gag orders and National Security Letter, NSL, gag orders is meaningful; No. 3, sunsetted the NSL authorities after 4 years; and No. 4, required notification of sneak-and-peek search warrants within 7 days of the search rather than within 30 days. I believe that each of these amendments would have improved both the Sununu compromise bill and the conference report. Regardless of whether my colleagues agree with me on that, I believe the Senate should have been given the opportunity to vote on them.

On March 1, 2006, the Senate conducted a series of votes, both procedural and substantive on the Sununu compromise bill and the PATRIOT Act conference report. I voted to support the Sununu compromise. I also voted to proceed to the motion to reconsider the conference report, to proceed to the conference report, and to invoke cloture on the conference report because, in my view, the Sununu compromise and the conference report come as a package deal. I support the two taken together, and for that reason, I also voted for the conference report today.

I support the Sununu compromise bill because it makes some important improvements to the PATRIOT Act. First, it allows judicial review of a section 215 nondisclosure order 1 year after its receipt. Section 215 of the PATRIOT Act allows the Government to obtain business records, including library, medical, and gun records among other things. Under the conference report, recipients of these section 215 orders were subject to an automatic permanent nondisclosure order which would have prevented them from bringing any court challenge. Under the compromise, a section 215 nondisclosure order is now subject to judicial review.

Second, the conference report would have required recipients of National Security Letters, NSL, to identify their attorneys to the FBI. NSLs allow the Government to obtain, without a warrant, subscriber records and other data from telephone companies and Internet providers. The compromise removes that requirement so that recipients of NSL orders can seek legal advice without having to inform the FBI.

Third, the compromise clarifies that the Government cannot issue NSLs to libraries unless the libraries provide ''electronic communications services'' as defined by the statute. Thus, libraries functioning in their traditional roles, including providing Internet access, are not covered.

Even though this legislation does not address all of my concerns with the conference report, these compromise provisions are steps in the right direction and will be important components of the PATRIOT Act.

I am proud to support this legislative package and am pleased we have reauthorized and improved the PATRIOT Act. I believe there is still more work to be done and will work with my colleagues; such as Senator FEINGOLD and Senator SPECTER, on further improvements. For example, in a perfect world the PATRIOT Act would provide for more meaningful judicial review of section 215 gag orders as well as NSL gag orders. There is no reason to have a conclusive presumption against recipients—one that can only be overcome by a showing of Government bad faith. Nor is there any reason to prohibit judicial review of those gag orders until a full year has passed. They should be immediately reviewable, and, if there are any presumptions, they should be in favor of the privacy rights being invaded rather than the Government doing the invading.

In a perfect world, the Patriot Act would require the subjects of section 215 business record disclosures to have some link to suspected terrorists. As I mentioned earlier, section 215 is expansive, and it allows the Government to obtain very sensitive, personal records. Simply requiring those records to be relevant to an authorized intelligence investigation, as the conference report does, is simply not enough. This standard will not prevent Government fishing expeditions.

And, in a perfect world, the PATRIOT Act would have required the Government to notify victims of sneak-and-peek searches—unannounced and secret entries into the homes of Americans—within 7 days as the original Senate bill did. The 30- to 60-day timeframe is simply too long. People have a right to know when the Government has been in their house, searching through their things.

Thus, I understand why some of my colleagues are disappointed with the compromise. They say that it does not go as far as the original Senate bill which was passed by unanimous consent, and they are right. But the fact is

that the compromise does improve the original conference report. I believe the compromise was the product of good faith negotiations. It is not a perfect bill, but it is a step in the right direction. And I will continue to work with my colleagues so that we can create a more even balanced PATRIOT Act.

Mr. ROCKEFELLER. Mr. President, I rise to speak in favor of the conference report on the PATRIOT Act Improvement and Reauthorization Act of 2005 and the accompanying measure to amend the Reauthorization Act. I commend the work of Senator SUNUNU and others in addressing several flaws in the measure reported by the conference in December. And I congratulate the hard work of Senators SPECTER and LEAHY in leading the Senate's efforts to extend and improve the PATRIOT Act.

I remain disappointed, however, in the process followed by the House-Senate conference, which not only excluded Democratic Members from key meetings and deliberations but also excluded the public. Sadly, the deficient process of the PATRIOT Act conference is characteristic of the manner in which too many conferences have been conducted in recent years.

Nevertheless, overall, adoption of the conference report, along with the accompanying improvements contained in the Sununu bill, will not only extend the PATRIOT Act but make it a stronger, more balanced tool in our fight against terrorists. I was one of the Senate's 10 conferees: 6 Republicans and 4 Democrats. We were appointed from the leadership and ranks of the Senate Judiciary and Intelligence Committees, the two committees with a direct responsibility for reauthorizing the PATRIOT Act.

The Senate conferees were appointed on July 29, 2005, immediately upon the Senate's passage by unanimous consent of the bill that had been unanimously reported by the Senate Judiciary Committee. I had expected that the conference with the House, which in July had passed a different reauthorization bill, would begin promptly on the return of the Congress at the beginning of this past September from last session's August recess. In fact, the House did not name its conferees until November 9.

The conference met the following day, on November 10, for its one and only meeting. That meeting was devoted exclusively to 5-minute opening statements. In my opening statement to the conference, I stressed the importance of how we did our work. I urged that the conference proceed openly, including by considering amendments in public session. I warned that otherwise the Congress would risk losing an indispensable ally in the long-term effort to defend the Nation; namely, a public that has confidence in the necessity for and the balance of the PATRIOT Act.

Unfortunately, our opening statements turned out to be our closing ones, because we never met again as a conference. The flawed process of the conference produced a flawed result. Because it fell short of what the conference could have achieved, I joined my fellow Senate Democratic conferees in not signing the conference report. We then joined a bipartisan coalition that opposed cutting off debate in December and insisted that there be a further effort to improve the bill. That additional time has been well spent.

From the outset of the PATRIOT Act reauthorization debate, there has been neither division nor doubt in the Congress that we would unite in extending the investigative and information sharing powers that were enacted in the wake of September 11. Over this past year, as we have debated the checks and balances that should be added or strengthened, Republicans and Democrats alike have been prepared throughout to achieve what we have now accomplished, the extension of essential national security authorities.

In most cases, those authorities have been made permanent. For a few, we have decided that a further review in 4 years is appropriate before deciding whether to make these authorities permanent as well. The PATRIOT Act reauthorization agreement now before us establishes or augments some notable checks and balances. We have responded to the concerns of librarians and booksellers by requiring high level F.B.I. approval of applications for orders requiring the production of records. And we also have required that any such applications to librarians and booksellers be reported to the Congress. The holders of other sensitive records B concerning firearm sales, tax returns, education, and medical matters B also have enhanced protection.

The Reauthorization Act also places in the law provisions for the judicial review of orders from the Foreign Intelligence Surveillance Court for the production of records. Similarly, it also places explicitly into law something that the courts have already begun to require; namely, procedures for judicial review of national security letters to businesses from the F.B.I. demanding that they produce records for investigators.

I join others in the Senate and House in wishing that some of these provisions had been written in a more balanced way. Specifically, I am concerned that some of the new judicial review procedures tilt in a one-sided manner toward the Government and may not give the individuals and businesses who may seek relief a fair opportunity to make their cases. If Congress promises citizens judicial review, it ought to deliver fully on that promise. Some of those imbalances may have to be addressed by the courts or in future legislation.

The additional time to reach a PATRIOT Act agreement also gave us the opportunity to change other objectionable provisions of the original conference report. The report had contained a requirement that the recipients of orders for the production of documents from the Foreign Intelligence Surveillance Court or by a national security letter advise the F.B.I., on its request, of the name of any attorney they contacted.

This would have been the first time, to my knowledge, that Congress had empowered the F.B.I. to demand that a citizen, who has been presented with a demand by the Government, inform the F.B.I. that he or she has spoken to an attorney and be required to give the F.B.I. the lawyer's name. I found that this intrusive provision, which we were told that the Department of Justice had insisted upon, to be inconsistent with basic American values. I am especially gratified that Senators SUNUNU, CRAIG, MURKOWSKI, and HAGEL were able to persuade the White House to strike this misguided provision.

Congress has an abiding commitment to provide our law enforcement and intelligence personnel with the tools and authorities they require to protect America. The Foreign Intelligence Surveillance Act and the PATRIOT Act are prime examples of that commitment. And it is a commitment that is not just a one time thing. Congress has returned repeatedly to these statutes to add new authorities or enhance existing ones.

In that process, any of us, as individual legislators, may not achieve all of what we want, but collectively we fulfill our oversight responsibilities by inquiring, debating, voting, and conducting oversight concerning the powerful tools that a President, whomever it may be at the time, believes that our law enforcement and intelligence officials need to protect America.

This process has not been followed, unfortunately, with respect to the NSA warrantless surveillance program inside the United States recently disclosed and acknowledged by the President. The administration continues to withhold important facts about the NSA program and, in turn, has prevented Congress from understanding the program and evaluating whether it is both legally and operationally sound. If a President refuses to deal with the Congress as a co-equal branch of Government, then the Congress cannot fulfill its responsibility on behalf of the people to ensure that the executive branch is acting under the rule of law.

For the PATRIOT Act, this is not the end of the process. We have an obligation to be vigilant in our oversight. And we will be returning to the act no later than 4 years from now when the remaining sunsets expire, in order to consider reauthorization legislation for those authorities.

During this time, the Senate Select Committee on Intelligence, of which I am vice chairman, will continue monitoring how the authorities contained in the PATRIOT Act are used to ensure that we have struck the proper balance

between empowering our counterterrorism efforts while not infringing upon the civil liberties of Americans.

Mr. KENNEDY. Mr. President, for months, we have been ready to roll up our sleeves and get back to work on the PATRIOT Act, but the White House has continued to block bipartisan efforts to improve the original bill and accept oversight of its intrusive surveillance programs. Again, and again, the administration has refused to join in serious negotiations with Republicans and Democrats on matters of national security, including the National Security Agency's warrantless wiretaps and the FBI's use of national security letters. The latest proposal offers improvements and deserves to pass; however, it is unacceptable and undemocratic that further amendments could not even be considered.

We need to implement these improvements quickly given the administration's disregard of congressional oversight. The proposed reauthorization bill requires public reports on the use of two of the most controversial provisions: section 215 and national security letters. It also requires the inspector general to audit their use, and it mandates a report on any data-mining activities by the Justice Department.

Americans deserve national security laws that protect both our security and our constitutional rights, and more changes are clearly needed. One of the most glaring omissions in the proposal is the failure to include a 4-year sunset provision on national security letters, even though it would be consistent with the new reporting and auditing requirements that will take effect.

The latest changes provide some additional protection for libraries, but these safeguards should apply to all of the means used by the Government to obtain sensitive information, including financial documents and library records. We also need a report on the Government's use of computerized searches from all Federal agencies, and we will continue to seek such a requirement as part of efforts toward other reforms.

We have not yet achieved the 9/11 Commission's goal to maintain governmental powers that enhance our national security while ensuring adequate oversight over their use. With so much at stake, the administration's refusal to work with Congress can only weaken our national security and further undermine the public's trust in their Government. So this battle will go on, and I regret we could not accomplish more in this needed legislation.

Mr. BINGAMAN. Mr. President, I rise today to speak in opposition to the PATRIOT Act conference report.

As I have stated in the past, I strongly support giving law enforcement the tools they need to aggressively fight terrorism. But I also believe that we must ensure that we adequately protect constitutional rights and properly balance civil liberties with national security concerns.

I support reauthorizing many of the expiring provisions of the PATRIOT Act, but I believe we need to make some important changes to ensure that Americans' civil liberties are protected. When the Senate debated this issue last July, I supported the bipartisan compromise, which unanimously passed the Senate, to reauthorize the expiring provisions of the PATRIOT Act. Unfortunately, many of the improvements that were made were later removed at the insistence of the White House and the House of Representatives. I cannot in good conscience support a reauthorization bill that is fundamentally flawed and lacks basic safeguards with regard to the rights of Americans.

The final compromise that was worked out, including the conference report and the bill offered by Senator SUNUNU, falls short in several respects. First, it does not address the problems with section 215, which allows the Government to obtain sensitive personal records, such as library, medical, or business records, as long as the Government submits a statement indicating that the documents are relevant to a terrorism investigation. I, along with many other Senators, have pressed to modify this standard to require that the Government show that the documents sought are actually relevant to the activities of a terrorism suspect or the activities of a person in contact with the suspect.

It is reasonable to require that if the Government is going to look at the private records of Americans that the Government demonstrate that the request for records has some actual connection to a terrorist and isn't just part of a fishing expedition. The final compromise does not include any significant improvements with regard to the standard for issuing section 215 orders.

The conference report also falls short with respect to section 215 gag orders. Under the PATRIOT Act, when a section 215 order is issued,the receipt of an order, such as a library or doctor, is automatically prohibited from disclosing that the FBI is seeking the records. In addition, under current law there is no explicit right to petition a court to modify or quash a gag order. The conference report still provides for an automatic gag order and prohibits judicial review, but specifies that a recipient of a section 215 gag order may disclose its existence to an attorney to obtain legal advice.

Although the Sununu bill the Senate passed earlier this week as part of the final compromise technically allows for judicial review of a nondisclosure order and permits a recipient to challenge the gag order before a FISA judge, this is merely an illusionary right and does not provide any meaningful review. A recipient must wait 1 year to challenge the gag order and the judge may overturn the order only if there is no reason to believe the disclosure will endanger national security. However, because the Attorney General may certify that the disclosure may endanger national security and a judge must treat this certification as conclusive unless the Government is found to be acting in bad faith, it would be almost impossible to ever successfully challenge a gag order.

I also have significant concerns with respect to national security letters, or NSLs. National security letters are essentially formal requests made by Federal intelligence investigators to communication providers, financial institutions, and credit bureaus to provide certain consumer information relating to a national security investigation. The issuance of an NSL does not require any judicial oversight. The laws explicitly permitting NSLs were meant to prevent financial institutions from being held liable for disclosing private financial information in contravention of Federal privacy laws. NSLs do not require any court approval, and since 9/11 the Government has increasingly relied on them to obtain information as part of terrorism investigations. Like recipients of section 215 orders, NSL recipients are subject to an automatic gag order. At least two Federal district courts have found that NSL gag order restrictions and the lack of judicial review amount to constitutional violations under the fourth and first amendments.

The conference report attempts to address constitutional problems regarding NSLs by authorizing judicial review of NSLs and providing the ability to challenge a nondisclosure order. However, while recipients are technically given the ability to go to court, the right is essentially meaningless. The conference report does allow an NSL recipient to challenge the validity of an NSL in a district court, but it also stipulates that all of the Government's submissions are secret and cannot be shared with the person challenging the order. In addition, although the gag order can be challenged in court after 1 year, like section 215 challenges, the only way to prevail is to demonstrate that the Government is acting in bad faith because the Government's certification that disclosure would harm national security is conclusive.

The final compromise included in the Sununu bill does not address the significant problems with the NSL process, but rather makes some minor improvements with regard to NSLs. Under the compromise, it would remove the requirement that a person inform the FBI of the identity of an attorney providing advice to a NSL receipt. The compromise also clarifies that libraries are not subject to NSLs. Libraries, however, would remain subject to section 215. I believe the compromise fails to provide meaningful judicial review of NSL orders.

Finally, I also believe we missed an important opportunity to address the so called sneak-and-peek provision, which allows the Government to search

homes without notifying individuals of the search for an extended period of time after the search.

Many of my colleagues have come to the Senate floor and stated that they share the same concerns that I do with regard to the shortcomings of this current compromise. Senator SUNUNU, who has been instrumental in negotiating this compromise with the White House, and Senator SPECTER, the chairman of the Senate Judiciary Committee, have indicated their intention to push legislation aimed at modifying the PATRIOT Act in a manner consistent with the bipartisan bill that the Senate unanimously passed in July.

Although I support these efforts, and I intend to support legislation that would make these modifications, I am under no illusion that the Senate will take up any of these bills in the near future. Having just finished debate on the PATRIOT Act, I do not believe that Congress would have much of an appetite to take up this issue again. We had our opportunity, and, unfortunately, we missed it.

The changes that I would like to see made have the support of the majority of Senators—indeed, they were included in the bill that unanimously passed the Senate. However, because the majority leader knew that these sensible changes would garner wide support, he used procedural maneuvers to prevent any Senator from offering an amendment to fix the bill. Had these amendments been adopted, which I think it is fairly clear they would have, I would have voted for the conference report without hesitation.

While I recognize that this bill will make some slight improvements with respect to the PATRIOT Act, we have missed a critical opportunity to address the primary issues that have concerned the American public. As I have discussed, the Government can still access the library records and medical records of Americans without having to show that the documents sought have some connection to a suspected terrorist or the activities of a terrorist. The conference report simply failed to address the core shortcomings of some of the provisions in the PATRIOT Act.

I supported the improvements in the Sununu bill, but the analogy I would use is this: If you need to fix the broken windows on your house and the repairman comes along and paints your house instead—has your house been improved? I would say yes, but your windows are still broken. It is time for Congress to address the primary problems with the PATRIOT Act, and it is my hope that we can eventually enact commonsense reforms that enable the Government to fight terrorism in a manner consistent with our Nation's historic commitment to upholding basic civil liberties. I truly believe that the American people expect more of Congress with regard to the approach we have taken in ensuring our national security while at the same time protecting the liberties of Americans.

Mr. SALAZAR. Mr. President, I discuss the pending reauthorization of the USA PATRIOT Act.

We are near the end of what has been a very long process. For the past year, Congress has grappled with the need to renew a handful of provisions of the PATRIOT Act. As my colleagues know well, this legislation has embodied the debate over how to balance the needs of law enforcement in the war on terrorism and the paramount importance of protecting Americans' civil liberties.

The greatest Americans have always understood our shared responsibility as citizens of this great country to ensure that we get this balance right. And many times over the course of the debate about the PATRIOT Act, I have thought of Benjamin Franklin's words, ''They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.'' I have thought about how Daniel Webster reminded us that ''God grants liberty only to those who love it, and are always ready to guard and defend it.'' I believe that it is worth taking pains to be sure that we produce the very best balance, and the very best legislation, we can.

Last week, several Senators with whom I have worked closely over the past year announced that they had reached an agreement with the White House on a proposal to renew these controversial provisions.

Let me say at the outset that I do not believe this agreement is by any means perfect. My colleagues who were involved in negotiating this compromise would be the first to agree with me on that point.

But it does contain a number of critical improvements over the original law. Our ultimate goal was to place reasonable checks on the law enforcement powers provided by the original PATRIOT Act. Although it is not as strong in some areas as I would prefer, the legislation today accomplishes that goal.

This proposal would produce a PATRIOT Act that includes a number of specific improvements over the law that was passed 4 years ago.

Section 215 of the original PATRIOT Act allowed the government to obtain business, library, and a whole host of other personal records simply by claiming the records were related to a terrorism investigation. The current proposal provides greater protection for the most sensitive records, by requiring senior level FBI-approval for orders related to library, book, education, gun, medical or tax records, and by limiting the retention and dissemination of information regarding Americans.

