

“TITLE VI—REPORTING REQUIREMENT  
“Sec. 601. Annual report of the Attorney  
General.

“TITLE VII—EFFECTIVE DATE  
“Sec. 701. Effective date.”.

Mr. FEINGOLD. Mr. President, this amendment would simply require the Department of Justice to report to the Intelligence Committee and the Judiciary Committee about the use of this new lone-wolf exception to FISA. With this information, Congress will be better able to assess the need for reauthorization as the sunset provision in the bill approaches. I am pleased that the amendment has been agreed to by the sponsors of the bill.

I ask unanimous consent that this amendment be agreed to under the previous order.

The PRESIDING OFFICER. Under the previous order, the amendment is agreed to.

The amendment (No. 536) was agreed to.

Mr. FEINGOLD. Thank you, Mr. President. I yield the floor.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. KYL. Mr. President, this morning I noted in detail the provisions of this amendment, why I supported the amendment and why I thought it was a good thing, and therefore any reference to further discussion on it can be made to the comments I made on it this morning.

Mr. FEINGOLD. Mr. President, I thank the Senator from Arizona for his cooperation in working together to provide this measure of accountability to this important piece of legislation.

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.

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 President, I ask unanimous consent that the order for the quorum call be rescinded.

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

AMENDMENT NO. 537

(Purpose: To propose a substitute)

Mrs. FEINSTEIN. Mr. President, I call up amendment No. 537.

The PRESIDING OFFICER. The clerk will report.

The legislative clerk read as follows:

The Senator from California [Mrs. FEINSTEIN], for herself and Mr. ROCKEFELLER, Mr. LEAHY, Mr. EDWARDS, Mr. FEINGOLD, Mr. DODD, Mr. WYDEN, and Mrs. BOXER, proposes an amendment numbered 537.

Mrs. FEINSTEIN. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

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

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. PRESUMPTION THAT CERTAIN NON-UNITED STATES PERSONS ENGAGING IN INTERNATIONAL TERRORISM ARE AGENTS OF FOREIGN POWERS FOR PURPOSES OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978.

(a) PRESUMPTION.—(1) The Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.) is amended by inserting after section 101 the following new section:

“PRESUMPTION OF TREATMENT OF CERTAIN NON-UNITED STATES PERSONS ENGAGED IN INTERNATIONAL TERRORISM AS AGENTS OF FOREIGN POWERS

“SEC. 101A. Upon application by the Federal official applying for an order under this Act, the court may presume that a non-United States person who is knowingly engaged in sabotage or international terrorism, or activities that are in preparation therefor, is an agent of a foreign power under section 101(b)(2)(C).”.

(2) The table of contents for that Act is amended by inserting after the item relating to section 101 the following new item:

“Sec. 101A. Presumption of treatment of certain non-United States persons engaged in international terrorism as agents of foreign powers.”.

(b) SUNSET.—The amendments made by subsection (a) shall be subject to the sunset provision in section 224 of the USA PATRIOT Act of 2001 (Public Law 107-56; 115 Stat. 295), including the exception provided in subsection (b) of such section 224.

Mrs. FEINSTEIN. Mr. President, I rise to offer a substitute amendment to S. 113, the Kyl-Schumer FISA bill. I ask you to bear with me because the explanation goes on for a while.

I am also pleased that Senator ROCKEFELLER, the ranking member on the Intelligence Committee, and Senator LEAHY, the ranking member of the Judiciary Committee, are cosponsors of this amendment. I am pleased to also acknowledge that Senators DODD, EDWARDS, FEINGOLD, BOXER, and WYDEN are also cosponsors of the amendment.

Let me try to briefly describe the difference between current law, S. 113, and my amendment.

S. 113 is the Kyl-Schumer FISA amendment. First, the Kyl-Schumer amendment only applies to non-U.S. persons. I want to make clear that it does not cover green card holders under that amendment.

Under current law, the FISA court may only grant a FISA application against a non-U.S. person if the Government can show probable cause that the target is working on behalf of a foreign power or a terrorist group. The Government also has to certify that it is seeking foreign intelligence information that can't be obtained by any other means.

As I understand the Kyl-Schumer bill, it drops a primary requirement for FISA warrants; that is, the individual or the target be agents of a foreign power. Under Kyl-Schumer, this prerequisite is gone. That is what the so-called lone wolf deals with.

This would then give the FISA court no discretion to deny applications for FISA orders against a true so-called lone wolf. These are alleged inter-

national terrorists operating completely on their own. This is confusing. In other words, current law gives the FISA court no discretion to grant FISA orders in closed cases. But S. 113—Kyl-Schumer—gives judges no discretion to deny FISA the FISA court application in closed cases. Both of these circumstances raise certain problems.

My amendment is essentially a compromise. It grants the court a presumption. So the FISA court may presume that a target is an agent of a foreign power, or the court may choose not to invoke that presumption. The bottom line is the court is given some discretion.

In other words, the court may choose to grant a FISA order despite a lack of evidence that a target is working on behalf of a foreign power. Similarly, the court may choose to deny an order against a true lone wolf. It is up to the court. Federal judges in title III criminal cases have similar discretion. Although the standard there is about whether the Government can show probable cause that a person has committed a crime or will commit a crime, that is a very different standard than under FISA. Federal judges have not abused that discretion and, in fact, in rare cases have been able to act as a check on the Government to prevent overreaching and abuse.

Why do the sponsors of S. 113 show less trust for FISA judges in the FISA content? In fact, such trust is even more warranted in the FISA content. Not only is the FISA process secret and hard to keep accountable, but the FISA court has only denied one FISA application in its 25-year history.

Such a lack of trust is even less necessary given the fact that even if the Government is unable to get a FISA order against a target, it remains completely free to use all the tools of the criminal process under title III to get search and wiretap orders against the target.

The bottom line is, our amendment preserves FISA's agent-of-a-foreign-power requirement without jeopardizing our security. Our amendment allows the Government to get FISA orders against suspected international terrorists even in close cases where the Government cannot show the target is working on behalf of a foreign power or terrorist group. However, unlike S. 113, the amendment also ensures the FISA court is more than a rubberstamp and has discretion to deny a FISA application if the Government overreaches by attempting to use FISA authority.

I now would like to discuss the issue in somewhat greater detail.

Mr. President, at times of crisis, it is possible the Government can overreach in both legislative and executive decisionmaking with respect to our criminal and intelligence laws. That can have unfortunate consequences for both our security and individual rights.