The original law did not provide for judicial review of Section 215 orders, National Security Letters, or for the accompanying gag orders. The current proposal does.

The original law did not allow the recipient of a Section 215 order or a National Security Letter to consult with an attorney. The current proposal does.

The original law allowed delayed notification of property searches—so-called ''sneak-and-peek'' searches—for undefined ''reasonable'' periods. The current proposal establishes hard limits on those delays, while continuing to allow extensions when they are warranted.

The original law allowed the government to target libraries with National Security Letters. The legislation exempts libraries from NSLs unless they meet the statutory definition of an Electronic Communications Service Provider.

The original law allowed the use of ''John Doe'' roving wiretaps, which don't specify the target or the phone or computer. The current proposal imposes limits on the use of such wiretaps.

Finally, the current proposal once again sunsets the Act's most controversial provisions—Section 215 and roving wiretaps—in 4 years, increases public reporting requirements about the use of the powers authorized by the Act, and requires the Inspector General in the Department of Justice to audit the use of Section 215 and National Security Letters.

These safeguards are not simply cosmetic; they make meaningful improvements to the original law, and will go a long way toward protecting Americans' rights and freedoms.

In spite of these safeguards, the proposal before us is not perfect. I would have preferred a stronger standard for obtaining a search order under Section 215. I would have preferred that the expanded authority to issue National Security Letters be sunset. But we will have the opportunity to review these provisions—both with the sunsets contained in this legislation and its increased reporting and auditing requirements. I am committed to taking advantage of those provisions to fight for strong and appropriate civil liberties safeguards, and I know my colleagues are, too.

I joined with colleagues on both sides of the aisle to push for the very best PATRIOT Act we could realistically get. We have come to the point where the very best achievable version of the PATRIOT act is the one before us.

I thank Senators CRAIG, DURBIN, SUNUNU, FEINGOLD, and MURKOWSKI—my fellow SAFE Act cosponsors—for all of their hard work over the past several years on this critical issue. Without their efforts, we would not have the civil liberties protections contained in this proposal. I express my sincere gratitude for allowing me to become involved in these efforts.

The vote on this agreement by no means marks the end of this process. Whether or not we differ on the legislation before us, I know we will continue to work together to provide law enforcement with the tools they need to fight terrorists, and to protect and preserve Americans' basic rights and freedoms.

That has been, and will continue to be, a fight that demands our most vigorous efforts.

Mr. AKAKA. Mr. President, I oppose the conference report for H.R. 3199, the USA PATRIOT Improvement and Reauthorization Act of 2005. This bill does not protect the cherished civil liberties and freedoms of the American people.

I voted for the PATRIOT Act in 2001. I believed then, as I do now, that we must give our Government the tools it needs to fight, detect, and deter terrorist acts. While I had reservations about the PATRIOT Act and the possibility that it would allow the Government to infringe upon our privacy rights and civil liberties, I supported the bill since the more controversial provisions were not made permanent. Granting the Government this time-limited authority allowed Congress an opportunity to review how these broad new grants of power were being used.

Unfortunately, the administration has been less than forthcoming in disclosing how the PATRIOT Act has been used. According to the reports we have received, the Government has used the PATRIOT Act to:

investigate and prosecute crimes that are not terrorism offenses;

investigate individuals without having any cause to believe the person is involved in terrorist activities; and

coerce Internet Service Providers, ISP, to turn over information about email activity and web surfing while preventing the ISP from disclosing this abuse to the public. This information is disturbing and may be indicative of other abuses that the Justice Department has not told us about.

Given these abuses, meaningful checks and balances on the Government's authority to investigate Americans are essential. Last July the Senate agreed by unanimous consent to reauthorize the PATRIOT Act with substantially stronger protections in place. However, the Republican-controlled House of Representatives objected to the Senate bill and tried to pass a conference report lacking the protections that the Senate insisted upon. Last month, a compromise bill was introduced, S. 2271, the USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006.

I voted for S. 2271 because it is an improvement over the PATRIOT Act. Any improvement is good. However, S. 2271 does not go far enough to correct the flaws in the PATRIOT Act and convince me that the changes made to the underlying bill will preserve our civil liberties. S. 2271 will make explicit the right to counsel and the right to challenge in court an order from the Federal Bureau of Investigation, FBI, to turn over records sought in an intelligence investigation, called section 215 orders, but it does not correct the underlying standard for issuing these orders. As such, the FBI, after going before the Foreign Intelligence Surveillance Act, FISA, Court, can demand a wide array of personal information—including medical, financial, library, and bookstore and gun purchase records—about an individual without any cause to believe the person is involved in terrorist activities. S. 2271 does provide an express right to challenge the gag order that accompanies a Section 215 order, but only after waiting a year. However, if the Government certifies that the disclosure would harm national security, the gag order cannot be lifted.

S. 2271 would also remove the conference report's language requiring recipients of National Security Letters, NSLs, to inform the FBI of the name of any attorney they consult about the demand for financial or Internet records. NSLs can be issued without FISA Court review. Again the bill still does not require that there be any connection between the records sought by the FBI and a suspected foreign terrorist or person in contact with such a target. This is especially troubling since news reports show that 30,000 NSLs are issued by the Government per year, a hundred-fold annual increase since the PATRIOT Act relaxed requirements on the FBI's use of the power.

In 2003, the State legislature in my home State of Hawaii passed a resolution reaffirming its commitment to civil liberties and called the entire Hawaii congressional delegation to repeal any sections of the PATRIOT Act that limit or violate fundamental rights and liberties protected by the Constitution of the United States. In good conscience I cannot vote to support the PATRIOT Act because I believe that it allows the Government to infringe upon the rights and protections we hold most dear.

I do not believe that the PATRIOT Act makes our Nation safer. It makes our country weaker by eroding the very freedoms that define us. As Thomas Jefferson said, ''The man who would choose security over freedom deserves neither.'' I am afraid that by passing this legislation today we will in fact have neither a more secure nation nor the freedoms for which we are fighting.

Mrs. BOXER. Mr. President, I voted for the conference report because on balance I believe it is necessary legislation to give our law enforcement officials the tools they need to protect the American people from terrorist attacks. Before the Patriot Act, various law enforcement agencies did not have the ability to share information and work together, and this was a vulnerability that needed to be fixed after 9/11.

But this was a difficult decision. The bill had flaws, and two in particular concern me the most the so-called ''sneak and peek'' and library search provisions. Given my concerns about these provisions, I voted for every opportunity to make further improvements to the bill.

But ultimately I believe that by voting for the conference report I will be in a stronger position to help improve the Patriot Act in the future, working with Judiciary Committee Chairman SPECTER, Ranking Member LEAHY and Senators FEINGOLD and SUNUNU.

I also wanted to show my support for Senator DIANNE FEINSTEIN's anti-meth-amphetamine bill, which was included in the conference report. Meth has become a terrible scourge across our country and Senator FEINSTEIN's bill will go a long way to combat the spread of the drug by restricting access to the ingredients used to make meth.

Mr. DURBIN. Mr. President, I am pleased that this conference agreement includes important provisions which will provide critical new tools and resources to help combat methamphetamine—one of the deadliest, most powerfully addictive, and rapidly spreading drug threats facing our country. Fighting meth requires a comprehensive approach designed to assist States, local law enforcement and prosecutors to crack down on cooks and traffickers of meth while bolstering community education and awareness and expanding treatment options for those addicted to this dangerous drug. As a cosponsor of the underlying Combat Meth Act that was incorporated in this conference agreement, I believe our action today is long overdue.

In my home State of Illinois, the meth scourge, especially in rural areas, is egregious. Like many States, Illinois faces the daunting challenge of trying to stay one step ahead of those who will go to any length to procure the ingredients to make their drugs.

Just a year ago, a law took effect in Illinois which required placing adult-strength cold tablets containing ephedrine or as their only active ingredient behind store counters. The law also limited to two packages per transaction the purchase of adult-strength cold tablets containing ephedrine or pseudoephedrine as the sole active ingredient and tablets with ephedrine or pseudoephedrine in combination with other active ingredients. Additionally, the law required education and training for retail sales personnel. At that time, the Illinois law was among the toughest in the Nation and the strongest law among our border States.

However, after that date, several States passed laws more restrictive than the Illinois law, and reports from law enforcement authorities indicated that meth makers from Missouri, Iowa, Kentucky and nearby States were coming to Illinois to purchase products. Incidents such as these led to enactment in November 2005 of the Methamphetamine Precursor Control Act to impose stricter controls on the display and sale of cold and sinus products containing meth's key ingredient pseudoephedrine. The Attorney General of Illinois, Lisa Madigan, has instituted and operates an aggressive anti-meth program in partnership with law enforcement agencies and multi-country drug task forces.

The facts and figures about the devastating impact of meth in Illinois underscore why our actions today to advance tough new provisions and funding authorization are so vital.

The number of meth labs seized by law enforcement authorities in Illinois grew from 24 labs in 1997, to 403 labs in 2000, to 1,099 labs in 2003. Illinois State Police reported 962 lab seizures in 2004 and nearly 1000 meth labs in 2005, more than double the number uncovered in 2000. Since 1997, the quantity of methamphetamines seized annually by the ISP has increased over tenfold.

The number of methamphetamine submissions to the Illinois State Police crime laboratories increased from 628 in 1998 to 3,250 in 2003—more than a five-fold increase. The number of counties submitting meth also increased during that period, from 73 in 1998 to 96 in 2003. In 2004, Byrne grants helped Illinois cops make almost 1,267 meth-related arrests and seize approximately 348,923 grams of methamphetamines. Local police departments depend on Byrne grant funding to participate in meth task forces which tackle the meth problem by coordinating the enforcement and interdiction efforts of local agencies within regional areas. In fact, over 65 percent of Illinois's Byrne funding in 2004 went to local law enforcement agencies.

The Southern Illinois Enforcement Group pays almost half of its agents with funding from Byrne grants. In 2004, this regional task force was responsible for more than 27 percent of the State's meth lab seizures. In a recent success of Byrne grant funding, Glen Carbon Police coordinated with the Illinois State Police Meth Task Force to discover the largest lab in the village's history. In this incident, local authorities raided a meth lab that proved to be capable of producing up to 6,000 grams of finished methamphetamine. Given examples such as this, it is baffling that this administration seeks to eliminate these critical funds in its budget proposal.

Methamphetamine is the only drug for which rural areas in Illinois have higher rates of drug seizures and treatment admissions than urban areas. Meth use, and the number of people behind bars for possessing, making or selling it, has grown rapidly over the past decade in Illinois. Just 5 years ago, 79 inmates entered State prisons on meth offenses. Last year, that number was 541. In fiscal year 2003, rural counties accounted for the vast majority, 79 percent, of persons sentenced to prison for meth-related offenses. The number of treatment admissions relating to methamphetamine abuse in Illinois jumped from 97 in 1994 to 3,582 in 2003.

Another disturbing implication is the effect on families. In 2004, more than half of the children entering foster care in some areas of rural southeastern Illinois were forced into the program because their caretakers were meth abusers. Officials expect to encounter even more children in homes where meth labs exist in coming years.

When specific regions were examined, findings indicate that rural counties have experienced the greatest impact of methamphetamine. Rural counties have been greatly impacted by the presence and growth of methamphetamine, and are responsible for driving the escalating levels of methamphetamine arrests, drug seizures and submissions, clandestine lab seizures, methamphetamine commitments to Illinois Department of Corrections and methamphetamine treatment admissions.

Illinois Criminal Justice Information Authority statistics show that in 2003, the per capita occurrence of clandestine meth labs in rural counties was over 1700 percent greater than it is in non-rural areas. The per capita presence of meth in rural areas in over 500 percent greater than it is in non-rural areas; more than 73 percent of meth labs found in the State of Illinois were found in rural counties. Of 366 felony arrests in Edgar County, IL, 145 were for methamphetamine.

But urban areas are not immune to the meth crisis. The perception that meth labs are a rural issue ended when a major meth lab was discovered in a Chicago apartment building last September. The challenge we face is overwhelming and our actions today signal a commitment to support a concerted effort to tackle this urgent criminal justice and public health and safety challenge.

I commend the tireless and tenacious leadership of Senators TALENT and FEINSTEIN who have labored long and hard to secure passage of a strong Combat Meth Act. I look forward to working with them to ensure that full funding is provided to implement these new tools and provide the needed resources to localities grappling with this drug crisis.

Mr. LEVIN. Mr President, when the PATRIOT Act reauthorization bill left the Senate last July, we had a bill with provisions that protected both our security and our liberty. What came back to the Senate from the House-Senate conference committee was a bill that raised significant concerns for Senators from both sides of the aisle. As a result, the Senate did not vote to end debate in December, as Senators wanted more time to address those concerns.

The PATRIOT Act conference report which is before us leaves major problems unaddressed. Among the conference report's flaws: Section 215 of the PATRIOT Act permits the Government to seek court orders, to compel the production of any tangible thing, including library, medical and business records, in foreign intelligence investigations, including records of people who are totally innocent even of any allegation of impropriety. The conference report omits language in the Senate-passed bill establishing a reasonable standard for the FBI to obtain these sensitive records with Section 215 orders. And to make matters worse, the conference report permits the FBI to include gag orders that preclude the recipient from telling anyone they even received the order. The conference report does not even permit recipients to challenge those gag orders in court. Also, the conference report requires recipients section 215 orders to tell the FBI, if asked, from whom they have sought legal advice.

Since December, there have been a number of efforts to improve the conference report. Unfortunately, those have met with limited success. The Sununu bill, if it passes the House of Representatives, would make only minimal improvements to the conference report that the Senate considered last December.

The Sununu bill, if it passes the House, would eliminate the requirement that recipients of 215 court orders tell the FBI, if asked, whom they consulted for legal advice. This would be a worthwhile, if minor, improvement. The Sununu bill also provides people the right to challenge gag orders attached to so-called section 215 court orders. But the benefit of that is offset by the fact that the bill severely constrains the court's discretion to modify or set aside those gag orders.

Some argue the conference report is an improvement over the original PATRIOT Act. The bill before us does indeed correct some of the flaws in the original PATRIOT Act. For example, the PATRIOT Act did not require that a roving wiretap order identify a specific target—raising concerns that it could authorize so-called John Doe roving wiretaps. I am pleased that the conference accepted language that I proposed to correct that flaw.

However, too many flaws remain, the most serious of which is the standard of review section 215 court orders.

As I said earlier, section 215 of the PATRIOT Act permits the Government to seek court orders, to compel the production of any tangible thing, including library, medical and business records, in foreign intelligence investigations. No problem there. However, under section 215, the Government need not describe, much less identify, a particular person to whom the records relate, even in general terms, as linked to a terrorist groups or organization. I believe that we ought to apply the same logic to section 215 orders that the conference report applies to roving wiretaps. We ought to require that records sought with section 215 orders have some connection to an alleged terrorist or terrorist organization. Unfortunately, the standard in the conference report does not include that. It fails to narrow the scope of records that the Government can subpoena under section 215 to less than the entire universe of records of people who, for instance, patronize a library or visit a doctor's office. Instead, fishing expeditions are authorized, which could result in invasions of the privacy of large numbers of innocent Americans.

Let's assume the FBI has information that a person, whose identity is not known to the FBI, is using computers at New York public libraries to view certain Web sites.

The FBI only knows that the person has knowledge of the particular Web sites. The person is not suspected of wrongdoing himself. The FBI wants to find out the person's identity as part of a foreign intelligence investigation into those Web sites. The agency believes that they might be able to identify the person if they could review all the computer user records held by public libraries in New York.

The conference report would presumably permit the FBI to obtain a court order compelling the New York Public library to provide the records of all their patrons. That is truly a fishing expedition. The conference report would also allow the FBI to prohibit the library from telling patrons that their names had been handed over to the FBI. While the Sununu bill permits the library to challenge that prohibition in court, it does not permit meaningful court review because, under its terms, if the Attorney General or another specified senior official certifies that disclosure may endanger national security or harm diplomatic relations, the court must find bad faith on the part of the Government in making such certification for the court to modify or set aside the nondisclosure requirement. This virtually eliminates the court's discretion.

Another example. Assume the FBI has information that a person, whose identity is not known to the agency, is sending money to charitable organizations overseas. They know from a credible source that the person is being treated for HIV at a particular AIDS clinic in New York that has 10,000 patients. The FBI wants to find out the person's identity as part of a foreign intelligence investigation into links between unspecified overseas charities and terrorist organizations. The agency believes that they might be able to identify the person if they could review the AIDS clinic's 10,000 patient files.

The conference report would permit the FBI to obtain a court order compelling the AIDS clinic to provide the files of all of its patients. The conference report would allow the FBI to prohibit the AIDS clinic from telling its patients that their names had been handed over to the FBI. While the Sununu bill permits the clinic to challenge that prohibition in court, as I discussed earlier, it does not permit meaningful court review because the Attorney General's unilateral certification would have to be found by the court to have been made in bad faith for the gag order to be lifted.

It is argued in response to the fishing expedition argument that the Government must set forth ''facts'' supporting a section 215 application. But that requirement doesn't fix the fishing expedition flaw. I just set forth facts, in two hypotheticals. If those hypothetical facts would not support a broad search of the library or clinic's records, the supporters should say what language in the conference report would preclude a search.

When this bill left the Senate, it contained protections against fishing expeditions. The Senate bill required a showing that the records sought were not only relevant to an investigation but also either pertained to a foreign power or an agent of a foreign power, which term includes terrorist organizations, or were relevant to the activities of a suspected agent of a foreign power who is the subject of an authorized investigation or pertained to an individual in contact with or known to be a suspected agent. In other words, the order had to be linked to some suspected individual or foreign power. Those important protections are omitted in the bill before us.

Some kind of narrowing language needs to be included in the PATRIOT Act for section 215 orders, just as it was when this bill left the Senate. Without that language and that linkage, the PATRIOT Act authorizes the rankest kind of fishing expedition.

The conference report is also flawed in its treatment of national security letters, or NSLs. NSLs compel phone companies and banks, for example, to turn over certain customer records. The Government can issue an NSL without going to court. And, like section 215 court orders, the Government does not have to show any connection between the records sought and an individual who the Government thinks is a terrorist. And like section 215 orders, the Government can impose a gag order on the recipient of an NSL. Also, in the case of NSLs, the conference report does not permit meaningful judicial review of those gag orders.

Also troubling about the NSL authority is that there is no requirement that the Government destroy records acquired with an NSL that turn out to be irrelevant to the investigation under which they have been gathered. These are records that relate to innocent Americans, and the Government should be required to destroy them if they contain no relevant material.

It is argued that while these protections were in the bill that left the Senate, they are not in current law. That is true. But the reason we put sunset provisions in the law is so we could more reliably make changes if experience indicated the need for change. We understandably acted quickly after 9/11 to fill some holes in our laws that needed to be filled. We added sunset provisions so we could review the law we wrote with the benefit of greater thought, in an atmosphere more conducive to protecting our liberties than understandably was the situation immediately after a horrific, wrenching, deadly attack.