The Foreign Intelligence Surveillance Act, or FISA, was passed in 1978. It was the first statute ever passed in

the United States to provide a statutory procedure for the authorization of clandestine activities of our Government to obtain foreign intelligence.

Before it passed, then-Attorney General Griffin Bell testified in favor of the bill before Congress. He noted the "delicate balance" that needed to be struck between "adequate intelligence to guarantee our Nation's security on the one hand and preservation of basic human rights on the other."

He stated:

In my view this bill strikes the balance, sacrifices neither our security nor our civil liberties, and assures that the abuses of the past will remain in the past. . . .

Now, what does he mean by "abuses of the past"? Decades earlier, America saw what happened in World War II with Japanese Americans who were removed from their homes, their businesses, and their schools, and placed in interment camps in violation of their rights. We do not want that to happen ever again in this country.

I am not saying this is an identically similar situation. I am concerned, however, about zealotry and overreach because now we are engaged in a global war on terror. In conducting this war, we must be careful that we not overreach when the temptations are so great.

This kind of war is unprecedented for the United States. It is unprecedented and unbelievable that anybody could fly four big planes, three into buildings, and kill 3,000 people. This is beyond our ken. America and Americans want to protect our homeland and our individuals, notwithstanding this is an entirely secret process and, as such, the laws that govern it must be balanced, must be carefully crafted, and must prevent it, lest someone use them to overreach. It has happened in the past, so you can assume it could well happen in the future. This is especially true, as I said, with FISA.

I supported reporting S. 113, the Kyl-Schumer FISA bill we are debating, in the Judiciary Committee. I agree with my colleagues—there is a clear problem here, needing a solution; namely, the potential difficulty the Government may have in obtaining FISA orders against certain international terrorist so-called "lone wolves." These are people who have no affiliation with a terrorist group, no affiliation as an agent of a foreign power.

Under FISA, a "foreign power" is simply defined as "two people conspiring," so it is a very easy goal and target. A problem arises in cases where the Government knows of a foreign individual who may be involved in terrorism but cannot yet prove a connection to foreign groups or governments. This problem stems from the proof requirement under FISA in current law.

To get a FISA order against a foreign visitor to the United States under current law, the Government needs to show two key things:

First, that the individual is a foreign power or an agent of a foreign power.

Again, that is defined as two people working together. A foreign power could be a foreign government or an international terrorist group as defined.

And second, that it is seeking "foreign intelligence information" that cannot be obtained by other means.

This symbolizes the very purpose of FISA: to gather foreign intelligence. Criminal courts are for criminal cases, and the FISA court was set up specially to deal with cases where the Government wishes to obtain information or intelligence about the activities of foreign powers.

The problem is this: Under this current standard, it may well be difficult for the Government to meet the foreign power requirement if the Government does not yet have enough evidence of a connection to a foreign group, entity, or power. Some have described this problem as the "false lone wolf" problem, where you have an individual who may appear at first to be operating as a "lone wolf," even though that individual is really an agent of a larger group.

That was one of the alleged problems with the pre-September 11 investigation into Zacarias Moussaoui. The FBI did not learn until after September 11 that Moussaoui had links to al-Qaida and may have been the intended 20th hijacker.

As a result, the Government may have been reluctant to request a FISA warrant because they did not think the intelligence they had could connect Moussaoui to an international group or government.

So there is no question in my mind that we need to amend FISA to fix this problem. And I applaud my colleagues, Senators KYL and SCHUMER, for working so diligently to solve it. But the Kyl-Schumer bill also redefines "agent of a foreign power" to include any non-U.S. individual preparing to engage in international terrorism. In other words, it essentially eliminates the foreign power requirement altogether.

This change would allow the Government to get a FISA search or wiretap order against any foreign individual in the United States who is preparing to engage in international terrorism, regardless of whether the person is really an agent of a foreign government or terror group, and regardless of whether there is any potential to gather foreign intelligence.

Again, it is this foreign intelligence component that defines the very purpose of FISA. As a result, I believe this change goes too far.

Under S. 113, for the first time ever, the Government will be able to use FISA against any non-U.S. citizen preparing to engage in international terrorism—even individuals whom the Government knows have no connection at all to anyone else engaged in international terrorism.

There would be no check at all on the Government's use of FISA against many common criminals who just hap-

pen to be noncitizens and, therefore, the Government might be able to use this secret FISA court to obtain warrants that: (A) are easier to get; (B) last longer; and (C) are less subject to normal judicial scrutiny than criminal warrants under title III or regular criminal statutes.

FISA wiretap orders, for instance, are good for 4 times longer than normal criminal warrants—120 days versus 30 days—giving the Government a clear incentive to use this process even against common criminals. These orders can be reauthorized indefinitely each year for 1-year periods. The same is true for physical search orders under FISA, although these are good for 90 days, and 1-year extensions are subject to the requirement in current law that the judge find "probable cause to believe that no property of any United States person will be acquired during the period."

Under FISA, as modified by S. 113, the Government must show by probable cause only that a foreign national is engaged in international terrorism or preparation thereof. You might listen to that and you might think: What is wrong with that? We all want that. I want it, too. But in many instances, this probable cause standard will be easier to meet than the traditional criminal probable cause standard.

For example, for a title III wiretap, the Government must show that there is probable cause to believe an individual is about to commit or has committed an enumerated crime. To get a search order, the Government must show probable cause that the search will result in the discovery of offending items connected with the criminal activity. However, under S. 113, the Government need only show probable cause that the person is engaging in "activities in preparation" for international terrorism. Many "activities in preparation" for international terrorism are not crimes.

For example, a foreign visitor who bought a one-way airline ticket and a box cutter would arguably qualify as a person engaging in activities in preparation for international terrorism, even in the absence of other evidence that he or she might be an international terrorist.

However, these two activities, taken alone, would clearly not demonstrate probable cause that the person would commit a crime. These activities may be entirely innocent. As a result—and I don't believe this is anyone's intent—S. 113 could easily serve as a clarion call to all aggressive prosecutors who want to listen in on or search the homes of targets of investigation without ever having to prove that any crime may be committed or that foreign intelligence may be gathered.

By allowing FISA to be used against all solo suspected international terrorists, S. 113 runs counter to the whole purpose of FISA, which is to allow the Government to get foreign intelligence by searching and wiretapping people

working for other countries and groups against U.S. interests.