Finally, I must comment on a tactic used in this debate which runs against the very grain of the Senate. The majority leader used a procedural tactic to prevent any Senator from offering any amendment during consideration of the Sununu bill, amendments which could have addressed some of the flaws I just described. That tactic of stifling consideration of any amendment is contrary to the normal procedures of the Senate and reflects poorly on what is sometimes billed as the greatest deliberative body in the world. The rules of the Senate were written with the intent of allowing the consideration of amendments. In this instance, the rules were misused to block any effort to offer amendments. I voted against ending debate on the Sununu bill and against proceeding to debate on the PATRIOT Act conference report because no amendments were allowed to be considered.

This conference report still falls short of what the American people expect Congress to achieve in defending their rights while we are advancing their security. As a result, although I support many of its provisions, I must oppose it.

Mr. KYL. Mr. President, I rise today to comment on the USA PATRIOT Improvement and Reauthorization Act conference report. I support the conference report and, in particular, the conference report's amendments to section 215, the FISA business records provision, because those amendments confirm that investigators may use section 215 to obtain records and other tangible items that are relevant to any authorized national security investigation other than a threat assessment. The conference report appropriately balances privacy concerns and national security needs by amending the method by which investigators can obtain relevant records but not changing or otherwise limiting the scope of records that can be obtained through a section 215 order. For example, where appropriate, investigators may still obtain sensitive records such as library or bookstore, medical, or tax return records, but they must obtain very high-level sign-off internally before asking the court to order those records' production. Similarly, the conference report imposes an obligation on the Attorney General to develop minimization guidelines for the retention and dissemination of U.S. person information obtained through a section 215 order, but leaves the Department with flexibility in obtaining the information in the first instance and in structuring those minimization procedures.

My support for the conference report turns on my understanding that it codifies our intent not to limit the scope of items and records that can be obtained through section 215. This stands in contrast to the so-called ''three-part test'' that passed the Senate last year, which really did run the risk of limiting our investigators' ability to obtain records relevant to authorized national security investigations. The conference report is clear: we are continuing to provide our investigators with the tools they need. Along with two of my fellow conferees, Senators ROBERTS and SESSIONS, I sent a letter to Chairman SPECTER on the eve of the conference vigorously objecting to the Senate's proposed three-

part test. As the three of us expressed in that letter, we believed that requiring use of the three-part test to show relevance would have been a serious mistake. I am pleased to see that the final conference report does not mandate the use of that test. I will have that letter added to the RECORD following my remarks.

I support the conference report, including its amendments to section 206 of the USA PATRIOT Act, which authorizes ''roving'' wiretap orders under FISA because I believe that the amendments to section 206 do not hamper investigators' ability to use this critical tool. In this day and age of sophisticated terrorists and spies who are trained to thwart surveillance, allowing investigators to seek a wiretap that follows a specified target—rather than a particular cell phone—is critical. The conference report explicitly preserves this ability, while clarifying the level of detail necessary for investigators to obtain this type of wiretap. Similarly, I support the conference report's amendments to section 206 because they recognize that there may be some situations where it will not be practicable for investigators to return to court within 10 days of directing surveillance at a new phone or place. The conference report wisely affords the FISA Court judges discretion to extend the period of time investigators will have to keep the court apprised of how roving wiretaps are being used.

I support the conference report, and I support the amendments set out in S. 2271, because I think they set out the proper standard for judicial review of nondisclosure orders accompanying section 215 FISA business records orders and national security letters. We all recognize the need for secrecy in national security investigations—both to avoid tipping off targets in a particular case, and to avoid giving our enemies a better picture of how we conduct our investigations. Our enemies are sophisticated and devote enormous time and energy to understanding how we operate, all in service of allowing their agents to evade our investigations. The conference report recognizes the need for secrecy when the Government obtains a section 215 order from a court or serves an NSL on a business. But it also responds to concerns raised that recipients should have an explicit right to judicial review of nondisclosure orders.

The standard in the conference report is the appropriate one, both constitutionally and practically, as it recognizes that sensitive national security and diplomatic relations judgments are particularly within the Executive's expertise. The Constitution has vested these determinations with the Executive, and courts have long recognized that judges are ill-suited to be second-guessing the Executive's national security and diplomatic affairs judgments. Disclosures that seem innocuous to a judge who quite naturally must view those disclosures without being fully aware of the many other data points known to our enemies—may nonetheless be quite damaging. The conference report's standard is therefore the correct one. It will be the exceedingly rare case in which a judge will find, contrary to a certification by an executive branch official, that there is no reason to believe that the nondisclosure order should remain in place. It will be even rarer for a judge to find that one of the Senate-confirmed officials designated in the conference report has acted in bad faith.

I could not have supported the conference report or the explicit judicial review of nondisclosure orders if I thought that they would give judges the power to second-guess the informed national security and diplomatic relations judgments of our high-level executive branch officials. The conference report makes clear that judges will not have such discretion, which is why I am voting for this report.

Another provision in particular that I support is the new public reporting obligations for the FBI's use of national security letters. That reporting will allow Congress to better perform our oversight obligations without endangering national security. The reporting requirement is focused on what is the most relevant number to Congress and the public—the aggregate number of different U.S., persons about whom information is requested. The reporting requirement does not require the FBI to break down the aggregate numbers in its report by the different authorities that allowed the national security letters, which is critical to preventing our enemies from gaining too much information about the way we investigate threats to the national security. And the reporting obligation is limited to information about U.S. persons. I support this limited public reporting because I think it will provide valuable information for our public debate—but without revealing too much information about the FBI's use of this valuable tool and thus compromising its use.

I ask unanimous consent that the November 3 letter to Chairman SPECTER be printed in the RECORD.

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

U.S. SENATE,
Washington, DC, November 3, 2005.

Hon. ARLEN SPECTER,
Chairman, Committee on the Judiciary, Hart Senate Office Building, Washington, DC.

DEAR CHAIRMAN SPECTER: We are writing to express our concern about legislative language that we understand that you are considering adding to section 215 of the USA Patriot Act, the business-records provision of the Foreign Intelligence Surveillance Act. We have learned that you have discussed with Chairman Sensenbrenner the possibility of adopting in the final bill a modified version of the three-part test for ''relevance'' that was added to the Senate bill when it was marked up in the Judiciary Committee.

We believe that adding the three-part test to the final bill would be a serious mistake. We are deeply troubled by the complications that this language might cause for future anti-terrorism investigations. Given the continuing grave nature of the terrorist threat to the United States, and the complete absence of any verified abuses under the Patriot Act since it was enacted, we believe that congress should be strengthening, not diluting, the investigative powers given to United States intelligence agents. We would have great difficulty supporting a conference report that adds the three-part test to section 215.

As you know, §215 of the Patriot Act allows the FBI to seek an order from the FISA court for ''the production of tangible things (including books, records, papers, documents, and other items) for an investigation to obtain foreign intelligence information.'' FISA defines ''foreign intelligence'' as information relating to foreign espionage, foreign sabotage, or international terrorism, or information respecting a foreign power that relates to U.S. national security or foreign policy.

Section 215 is basically a form of subpoena authority, albeit one whose use requires preapproval by a judge. As then-Deputy Attorney General Comey noted, ''orders for records under [§215] are more closely scrutinized and more difficult to obtain than ordinary grand jury subpoenas, which can require production of the very same records, but without judicial approval.'' Similarly, the Washington Post has noted in an editorial regarding §215 that similar authority ''existed prior to the Patriot Act; the law extends it to national security investigations, which isn't unreasonable.''

Some critics of the Patriot Act have noted that it currently does not require a finding that a §215 order be relevant to a foreign-intelligence investigation. The Justice Department has conceded in litigation that a subpoena must be relevant to a legitimate investigation, and both the Senate and House bills add an explicit relevance requirement to the Patriot Act.

The final Senate bill goes further, however. The night before the committee mark up of the bill, a set of additional changes to the bill was proposed in order to address continuing Justice Department concerns and to appease the Democrats, who had filed in excess of 80 amendments to the bill. This final managers' amendment included, among other things, a three-part test for determining whether a §215 subpoena is, in fact, relevant to a foreign-intelligence investigation.

We appreciate the need to move this bill expeditiously and to avoid an extended debate over amendments in the Judiciary Committee. It had been our understanding, however, that the last-minute changes that were made to the bill in order to speed legislative progress would be re-evaluated in conference. And we believe that the three-part test that was added to §215 is unsound.

The three-part test, as we understand its latest iteration, would require the FBI to show, before a §215 subpoena may issue, that there are reasonable grounds to believe that the records that are sought either pertain to, are relevant to the activities of, or pertain to an individual in contact with or known to a suspected agent of a foreign power.

We have several questions about the language of the three-part test. To begin with the first part, what does it mean for information to ''pertain'' to a foreign power or its agent? How is this standard different from the traditional relevance test? Obviously, all foreign-intelligence information in some way relates to a foreign power—FISA expressly defines ''foreign intelligence'' in terms of foreign powers and their activities. Does all information that is relevant to a foreign-intelligence investigation therefore also ''pertain'' to a foreign power? If it does, what is

the purpose of the three-part test? And if the two standards are not co-extensive, what investigations are blocked by the three-part test, and are these investigations something that we want to block?

Similarly, what is the scope of the ''activities'' of a suspected agent of a foreign power? Does it include activities in which one suspects that a foreign agent might generally be involved, without regard to a specific subset of dates, times, and locations? Also, has the FBI ever subpoenaed records in the course of an intelligence investigation that did not relate to the activities of a suspected foreign agent, but which nevertheless were relevant to a foreign-intelligence investigation? Also, are there likely scenarios that would meet the relevance test but that do not relate to the activities of a foreign power? If so, we should inform ourselves about these past cases and scenarios, and ask whether we would want to preclude an FBI investigation in those circumstances.

Finally, what does it mean for a person to be ''in contact with'' or ''known to'' a suspected foreign agent? Does ''contact'' require a showing of communication between the two, or mere association? If association is sufficient, must it be recurring? And if a single instance of association is sufficient, how long must that association last? Also, what is the purpose of the language requiring that the ultimate target of the subpoena be ''known to'' an agent of a foreign power? This language appears to preclude a subpoena if the FBI can show only that the foreign agent is known to the target, but not that the target is known to the foreign agent. Is this distinction intentional? Also, this part appears to bar investigations of targets who are seeking to make contact with a foreign power but have not yet consummated that contact. Do we want to bar the use of §215 in such circumstances?

Although we would hope that the three-part test would be construed broadly by the FISA court, we would expect that court to conclude that the test significantly retracts the permissible scope of FISA subpoenas. First, the court inevitably would assume that congress added the three-part test to the statute because it perceived a need to restrict the use §215. Further, the canon of statutory of construction that each part of a statute should be interpreted so that it has independent meaning also recommends a narrow interpretation of the three-part test. If each part of the three-part test is to have independent meaning, it must restrict investigations to a greater extent than does the relevance test. It thus seems to us inevitable that if we adopt the three-part test, that test will bar some significant subset of investigations that otherwise would be permitted by current law and the relevance test.

Just as important as the substantive limits created by the three-part test, however, are the bureaucratic burdens that it certainly will entail. One of the consistent lessons taught by all of the investigations of the failures that led the 9/11 attacks is that seemingly small or technical barriers can make a critical difference to the success of a terrorism investigation.

In two separate instances that we now know of, federal investigators were in close pursuit of 9/11 conspirators prior to the attacks and might have been able to uncover or even disrupt the plot. In each instance, however, these investigations were seriously—perhaps critically—undermined by bureaucratic barriers that few would have thought significant before 9/11. Several weeks before the attacks, federal agents in Minneapolis had arrested Zacarias Moussaoui and sought a FISA warrant to search his belongings, which we now know included the names of two 9/11 hijackers and a high-level organizer of the attacks who later was captured in Pakistan. The FBI was unable to obtain that warrant, however, because at the time FISA required that the target of the warrant be an agent of a foreign power—apparent lone-wolf terrorists such as Moussaoui, even when believed to be involved in international terrorism, could not be the target of a FISA warrant. Similarly, two weeks before the 9/11 attacks, federal agents learned that Khalid Al-Midhar, one of the eventual suicide pilots, was in the United States. Based on his past Al Qaeda associations, these agents understood that Al-Midhar was dangerous and they immediately initiated a search for him. These intelligence agents were barred from seeking assistance from the FBI's Criminal Division, however, because of the legal wall that at that time barred cooperation between intelligence and criminal investigators.

We understand that you and Chairman Sensenbrenner are considering adopting the three-part test as a permissive presumption, and that you would also allow the issuance of §215 orders that meet the relevance test but not the three-part test so long as those orders are subject to minimization procedures. Though such a system apparently would eventually allow any relevant investigation to go forward, its ultimate effect would be to greatly complicate the process of obtaining a §215 order. Current law simply requires a showing of relevance to an intelligence investigation. The proposed system, in addition to its alternative procedures and presumptions, introduces a host of legal issues discussed earlier. These issues not only will generate litigation, but will also produce considerable legal and operational aversion to the use of §215.

We think that it is inevitable that in some cases, agents will be dissuaded from or delayed in seeking a §215 subpoena by the burdens created by this proposed system. The risk may appear insignificant that these additional burdens would fatally undermine a critical anti-terrorism investigation. But again, the legal and technical barriers that seriously undercut the pre–9/11 Moussaoui and Al-Midhar investigations also must have seemed minor at that time. When agents are investigating a particular suspect, they typically will have no way of knowing if he is a lead to discovering a major terrorist conspiracy. Even the Moussaoui and Al-Midhar investigators could not have known the importance of their efforts. Thus even when a bureaucratic barrier can be overcome, it is easy to envision how it might cause investigators to abandon pursuit of one target in favor of competing targets, or to give that target a lower priority.

We appreciate that §215 has become controversial in the debate over the Patriot Act—that it is one of the few provisions specifically attacked by so-called civil liberties groups and in newspaper editorials. We understand the appeal of doing something that would appease these parties. Nevertheless, we believe that higher priorities must be given precedence in this case. Absent real evidence of abuse, we should not legislate on the basis of hypothetical scenarios. Our national-security investigators abide by the rules governing their conduct. We should provide them with all of the tools to do their jobs that are constitutionally available—especially when those tools already are available to agents conducting ordinary criminal investigations.

Few things would cause us greater regret than if another major terrorist attack were to occur on United States soil, and we were later to discover that procedural roadblocks that we had adopted in this conference report substantially impeded an investigation that might have prevented that attack. Again, we strongly urge you to oppose adding the proposed three-part test to §215 of the Patriot Act, and we note that we would have great difficulty supporting a conference report that includes such a provision.

Sincerely,

JON KYL,
U.S. Senator.
PAT ROBERTS,
U.S. Senator.
JEFF SESSIONS,
U.S. Senator.

Mr. CHAMBLISS. Mr. President, once again, I want to congratulate Chairman SPECTER and Chairman ROBERTS for their extraordinary work in forging a conference report on the reauthorization of the USA PATRIOT Act. I have previously expressed disappointment that many concessions were made during this process which I believe have resulted in a bill far weaker than the original PATRIOT Act which passed overwhelmingly in response to the terrorist attacks of 9–11 and which represented long-overdue modernization of our intelligence and criminal investigative techniques. Similarly, this bill is far weaker than that agreed to after the hard work of the House-Senate conferees.

Nevertheless, our failure to pass this important extension would once again relegate America's intelligence and criminal professionals to the dark ages of investigative techniques, shackle them with outdated constraints, and prevent them from finding and stopping those who are intent on murder, terror, and the ultimate annihilation of Western civilization.

Arguments against the PATRIOT Act have been largely, if not wholly, without factual basis. They are premised upon a misperception of what protects our liberties. For the last 5 years, it has been the PATRIOT Act which has, at once, helped to keep us safe and to protect our Constitutional rights and liberties. Those liberties have not been jeopardized by expanded governmental authority, but by violent attacks against our way of life by terrorists. Those who have systematically worked to weaken this important bill, and who, even now oppose it, have, in my view, lost site of that reality, whether intentionally or not.

The PATRIOT Act represented long-overdue reforms of both our criminal and intelligence investigative laws. It modernized outmoded and antiquated law enforcement provisions and provided for commonsense law enforcement at its best. The provisions of the PATRIOT Act have been responsibly and appropriately utilized by the dedicated men and women of Federal law enforcement and the intelligence community to accomplish amazing victories in the war on terrorism.

In my earlier statement in support of the conference report on December 19, 2005, I outlined in detail case after case in which provisions of the PATRIOT Act had been utilized to identify and successfully prosecute terror-criminals and to thwart terrorist plots designed to harm Americans. I will not recount

those cases again here, but suffice it to say that the PATRIOT Act has, in very tangible ways kept us safe and free.

I therefore urge my colleagues to vote for this reauthorization, even as we work to remove the burdensome restrictions on law enforcement and intelligence professionals which have been imposed on them during this renewal process. We owe that much to them and to the future generations of the free peoples of the world. We must not shrink from that solemn obligation.

Ms. CANTWELL. Mr. President, I rise today to speak about the PATRIOT Act.

Like many of my colleagues, I am confronted with a very difficult decision. There are rarely easy answers in the Senate and today is no exception. The healthy debate we have had in this body over the last few days has been vigorous and valuable.

Today, we have a solemn obligation to protect our Nation from those who may bring terror into our homes. At the same time, we have a responsibility to respect our rights and honor our privacy. These principles are not mutually exclusive: we can and must achieve both.

This is one of the most significant pieces of legislation shaping our ability to resist and eliminate terrorist activity on our home front. Our actions today will have tremendous consequences in the lives of all Americans in months, years, and decades ahead.

I am proud that in the rush and passions surrounding this bill, I have worked with my colleagues to insist on a serious, patient, and transparent debate in the Senate as we strive to find the right balance between protecting our civil liberties and fighting terrorism.

Despite my reservations and after great deliberation, I support reauthorization today.

I believe that we must not allow the PATRIOT Act to expire. With new provisions and improved meaningful oversight secured at last, empower our national leaders and policy makers with the accountability, wisdom, and prudence to use this legislation's powers in a way that does not undermine the freedoms we seek to protect.

Under provisions of this conference report, the Federal Government must now provide public information on its use of intelligence gathering tools like national security letters and FISA warrants. What is more, this legislation provides for formal audits of these programs. We must play close attention in order to learn lessons of the past and prevent abuse in the future.

I will join my colleagues in strongly pursuing additional sunset provisions I believe should have been included in this bill, to give Congress the opportunity to reassess whether these tools are yielding the intended results in the war on terror.

We have already made some critical reforms to implement meaningful oversight. We have managed to get some of the most controversial provisions to sunset in another 4 years, despite the administration's desire to make them permanent. We have started with sunsets on the roving wiretaps and record requests from businesses and libraries. They are not enough, but they are a start.

Because of an important vote we took yesterday, we have removed America's libraries from the purview of national security letters. We're allowing recipients of records requests to challenge the gag orders on the requests and have removed disclosure requirements for the names of attorneys assisting with those challenges. We are seeing improvements on disclosure for ''sneak and peek'' warrants.

But I want to be clear, new powers must not be allowed to chip away at traditional privacy rights. We must closely watch how law enforcement uses these tools and be prepared to confront all abuses.