S. 113 essentially eliminates any discretion the FISA court has to turn down a case—this is my big problem with it—thus enabling the Government to overreach. I am not saying that it will overreach. But because it is a secret process, the laws we pass have to prevent that overreach.

By nullifying the requirement that the target of an investigation has some connection, any connection, to a foreign entity or government, this legislation essentially makes the FISA court a rubberstamp. The court will be required to grant a FISA order, even if there is no probable cause to indicate a connection to a foreign power; indeed, even if there is clear evidence that the individual is operating completely on their own. In fact, even if the Government admits that the terrorist is operating alone and that there is no foreign intelligence to be gathered, the FISA court must still grant the order under S. 113.

That is not what FISA is meant to be. Put simply: The legislation goes too far.

Let me be clear: We who are sponsoring this amendment are not trying to protect international terrorists, and our amendment does nothing to protect them. The vast resources of the Federal Government and the powerful tools of the criminal process remain available to target and investigate any terrorist against whom the Government is unable to get a FISA order.

What our amendment will do is retain the original purpose of FISA—the seeking of foreign intelligence. S. 113 would not.

Our amendment is simple. Rather than simply eliminating the foreign power requirement altogether, our amendment would allow the FISA court judge to presume that a foreign terrorist is also an agent of a foreign power, even if there is no evidence supporting that presumption. On the other hand, under our amendment, the FISA court could also refuse to presume this connection in troubling cases of Government overreach. Thus, a FISA court judge would have some discretion.

What does this mean? In the Moussaoui case, for instance, even though the Government did not yet have evidence that Moussaoui was acting as an agent of a foreign power, both our amendment and S. 113 would allow the Government to get a warrant. The only difference is that our amendment would allow the judge to carefully look at the case and, if the court determined Moussaoui was clearly acting alone, the warrant could be denied.

I know some will argue that this casts too much doubt upon the outcome of cases and that, as a result, FISA orders will be too hard to obtain. But in most cases, if you think about it, the outcome will be exactly the same, whether under our amendment or the underlying bill.

Others may argue that this amendment might give liberal judges too

much power to deny FISA orders in every case or, as Senator SCHUMER put it today, “inject gray into the statute.” But in reality, I believe these judges should have some discretion. This is an entirely secret process. By providing this presumption, we give judges that discretion. That is, in fact, a good thing.

Liberal judges can always find ways to deny a FISA order, even under S. 113, if they are determined to do so. For instance, a judge could simply decide there is no probable cause showing that an individual is engaged in international terrorism. That is a requirement in both S. 113 and our amendment.

The bottom line is that we can and should preserve the foreign power requirement of FISA without jeopardizing our security. Under either approach, the Government will be able to get FISA orders against international terrorists, even if the Government cannot meet the foreign power requirement.

Bottom line, again: The only difference between the two approaches is that our amendment preserves some limited discretion so the FISA court could stop the Government from overreaching against those individuals who have no connection to a foreign conspiracy. Let me say, if they have no connection to a foreign conspiracy, you can get the title III criminal warrant.

I urge my colleagues to support the amendment and, therefore, support the underlying purposes of FISA.

I yield the floor.

The PRESIDING OFFICER. Who yields time?

Mrs. FEINSTEIN. I yield such time as the Senator from Vermont, the ranking member of the Judiciary Committee, requires.

The PRESIDING OFFICER. The Senator from Vermont is recognized.

Mr. LEAHY. Mr. President, I thank the distinguished Senator. I will not speak long.

In times of national stress there is an understandable impulse for the government to ask for more power. Sometimes more power is needed, but sometimes it is not.

After the September 11 attacks, we worked together in a bipartisan fashion and with unprecedented speed to craft and enact the USA PATRIOT Act, which enhanced the government's surveillance powers.

Now, as we consider S. 113—and we anticipate a possible sequel to the USA PATRIOT Act—it is vital for us first to examine and understand how Federal agencies are using the power that they already have. We must answer two questions: First, is that power being used effectively? Our citizens want not only to feel safer, but to be safer. They need results, not rhetoric.

Second, is that power being used appropriately, so that our liberties are not sacrificed, the openness of our society and our government are preserved, and our tax dollars are not squandered?

Unfortunately, the FBI and the Department of Justice have either been unwilling or unable to help us to answer these basic questions. Moreover, the information that we have gleaned on our own through our bipartisan oversight efforts has not inspired confidence.

In February, Chairman GRASSLEY, Chairman SPECTER and I released a detailed report based on the oversight that the Judiciary Committee conducted in the 107th Congress. That report distilled our bipartisan findings and conclusions from numerous hearings, classified briefings and other oversight activities. Our oversight demonstrated the pressing need for reform of the FBI. In particular, it focused on the FBI's failures in implementing what is already in FISA.

The administration's response to our bipartisan oversight report has been to dismiss it as “old news” relating to problems that are all already fixed. In short, “everything is fine” at the FBI and they plan to do nothing to respond to the systemic criticisms in the Specter, Grassley, Leahy report. Predictably, however, Congress is asked yet again to expand the FISA statute.

The bill that we are considering, S.113, adopts a “quick fix” approach. With slick names like the “Moussaoui fix,” and the “lone wolf” bill, it is aimed at making Americans feel safer, but it does nothing to address the problems that actually plague our intelligence gatherers. It does nothing to fix the real problems that plagued the FBI before 9/11 and that continue at the FBI.

In private briefings, even FBI representatives have stated that they do not need this change in the law in order to protect against terrorism. They are getting all the warrants they want under the current law.

Sunset provisions, such as the one I helped add during the Judiciary Committee markup, allow us to adopt such measures as S. 113 on a temporary basis. The reporting requirement that is being added to the bill on the floor is another welcome improvement, which will help us to ascertain whether this surveillance tool is working properly or not. The reporting requirement is similar to those proposed in a bill I introduced with Senators GRASSLEY and SPECTER—S. 436, the Domestic Surveillance Oversight Act.

While there is little evidence that this bill is necessary, it does create significant problems. First, it tears FISA from one of its most basic moorings. FISA was intended to assist in gathering intelligence about foreign powers and their agents. The Kyl-Schumer proposal would simply read that requirement out of the law for a whole class of FISA cases.

As introduced, the bill essentially said that a “person” is now a “foreign power,” which makes little sense as a matter of logic or policy. As reported by the Judiciary Committee, the bill's wording makes more sense, but the fundamental policy problem remains.

Second, in the rare case of a true "lone wolf," our federal law enforcement agents already have potent tools at their disposal, including the title III wiretap, the rule 41 search warrant, and the grand jury subpoena. These provide ample means to combat isolated criminal acts, but with more accountability and judicial supervision than the FISA surveillance authorities.

Far from addressing a true problem, then, all that S.113 would do is encourage the use of the secret, unchecked FISA process for an entire class of cases that are more appropriately handled as criminal matters.

To the extent that some believe that there is a problem that needs to be addressed, I support the more measured and practical approach that Senator FEINSTEIN developed, and that I was pleased to cosponsor. The Feinstein approach is to create a statutory presumption to assist the FBI in terrorism cases.

Using this approach, when the government shows probable cause to believe that a non-U.S. person is engaging in international terrorism, the FISA Court may presume that the person is also an agent of a foreign power. This permissive presumption would allow law enforcement some extra leeway in international terrorism cases, but without simply removing the foreign power nexus from a huge class of FISA matters altogether.

I commend Senator FEINSTEIN for her work on this amendment. I believe it is a constructive and reasonable compromise. It would give the FBI what it claims to need as a practical matter, to ensure that it can use FISA against individuals like Zacarias Moussaoui, whose ties to a foreign power may be difficult to prove.

At the same time, the amendment would preserve some discretion on the part of the FISA court to determine that an individual should not be subject to surveillance because he is not, in fact, an agent of a foreign power. The FISA court should not become an automatic adjunct of the executive branch. That would destroy the checks and balances that keep us all free. Let's make sure they have the ability to act as a court.

I yield the floor.

The PRESIDING OFFICER. Who yields time?

Mr. FEINGOLD. Mr. President, I ask the Senator from California to yield me some time so I can speak in support of the amendment.

Mrs. FEINSTEIN. I am happy to yield as much time as the Senator requires.

The PRESIDING OFFICER. The Senator from Wisconsin is recognized.

Mr. FEINGOLD. Mr. President, I agree with the Senator from California that S. 113 is the wrong way to fix the Foreign Intelligence Surveillance Act. The approach taken in S. 113 would eliminate the current requirement in FISA that the individual who is the target of a warrant must be an agent of

a foreign power. This means that S. 113 may very well result in FISA serving as a substitute for some of the most important criminal laws we have in this country. Senator FEINSTEIN's permissive presumption amendment would allow the Government to obtain FISA warrants against suspected lone wolf international terrorists without unnecessarily eliminating an essential element of FISA, and that is the agent of a foreign power requirement.

FISA, as the Senator from California has very carefully and effectively pointed out, represents an important exception to traditional constitutional restraints on criminal investigations, allowing the Government to gather foreign intelligence information without having probable cause that a crime has been or is going to be committed. I will repeat that. This is something the Government can do without having probable cause that a crime has been or is going to be committed. That is a major exception to our normal understanding about how criminal proceedings should be conducted under our Constitution. The courts have permitted the Government to proceed with surveillance in this country under FISA's lesser standard of suspicion because the power is limited to investigations of foreign powers and their agents.

Senator FEINSTEIN ably pointed out the history behind this and the careful balance that Attorney General Griffin Bell discussed at the time, and how important that balance was for such an unusual exception to be made to our rules about criminal proceedings.

S. 113 writes out of the statute a key requirement necessary to the lawfulness of intrusive surveillance powers that would otherwise simply be unconstitutional.

FISA's own appellate court, the Foreign Intelligence Surveillance Court of Review, discussed in a November 2002 decision why a FISA warrant does not require a showing of probable cause of criminal activity. The court stated that FISA is constitutional in part because it provides "another safeguard . . . that is, the requirement that there be probable cause to believe the target is acting 'for or on behalf of a foreign power.'" So this is supposed to be about people acting in connection with a foreign power. S. 113, as currently drafted, simply eliminates that safeguard.

Even if S. 113 survived constitutional challenge, it would mean that non-U.S. persons could have either electronic surveillance and searches authorized against them using the lesser standards of FISA, even though there is no conceivable foreign intelligence aspect to their case. S. 113 will then likely result in a dramatic increase in the use of FISA warrants in situations that do not justify such extraordinary Government power.

I think Senator FEINSTEIN's amendment is a thoughtful and reasonable alternative to make sure that FISA can be used against a lone wolf terrorist,

which I commend the Senator from Arizona and the Senator from New York for trying to address. But at the same time her amendment means we can do this without eliminating the important agent of a foreign power requirement. The amendment would create a permissive presumption that if there is probable cause to believe a non-U.S. person is engaged in or preparing to engage in international terrorism, the individual can be considered to be an agent of a foreign power even if the evidence of a connection to a foreign power is not clear. The use of a permissive presumption, rather than eliminating the foreign power requirement, maintains judicial oversight and review on a case-by-case basis on the question of whether the target of the surveillance is an agent of a foreign power. The permissive presumption would permit the FISA judge to decide, in a given case, if the Government has gone too far in requesting a FISA warrant.

I want to be clear about one point that apparently came up this morning. I understand the Senator from Arizona argued this morning that this amendment would weaken or impact on the FISA law as a whole. That is just not true. This amendment applies only to the changes made in the bill to address the lone wolf problem. It is a narrow, carefully drafted, very important amendment to this bill.

Any concern that the FISA judges would not use their discretion wisely is, I think—as the Senator from California pointed out—misplaced. What is the reason for any concern whatsoever about the proper use of this provision by judges? In the 23 years that the FISA court has been reviewing FISA applications, they have only declined to issue the warrant on one occasion. In that case, the decision of the court was reversed on appeal. The FISA judges clearly take their responsibility seriously and execute it carefully. The experience of the last two decades shows we can trust them not to deny FISA applications too hastily. We should also be able to trust them enough to maintain their power to serve as a reasonable check on Government overreaching.

We are told that one of the inspirations for this bill was the case of Zacarias Moussaoui, the alleged 20th hijacker. One of the FBI's excuses for not seeking a warrant to search Mr. Moussaoui's computer prior to September 11 was that they could not identify a foreign power or group with which Moussaoui was associated. In other words, they could not meet the agent of a foreign power requirement to get a FISA warrant. In the case of Moussaoui, a warrant application was never even submitted to the FISA court.

As Senator SPECTER pointed out, many legal observers think the FBI simply misread the law, and it could and should have obtained a FISA warrant against Mr. Moussaoui if it had tried.