I believe that many provisions of the bill, particularly those sections dealing with electronic eavesdropping and computer trespass, remain seriously flawed and may infringe on civil liberties. And that is why I will continue our work to improve these protections even as we implement them.

At a time when we are making permanent broad powers for our law enforcement and intelligence communities without the full traditional safeguards of judicial review and congressional oversight my concerns have been exacerbated, truthfully, by the administration's explicit attempts to go around both the courts and the Congress with their wiretapping and secret listening posts.

So as the FBI and other agencies continue to expand and evolve, so will their powers. We will continue to ask who should be watching the watchers in oversight.

There is clearly more work to be done—Chairman ARLEN SPECTER and Ranking Member PAT LEAHY have worked together and are introducing legislation that addresses many of my outstanding concerns. I will be on that bill—we have made meaningful reforms.

I also want to thank Senator FEINGOLD for his continued dogged support for reform of this bill. I want him to know that I stand with him in the battle to gain further reforms.

Also included in this conference report is some good news for port security. Sadly, there is not the funding that we have repeatedly asked for from this administration—but at least new criminal penalties for smuggling goods through ports. There are tools to help crackdown further on money laundering overseas by terrorist organizations.

Finally, I am very pleased that the conference report includes essential and long overdue resources to combat our Nation's surging methamphetamine epidemic.

Meth, as a problem in our communities, will not simply disappear on its own. We must make it a top priority and work to end it together. That's why I had introduced similar legislation to address meth use, manufacture, and sale, and create a law regulating the commercially available products used to make meth, such as pseudoephedrine.

And that's why I am so glad to see the Combat Meth Act included in today's legislation. I was proud to cosponsor this legislation when Senators TALENT and FEINSTEIN introduced it, and I am pleased that it will be signed into law, providing comprehensive reforms and critical resources. The legislation enforces strict regulations and keeps records so that meth producers can't get their hands on those key ingredients. When a similar type of law was enacted in Oklahoma, it reduced meth lab busts in the state by 80 percent.

This legislation also provides valuable resources to State and local governments for law enforcement officials investigating and shutting down labs, investigating violent meth-related crimes, educating the public, and caring for children affected by the drug's scourge. The bill also confronts international meth trafficking new reporting and certification procedures.

My State, Washington, is sixth in the country in meth production. In 2004, 1337 meth lab sites were discovered in Washington State. That same year, 220 fatalities were linked to the drug. And we are first in the country, when it comes to the number of children found on raided sites. It is clear this is neither a small problem not an isolated one.

But these aren't just numbers. They are parents and children, individual people with terrible stories of struggle and addiction. Acting here and now, to fight this epidemic, we can provide the resources to and protect our Nation's families and communities.

The events of September 11 have changed our country and its people forever. We were attacked on our own soil. Thousands have died; thousands were injured. Very simply, we must do all that we can to stop terrorism by finding and ending terrorist activities here and abroad. Our challenge is to do this without compromising the values that make Americans so unique. They are the same values that have allowed our Nation to become great: respect for personal autonomy and the rights of the individual; and tolerance of all regardless of race or religion.

They are the values that have always guided our Nation's leaders. It was Benjamin Franklin who said essentially:

> Make sure we have our liberties. Make sure we protect the people from ourselves. Those who would give up their essential liberties for security deserve neither and get neither.

We must defend both.

We must maintain and take full advantage of meaningful oversight to ensure power is never abused. While I will

vote for this bill, I will also continue to work to improve this bill. I will continue to be vigilant and urge those working defend and secure our Nation to use these powers wisely and with great deliberation.

Mr. KYL. Mr. President, I rise today to comment on section 507 of the USA PATRIOT Improvement and Reauthorization Act conference report. This section originates in a bill that I introduced earlier in this year, S. 1088, the Streamlined Procedures Act. Section 507 is based on subsections (b) through (e) of section 9 of S. 1088. My Arizona colleague, Representative FLAKE, took an interest in this matter and sought to offer this provision as an amendment to a court security and police-officer protection bill last November. Mr. FLAKE's version of the provision is printed in House Report 109–279; it made a number of improvements to the original version in section 9 of my bill. Section 507 of the present conference report reflects most of Mr. FLAKE's improvements, such as the simplification of the chapter 154 qualification standard, which obviates the need for separate standards for those States that make direct and collateral review into separate vehicles and those States with unitary procedures, and Mr. FLAKE's enhanced retroactivity provisions.

Mr. FLAKE already has commented on section 507 in an extension of remarks, at 151 CONG. REC. E2639–40, December 22, 2005. I will not repeat what he said there and will simply associate myself with his remarks. Instead, I would like to focus today on why section 507 is necessary.

Section 507 expands and improves the special expedited habeas-corpus procedures authorized in chapter 154 of the U.S. Code. These procedures are available to States that establish a system for providing legal representation to capital defendants on State habeas review. Chapter 154 sets strict time limits on Federal court action, bars consideration of claims that were not adjudicated in State court, and sharply curtails amendments to petitions. The benefits that chapter 154 offers to States that opt in to its standards are substantial. Currently, however, the court that decides whether a State is eligible for chapter 154 is the same court that would be subject to its time limits. Unsurprisingly, these courts have proven resistant to chapter 154. Section 507 places the eligibility decision in the hands of a neutral party—the U.S. Attorney General, with review of his decision in the U.S. Court of Appeals for the District of Columbia Circuit, which does not hear habeas petitions. Section 507 also makes chapter 154's deadlines more practical by extending the time for a district court to review and rule on a chapter 154 petition from 6 months to 15 months.

As I mentioned earlier, section 507 of the present conference report is based on section 9 of the Streamlined Procedures Act. The SPA and habeas reform have been the subject of multiple hearings in both the House and Senate during this Congress. In answers to written questions following their testimony at a July 13 hearing before the Senate Judiciary Committee, Arizona prosecutors John Todd and Kent Cattani provided detailed evidence of systematic delays in Federal habeas corpus review of State capital cases. Among the information that they provided was a comprehensive study undertaken by the Arizona Attorney General's Office of all capital cases in the State. This study examined the appeals of all prisoners currently on Arizona's death row—over 100 prisoners. Mr. Todd summarized the findings in his answers to written questions:

> [S]tatistical information based on Arizona's current capital cases in Federal court, and anecdotal information derived from Arizona's current and former capital cases substantiate the significant problem of delay and lack of finality for victims. The AEDPA has not solved this problem.
>
> There are 76 Arizona capital cases pending in Federal court. This represents over two thirds of Arizona's pending capital cases. Although some cases were filed within the last few months, over half of the cases have been pending in Federal court five years or more. Of those, thirteen cases have been pending for seven years. Ten cases have been pending for eight years. Five cases have been pending for more than fifteen years.
>
> The AEDPA was a major step in making Federal habeas review more reliable and speedy. However, the Supreme Court's reversals of the Ninth Circuit exemplify the unwillingness of some court cultures to obey this Congress' directives if there is any ambiguity in the law.

Mr. Todd also gave a summary of the extreme delays experienced by the State of Arizona on Federal habeas review:

> Only one of the 63 [Arizona death-penalty] cases filed under the AEDPA has moved from the Federal District Court to the Ninth Circuit. That case has been in the Ninth Circuit for over 5 years. Twenty-eight of Arizona's capital cases have been pending in District Court for between six and eight years.
>
> [One Arizona death penalty case] has been on Federal habeas review for over 19 years. Two of those cases have been on Federal habeas review for over 18 years, one for over 16 years, another for over 14 years, still another for over 12 years. These cases alone establish a pattern of unreasonable delay. The [Arizona Attorney General's] report shows that these cases are not simply strange aberrations in an otherwise smooth functioning system of habeas review.

Mr. Todd concluded: ''there is a serious problem of delay and lack of finality currently in Federal habeas review of state-court judgments, even after Congress' enactment of the AEDPA almost a decade ago. . . . Based on the attached review of the Arizona capital cases since enactment of the AEDPA, delay has not been eliminated or even reduced, rather it has been prolonged.''

Similarly, in his answers to written questions, Kent Cattani, the Chief Counsel of the Capital Litigation Section of the Arizona Attorney General's Office, reviewed the Arizona Attorney General's study of Arizona capital cases and concluded as follows: ''Federal habeas reform is necessary. After 9 years under the Anti-Terrorism and Effective Death Penalty Act of 1996 (''AEDPA''), it is clear that the Act did not eliminate or even reduce the problem of delay in the Federal habeas process.''

Interestingly, although the Judicial Conference of the United States has uniformly opposed all Federal habeas reform—it even objected in writing to SPA Section 8(a)'s requirement that circuit courts decide habeas cases within 300 days after briefing is completed—in its September 26, 2005 letter to Chairman SPECTER regarding the SPA, the Conference itself provides substantial evidence of a growing backlog and delays in resolution of capital habeas petitions. The September 26 letter notes the following facts: From 1998 to 2002, the number of State capital habeas cases pending in the Federal district courts increased from 446 to 721. During the same period, the percentage of State capital habeas cases pending in the Federal district courts for more than 3 years rose from 20.2 percent to 46.2 percent; in the Federal courts of appeals, the number of pending State capital habeas cases rose from 185 to 284; and the median time from filing of a notice of appeal to disposition for State capital habeas cases increased from 10 months to 15 months.

It is noteworthy that all of these increases in backlog and delay have taken place after the enactment of the AEDPA in 1996—a law that some critics of habeas reform assert has solved all of the problems with Federal habeas.

At the most recent hearing on the Streamlined Procedures Act, before the Senate Judiciary Committee on November 16, Ron Eisenberg, Deputy District Attorney for Philadelphia, summarized the problems and delays with Federal habeas review that he encounters in the course of his work. He stated:

> I have served as a prosecutor for 24 years. I am the supervisor of the Law Division of the Philadelphia District Attorney's Office, a group of 60 lawyers. Many of those lawyers handle regular appeals in the Pennsylvania appellate courts. But more and more of our attorneys must devote themselves full time to Federal habeas corpus litigation. In the last decade, the number of lawyers employed exclusively on habeas work has increased 400%. Despite the limits supposedly imposed by law, the only certain limit on the Federal habeas process as it is currently administered is the expiration of the defendant's sentence.
>
> But that leaves ample opportunity and motivation for litigation, because the cases that reach Federal habeas review involve the most dangerous criminals, who receive the most serious sentences—not just death penalties, but non-capital murders, rape, violent robberies and burglaries, brutal beatings, and shootings.
>
> Too often, discussion of the proper scope of Federal habeas corpus review is really just a debate about the value of the death penalty, and the justness of imprisonment and punishment generally. To be sure, many Federal courts seem flatly unwilling to affirm capital sentences. In Pennsylvania, for example, almost every single contested death sentence litigated on habeas—over 20 cases in the last

decade—has been thrown out by Federal judges; only one has been upheld.

But the primary problem is one of process, not results. The truth is that, whether or not they end up reversing a conviction, Federal habeas courts drag out litigation for years of utterly unjustifiable delay, creating exorbitant costs for the state and endless pain for the victims.

This data and testimony confirm what many capital litigators and judges have told me is, in their view, an obvious and uncontestable fact: the problems with Federal habeas corpus are systematic, they are severe, and they and are growing worse. Yet even this information does not really tell us why this problem matters—why ordinary people, rather than just civil servants and judges, should be concerned about the functioning of the Federal habeas system. For that information, it is necessary to look at the impact of the current habeas system on the surviving victims of violent crimes. The current system and the delays that it engenders, particularly in capital cases, often are grossly cruel to these individuals. The perpetual litigation of Federal habeas cases denies the surviving family of a murder victim closure—it forces them to continually relive the crime, rather than be able to put the terrible events behind them.

Two parents of murder victims testified at hearings in this Congress about how they have been treated by the Federal habeas system. Their testimony makes a compelling case that this system is broken and in need of reform. And it highlights why we should all be concerned. What these individuals and their families—people who had already suffered so much—have experienced at the hands of the Federal courts should offend every American.

The first witness to testify was Carol Fornoff, who addressed the House Judiciary Committee's Crime Subcommittee on June 7 of last year. Mrs. Fornoff's 13-year-old daughter, Christy Ann, was murdered in 1984. Almost every Arizonan who lived in the State at the time knows the name Christy Ann Fornoff. Christy's murder was an event that shattered people's sense of security, that made them afraid to let their children play outside or go out of their sight. I remember the case vividly. And I was stunned when I learned last year that the man who killed Christy, although sentenced to death by the State of Arizona, still is litigating his conviction and sentence in Federal court. His Federal proceedings began in 1992—14 years ago. Just think about how long ago 1992 is. President Bush's father was the President at the time. Bill Clinton was the Governor of Arkansas. Saddam Hussein's invasion of Kuwait is closer in time to that date than the U.S. invasion of Iraq is to today. And yet the case of Christy's killer remains in Federal court.

Mrs. Fornoff made a powerful case for why we should find this unacceptable. She described the suffering of her family, how this decades-long litigation has denied them closure. I do not think that anyone who heard Mrs. Fornoff's testimony would assert that there are no problems with the present system. Allow me to quote the main portion of Mrs. Fornoff's statement to the House Crime Subcommittee:

My husband Roger and I are here today to tell you about our daughter, Christy Ann Fornoff. Christy was our youngest daughter. She was a loving child, very gentle. She often seemed to make friends with the kids at school who weren't so popular. She was very dear to us.

In 1984, our family was living in Tempe, Arizona, and Christy was 13 years old. Christy and her brother Jason both held jobs as newscarriers for the Phoenix Gazette, a local newspaper. Roger and I believed that jobs like this would teach our children responsibility, while also helping them earn a little money.

After dinner on Wednesday evening, May 9, 1984, both Christy and Jason had been invited to go jumping on trampolines. Jason went, but Christy had just had a cast removed from her ankle. Instead, she went to collect on newspaper subscriptions at an apartment complex near our house.

Christy delivered papers at this complex every day, it was just two short blocks from our house. Nevertheless, it was getting dusk, so I went with Christy; she rode her brother's bike while I walked alongside with our little dog.

At the first apartment that Christy visited, I was stopped by a neighbor who wanted to talk about our cute dog. Christy went on to the next apartment alone, and I followed a few minutes later. When I got there, the bike was outside, but there was no Christy. I started calling her name, but there was no answer. Our dog started to get nervous. After a few minutes, I ran home, and came back with my daughter's boyfriend. I asked the people at the apartment that Christy had gone to if they had seen her, and they said yes, ten minutes ago, and that she had left. I knew that Christy wouldn't just leave her brother's bike there.

I ran home again. My husband had just arrived at home and I told him that Christy was missing. He immediately called the police, and then he went to the apartment complex and began knocking on doors. Outside of one apartment, people standing nearby told us don't bother knocking on that door, that is the maintenance man, and he is looking for Christy. Shortly after, the maintenance man joined Roger in the search for Christy.

That night, police helicopters with searchlights examined every corner of our neighborhood. Our son drove up and down every alley in the area on his motorcycle. Christy's newspaper-collections book was found over a fence near the apartment complex. But no one found Christy.

Two days later, a policeman knocked at our door. Christy's body had been discovered wrapped in a sheet, lying behind a trash dumpster in the apartment complex. We were absolutely devasted. We had been hoping against hope, and couldn't believe that our beautiful daughter was dead.

Christy's body was taken to a morgue so that an autopsy could be performed. On Sunday, which was Mother's day, we were finally able to view Christy's body at the funeral home. Mother's Day has never been the same for me since.

Ten days after Christy's body was found, the maintenance man at the apartment complex—the same man who supposedly had been looking for her the night that she disappeared—was arrested for her murder. Christy had been sexually assaulted and suffocated. There was blood, semen, and hair on Christy's body that was consistent with that of the maintenance man. Vomit on Christy's face matched vomit in the maintenance man's closet. Fibers on Christy's body matched the carpet and a blanket in the maintenance man's apartment. And police found Christy's hair inside of the apartment. We knew who had killed our daughter.

In 1985, the maintenance man was convicted of Christy's murder and sentenced to death. The conviction was upheld in a lengthy opinion by the Arizona Supreme Court. The killer raised many more challenges, but his last state appeals were finally rejected in 1992. By that time, we already felt like the case had been going on a long time—it had been seven years. We couldn't imagine that the killer would have any more challenges to argue.

But in 1992, the killer filed another challenge to his conviction in the United States District Court. That challenge then remained in that one court for another 7 years! Finally, in November of 1999, the district court dismissed the case. But then a few years later, the Federal Court of Appeals for the Ninth Circuit sent the case back to the district court for more hearings. Today, the case remains before that same Federal district court.

It has now been over 21 years since Christy was murdered. By this fall, the case will have been in the Federal courts for longer than Christy was ever alive.

I cannot describe to you how painful our experience with the court system has been. I cannot believe that just one court took over 7 years to decide our case.

Some might ask why we can't just move on, and forget about the killer's appeals. But it doesn't work that way. She was our daughter, our beautiful little girl, and he took her away. We want to know if he was properly convicted. We want to know, will his conviction be thrown out? Will there be another trial? I cannot imagine testifying at a trial again. And would they even be able to convict this man again? It has been 21 years. How many witnesses are still here, is all of the evidence even still available? Could this man one day be released? Could I run into him on the street, a free man—the man who assaulted and killed our little daughter? The courts have turned this case into an open wound for our family—a wound that has not been allowed to heal for 21 years.

I understand that the Federal government has the right to create such a system. It can let the Federal courts hear any challenge to a state conviction, at any time, with no limits. My question to you, Mr. Chairman, is why would we want such a system? Why would we want a system that forces someone like me to relive my daughter's murder, again and again and again? My daughter's killer already litigated all of the challenges to his case in the state courts. Why should we let him bring all of the same legal claims again, for another round of lawsuits, in the Federal courts? Why should this killer get a second chance? My daughter never had a second chance.

I understand that people are concerned about innocent people being behind bars, but that is not what my daughter's killer is suing about. Right now, the issue that is being litigated in the Federal courts is whether the trial court made a mistake by allowing the jury to hear that he told a prison counselor that he ''didn't mean to kill the little Fornoff girl.'' He claims that the counselor was like his doctor, and that the statement is private, even though he said it in front of other prisoners. Earlier this year, a Federal court held a hearing on whether the killer had a right to prevent the jury from hearing about this statement. But the statement is irrelevant. Whether or not he said it, the evidence of his guilt—the hairs, the fibers, the bodily fluids—is overwhelming. The

issue that the killer is suing about was already resolved before by the Arizona Supreme Court—over 17 years ago. Yet here we are, 21 years after my daughter died, arguing about the same legal technicalities.

People might say that it is worth the cost to let the killer sue over every issue like this again and again. I don't think that it is worth the cost. When you and your colleagues are writing laws, Mr. Chairman, please think about people like me. Please think about the fact that every time that there is another appeal, another ruling, another hearing, I am forced to think about my daughter's death. Every time, I am forced to wonder, if only Christy hadn't had the cast on her ankle—if only she could have gone on the trampoline that evening, she would still be alive today. Every time that I hear a helicopter, I am terrified—I think of the police helicopters searching for Christy on the night that she disappeared. Every time that I hear a motorcycle, I think of my son, searching for Christy. Every time that the courts reopen this case, I am forced to wonder, why didn't I follow Christy to that second apartment—why did I let that neighbor stop me to talk? Every time, I am forced to think about how scared my little girl must have been when she died.