No matter, in any event, Senator FEINSTEIN's amendment would fix the so-called Moussaoui problem just as well as the current bill. The permissive presumption would still ensure that future investigators do not need to show specific evidence of a particular foreign power or group for which the individual was an agent if they have other good evidence that the subject is preparing to engage in international terrorism, as they did in Moussaoui's case, but have not been able to identify the specific agent of a foreign power.

At the same time, Senator FEINSTEIN's formulation would put some limit on the Government's ability to use this new power to dramatically extend FISA's reach. If the Government comes to a conclusion that an individual is truly acting on his or her own, then our criminal laws concerning when electronic surveillance and searches can be used, in my view, and I think in the view of many, are more than sufficient. True lone wolves can and should be investigated and prosecuted in our criminal justice system.

Under this amendment, the FISA court could presume that any non-U.S. person preparing to engage in international terrorism is an agent of a foreign power. At the time of the initial warrant application, and perhaps even later, this presumption makes sense. It is somewhat difficult to envision a foreigner in the United States planning an international terrorist attack who is not an agent of a foreign power, which includes a terrorist organization. But one can envision a situation where, at the time of a request for a reauthorization, a FISA warrant is made, the Government has now determined that the suspect is truly a lone wolf.

In those situations where the person is simply a lone wolf in every sense of the word and is not connected with a foreign power or terrorist organization, FISA should not apply. The Government should then use all the tools of the criminal process because—and this is the key issue—in that circumstance, the foreign intelligence rationale, the entire basis for the creation of a FISA law, that entire rationale for FISA's lesser standard no longer exists.

Senator FEINSTEIN's amendment retains FISA's agent of a foreign power requirement, maintains the independence of the FISA court, and preserves judicial oversight of the abuse of the new power. It protects national security by addressing the lone wolf problem, and it does not threaten the constitutional freedoms we cherish.

I am grateful to the Senator from California for her leadership role on this important amendment. I strongly urge my colleagues to support this reasonable amendment that will simply make this a much better bill and, frankly, a bill that would cause many of us to feel comfortable supporting the bill.

I urge my colleagues who are proponents of this bill to consider how important it is that we have as many Sen-

ators as possible support such a bill. This goes right to the heart of the question of whether in times of crisis this Nation is going to get the balance right between civil liberties and our Constitution and the important paramount issue of fighting terrorism. We need as many people supporting this to send a message to the American people that we are getting this right. The Feinstein amendment is a reasonable, modest attempt to achieve that kind of consensus. I urge my colleagues to support it.

I thank the Chair. I yield the floor.

The PRESIDING OFFICER (Mr. SUNUNU). The Senator from New York.

Mr. SCHUMER. I thank the Chair.

Mr. President, I rise in reluctant, but considered, opposition to the amendment of my good friend from California. I thank her and the Senator from Wisconsin for their roles in this area. My colleague from California and I usually share many of the same views on law enforcement issues, and we work closely together. I say usually, it is the other way around. I am on one side, and she is trying to put together the compromise. Now she is trying to put another compromise together. I respect her for that.

I say to the Senator from California and the Senator from Wisconsin, who is a devout believer in the freedom and liberty this country cherishes and a constant watchdog on our committee, I have great respect for both of them. This is a good debate because in our brave new post-9/11 world, we have to balance liberty and security and, obviously, some adjustments have to be made.

The Founding Fathers knew that in times of war, in times of crisis, security might gain a little. I do not think this is an issue of security versus liberty, though. I do think it is an issue of the new technologies that are available and allows individuals or small groups of individuals unknown before to do real damage to America. Then 10 years ago, you knew who was going to hurt you. It would be a nation. It would be an established group of terrorists. But today, any small group can pop up, even individuals, and do such damage. That is what has caused the Senator from Arizona and I to change the law.

I think the Feinstein amendment is well-intentioned, and honestly it recalibrates the balance in a little different way than I would. This is what the debate is about. My guess is, if Washington, Jefferson, or Madison were looking down on the Senate Chamber, they would want us to have this debate. It is a good thing we are having this debate. I appreciate it.

I am going to be brief. I know we want to deal with this amendment.

My objection to the amendment of the Senator from California is that it does leave discretion in the hands of the judge—the very purpose of the amendment. I do not think there ought to be discretion when there is probable cause that some individual or small

group, whether they can be connected to a terrorist group, a known terrorist group, a terrorist organization or not—I do not think there should be discretion in getting that FISA warrant. Obviously, the judge will have discretion, so to speak, in determining if probable cause is there. So this is hardly a straitjacket, even the amendment we have proposed.

If the judge does not find probable cause to engage or prepare to engage in terrorist activity, there is not going to be a warrant.

The other point I want to stress, of course, and this matters to me—I know some in the civil liberties community say everyone who is dealing with American law should have the same rights. This does not affect citizens or those who hold green cards. I think it strikes a fair balance. The idea of giving the judge discretion, the so-called permissive presumption, in my judgment, goes too far.

One of the problems we had with the Moussaoui case was that the FBI was unsure that they could seek a warrant. They did not think the law allowed them to seek a warrant. That is what brought up our amendment.

With the Feinstein amendment, they would still not have that certainty. You also might get in the very same case a judge in California ruling one way and a judge in New York ruling another way. I do not think we want confusion, differing opinions, judicial discretion when clearly probable cause is met.

I realize that my good friend from California seeks an ability to check on the abuse of FISA. I agree with her. I argue this is the wrong way to do it. Again, if probable cause is established, it should not matter if it is a lone wolf or a known terrorist group or a known terrorist organization. To have different judges come to different conclusions about that I do not think helps move our law, move our safety, or, for that matter, further protect our liberties.

I urge my colleagues to vote against this amendment. It is well intentioned. It does seek to understand the balance between liberty and security, but it would do it in a way that I think is not advised, particularly in our post-9/11 world. I urge my colleagues to vote down the amendment.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. KYL. Mr. President, first let me address Senator FEINGOLD. He is correct about the misstatement I made this morning. I do recall making this statement that the Feinstein amendment would apply generally to the section of law rather than just S. 113. The Senator from Wisconsin is correct. What I said was in error. It does not detract from my primary argument, but that is correct, and I appreciate him pointing that out.

I wish to respond to the three primary arguments we have heard. First

of all, Senator LEAHY primarily was making the point that we should see if the Patriot Act is working before we make the changes that Senator SCHUMER and I and others are trying to make.

First, I note that the vote in the Judiciary Committee was 16 to 0. It was unanimous. I appreciate the bipartisan support from people such as Senator LEAHY and would note that we have had that kind of bipartisan support from the very day that Senator—in fact, 2 years ago it was Schumer-Kyl, now it is Kyl-Schumer, for obvious reasons.

Secondly, this has nothing to do with the PATRIOT Act. The FISA law was put into effect in 1978, I believe it was. So this is a law that has been in effect for a long time. The problem with it is that a significant change has occurred on the international stage. As has been pointed out, the law was originally intended to deal with Soviet spies, foreign powers, or international terrorist organizations such as the Red Brigade, the Baader-Meinhof gang and people like that.

In that day, it was a tight-knit group of people who actually worked as a terrorist organization. But today, as the testimony before the Intelligence Committee went into in detail, it is now a worldwide Islamic jihadist movement. It is about a cause rather than an organization.

The FBI Director, whose testimony I read this morning, went into a great deal about how, therefore, the people who work in this international cause are very different from the old members of the gangs or the Soviet spy network, and to try to pigeon hole a FISA warrant against these individual people into the provisions of the law as it was originally drafted is really not possible. That is why the FBI would not go after a warrant for Zacarias Moussaoui. It is why Agent Rowley was very upset about it. But at the end of the day, headquarters was probably right not to try to make out the case that Zacarias Moussaoui was somehow connected to an international terrorist organization. They found some tenuous connections with some Chechen rebels but at the stage that the warrant was corrected they could never tie it into an international terrorist organization. We now know subsequent to the issuance of the warrant that there were some ties to al-Qaida, but he may be a good example of the lone-wolf terrorist.

So that is why times have changed. The law has to change to keep up with this. Otherwise, we would not be suggesting this rather modest change in the law.

The people against whom we are now directing our surveillance with respect to international terrorism are a very different group of people. Much of the time they do not act in concert and sometimes they enact as lone wolves.

That gets me to the next point. As I understand it, Senator FEINGOLD's pri-

mary argument is that we should have this kind of surveillance against agents of foreign powers, but that we should not have it against lone wolves. Of course, the Feinstein amendment provides a presumption that the lone wolf is an agent of a foreign power.

That is not our point. We are not trying to prove the lone wolf is an agent of a foreign power. I do not want to have a presumption in there that presumes something that we are not even alleging. Sometimes our U.S. Government is going to say, we do not have any reason to believe this person is connected to an international terrorist organization or a foreign power, country. We are not alleging that. We are alleging that he is a person engaged in or about to engage in a terrorist action, we have probable cause to believe that. That standard remains the same and, therefore, we want to, what, prosecute him? No, get a warrant to see what else he is doing.

So this amendment does not match up with what we are trying to do. We are not trying to prove that they are agents of a foreign power. We are providing the court with evidence that a non-U.S. person is engaging in or about to engage in activities involving terrorism against the United States and, therefore, the court is warranted in allowing us to investigate it further. We do not want the presumption because in many cases that is not what we are trying to prove.

The important point is a point I would like to make in response to Senator FEINGOLD and that is that there still has to be international terrorism involved. It is not as if we are going after people because we do not like their nationality or something of that sort. We are dealing with a very sophisticated court that is not a kangaroo court; it is the FISA court, and they have not turned down warrants because the Justice Department has been very careful to make sure they have all the evidence that is needed.

I will tell my great friend Senator FEINSTEIN and just make a footnote—I said it this morning but I will say it again—I cannot remember a time that she and I disagreed on a matter involving intelligence or law enforcement activities. It just does not happen except this one time. I guess the exception proves the rule. There is nobody in the Senate with whom I have enjoyed working more on these matters. Witness the fact that Senator FEINSTEIN and I have been the chairman and ranking member alternately of the Terrorism, Technology, and Homeland Security Subcommittee of the Judiciary Committee ever since I came to the Senate. It has been a wonderful relationship, and there is nobody in this body that I admire more.

So I want to answer this question very specifically, because if I understood one of her arguments, it was that we have changed the probable cause standard, and we have absolutely not done that. In fact, in response, I think

to a suggestion of one of our Democratic colleagues, we had the language exactly tracked in the statute, and I will read it precisely. This is in 50 United States Code, section 1801, the definitions section under foreign power. I will not read the whole thing, but No. 4 is "a group engaged in international terrorism or activities in preparation therefor."

Then, under "agent of foreign power"—and, remember, this is where we have the definition of a non-U.S. person. We had the third category. We tracked the language precisely—"engages in international terrorism or activities in preparation therefor." It is the exact same language.

So the probable cause standard remains identical. In very simple terms, this is what the U.S. attorney would have to say: Judge, here is my affidavit and what it says is that Joe Blow is a non-U.S. citizen. Here is the documentation for that, and here are the activities that we have probable cause to believe he is engaging in.

So it is the probable cause standard. What would satisfy that test? Let me be very precise in the order that I present this.

Under this section of definitions—and our bill is the same as S. 2568, which the Justice Department was referring to when it made this comment, someone who is involved in terrorist acts:

That transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

This is quoting from 50 United States Code, section 1801(c)(3):

As a result, a FISA warrant would still be limited to collecting foreign intelligence for the international responsibilities of the United States, and the duties of the Federal Government to the States in matters involving foreign terrorism.

That is quoting from a court case that interpreted the provision.

Therefore, according to the Justice Department, the same interests and considerations that support the constitutionality of FISA as it now stands would provide the constitutional justification for S. 2568, which is the predecessor to S. 113, which is the bill before us.

So the definition is the same, the probable cause standard is the same, and the nexus to international terrorism is the same. None of that changes. The only thing that changes is that we add non-U.S. person so you can get to the lone wolf and do not have to either assert that the person is involved with an international terrorist organization or foreign power or presume that the individual is, because that person may well not be.

Finally, Senator FEINSTEIN made the point that under proper circumstances, S. 113 would allow the search of a solo international terrorist and the answer is, yes, that is exactly what it would allow. And especially with today's

weapons, which allow even a solo terrorist to be able to cause enormous destruction, the FBI should be able to monitor such a terrorist if it can convince the court that probable cause exists that would otherwise be the standard in any kind of FISA warrant request.

I think those are the answers to the allegations that have been made in support of the Feinstein amendment. I think it gets right down to what Senator FEINGOLD said, which is that there is simply disagreement about whether the lone wolf should be the subject of this statute. Obviously, if the amendment were to be adopted, we have our purpose, which is to add the third category.

The PRESIDING OFFICER. The Senator from California.