I urge you, Mr. Chairman, to do what you can to fix this system. My family and I have forgiven our daughter's murderer. But we cannot forgive a justice system that would treat us this way.

Another witness who testified before Congress last year on the need for Federal habeas reform is Mary Ann Hughes of Chino Hills, CA. Mrs. Hughes's son Christopher, then 11 years old, was murdered in 1983. As in the Fornoff case, the killer was captured, convicted, and sentenced to death—and is still litigating his case in Federal court today. Mrs. Hughes testified before the House Judiciary Committee's Crime Subcommittee on November 10, 2005. This is what she said:

Christopher was a beautiful little boy. He had just completed the fifth grade at a local Catholic school. His classmates later planted a tree in his memory at the school. Chris swam on the swim team and dreamed of swimming for the University of Southern California and being in the Olympics. He loved his younger brother, and in typical brotherly fashion would tease him one minute and be his best friend the next. Chris' younger brother is now 28-years-old. He has missed Chris every day since he was murdered. Our younger son was not yet born when Chris was murdered. I was pregnant during part of Cooper's trial with our third son. When he was born we gave him the middle name Christopher after the brother he never knew. Both boys have only in the last few years been able to face what happened to their brother. As the years have passed, we are reminded that Chris never got to finish grammar school, go to a prom, marry, have children of his own, or pursue his dreams.

On Saturday, June 4, 1983, Chris asked me for permission to spend the night at the home of his friend, Josh Ryen. We lived in what was then a very rural neighborhood. Josh was the only boy nearby who was really close to Chris' age and so they formed a bond. We were good friends with Josh's parents, Doug and Peggy Ryen. The Ryens lived just up the road from our home with their 10-year-old daughter Jessica and eight-year-old Josh. The last time I saw Chris alive he and Josh were riding off on their bicycles toward Josh's house. They were excitedly waving because they were so happy I had given Chris permission to spend that night with Josh. The only thing Chris had to remember was to be home Sunday in time for church. The next time I saw Chris was in a photograph on an autopsy table during Cooper's preliminary hearing.

Unbeknownst to anyone, Cooper had been hiding in a house in Chino Hills just 126 yards from the Ryen's home. He had escaped two days earlier from a minimum security facility at a nearby prison. When Cooper was arrested for burglary in Los Angeles he used a false identity. His identity and criminal past should have caught up with him before he was wrongly assigned to the minimum security portion of the prison. The prison, however, mishandled the processing of an outstanding warrant for Cooper for escape from custody in Pennsylvania. He was being held pending trial for the kidnap and rape of a teenage girl who interrupted him while he was burglarizing a home. While staying at the hide-out house near the Ryens, Cooper had been calling former girlfriends, trying to get them to help him get out of the area. A manhunt was under way for Cooper, but the rural community surrounding the prison was never notified of the escape.

The failure of the California prison-system to protect the surrounding community from a dangerous felon marked the beginning of our family and community's being let down by our government. Within a few hours of Cooper's escape, prison officials realized who Cooper was and how dangerous he was. Nevertheless, they still failed to alert the community that he was at large. Our frustration and disappointment with our government's failings has only grown since that time as Cooper's case continues to wind its way down a seemingly endless path through our judicial system.

The morning following the murders, I remember being mad at Chris because he had not arrived home on time as promised so we could attend church. Then my anger turned to worry. I sent my husband Bill up to the Ryen home. He saw that the horses had not been fed, and that the Ryen station wagon was gone.

Uncharacteristically, the kitchen door was locked, so my husband walked around the house. He looked inside the sliding glass door of the Ryen's master bedroom. He saw blood everywhere. Peggy and Chris were lying on the ground and Josh was lying next to them, showing signs of life but unable to move. My husband could not open the sliding glass door, so he ran and kicked open the kitchen door. As he went into the master bedroom, he found 10-year-old Jessica lying on the floor in fetal position in the doorway, dead. He saw Doug and Peggy nude, bloodied, and lifeless. When he went to our son Chris, he was cold to the touch. Bill then knew that Christopher was dead.

My husband then forced himself to have enough presence of mind to get help for Josh, who miraculously survived despite having his throat slit from ear to ear. Josh, only eight years old, lay next to his dead, naked mother throughout the night, knowing from the silence and from the smell of blood that everyone else was dead. He placed his fingers into his throat, which kept him from bleeding to death during the 12 hours before my husband rescued him.

Everyone inside the home had been repeatedly struck by a hatchet and attacked with a knife. Christopher had 25 identifiable wounds made by a hatchet and a knife. Many of them were on his hands, which he must have put against his head to protect himself from Kevin Cooper's blows. Some were made after he was already dead. No one should know this kind of horror. That it happened to a child makes it even worse.

The killer had lifted Jessica's nightgown and carved on her chest after she died. The killer also helped himself to a beer from the Ryen's refrigerator. We wondered what kind of monster would attack a father, mother, and three children with a hatchet, and then go have a beer. That question has long since been answered, but 22 years later we are still waiting for justice.

The escaped prisoner who committed this crime was caught 2 months later. He admitted that he had stayed in the house next door but denied any involvement in the murders. According to the California Supreme Court, however, the evidence of defendant's guilt was ''overwhelming.'' Not only had the defendant stayed at the vacant house right next door at the time of the murders; the hatchet used in the murders was taken from the vacant house; shoe prints in the Ryen house matched those in the vacant house and were from a type of shoe issued to prisoners; bloody items, including a prison-issue button, were found in the vacant house; prison-issue tobacco was found in the Ryen station wagon, which was recovered in Long Beach; and the defendant's blood type and hair matched that found in the Ryen house. The defendant was convicted of the murders and sentenced to death in 1985, and the California Supreme Court upheld the defendant's conviction and sentence in 1991.

The defendant's Federal habeas proceedings began shortly thereafter, and they continue to this day—23 years after the murders. In 2000, the defendant asked the courts for DNA testing of a blood spot in the Ryen house, a t-shirt near the crime scene, and the tobacco found in the car. Despite the overwhelming evidence of his guilt, the courts allowed more testing. All three tests found that the blood and saliva matched the defendant, to a degree of certainty of 1 in 310 billion. Blood on the t-shirt matched both the defendant and one of the victims.

Mrs. Hughes went on to describe, in her November 10 testimony, the impact of this crime and the attenuated legal proceedings on her family:

''While I know that Cooper is the one who murdered my son, I will always bear the guilt of having given Chris permission to spend the night at the Ryen's house. I will always feel responsible for sending my husband to find the bodies of our son and the Ryen family. It is a guilt similar to the guilt that Josh feels to this day because he had begged me to let Chris spend the night. He thinks that Chris would still be alive if he had not spent the night. Of course, Cooper is responsible for all the pain and suffering that he inflicted that night and the continued pain that has followed, but it does not help stop the pain and guilt. Kevin Cooper is still here over 22 years later—still proclaiming his innocence and complaining about our judicial system.

As Josh explained when he finally got a chance to speak to the Judge about how he has been affected by Cooper's crimes: Cooper never shuts up. We continually get to hear more bogus claims and more comments from Cooper and his attorneys. Over the years I have learned to know when something has happened in Cooper's never-ending legal case: the calls from the media start up again, or, at times, the media trucks just park in

front of our house. We have no opportunity to put this behind us—to heal or to try to find peace—because everything is about Cooper. Our system is so grotesquely skewed to Cooper's benefit and seemingly incapable of letting California carry out its judgment against him.

[The] judicial system so out of balance in favor of the convicted that it literally enables them to victimize their victims and their families all over again through the Federal judicial system. We understood the rights of an accused and that Cooper's rights took precedence over ours as he stood trial. His trial was moved to another County because of the publicity surrounding the horrendous crimes. I had to drive a long distance to another County to watch the trial as it could not take place in our County. Cooper's defense attorney spent an entire year preparing to defend Cooper at trial. Everything was about Cooper's rights and none of our sensibilities or concerns could be dignified because Cooper had to have a fair trial. We understood and we waited for justice. In California, Cooper's appeal was automatic because he had received the death penalty for his crimes. The appeal took six years to conclude. We understood the need for a thorough appeal and we waited for justice.

By 1991, Cooper had received a fair trial and his appeal had been concluded. The California Supreme Court aptly observed that the evidence against Cooper, both in volume and consistency, was ''overwhelming''. Since then, we have waited and watched as the United States Supreme Court has denied Cooper's eight petitions for writ of certiorari and two petitions for writ of habeas corpus, and the California Supreme Court has denied Cooper's seven habeas corpus petitions and three motions to reopen Cooper's appeal. The Ninth Circuit affirmed the denial of Cooper's first Federal habeas petition, and denied him permission to file a successive petition in 2001, and again in 2003. But then, on Friday night, February 6, 2004, Cooper's attorneys filed an application with the Ninth Circuit requesting permission to file a successive habeas petition.

A three-judge panel of the Ninth Circuit denied Cooper's application to file a successive petition on Sunday, February 8, 2004. Cooper was scheduled to be executed at one minute after midnight on Tuesday, February 10, 2004. On Monday, February 9, 2004, my husband and I made the trip to Northern California from our home in Southern California. Relatives of the extended Ryen family flew in from all over the Country. Josh Ryen, now 30, left for dead at the age of eight, his entire immediate family murdered, drove hundreds of miles to reach the prison to witness the execution of Cooper. We all expected that finally, this case would be brought to a close.

Mrs. Hughes went on to describe, however, how on the eve of the execution, the en banc Ninth Circuit Court of Appeals sua sponte reviewed the denial of the petitioner's successive petition application and reversed the three-judge panel. The en banc decision stayed the killer's execution and permitted him to pursue a second round of Federal habeas-corpus litigation. This second round still is going on today—15 years after the California Supreme Court affirmed the conviction and sentence, and 23 years after the murders.

Section 2244(b)(3)(E) of title 28 states that ''[t]he grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.'' To us lesser lawyers, this provision might seem like it means that there shall be no en banc review of the three-judge panel's denial of the application. But the enlightened jurists of the Ninth Circuit have discovered that although subparagraph (E) bars the habeas petitioner from appealing the denial, the en banc court remains free to sua sponte grant review. Some might find it strange that Congress would have intended to bar the en banc courts of appeals from considering a case on the basis of a party's appeal and adversarial briefing, but intended to allow the same courts to hear the same case without a request for review and with no briefing. Typically, briefing is regarded as aiding a court's consideration of a case. Of course, the losing habeas petitioner typically does seek en banc review of the denial of the successive-petition application and file a brief in support of his request. I suppose that we are to trust that the en banc court of appeals does not read that brief, or that if it does so, it puts the brief out of its collective mind so that it might act ''sua sponte'' when it votes on whether to go en banc, lest its actions otherwise appear to violate subparagraph (E)'s clear command that the denial of the application is not ''appealable.''

In this case, I am prepared to believe that the judges did not read the briefs. Despite DNA evidence that linked the habeas petitioner to the murder scene to a degree of certainty of 1 in 310 billion, the en banc Ninth Circuit determined that the petitioner met section 2244's requirement that he present ''clear and convincing evidence that . . . no reasonable factfinder would have found [him] guilty of the underlying offense.'' The Ninth Circuit's theory was that the police might have planted the blood evidence. As Mrs. Hughes noted in her November 10 testimony, however:

Of course, Cooper could not explain how or why police would plant a minute amount of blood on the t-shirt only to never use it as evidence against him at trial. Moreover, this evidence had been in police custody since 1984. Apparently, these supposed rogue police officers also anticipated the development of the Nobel Prize-winning science that would enable Cooper to have the blood tested for DNA. Cooper also could not explain how the police could have planted his blood at the crime scene within a few hours of discovering the bodies, while he was still at large.

The Ninth Circuit first granted sua sponte en banc review of the denial of a successive-petition application in the case of *Thompson* v. *Calderon,* 120 F.3d 1045, 9th Cir. 1997, a decision with other procedural irregularities so glaring that the Supreme Court did not even notice this aspect of the decision when it took it up and reversed, *Calderon* v. *Thompson*, 523 U.S. 538, 1998. The Sixth Circuit subsequently copied Thompson, thus allowing the Ninth Circuit to attribute this practice to other circuits when it again applied it in the case of the killer of Mary Ann Hughes's son. Section 8(b) of the Streamlined Procedures Act would prevent the Ninth Circuit from doing this in the future. Unfortunately, I was unable to have that provision included in this conference report. I will try again in the future.

This year, it will have been 23 years since Christopher Hughes and Doug, Peggy, and Jessica Ryen were murdered. In 2004, after the Ninth Circuit authorized another round of litigation, a local newspaper described the impact of this crime and the ensuing years of appeals on the surviving family of the victims:

For nearly 20 years, since convicted murderer Kevin Cooper was sentenced to death for the 1983 slayings of a Chino Hills family and their young houseguest, families of the victims have waited silently for the day the hand of justice would grant them peace.

For those families, the last two decades have seemed like an eternity.

I lived through a nightmare,'' said Herbert Ryen, whose brother Douglas Ryen was among those killed, along with Douglas' wife Peggy, their 11-year-old daughter Jessica, and her 10-year-old friend Christopher Hughes.

[O]n the morning of Feb. 9, [2004,] the day of Cooper's scheduled death by lethal injection, word came down that the 9th U.S. Circuit Court of Appeals had decided to block the execution.

[T]o the Ryen and Hughes families, the stay just hours before Cooper's scheduled execution at San Quentin State Prison was nearly incomprehensible. The indefinite delay has left them in a sort of emotional limbo, questioning whether the legal system had abandoned them.

The bottom line is that this whole issue is not about Kevin Cooper . . . it is about the death penalty,'' said Mary Ann Hughes, the mother of Christoper Hughes. ''We're so mad—mad because we feel as though the courts turned their back on my son.''

They (Court of Appeals) are holding us hostage,'' Hughes said.

For Herbert Ryen and his wife Sue, waiting for justice has taken an equally destructive toll on their lives. The torment their family experienced following the murders, and the subsequent years lost to depression, could never be replaced, he said from his home in Arizona.

Mary Ann Hughes said the pain her family suffers is only amplified by the seemingly continuous bombardment of celebrities campaigning against Cooper's execution. She wonders who will cry out in anger for the victims.

One former television star and anti-death penalty activist, Mike Farrell of the popular series MASH, spoke of the case on a recent news program.

''He claimed that we must feel relieved since the stay of execution was granted,'' Hughes said. ''How can (Farrell) have the audacity to say he knows what we are feeling?''

Farrell could not be reached for comment.

Since Christopher's death, the Hughes family has chosen to remain out of the media spotlight. And until recently, their efforts were successful, due largely to the support of their surviving children, family members and a strong network of close friends, Hughes said.

The court's decision Feb. 9 has re-opened the case, forcing the families to re-live the nightmare they have fought so hard to leave behind, they say.

Mary Ann Hughes is left wondering about other families who have had loved ones taken from them, about the legal battles they have had to endure in their own quests for justice.

She thinks of the parents of Samantha Runion, the 5-year-old Orange County girl who was murdered in 2003, and of what her family could face in the next 20 years.

For Bill Hughes, the anguish is intensified—he will forever know the pain of walking into the Ryens' home the morning after the murders, and finding his son, dead and covered in blood near the Ryens' bedroom door. He was also the first to discover Joshua Ryen, also drenched in blood, clinging to life.

''It is a memory he will always have to live with,'' Mary Ann Hughes said.

Indeed, time has been no friend to the victims' families, as California's recent appellate court ruling has further denied them closure, she added.

''What this decision has done to our legal system in California is unthinkable,'' she said. ''Somewhere along the line, the courts have got to uphold the law, and we will wait it out until they do.'' (Sara Carter, ''Families of Murder Victims Wait for Justice in Cooper Case,'' Inland Valley Daily Bulletin, February 24, 2004.)

The impact of this litigation on Mary and Bill Hughes and Herbert and Sue Ryen alone makes the handling of this case indefensible. No one, however, has borne the weight of our system of Federal collateral review more heavily in this case than has the one surviving victim of the June 4, 1983 attack. Josh Ryen was 8 years old when he was stabbed in his parents' bedroom and his parents and sister were murdered. He had been Christopher Hughes's neighbor and best friend. As of last year, however, Mary and Bill Hughes had not seen Josh since he was airlifted by helicopter from the scene of the murders to Loma Linda University hospital. Then on April 22, 2005, Josh Ryen appeared at the latest Federal habeas corpus hearing for the man who killed his family. He is now 30 years old. Pursuant to the recently enacted Crime Victims' Rights Act, he gave a brief statement before the court. I will quote Josh Ryen's statement in its entirety:

The first time I met Kevin Cooper I was 8 years old and he slit my throat. He hit me with a hatchet and put a hole in my skull. He stabbed me twice, which broke my ribs and collapsed one lung. I lived only because I stuck four fingers in my neck to slow the bleeding, but I was too weak to move. I laid there 11 hours looking at my mother who was right beside me.

I know now he came through the sliding glass door and attacked my dad first. He was lying on the bed and was struck in the dark without warning with the hatchet and knife. He was hit many times because there is a lot of blood on the wall on his side of the bed.

My mother screamed and Cooper came around the bed and started hitting her. Somehow my dad was able to struggle between the bed and the closet but Cooper bludgeoned my father to death with the knife and hatchet, stabbing him 26 times and axing him 11. One of the blows severed his finger and it landed in the closet.

My mother tried to get away but he caught her at the bottom of the bed and he stabbed her 25 times and axed her 7.

All of us kids were drawn to the room by mom's screams. Jessica was killed in the doorway with 5 ax blows and 46 stabs. I won't say how many times my best friend Chris was stabbed and axed, not because it isn't important, but because I don't want to hurt his family in any way, and they are here.

After Cooper killed everyone, and thought he had killed me, he went over to my sister and lifted her shirt and drew things on her stomach with the knife. Then he walked down the hallway, opened the refrigerator, and had a beer. I guess killing so many people can make a man thirsty.

I don't want to be here. I came because I owe it to my family, who can't speak for themselves. But by coming I am acknowledging and validating the existence of Kevin Cooper, who should have been blotted from the face of the earth a long time ago. By coming here it shows that he still controls me. I will be free, my life will start, the day Kevin Cooper dies. I want to be rid of him, but he won't go away.

I've been trying to get away from him since I was 8 years and I can't escape. He haunts me and follows me. For over 20 years all I've heard is Kevin Cooper this and Kevin Cooper that. Kevin Cooper says he is innocent, Kevin Cooper says he was framed, Kevin Cooper says DNA will clear him, Kevin Cooper says blood was planted, Kevin Cooper says the tennis shoes aren't his, Kevin Cooper says three guys did it, Kevin Cooper says police planted evidence, Kevin Cooper gets another stay from another court and sends everyone off on another wild goose chase.

The courts say there isn't any harm when Kevin Cooper gets another stay and another hearing. This just shows they don't care about me, because every time he gets another delay I am harmed and have to relive the murders all over again. Every time Kevin Cooper opens his mouth everyone wants to know what I think, what I have to say, how I'm feeling, and the whole nightmare floods all over me again: the barbecue, me begging to let Chris spend the night, me in my bed and him on the floor beside me, my mother's screams, Chris gone, dark house, hallway, bushy hair, everything black, mom cut to pieces saturated in blood, the nauseating smell of blood, eleven hours unable to move, light filtering in, Chris' father at the window, the horror of his face, sound of the front door splintering, my pajamas being cut off, people trying to save me, the whap whap of the helicopter blades, shouted questions, everything fading to black.

Every time Cooper claims he's innocent and sends people scurrying off on another wild goose chase, I have to relive the murders all over again. It runs like a horror movie, over and over again and never stops because he never shuts up. He puts PR people on national television who say outrageous things and then the press wants to know what I think. What I think is that I would like to be rid of Kevin Cooper. I would like for him to go away. I would like to never hear from Kevin Cooper again. I would like Kevin Cooper to pay for what he did.

I dread happy times like Christmas and Thanksgiving. If I go to a friend's house on holidays I look at all the mothers and fathers and children and grandchildren and get sad because I have no one. Kevin Cooper took them from me.

I get terrified when I go into any place dark, like a house before the lights are on. I hear screams and see flashbacks and shadows. Even with lights on I see terrible things. After I was stabbed and axed I was too weak to move and stared at my mother all night. I smelled this overpowering smell of fresh blood and knew everyone had been slaughtered.

Every day when I comb my hair I feel the hole where he buried the hatchet in my head, and when I look in the mirror I see the scar where he cut my throat from ear to ear and I put four fingers in it to stop the bleeding which, they say, saved my life. Every year I lose hearing in my left ear where he buried the knife.

Helicopters give me flashbacks of life flight and my Incredible Hulks being cut off by paramedics. Bushy hair reminds me of the killer. Silence reminds me of the quiet before the screams. Cooper is everywhere. There is no escape from him.

I feel very guilty and responsible to the Hughes family because I begged them to let Chris spend the night. If I hadn't done that he wouldn't have died. I apologize to them and especially to Mr. Hughes for having to find us and see his son cut and stabbed to death.

I thank the judge who gave my grandma custody of me because she took good care of me and loves me very much.

I'm grateful to the ocean for giving me peace because when I go there I know my mother and father and sister's ashes are sprinkled there.

Kevin Cooper has movie stars and Jesse Jackson holding rallies for him, people carrying signs, lighting candles, saying prayers. To them and you I say:

I was 8 when he slit my throat,
It was dark and I couldn't see.
Through the night and day I laid there, trying to get up and flee.
He killed my mother, father, sister, friend,
And started stalking me.
I try to run and flee from him but cannot get away,
While he demands petitions and claims, some fresh absurdity.
Justice has no ear for me nor cares about my plight, while crowds pray for the killer and light candles in the night.
To those who long for justice and love truth which sets men free, When you pray your prayers tonight, please remember me.

Even those who oppose capital punishment—who would like to see it abolished—should not support a system that treats the victims of violent crimes in this way. Creating a fair, efficient, and expeditious system of Federal habeas review should be a bipartisan cause. Indeed, it was President Clinton who noted after the enactment of the 1996 AEDPA reforms that ''it should not take eight or nine years and three trips to the Supreme Court to finalize whether a person in fact was properly convicted or not.''

I believe that section 507 of the PATRIOT Reauthorization Act, by extending the benefits of chapter 154 to States that provide counsel to capital defendants on postconviction review, will help to achieve that goal. In *Murray* v. *Giarratano*, 492 U.S. 1, 1989, the Supreme Court held that States are not constitutionally required to provide counsel in State postconviction proceedings, even in capital cases. In AEDPA, Congress added chapter 154 to title 28 of the United States Code, offering the States an incentive to provide qualified counsel in such proceedings. Among the incentives was an expedited process, with time limits on both the district courts and the courts of appeals.

AEDPA left the decision of whether a State qualified for the incentive to the same courts that were impacted by the time limits. This has proved to be a mistake. Chapter 154 has received an extremely cramped interpretation, denying the benefits of qualification to States that do provide qualified counsel and eliminating the incentive for other States to provide counsel. In

Ashmus v. *Woodford*, 202 F.3d 1160, 2000, the Ninth Circuit held that California did not qualify because its competency standards were in the State's Standards of Judicial Administration rather than its Rules of Court, a hypertechnical reading of the statute. In *Spears* v. *Stewart*, 283 F.3d 992, 1018, 2001, the Ninth Circuit held that even though Arizona had established a qualifying system and even though the State court had appointed counsel under that system, the Federal court could still deny the State the benefit of qualification because of a delay in appointing counsel.

Section 507 of this bill abrogates both of these holdings and removes the qualification decision to a neutral forum. Under new section 2265, the Attorney General of the United States will decide if a State has established a qualifying mechanism, and that decision will be reviewed by the D.C. Circuit, the only Federal circuit that does not handle State-prisoner habeas cases and therefore is not impacted by the qualification decision. The requirements for certification are removed from section 2261(b) and placed in the new section 2265(a). The ''statute or rule of court'' language construed so severely by Ashmus is removed, allowing the States flexibility on how to establish the mechanism within the State's judicial structure. There is no longer any requirement, express or implied, that any particular organ of government establish the mechanism for appointing and paying counsel or providing standards of competency—States may act through their legislatures, their courts, through agencies such as judicial councils, or even through local governments.

Once a State is certified as having a qualifying mechanism, chapter 154 applies to all cases in which counsel was appointed pursuant to that mechanism, and to cases where counsel was not appointed because the defendant waived counsel, retained his own, or had the means to retain his own. ''Pursuant'' is intended to mean only that the State's qualifying mechanism was invoked to appoint counsel, not to empower the Federal courts to supervise the State courts' administration of their appointment systems. Paragraph (a)(3) of new section 2265 forbids creation of additional requirements not expressly stated in the chapter, as was done in the Spears case.

When section 507 was being finalized, I and others were presented with arguments that some mechanism should be created for ''decertifying'' a State that has opted in to chapter 154 but that allegedly has fallen out of compliance with its standards. I ultimately concluded that such a mechanism was unnecessary, and that it would likely impose substantial litigation burdens on the opt-in States that would outweigh any justification for the further review. The States are entitled to a presumption that once they have been certified as chapter-154 compliant, they will substantially maintain their counsel mechanisms. After all, to this day, both California and Arizona have kept up their postconviction counsel mechanisms and standards since the late 1980s and the mid–1990s, respectively, even though neither State has ever received any benefits under chapter 154. This history alone suggests that it is unnecessary to provide a mechanism for ''decertification'' of States that have opted in. Moreover, if such a means of post-opt-in review were created, it inevitably would be overused and abused. In my home State of Arizona, defense attorneys in the past have boycotted the 154 system. The Ninth Circuit later used the delays in appointing chapter 154 counsel stemming from this boycott as grounds for denying Arizona the benefits of chapter 154 in the Spears case. In light of this history, I thought it best to create a system of one-time certification, with no avenues to challenge or attempt to repeal the State's continuing chapter-154 eligibility. The consequences of opting in to chapter 154 should not be perpetual litigation over the State's continuing eligibility. Even if defense lawyers in Arizona do boycott the State's system again, the resultant delays in appointing counsel are unlikely to prejudice their clients, who typically want delay in the resolution of their cases. And the occasional case where such delay might prejudice a petitioner simply is not worth the cost of creating opportunities to force the State to continually litigate its chapter 154 eligibility. Therefore, under section 507, once a State is certified for chapter 154, that certification is final. There is no provision for ''decertification'' or ''compliance review'' after the State has been made subject to chapter 154.

The incentive for a State to try to satisfy chapter 154's counsel requirement is the array of procedural benefits that 154 provides to States defending capital convictions and sentences on Federal habeas. Section 2266 applies a series of deadlines for court action on chapter 154 applications: district courts will be required to rule on such applications 15 months after they are filed.

Allow me as an aside to describe some of the back history of this particular deadline. Current pre-conference-report law gives district courts only 180 days to rule on a 154 petition. This probably is not enough time for district courts to rule on these cases, even with the streamlining provided by the rest of chapter 154. Nor was this reality obscure to Congress in 1996. I worked on developing this provision in my first year in the Senate, in cooperation with the Arizona Attorney General's Office and then-California Attorney General Dan Lungren, among others. The bill's managers initially adopted a 180-day deadline as a bargaining position, but had always intended to extend this limit to 1 year. Unfortunately, at a certain point in the legislative process, other participants decided that they would object to making any change whatsoever to the AEDPA, even to correct scrivener's or grammatical errors—or to liberalize this deadline. Thus we ended up with 180 days. In order to avoid imposing impossible burdens on the district courts, I proposed extending this deadline to 15 months in the SPA, and this extension has been included in section 507. I likely would receive a cool reception from Chief Judge McNamee upon my next visit to the Phoenix Federal courthouse had section 507 given Arizona access to chapter 154 without at least somewhat liberalizing this particular deadline.

Other relevant deadlines imposed by section 2263 are that the court of appeals must rule on a case 120 days after briefing has been completed. That court also must rule on a petition for rehearing and suggestion for rehearing en banc within 30 days of the filing of the petition and any reply. And if the court grants rehearing or goes en banc, it must decide the case within 120 days of doing so.

These deadlines are created by chapter 154 for a reason. In too many cases, Federal courts' resolution of capital habeas petitions has been unreasonably slow. In the Fornoff case, for example, the petition remained before the Federal district court from 1992 to 1999, and that court did not even hold an evidentiary hearing in the case during that time. And this is far from the most extreme example of habeas delay. At the end of her written testimony before the House Crime Subcommittee, Mrs. Fornoff included several examples of other cases involving habeas petitioners who had murdered children and whose Federal habeas proceedings have been unconscionably delayed. All of these examples involved delays in the district courts much longer than the 7-year delay in the case of the man who killed Christy Ann Fornoff: the several cases that Mrs. Fornoff described had remained before one Federal district court for periods of 10 years, 12 years, 13 years, and in one case, for 15 years. I quote the portion of Mrs. Fornoff's testimony describing these cases:

> Benjamin Brenneman [was] 12 years old [when he was killed in] 1981. This case is surprisingly similar to my daughter's case. Benjamin also was a newspaper carrier, and also was kidnaped, sexually assaulted, and killed while delivering newspapers at an apartment complex. Benjamin's killer tied him up in a way that strangled him when he moved. Police began by questioning a man in the building who was a prior sex offender. They found Benjamin's special orthopedic sandals in his apartment. When they interviewed him, he admitted that he kidnaped Benjamin, but claimed that ''he was alive when I left him.'' Police found Benjamin's body in a nearby rural area the next day. (More information about the case is available in the court opinion for the State appeal, *People* v. *Thompson*, 785 P.2d 857.)
>
> Benjamin's killer was convicted and sentenced to death. After the State courts finished their review of the case, the killer filed a habeas corpus petition in the Federal District Court in 1990. Today, 15 years later, the

case is still before that same court. In 15 years, the district court still has not ruled on the case! To put the matter in perspective, so far, and with no end in sight, the litigation before that one district court has outlived Benjamin by three years. This is simply unconscionable.

Michelle and Melissa Davis [were] ages 7 and 2 [when they were murdered in] 1982. An ex-boyfriend of the sister of Kathy Davis took revenge on the sister for breaking off their relationship by killing Kathy's husband and her two young daughters, Michelle and Melissa. The killer confessed to the crime. The State courts finished their review of the case in 1991. (*People* v. *Deere*, 808 P.2d 1181.) The next year, the defendant went to the Federal District Court. He remained there for the rest of the decade, until 2001. When he lost there, he appealed, and in 2003, the Federal Court of Appeals for the Ninth Circuit sent the case back to the district court for another hearing. Today, 14 years after State appeals were completed, and 23 years after Michelle and Melissa were taken from their mother, the case remains before the same district court.

Vanessa Iberri [was] 12 years old [when she was killed in] 1981. Vanessa and her friend Kelly, also 12 years old, were both shot in the head while walking through a campground in 1981. Kelly survived, but Vanessa did not. The killer did not dispute that he shot the two girls. (The case is described in *People* v. *Edwards*, 819 P.2d 436.) The State courts finished their review of the case in 1991—already a long time. The killer then went to Federal court in 1993. The Federal District Court finally held an evidentiary hearing in December 2004, and dismissed the case in March of this year. Just now, 12 years after the case entered the Federal courts, and 24 years after the murders occurred, the appeal to the Federal Court of Appeals is just beginning.

Michelle Melander [was] 5 months old [when she was murdered in] 1981. Michelle, who was just a five-month-old baby, and her brother Michael, then 5 years old, were kidnaped in Parker, Arizona, in July 1981. The killer dropped off Michael along the road. Michelle's body was discovered six days later at a garbage dump several miles down the same road. She had been severely beaten and sexually mutilated. The State court opinion describes the many injuries that this helpless baby suffered. The man who committed this horrific crime later attempted to kidnap and rape a 10-year-old girl.

State courts finished their review of his case in 1991. (*People* v. *Pensinger*, 805 P.2d 899.) The case then went to Federal District Court in 1992. The defendant raised new claims that he had never argued in state court, so the Federal court sent the case back to state court. Five years later, the case returned to Federal court. Today, the case remains before the same Federal District Court where the Federal appeals began in 1992. Baby Michelle would be 24 years old now if she had lived, and there is no end in sight for her killer's appeals.

Other examples of extreme delays on Federal habeas have been provided to me by State prosecutors. Clarence Ray Allen, who was executed by the State of California earlier this year, had begun his Federal habeas proceedings in 1988—they lasted for over 17 years. Lawrence Bittaker was convicted of four murders, four kidnappings, and nine rapes by the State of California in 1981. He filed a habeas petition in the Federal district court in 1991. That petition still is pending before the same Federal district court today. Alejandro Ruiz was convicted and sentenced to death for three murders in 1980. He initiated Federal habeas proceedings in 1989. Those proceedings still are pending before the same Federal district court today.

I do not mean to single out the Federal district courts for criticism. Inexplicable delays in Federal habeas review of State convictions appear throughout the Federal system. Section 2263's deadlines for issuing court-of-appeals decisions and resolving appellate rehearing petitions also are manifestly necessary. In *Morales* v. *Woodford*, 336 F.3d 1136, 9th Cir. 2003, for example, the Ninth Circuit took 3 years to decide the case after briefing was completed. And after issuing its decision, the court took another 16 months to reject a petition for rehearing. Similarly, in *Williams* v. *Woodford*, 306 F.3d 665, 9th Cir. 2002, the court waited 25 months to decide the case after briefing was finished—and then waited another 27 months to reject a petition for rehearing, for a total delay of almost 4½ years after appellate briefing had been completed. Section 2263 would have sharply reduced these delays.

Chapter 154 also creates uniform, clear rules for addressing defaulted and unexhausted claims. It bars all review of any claim that has not been addressed on the merits when the Federal petition is filed, unless the claim meets one of three narrow exceptions. Section 2264, by not extending the chapter 153 exhaustion requirement to chapter 154, allows Federal courts to treat defaulted and unexhausted claims the same way, rather than distinguishing between them and only dismissing the former unless they meet an exception, but returning the latter to State court for further exhaustion. Chapter 154 eliminates the need to ever send a claim to State court for further exhaustion.

As those familiar with the history of chapter 154 are aware, the chapter has its origins in the 1989 Powell Committee Report. See Judicial Conference of the United States, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal, August 23, 1989. Then-Chief Justice Rehnquist had appointed former Justice Lewis Powell to chair this committee, which was charged with studying problems with Federal habeas corpus review of capital cases. The report identified a lack of finality and unnecessary delays in Federal collateral review of State capital cases, and recommended specific reforms. With a few significant changes, such as a more restrictive standard for holding evidentiary hearings and accommodation of the rule of Teague v. Lane, not to mention the changes that are about to be made by section 507, the Powell Committee Report's recommendations are what is now chapter 154. The Powell Report is thus a very useful guide to understanding chapter 154.

The Powell Committee Report explains, for example, why section 2264 eliminates the exhaustion rule and treats unexhausted claims the same way as defaulted claims. As the Report notes:

> The Committee identified serious problems with the present system of collateral review. These may be broadly characterized under the heading of unnecessary delay and repetition. The lack of coordination between the Federal and state legal systems often results in inefficient and unnecessary steps in the course of litigation. Prisoners, for example, often spend significant time moving back and forth between the Federal and state systems in the process of exhausting state remedies.

The Powell Committee Report then describes its proposed approach to unexhausted claims:

> Federal habeas proceedings under the proposal will encompass only claims that have been exhausted in state court. With the counsel provided by the statute, there should be no excuse for failure to raise claims in state court. The statute departs from current statutory exhaustion practice by allowing for immediate presentation of new claims in Federal court in extraordinary circumstances.

The Powell Committee Report further elaborates on this change to the exhaustion requirement in its comment following the presentation of the language that became section 2264:

> If a petitioner asserts a claim not previously presented to the state courts, the district court can consider the claim only if one of three exceptions to the general rule listed in [section 2264(a)] is applicable. . . .
>
> As far as new or ''unexhausted'' claims are concerned, section [2264] represents a change in the exhaustion doctrine as articulated in *Rose* v. *Lundy*, 455 U.S. 509 (1982). Section [2264] bars such claims from consideration unless one of the [subsection (a)] exceptions is applicable. The prisoner cannot return to state court to exhaust even if he would like to do so. On the other hand, if a [subsection (a)] exception is applicable, the district court is directed to conduct an evidentiary hearing [note that this aspect of the Powell Committee recommendation is superseded by section 2254(e)] and to rule on the new claim without first exhausting state remedies as Rose v. Lundy now requires. Because of the existence of state procedural default rules, exhaustion is futile in the great majority of cases. It serves the state interest of comity in theory, but in practice it results in delay and undermines the state interest in the finality of its criminal convictions. The Committee believes that the States would prefer to see post-conviction litigation go forward in capital cases, even if that entails a minor subordination of their interest in comity as it is expressed in the exhaustion doctrine.

Section 2264 implemented the Powell Committee's approach by limiting Federal habeas review under chapter 154 to ''claims that have been raised and decided on merits in the State courts,'' and, in subsection (b), by declining to extend the exhaustion principles of section 2254(b) and (c) to chapter 154. This system shifts the focus away from and eliminates the need to exhaust State remedies for every claim. Section 2264 does not require exhaustion, but, rather, adjudication on the merits in State court or satisfaction of one of subsection (a)'s exceptions. If an unexhausted or otherwise not-adjudicated-on-the-merits claim can meet

one of those subsection (a) exceptions, then it can go forward, because the exhaustion requirement does not apply. And in any event, even if a chapter 154 prisoner, for whatever reason, still wanted to exhaust State remedies for a new claim after he has filed his Federal petition, he would not be able to do so and then return to Federal court: unlike chapter 153, chapter 154 sharply curtails amendments to petitions and thus would make it all but impossible to amend the newly exhausted claim back into the Federal petition. Under chapter 153's stay-and-abey regime, ''a district court may, in its discretion, allow a petitioner to amend a mixed petition by deleting the unexhausted claims, hold the exhausted petition claims in abeyance until the unexhausted claims are exhausted, and then allow the petitioner to amend the stayed petition to add the now-exhausted claims.'' *James* v. *Pliler*, 269 F.3d 1124, 9th Cir. 2001. As the courts have explained, chapter-153 habeas petitioners are permitted to ''stay and abey'' and then come back to Federal court because chapter 153 petitions are subject to the relatively liberal amendment standards of Federal Rule of Civil Procedure 15. See *Anthony* v. *Cambra*, 263 F.3d 568, 576–578 (9th Cir. 2000). This system would not be possible under chapter 154's section 2266(b)(3)(B), however. That subparagraph would bar the post-exhaustion amendment that restores the newly exhausted claims unless the amendment could meet the exacting standards of the successive-petition bar.