Mrs. FEINSTEIN. Mr. President, I thank the distinguished Senator from Arizona for his personal comments. He knows I have thoroughly enjoyed working with him. It is unusual—as a matter of fact, I cannot remember in all these years when we have ever been on opposite sides of one of these questions.

Let me state to the Senator my great fear. We all forget beneath the surface this Government has tremendous power. When that power is exercised against a person in this country, alone as a visitor, has no rights, it is enormous what can happen. What my deep concern is that overzealous prosecutors will use this where they should use title III and get a criminal warrant instead of a FISA warrant because of the removal of the agent of the foreign power. We keep the connection with the basics of the FISA statute which is surveillance related to an agent of the foreign power. We keep that. That is the justification for FISA. We give the judge the ability to make that as a presumption—ergo, giving the judge some discretion not to make it, and therefore the individual seeks the warrant—an FBI agent or whoever it is—goes to title III and gets a criminal warrant.

Once you get a FISA warrant, the benefits from the law enforcement side of the FISA warrant are much greater than the title III warrant.

It is a small protection. I don't believe, in my heart of hearts—and if this were to pass and the Senator from Arizona showed me that it did in any way prevent the FISA court from exercising its discretion just as you want it to, I will change it. I would be the first one to come back.

It prevents this misuse of a prosecutor who should be getting a title III warrant, who will come to the FISA court instead because the FISA court will be a rubberstamp, and because myself, a visiting Indian, Pakistani, Muslim, Frenchman, Italian, anybody in Los Angeles who happens to have in their pocket a one-way ticket and maybe a pocket knife—a box cutter may be out of date—and somebody has a suspicion, they do not have to prove anything. And they can surveil me, they can wiretap me, they can exert all

of the surveillance powers that are used under FISA. They do not know whether I am going to commit a criminal act and they have no evidence of anything else. That is what title III is for. Title III has a little heavier cause burden, but as the Senator said, there is probable cause in both.

But the benefits of the FISA warrant are superior to the benefits of the title III warrant in their duration. So you can do all this to somebody for 90 days instead of 30 days and you do not have to come back and renew the warrant once every year. That is my concern.

As I read your legislation, there is no discretion. That is the problem I have with it. This is such a slight change, it is kind of a little tweak that a judge can say, hey, now, let's wait and see what you are doing here.

If the Senator would like to respond, I am happy to yield.

Mr. KYL. If I could, the Senator from California has been talking about discretion, and I guess I begin by asking a question.

Does the Senator intend the presumption language would apply both to the definition of the individual as an agent of a foreign power and relative to the activities in which the individual is allegedly engaging?

Mrs. FEINSTEIN. The presumption would be that the target or the individual would be an agent of a foreign power. Otherwise, you could have this against the Unabomber, Oklahoma City. Of course, they are American citizens, so I understand that does not apply, but that same kind of situation.

Mr. KYL. There are two things the court will have to determine. First, that this is a warrant that should be issued, that there is probable cause the underlying crime is being committed or activities engaged in for the preparation of a crime. And second, it lies against a particular kind of person we are talking about. In regular title III court you do not have the second requirement, but in FISA court you have to prove the person is either an agent of a foreign power or foreign intelligence organization, and we are adding this third criteria.

So the court has to make a 100 percent determination in both of those matters. If the court cannot find any evidence in the affidavit that the individual is not a United States citizen, for example, the court would have no discretion and have to deny the warrant. But if the court found part of the warrant was satisfied, this person is clearly a non-United States citizen, then, number two is satisfied; go back to number one, which is the question, Do we have probable cause to believe the person is engaging in the kind of activities that the statute discusses here.

That is not necessarily a matter of discretion so much as it is a matter of a court weighing the affidavit presentation and determining whether it is sufficient to meet the probable cause standard.

Mrs. FEINSTEIN. What I don't understand is why you do not want to give the judge that small bit of discretion with a presumption. The judge can presume it. We both know the history and the history is 100 percent if you include the appeal of FISA judges in granting warrants. So there will not be a problem there.

I am concerned about the overreach. I am concerned about the misuse. And the only way we could figure to counter that was to keep the agent a foreign power, provide this presumption that a judge could use in that one case.

Senator, neither you nor Senator FEINGOLD nor I would ever know if there was an overreach. That is what makes this far more dangerous, the fact that it is so secret.

Mr. KYL. If I could respond to the last point.

The matter about which the court has some degree of discretion is in the way it weighs the affidavit presentation relative to the underlying predicate for the warrant, the activities that are being engaged in, the purchase of the ticket, the presence of box cutters, all that information. The court weighs all that. It is presented in the affidavit, and the court makes a decision. It is enough or it is not enough. To some extent, you can say that is discretion. It is really applying the evidence to the probable cause test, weighing it and determining whether the evidence meets the case. In any event, that is where the court has some leeway to decide.

Where the court does not have any leeway is to something that is either a fact or it is not. That is, Does this person qualify or not? That is to say, is the person an appropriate subject for the warrant or not?

If you were asserting, for example, that the individual was a member of the Baader-Meinhoff gang, there would have to be evidence in the affidavit that is clear enough for the court to reach that conclusion or the court would say, sorry, this person does not qualify for a FISA warrant. I cannot find enough evidence in here that he is a member of the Baader-Meinhoff gang or a spy for the Soviet Union.

But with respect to whether this person is a non-United States person, that is something that will either be fairly true or not. It is either going to be true or not. The court is either going to be faced with a situation where the evidence is overwhelmingly clear in the affidavit and the United States attorney says it is very clear this person is not a United States citizen, here is the evidence we have, and the court will say, I agree. Or the court will say, all you have done is assert that the person is a non-United States citizen. I don't have any basis to know that or not. Where is your evidence to know that he is a non-U.S. citizen? So I am not going to grant the warrant. But that is the basis on which the court is going to make that judgment.

The court is not going to say there is a provision here that says I can presume that this individual is an agent of a foreign power and therefore I can have some leeway here to decide whether or not the warrant lies against this individual. The Government is either going to assert that the person is an agent of a foreign power or not. If the Government is saying no, we don't think this person is working for some foreign power, we think he is working on his own or at least we don't have any evidence to suggest he is anything other than an international terrorist traveling all around the world training and picking up different things and so on, but he is a dangerous guy and here is the reason we believe he is dangerous, a presumption at this point doesn't get you anywhere.