Instead of staying and abeying and further exhausting, the chapter 154 petitioner will go forward: his claims in the Federal petition will have either been raised and adjudicated on the merits in State court, they will satisfy one of the section 2264(a) exceptions, or they will be dismissed, and Federal adjudication of the merits of the claims that remain before the court will commence immediately. This streamlined approach is what makes chapter 154's deadlines for district court adjudication possible. Obviously, if applicants were expected to use the stay-and-abeyance system, and proceedings were put on hold so that another round of State-court review could be completed, district courts would not be able to resolve chapter 154 petitions within 15-month limit, much less the 180 days required prior to 2006, that is imposed by section 2266.

Section 2264's abolition of stay-and-abey would have made a real difference in some of the cases that I have described. For example, in the case of the man who killed Mary Ann Hughes's son, eliminating the need to return to State court to exhaust new claims would have reduced the delay in the Federal proceedings by nearly 3 years. And in the case of Michelle Melander, the baby girl who was killed in 1981 whose case is described in Carol Fornoff's testimony, the section 2264 system would have eliminated 5 years of delay from the ongoing Federal proceedings in that case.

By requiring that chapter 154 courts only consider claims adjudicated on the merits in the State courts, and limiting the exceptions to that rule to those enumerated in section 2264(a), chapter 154 also effectively eliminates use of several other exceptions to the procedural-default doctrine that I believe have proven problematic. The chapter 153 procedural-default doctrine derives from the Supreme Court's own rules for allowing review of a State court judgment when respondent asserts the presence of an adequate and independent State bar to review of the Federal question. These exceptions are numerous, complex, and in some cases they are overly broad and simply do not provide an adequate justification for ignoring State procedural rules. It generally is not a significant burden on the States that the U.S. Supreme Court has granted itself such broad and amorphous authority to override State procedural requirements. The Supreme Court only decides a limited number of cases every year. But on Federal habeas, where every State criminal conviction effectively is subject to ''appeal of right'' in Federal court, application of the full panoply of the U.S. Supreme Court's exceptions to the adequate-and-independent State grounds rule has become burdensome and unwieldy.

One exception to the adequate-and-independent State grounds doctrine that has proved particularly problematic in the habeas context is the rule that a State procedural bar is not adequate to preclude further Federal review if the procedural requirement is ''inconsistently applied'' by the State courts. Viewed literally and without regard to the policies underlying the procedural default doctrine, the ''inconsistently applied'' standard can have a disturbingly broad sweep. This standard can be understood to void any State procedural rule that has been altered in any way or that is not strictly enforced in absolutely every case.

Unfortunately, some lower Federal courts have adopted this draconian interpretation. For example, the Ninth Circuit has held that if a State's highest court clarifies a State procedural rule or reconciles competing interpretations of that rule, then that rule was ''inconsistently applied'' prior to such clarification. As a result, the Ninth Circuit deems the State rule ''inadequate'' to be enforced on Federal habeas review prior to that point.

Another problematic area of chapter-153 procedural-default jurisprudence is particular Federal courts' interpretation of the ''independence'' requirement. A State procedural decision cannot serve as a bar to further review on the merits if it is not truly procedural—i.e., if it is in reality a decision on the merits of the Federal claim. Many State courts have incorporated into their procedural rules—particularly their deadlines for filing claims—an ''ends of justice,'' ''plain error,'' or ''manifest injustice'' exception that allows State courts to hear the occasional egregious but untimely or otherwise improper claim. Presumably, in applying such an exception, these State courts perform at least a cursory review of the merits of every petition, even those that clearly are untimely. Technically, because these State courts conduct such review, their deadlines are not purely ''procedural''—they involve some review, however fleeting, of the merits—and therefore these deadlines are not ''adequate'' for habeas purposes. The Ninth Circuit has adopted this rather extreme interpretation of the adequacy requirement.

It is difficult to understate the perverse consequences of the more extreme interpretations of the exceptions to the chapter-153 procedural default doctrine. By punishing State courts for ever departing from or even clarifying their procedural rules, or for exercising discretion to hear egregious cases, these interpretations deter State courts from making the kind of commonsense decisions that are essential to preventing a miscarriage of justice. No system of procedure will ever be perfect; every system will always require some exceptions in order to operate fairly and efficiently. Yet under some Federal courts' interpretations of procedural default, unless the State court adopts a zero-tolerance approach to all untimely claims, no matter how worthy of an exception, the State procedural rule is at risk of being voided for all Federal habeas cases.

In Arizona, litigants have seen the inevitable consequences of the Ninth Circuit's no-good-deed-goes-unpunished rule: when liberality towards criminal defendants is held against the State on Federal habeas, the State will outlaw such liberality. In his August 19, 2005, answers to written questions submitted to him by Senator LEAHY, Arizona prosecutor John Todd described the effect of the Ninth Circuit's application of an extreme ''independence'' requirement:

> as a result of Federal court rulings, the Arizona Legislature repealed the requirement that all criminal cases be reviewed by the state appellate courts for fundamental error. When an appellate court in Arizona reviewed the entire record for fundamental error, it did not matter that the defendant procedurally defaulted the issue. If the error were serious enough, even if it was only an error of state law, a defendant would receive relief in state court through this fundamental error review. Fearing that the Ninth Circuit's decision in *Beam* v. *Paskett,* 3 F.3d 1301, 1305 (9th Cir. 1993), would open Arizona criminal cases to endless litigation, the Arizona Legislature repealed Ariz. Rev. Stat. Ann. §13–4035 in 1995.

This is not a result that anyone should want. States should not be discouraged from affording broad review to a prisoner's claims in State court or exercising flexibility in their application of procedural rules. Yet in the Ninth Circuit, State executives would be ill advised to adopt any procedural rule that affords courts any discretion

or includes any plain-error type exceptions.

The Ninth Circuit has accounted for a disproportionate share of all Federal court of appeals decisions identifying exceptions to the chapter-153 procedural default doctrine, and has issued several particularly extreme interpretations of the doctrine. The States in that circuit effectively are subject to a different habeas regime. The Ninth Circuit has now voided State procedural rules in six of the States under its jurisdiction. It has found State procedures either inadequate or insufficiently independent to limit Federal review in California, Oregon, Arizona, Washington, Idaho, and Nevada.

Section 2264 eliminates these problems. Rather than incorporating the procedural-default doctrine and all of its baggage, it starts fresh; it bars all claims not raised and decided on the merits unless one of three narrow exceptions applies. It does not matter under chapter 154 that a Federal court thinks that the State's rules are not ''adequate'' or are not sufficiently ''independent,'' because the adequacy and independence of the State rule no longer are the basis for barring review of the claim in Federal court. Under chapter 154, that basis will be section 2264, which employs its own standard and exceptions. And under that section, no longer will the labyrinthine body of caselaw governing the Supreme Court's certiorari jurisdiction over cases decided on State-law grounds be applied to every State capital conviction on Federal collateral review.

Section 2264 also eliminates the overused ''ineffective assistance gateway'' that is a frequent feature of chapter 153 litigation. Under chapter 153, litigants often seek to recast claims that they know are defaulted as claims of ineffective assistance of counsel. They argue that the default should be excused because State trial or appellate counsel was ineffective. Chapter 154 does not include this exception. If a claim of ineffective assistance of trial or appellate counsel itself was raised and decided on the merits in State court, that same claim can be raised in Federal court. But otherwise, chapter 154 charges petitioners with the acts of their attorneys. The whole point of chapter 154 is to persuade States to establish mechanisms for providing defendants with qualified postconviction counsel. If a State has opted in to chapter 154, the petitioner presumptively received qualified counsel at all stages of his State proceedings, and opportunities to litigate issues of counsel competency should be scaled back. If the factual predicate of a claim could have been discovered through the exercise of due diligence, then per paragraph (3) of section 2264(a), regardless of what the attorney did or did not do, that claim does not qualify for an exception to the main rule of 2264(a) and it cannot be raised in Federal court.

It also bears mention that section 507 includes a retroactivity provision that my Arizona colleague, Congressman FLAKE, thought particularly important. New section 2265(a)(2) provides that the date that a State established the mechanism by which it qualifies for chapter 154 ''shall be the effective date of the certification under this subsection.'' This was intended to ensure that if a State established a mechanism for providing qualified counsel to capital defendants on postconviction review prior to the formal designation of a State as chapter-154 eligible—or even prior to the enactment of chapter 154—then all capital defendants who received counsel after the establishment of that mechanism shall be subject to chapter 154, even if they filed a Federal petition before the State is certified as chapter-154 eligible.

I had originally thought this provision sufficient to ensure that a State would receive the full benefits of chapter 154 even for Federal petitions filed before the State is certified as chapter-154 compliant. But questions of retroactivity often prove more complicated than they first appear. Representative FLAKE raised with me the question of whether even if a Federal petition filed precertification is deemed subject to chapter 154, Federal courts could still find that the procedural benefits of chapter 154 only apply to that case on a going-forward basis. In other words, the effective-date provision guarantees that even a prefiling petition is now governed by chapter 154, but chapter 154's procedural restrictions might be construed to not apply to what is already in that petition. For States such as Arizona, this would mean—assuming, of course, that I am correct in predicting that the U.S. Attorney General will find Arizona 154-eligible—that section 507 does not completely undo the damage done by the Spears case. It is possible, for example, that in Spears itself or in subsequent cases that should have been subject to chapter 154, additional claims have been amended into the petition that would not satisfy 2266(b)(3)(B), or unexhausted claims already may have been returned to State court for further exhaustion and the Federal petition stayed.

Given that stay-and-abey sometimes adds 5 years to the time that it takes to address a Federal petition, Mr. Flake and I decided that it should be made clear that the whole petition would be subject to chapter 154, not just new claims and amendments added after the State is certified as 154 eligible. To that end, subsection (d) was inserted into the middle of section 507 to ensure that the 154 changes—including the effective-date provision—would operate against pending cases. In effect, this provision guarantees the even for a pending case, the effective date provision applies retroactively and the case is regarded as always having been subject to chapter 154. Thus once a State is certified as 154-eligible and a particular petition falls within that chapter's sweep, the courts should review the whole petition and treat it as if chapter 154 had been applicable since before the petition was filed. Claims added via post-answer amendments should be reviewed for consistency with section 2266(b)(3)(B). If they do not qualify, they should be struck, just as they would have been if the petition had been governed by chapter 154 at the time when the amendment was filed. And most importantly, no unexhausted claim in a chapter-154 petition may be permitted to serve as a basis for ''stay and abey.'' Either that claim will satisfy one of the 2264(a) exceptions, and review of that claim and ''raised and decided'' claims in the petition will go forward immediately, or the claim will not meet the exception, it will be dismissed, and review of the rest of the proper claims in that petition will go forward immediately. In either event, review of all Federal petitions made subject to chapter 154 will go forward immediately, though the petitioner may, of course, continue to simultaneously pursue State review of the unexhausted claim, and the chapter 154 time deadlines will start running. Per paragraph (d)(2), that deadline does not run until section 507 is enacted with regard to a particular State—meaning that it does not run until the State is certified as chapter-154 eligible pursuant to section 507. Under section 507, once a petition is made subject to chapter 154, it can no longer be held in abeyance so that the petitioner can pursue State exhaustion of unexhausted claims.

Finally, I would like to thank those individuals who have been important to the enactment of section 507. This group includes Mike O'Neill and Brett Tolman of Chairman SPECTER's staff, Mike Volkov of Chairman SENSENBRENNER's staff, and Brian Clifford of Congressman FLAKE's staff. I also thank Kent Scheidegger of the Criminal Justice Legal Foundation, who came up with the idea that became section 507. Finally, I also thank Chairman SPECTER, who was willing to accommodate me on a matter of importance to prosecutors and crime victims in the State of Arizona by including section 507 in this conference report.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

Mr. FEINGOLD. Mr. President, in a few minutes, the Senate will conclude a process that began over a year ago by reauthorizing the PATRIOT Act. I will have a few closing remarks, but first I want to take this opportunity to thank the extraordinary staff who have worked on this bill for so long. These men and women, on both sides of the aisle, have worked extremely hard, and

they deserve to be recognized. Before I yield the floor, I will recognize the staff by name.

Mr. President, beginning in November, when we first saw a draft of the conference report, I have spoken at length about the substance of this bill. I hoped that when we started the task of reauthorizing the PATRIOT Act at the beginning of last year, the end product would be something the whole Senate could support. We had a real chance to pass a bill that would both reauthorize the tools to prevent terrorism and fix the provisions that threaten the rights and freedoms of innocent Americans.

This conference report, even as amended by the bill incorporating the White House deal that we passed yesterday, falls well short of that goal. And so, of course, I will vote no.

Protecting the country from terrorism while also protecting our rights is a challenge for every one of us, particularly in the current political climate, and it is a challenge we all take seriously. I know many Senators who will vote for this reauthorization bill in a few minutes would have preferred to enact the bill we actually passed, without a single objection, in the Senate in July of last year.

I appreciate that so many of my colleagues came to recognize the need to take the opportunity presented by the sunset provisions included in the original PATRIOT Act to make changes that would better protect civil liberties than did the law we enacted in haste in October 2001. Nevertheless, I am deeply disappointed we have largely wasted this opportunity to fix the obvious problems with the PATRIOT Act.

The reason I spent so much time in the past few days talking about how the public views the PATRIOT Act was to make it clear that this fight was not about one Senator arguing about the details of the law. This fight was about trying to restore the public's trust in our Government. That trust has been severely shaken as the public learned more and more about the PATRIOT Act which we passed with so little debate in 2001 and as the administration resisted congressional oversight efforts and repeatedly politicized the reauthorization process. The revelations about secret, warrantless surveillance last year only confirmed the suspicions of many in our country that the Government is, unfortunately, willing to trample the rule of law and constitutional guarantees in the fight against terrorism.

The truth is, the negative reaction to the PATRIOT Act has been overwhelming. Over 400 State and local government bodies passed resolutions pleading with Congress to change the law. Citizens have signed petitions, library associations and campus groups have organized to petition the Congress to act. Numerous editorials have been written urging Congress not to reauthorize the law without adequate protections for civil liberties.

These things occurred because Americans across the country recognize that the PATRIOT Act includes provisions that pose a threat to their privacy and to their liberty. These are values—values—that are at the very core of what this country represents and of who we are as a people.

In 2001, we were viciously attacked by terrorists who care nothing for American freedoms and American values. We, as a people, came together to fight back, and we are prepared to make great sacrifices to defeat those who would destroy us. But what we will not do, and what we cannot do, is destroy our own freedoms in the process.

Without freedom, we are not America. If we do not preserve our liberties, we cannot win this war, no matter how many terrorists we capture or kill. That is why the several Senators who have said, at one time or another during this debate, things such as, ''Civil liberties do not mean much when you are dead,'' are wrong about America at the most basic level. It seems they do not understand what America is all about. Theirs is a vision that the Founders of this Nation, who risked everything for freedom, would categorically reject, and so do the American people.

Americans want to defeat terrorism, and they want the basic character of this country to survive and prosper. They want to empower the Government to protect the Nation from terrorists, and they want protections against Government overreaching and Government overreacting. They know it might not be easy, but they expect the Congress to figure out how to do it. They do not want defeatism—defeatism—on either score. They want both security and liberty. And unless we give them both—and we can, if we try—then we have failed.

This fight is not over. The vote today will not assuage the deep and legitimate concerns the public has about the PATRIOT Act. I am convinced that in the end the Government will respond to the people, as it should. We will defeat the terrorists, and we will preserve the freedom and liberty that make this the greatest country on the face of the Earth.

It has been a particular privilege to work for so long and so closely with the bipartisan group that developed the SAFE Act. Each Senator is supported by dedicated and talented staff, and let me mention a few of them now. For Senator SUNUNU, Dave Cuzzi. Joe Zogby for Senator DURBIN; Brooke Roberts and Lisa McGrath for Senator CRAIG; Sam Mitchell with Senator SALAZAR; and Isaac Edwards with Senator MURKOWSKI. Let me also recognize Bruce Cohen, Julie Katzman, and Tara Magner with Senator LEAHY; and Chairman SPECTER's hardworking team—Mike O'Neill, Brett Tolman, and Nick Rossi. Other key staff on the Judiciary Committee include Joe Matal with Senator KYL; Christine Leonard with Senator KENNEDY; Steve Cash for Senator FEINSTEIN; Paul Thompson with Senator DEWINE; Reed O'Connor with Senator CORNYN; and Bruce Artim with Senator HATCH; Cindy Hayden with Senator SESSIONS; Preet Bharara with Senator SCHUMER; Chad Groover with Senator GRASSLEY; Eric Rosen with Senator BIDEN; Ajit Pai with Senator BROWNBACK; Mary Chesser with Senator COBURN; Nate Jones with Senator KOHL; and James Galyean with Senator GRAHAM.

Staff for a number of Senators not on the committee worked very hard on this bill as well. Let me recognize Brandon Milhorn and Jack Livingston for Senator ROBERTS; Mike Davidson, who works for Senator ROCKEFELLER; Joe Bryan with Senator LEVIN; Alex Perkins and John Dickas with Senator WYDEN; Steve Taylor with Senator HAGEL; Ruchi Bhowmik with Senator OBAMA; Mirah Horowitz with Senator KERRY; Caryn Compton with Senator BYRD; Eric Buehlmann with Senator JEFFORDS; and Alan Hicks with Senator FRIST. And thanks also to Senator REID's staffers, Ron Weich and Serena Hoy, and to our Democratic floor staff—Marty Paone, Lula Davis, Gary Myrick, Chris Kang, and Mike Spahn for their help over the past several weeks of this debate.

Finally, let me sincerely thank my own tireless and dedicated staff: Mary Irvine, Paul Weinberger, Sumner Slichter, Chuck Stertz, Bob Schiff, Lara Flint, Farhana Khera, Alex Busansky, Sarah Preis, Margaret Whiting, Molly Askin, John Haffner, Bharat Ramamurti, Avery Wentzel, Tracy Jacobson, and Molly McNab.

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

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

Mr. FEINGOLD. Mr. President, I yield back my remaining time.

The PRESIDING OFFICER. The time is yielded back.

Mr. FEINGOLD. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

Mr. HATCH. Mr. President, I yield myself such time as I may need.

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

Mr. HATCH. In more than 4 years since the September 11, 2001, attack on the United States, the PATRIOT Act has helped to protect our homeland from subsequent terrorist attack. Reauthorizing this effective piece of legislation is an important victory in the

continued war on terror. The PATRIOT Act safeguards freedoms of American citizens while aggressively curtailing the opportunities terrorists have to strike. We have added many provisions designed to ensure that our civil liberties remain unaffected despite the fact that civil libertarians were completely unable to point to one incident or provide any example of abuses under the original PATRIOT Act.

As everybody knows, that act was negotiated in the Judiciary Committee when I was chairman, and I had a lot to do with it, along with Senator LEAHY and others. We found that the original PATRIOT Act functioned very well in the protection of our country.

The PATRIOT Act has enjoyed robust public support in Utah since its inception. According to Dan Jones and Associates, our leading pollster in Utah, every time the firm has polled Utahns in the last 4 years, 60 percent or more have voiced approval of the antiterrorism measure. A poll of U.S. citizens reported that more than 60 percent of Americans believed that the Government should do more to protect this country from attack. Reauthorizing this act is definitely the right thing to do for our country at a time when we tend to forget that there are people and governments out there and in here that are committed to wiping the United States of America off the face of the Earth. I, for one, will stand up and say: Not on my watch.

We have held hearing after hearing listening to all sides' robust debate about how to change the PATRIOT Act. We have had some ridiculous suggestions, we have had some good suggestions, and we have had some that we have had to take on this bill that really are not very good. My prayer is that the terrorists will be foiled by our intelligence and law enforcement agencies before another attack. But we have to give those agencies the tools to do that. I have a lot of faith in the ability of law enforcement men and women to do the job effectively. My hope is that those who have agreed that we can take away some of the tools afforded these men and women are wrong, that we can prevent another attack and reduce the ability of law enforcement to prevent those attacks at the same time.

The additional language that has been demanded in this bill does exactly that. It has reduced our ability to be able to protect the Nation under the guise that we had to protect civil liberties that were never infringed upon in the 4 years that the PATRIOT Act has been in existence. I particularly commend Senators SPECTER and LEAHY for the work they have done, Congressman SENSENBRENNER in the House, and other members of the Judiciary Committee in the House. They have worked long and hard. There have been some provisions that we had to take in order to get this bill reauthorized to protect the American people that we wish we didn't have to take. I just hope this bill will work as well as the original PATRIOT Act which has done so well in keeping us free of terror ever since 9/11.

I don't think anybody can doubt that. We held some 24 hearings over the years when I was chairman on the PATRIOT Act. I demanded that every hearing show us where the act has not acted properly, show us where there has been a violation, show us where there has been a violation of civil liberties, show us where somebody who is a noncriminal has been hurt by the PATRIOT Act. The fact is, not one time in all those hearings have they been able to come up with one illustration that people's civil liberties have been interfered with.

We passed a bill that was the Hatch-Dole bill back in, I believe it was 1996. It was the antiterrorism effective death penalty bill. That bill took care of domestic terrorism, but our laws were not up to speed with regard to international terrorism. So the PATRIOT Act was the way that we got our laws up to speed so that we could work against international terrorism. All of these provisions in the original PATRIOT Act we basically have in our anticrime laws. So what we did is, we had these laws that would enable law enforcement to do a lot of things to protect us against the Mafia, against child molesters, against pornographers. We brought the PATRIOT Act up to the level of those law enforcement tools. That is what the original PATRIOT Act did. That wasn't good enough for some of our colleagues. So there has been a lot of screaming and shouting about the PATRIOT Act, even though not one illustration has been given in the last, really, 5 years that would indicate that the original PATRIOT Act had interfered with anybody's just civil liberties.

We need to pass this bill such as it is. We need to pass it and enact it into law and give our law enforcement the tools they need to be able to protect us. I just wish we could have reenacted the original PATRIOT Act. But be that as it may, I compliment the chairman of the Judiciary Committee and the distinguished ranking member, Senator LEAHY, for the work they have done. I don't think it could have happened without them and without Chairman SENSENBRENNER and others in the House. I express my regard for them and my regard for this bill and hope everybody will vote for it.

I yield the floor.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. Mr. President, I know some time has been specifically retained to the Senator from Vermont. Would the Chair be good enough to tell me how much time that is?

The PRESIDING OFFICER. Fourteen and a half minutes.

Mr. LEAHY. I thank my good friend.

Today's vote marks another stage in reauthorizing the USA PATRIOT Act. Our goal has always been to mend the PATRIOT Act, not to end it. To that end we passed a bipartisan bill with better provisions last July after it was unanimously reported by the Judiciary Committee. I appreciate the kind words of the Senator from Utah. He voted for that bill. I voted for that bill. The distinguished chairman of the committee, Senator SPECTER, voted for the bill. We have all been chairman of that committee. The bill came here to the floor of the Senate, and the Senate voted it out unanimously. That was a good bill.

Then the House-Senate conference was hijacked. Democratic conferees were excluded at the request of the Bush-Cheney administration, and congressional Republicans wrote the bill. I worked to get that process and the bill back on track and, working with Chairman SPECTER, we were able to make some progress and get some helpful additions and changes. But the conference report that was insisted upon by the Bush-Cheney administration and passed by Republican leaders through the House was still flawed.

Last December, I worked with a bipartisan coalition of Senators to oppose final passage of that conference report and create some additional opportunities for improvements. That led to the Sununu bill which is in essence an amendment to the conference report. I supported Senator SUNUNU's efforts and praised him for it and those who worked with him. I voted for that bill. It contained some of the improvements I had pushed for. Our efforts to protect libraries from national security letters was very important to me. That is why I supported Senator SUNUNU's bill in spite of the worsening of the gag rule provisions insisted upon by the Bush-Cheney administration.

Now we turn to the conference report. Even with the Sununu bill, which I support, the conference report has not been improved sufficiently for me to support it. Just as I opposed it last December, I continue to oppose it. The bill that the Senate will adopt today falls far too short and impinges too greatly on the liberties of Americans.

The Founders made a profound choice when they framed the fourth amendment to our Constitution as a measure to ensure the right of the people to be secure. The word they used was ''secure.'' The fourth amendment is, of course, about guaranteeing our privacy rights and the requirement of the judicial check on the Government invading our homes, our papers, and our effects. The Founders saw that as the right to be secure. As the Constitution and the Bill of Rights were written so carefully, every single word holds meaning. They saw a right to be secure, and so do I. I believe that Americans' security includes our national security, our security from terrorism, and also our right to be secure as Americans. That means exercising the liberties and rights and freedoms that define us across the world uniquely as Americans.

I do not believe this bill achieves the balance that we could have and should

have achieved. The final product would have been better had the Bush-Cheney administration and congressional Republicans not insisted on locking Democrats out of the negotiations throughout the process.

Still this bill, through our efforts, in some ways represents an improvement. It has better sunshine and reporting provisions. I worked hard to include these new provisions because sunshine, coupled with sunset provisions, adds up to more accountability in the use of these Government powers. But some key provisions remain significantly flawed.

I respect those who conclude that on balance the bill's virtues outweigh its vices. And it has both. But I believe we can and should do better. I believe America can do better.

I am one who worked diligently on the original PATRIOT Act in the days following the attacks of 9/11. I was chairman of the Judiciary Committee. We moved it through in record time. I also voted to reauthorize and improve a bipartisan version of the act back in July of 2005. I joined with Senator SUNUNU in leading the effort to ensure that the provisions did not expire when we reached an impasse last fall.

In the PATRIOT Act, we provided important and valuable tools for the protection of Americans from terrorism, and I have worked and voted to preserve them. But I am disappointed that this conference report represents a missed opportunity to get it right, to recalibrate the balance better, to respect the liberties and rights of Americans while protecting us from those who threaten harm.

I am concerned, as all Americans are, with our security. The Presiding Officer and I and thousands of others come to work every day in a building that was targeted for destruction by al-Qaida. I cannot think of anything I will do in my life that makes me more proud than to be in the Senate and come in this building every day. But I want this building secure for you, for me, and for everybody who works here. I know what it means to be targeted. I was a target of a letter laced with deadly anthrax. I was supposed to open it. A couple of innocent postal workers who touched the outside of the envelope died before it reached me, and it was stopped before it got to my desk. It doesn't hit much closer to home than that.

Many of us recall Benjamin Franklin's wise counsel. He was a man involved in a revolution against King George III. Had that revolution failed, he and his compatriots would have been hanged. When he was working to form a government that would respect liberty and protect people, he cautioned that those who would give up essential liberties for temporary security deserve neither liberty or security.

More than 200 years later, we should listen to Benjamin Franklin. We have to preserve our essential liberties or we do not preserve what makes us Americans.

The seriously bad parts of this bill are made unacceptable because we currently have an administration that does not believe in checks and balances and prefers to do so many things in secret. We now see the Bush-Cheney administration seeking to twist the authorization for use of military force against al-Qaida into a justification for the secret, warrantless wiretapping of Americans' e-mails and telephone calls. We see them claiming that they need not fulfill their constitutional responsibility to faithfully execute the laws but can pick and choose among the laws they decide to recognize. Even the Attorney General writes to the Judiciary Committee saying their position on the law evolves. I did not realize there were such legislative Darwinists in this administration that they believe so strongly in evolution when it suits their purpose.

Legislative action should be the clear and unambiguous legal footing for any Government powers. These matters should be governed by law, not by whim or some shifting conception of the President's inherent authority that is exercised in secret. Confronted with this administration's unique claims of inherent and unchecked powers, I do not believe the restraints we have been able to include in this reauthorization of the PATRIOT Act are sufficient.

I will continue to work to provide the tools that we need to protect the American people. I trust that Vermonters will understand that while I have repeatedly voted to extend and reauthorize the PATRIOT Act, this permanent measure falls short of what they deserve.

I will continue to work to provide the oversight and checks needed on the use of Government power. I know the Senate is going to adopt this measure now, but it is a pale shadow of what it could have been had the administration not stepped in and told the leadership in the House and the Senate that they had to get in line and do what the administration wanted, not what an independent Congress should do. It is not the best that the greatest democracy on Earth deserves. I will keep fighting for us to do better.

I will continue to work to improve the PATRIOT Act, and I will work to provide better oversight over the use of national security letters and to remove the un-American restraints on meaningful judicial review. I will seek to monitor how sensitive personal information from medical files, gun stores, and libraries is obtained and used. I will join Senators SPECTER, SUNUNU, CRAIG, and others in introducing a bill to improve the PATRIOT Act and reauthorization legislation in several important respects. Much is left to be done.

If Senators work together, much can be accomplished. We will be a more secure Nation if we do, and also our liberties will be more secure. Certainly, we owe that to the next generation, to protect the liberties so many other generations have fought to provide for us.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

Mr. FRIST. Mr. President, in a few moments, we will be passing the PATRIOT Act. By passing it, we will make America safer, while safeguarding our civil liberties and privacy. America will be safer because law enforcement will have the tools to track suspected terrorists and break up terrorist cells before harm is done to innocent Americans. America will be safer because the conference report goes beyond the original PATRIOT Act to combat terrorist financing and money laundering, protect our mass-transportation systems and the railways, secure our seaports, and fight methamphetamine drug abuse—what has grown to become the No. 1 drug problem in America—and it does so by restricting access to the ingredients that make that poisonous drug.

Today we are making a statement that we cannot return to a pre-9/11 structure that could cost innocent Americans their lives. We will not return to the days of the pre-9/11 bureaucratic wall that blocked information sharing between law enforcement and intelligence. We cannot go back. We must go forward.

Due to persistent delays and obstruction by some of my friends on the other side of the aisle, it has taken far too long to get to today's vote. By remaining focused on our goals, focused on governing with meaningful solutions, to act on principles and to make America safer and security our No. 1 priority, we will prevail today.

I am proud to cast my vote to support the PATRIOT Act, and I urge my colleagues to do the same.

The PRESIDING OFFICER (Mr. COLEMAN). Under the previous order, the hour of 3 p.m. having arrived, the Senate will proceed to vote on the adoption of the conference report to accompany H.R. 3199.

Mr. FRIST. Mr. President, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The question is on agreeing to the conference report. The clerk will call the roll.

The bill clerk called the roll.

Mr. DURBIN. I announce that the Senator from Hawaii (Mr. INOUYE) is necessarily absent.

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 89, nays 10, as follows:

[Rollcall Vote No. 29 Leg.]

YEAS—89

Alexander	Dole	Menendez
Allard	Domenici	Mikulski
Allen	Dorgan	Murkowski
Baucus	Durbin	Nelson (FL)
Bayh	Ensign	Nelson (NE)
Bennett	Enzi	Obama
Biden	Feinstein	Pryor
Bond	Frist	Reed
Boxer	Graham	Reid
Brownback	Grassley	Roberts
Bunning	Gregg	Rockefeller
Burns	Hagel	Salazar
Burr	Hatch	Santorum
Cantwell	Hutchison	Sarbanes
Carper	Inhofe	Schumer
Chafee	Isakson	Sessions
Chambliss	Johnson	Shelby
Clinton	Kennedy	Smith
Coburn	Kerry	Snowe
Cochran	Kohl	Specter
Coleman	Kyl	Stabenow
Collins	Landrieu	Stevens
Conrad	Lautenberg	Sununu
Cornyn	Lieberman	Talent
Craig	Lincoln	Thomas
Crapo	Lott	Thune
Dayton	Lugar	Vitter
DeMint	Martinez	Voinovich
DeWine	McCain	Warner
Dodd	McConnell	

NAYS—10

Akaka	Harkin	Murray
Bingaman	Jeffords	Wyden
Byrd	Leahy	
Feingold	Levin	

NOT VOTING—1

Inouye

The conference report was agreed to.

UNANIMOUS CONSENT AGREEMENT—S. 2320

Mr. FRIST. Mr. President, I ask unanimous consent that the cloture vote on the motion to proceed to S. 2320, the LIHEAP bill, be vitiated.

I further ask consent that immediately after the consent, the Senate proceed to the consideration of the bill, provided further that Senator ENSIGN or his designee be immediately recognized in order to make a Budget Act point of order and that Senator SNOWE or her designee be recognized in order to move to waive. I further ask that there then be one-half hour of debate, equally divided, prior to a vote on the motion to waive.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

Under the previous order, the cloture motion is vitiated.

Mr. FRIST. Mr. President, we will be having a vote in 30 minutes. In all likelihood, that will be the last vote of the day.

MAKING AVAILABLE FUNDS FOR THE LOW-INCOME HOME ENERGY ASSISTANCE PROGRAM, 2006

The PRESIDING OFFICER. The clerk will report the bill.

The legislative clerk read as follows:

A bill (S. 2320) to make available funds included in the Deficit Reduction Act of 2005 for the Low-Income Home Energy Assistance Program for fiscal year 2006 and for other purposes.

The PRESIDING OFFICER. Under the previous order, the Senator from Nevada is to be recognized. The Senate will be in order.

Mr. COBURN addressed the Chair.

The PRESIDING OFFICER. The Senator from Oklahoma.

Mr. COBURN. Mr. President, the pending bill, S. 2320, offered by the Senator from Maine, increases direct spending in excess of the allocation to the Health, Education, Labor, and Pensions Committee. Therefore, I raise a point of order against the bill, pursuant to section 302(f) of the Congressional Budget Act.

The PRESIDING OFFICER. The Senator from Maine.

Ms. SNOWE. Mr. President, pursuant to section 904(c) of the Congressional Budget Act of 1974, I move to waive the applicable points of order. I move to waive the point of order under the applicable provisions of the rules and statutes.

The PRESIDING OFFICER. The motion to waive is debatable. There is 30 minutes equally divided.

Who yields time? The Senator from Maine.

Ms. SNOWE. Mr. President, I rise today to ask the Senate to do the right thing and to oppose this budget point of order brought up against this legislation that will provide emergency funding for the Low Income Home Energy Assistance Program.

I thank the majority leader for his assistance in advancing this legislation. It is the culmination of his considerable efforts over the last few months to bring forward this legislation. I thank the minority leader as well for recognizing the importance and vitality of this issue, and promoting this amendment forward as well.

Mr. President, I know you are sitting in the chair, but you have been one of the leaders on this issue, trying to get additional commitment for funding for low-income fuel assistance, particularly for this winter, along with my colleague, Senator COLLINS of Maine. This legislation addresses a nationwide crisis by bipartisan consensus and fiscal responsibility. This legislation shifts the fiscal year for LIHEAP funding into the Deficit Reduction Act of 2005, which was already signed into law, from 2007 to 2006. This will provide an additional $1 billion for all those Americans who simply cannot wait any longer for relief from home heating fuel costs that have skyrocketed over last year's heating bill.

The vote we will be taking this afternoon is on the budget point of order against this bill. I would like to elaborate on why this legislation is absolutely vital to increasing the funding for low-income fuel assistance for all parts of the country that depend upon this program.

There has been a lot of misinformation with respect to exactly what this bill is all about. First of all, it is budget neutral. Don't take my word for it; it is the conclusion of the Congressional Budget Office. All of the funds under this bill have already been appropriated and accounted for within the budget. All this measure will do is shift the funds from fiscal year 2007 to 2006. There is no additional, there is no new spending.

This approach is not only fiscally sound and budget neutral, but, critically, it will allow States the flexibility to allocate funds to the residents who are struggling to pay for energy bills this year. The White House and our Senate leadership recognize this is the fiscally responsible solution to resolve this crisis.

I know some have said essentially we believe the LIHEAP program should be funded through contingency measures such as this legislation. That is what this legislation does, it utilizes the existing formula. It is not only cold weather States but also warm weather States that will benefit under this legislation.

I regret some of the misinformation that has been circulated with respect to LIHEAP as to who will benefit, which States will benefit under this legislation. I submit that in a year of high energy costs—and it has been a year of high energy costs, anywhere from 30 percent to 50 percent—it has devastated our State of Maine, Minnesota, and all parts of the country that have had to rely on home heating oil or natural gas or whatever the alternative. But the fact remains, the prices have increased 30 percent to 50 percent over last year's, and last year's prices went up 20 percent to 30 percent. That factor is not in dispute.

The additional factor is that we are using the same distribution formula. I believe that needs to be understood because I have seen some of the papers distributed as to which States will benefit. It is totally inaccurate. Nothing has changed with respect to that formula.

On the issues that are important to know about this increase in LIHEAP funding, No. 1, it is budget neutral; No. 2, it will not increase spending; and No. 3, the distribution formula remains the same. I regret that we have seen so much misinformation and mischaracterization with respect to the funding formula under this legislation.

Finally, we have heard: Well, it is a mild winter. I would like you to come to Maine, if you think it is a mild winter, and you ask all those people about the 30 percent to 50 percent increases. The current low-income fuel assistance program has not had an increase in real dollar terms since 1983. I happened to be in the House of Representatives when we created this program. It has not increased in real terms. If anything, it has been reduced. I regret that we have reached this point in time with respect to this vital program that so many low-income individuals depend upon who can barely make ends meet given the extent of the costs this winter with respect to home heating oil.

We are now talking about a program that has not increased in net terms