The court has no direction to go in. If you say there is a presumption that he is an agent of a foreign power and the Government is not trying to prove he is acting for a foreign power, what has this definition gained us? There are situations in which the Government simply isn't going to allege that the person is an agent of a foreign power; it is only going to allege that he is a lone wolf, but look at all the bad things he has done or is doing. If they are sufficient to grant a warrant, if there is probable cause there, the court can do it. If the court says it is not quite sufficient yet, get some more information, then he will deny the warrant.

The PRESIDING OFFICER. Who yields time?

Mrs. FEINSTEIN. I will yield time, Mr. President, and I will be very happy to have Senator FEINGOLD in this.

I think this is really the kind of discussion that we should be having. I welcome the free flow.

If I knew a better way of solving the problem Senator KYL mentioned, I would do it. But my view and what Intelligence staff and others have said to me is that the way it is worded creates a rubberstamp out of a FISA judge, once you take out that agent of a foreign power connection. I guess the reason they believe that is that it puts them into the other side, the title III side.

If I could think of another way, I would. But it is one added guarantee against an overreach. You and I have both known zealous prosecutors. You and I have both known people who would misuse this. The question comes, How do we prevent misuse from happening?

I am happy to yield to Senator FEINGOLD.

The PRESIDING OFFICER. The Senator from Wisconsin.

Mr. FEINGOLD. Mr. President, I again thank the Senator from California for yielding time and for her leadership. I thank the Senator from Arizona. He is a person of great integrity, and the way he concedes if he didn't say something exactly perfectly this morning is an example of exactly the kind of relationship I have with

him on these debates. They are good debates. I appreciate that.

It is also true the Senator from California and the Senator from Arizona almost always agree on these kinds of issues. They are one of the most formidable combinations here in the Senate, in a bipartisan combination. I take great pride in the bipartisan work I have had a chance to do with people such as the other Senator from Arizona and the Senators from Maine.

So I take my hat off to them for having done that. I have often been on the other side of their view, which is not easy because they are well prepared and they are very dedicated and they like to get things done.

I guess that is why I think this is kind of a significant moment, when Senator FEINSTEIN and I actually agree on a point, when the two of you so frequently agree. I think it is a sign that there is something that needs to be fixed in this bill.

It is modest, but it is very important. I remind the Senator from Arizona that I think I essentially said this: I voted for this in committee in the hope it would be fixed on the floor.

My goal here is not to kill this bill. I do know how to vote against bills I don't like. My goal is to fix it because I think there is a problem with this issue. That is where we are with this amendment. This is an attempt to fix this bill on a very important point without, in my view, doing any serious harm at all to the goal of the Senator from Arizona and the goal of the Senator from New York.

The way I understand this operates is that in these cases the FISA court is going to grant this warrant upfront, essentially every time in the first request, because there will be the evidence or the presumption that there is a problem.

Where this, the Feinstein amendment, has a real impact is where they come back later and they have to come back for a renewal. If after a couple of years there is just no evidence at all or virtually no sign at all that the original belief about what this guy was about to do isn't bearing any fruit at all, in that case, and only in that case, should this, in terms of our laws and our tradition, be returned to the regular criminal court—only in that circumstance.

In other words, yes, the Government was trying to protect the American people, as they should. They had a person here who they believed might have a connection to a foreign power or be connected to a terrorist organization. But it turns out after some period of time that it just didn't happen to be one of those cases where that was true.

It is still a person who intended, perhaps, to do something very wrong. It is still a person who should be prosecuted. But it is a person who deserves the protections of the laws of the United States—because I am sure the Senator from Arizona agrees with me, barring this unusual kind of cir-

cumstance that is the basis for the FISA law, everyone who commits a crime on our soil, whether an American citizen or not, is entitled to the protections of our Constitution and the Bill of Rights in a criminal proceeding.

The FISA law is only a narrow exception to that. So let's be very clear on the record. I do want to get at these lone wolves who may have some connection to international actors, such as foreign powers, or to terrorist organizations. As the Senator from California pointed out, if it is simply a person committing a bad act on our soil, a person who is not an American citizen, that is what our criminal courts are for. That is what title III is for. That is the foundation of our system.

This is really an incredibly narrow exception, a backstop, a safeguard to make sure that the good intentions of what this bill is all about don't go too far. That is what the Senator from California said, so that there is not overreaching.

I have just one other point about what the Senator from New York said. He seemed to be setting up a scenario where there might be a conflict between the FISA judges, almost as if there were different circuits like in the regular courts. That is not the way the FISA courts are set up. There are different FISA judges, but together they constitute the appeals courts. There would not be different areas of the country that would have different laws of this kind of thing that would present any kind of problem in terms of a conflict in the circuits. I don't think this argument holds up.

Let me return to the point. The Senator from California has been so careful in making sure this is just a safeguard down the line, when somebody has been identified as a potential lone wolf and it does not really pan out, that there is some discretion rather than a permanent warrant into perpetuity for eavesdropping on somebody who certainly maybe needs to be eavesdropped upon, but for whom that authority should be obtained through the normal criminal procedure, not on the basis of a law that was crafted under the assumption that this is a foreign threat to our Nation.

I yield the floor.

The PRESIDING OFFICER. Who yields time?

The Senator from Arizona.

Mr. KYL. Mr. President, first of all, I thank Senator FEINGOLD for the kind words he had for me and my colleague from Arizona, Senator MCCAIN. I just spoke with Senator FEINSTEIN.

I don't think either of us has a whole lot more to say here. I think Senator ROCKEFELLER may wish to speak and there may be others.

I urge anyone who would like to speak to this amendment to come to the floor and speak because otherwise I think we are getting close to the time when we could vote.

I inquire of the Chair, how much time remains on both sides on this amendment?

The PRESIDING OFFICER. The Senator from Arizona has 98 minutes remaining. The Senator from California has 68 minutes remaining.

Mr. KYL. I think there is a little time left on the debate time as well, but I am prepared to yield that back when we are done with this amendment, as would Senator SCHUMER.

We could either note the absence of a quorum and wait a few minutes for somebody else or I could yield the floor to someone?

Mrs. FEINSTEIN. Mr. President, I suggest the absence of a quorum. I know Senator ROCKEFELLER is on his way.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

The Senator from West Virginia.

Mr. ROCKEFELLER. Mr. President, I thank the distinguished Presiding Officer. I thank the Senator from California whose amendment to S. 113 I rise to support. I am a cosponsor of her amendment.

We live in a time in which we can never feel completely safe. There are terrorists throughout the world and here at home who have sworn to kill Americans. That is what they are trained to do. That is what they want to do. That is what they plan to do. We fight a war knowing that it may increase the terrorist threat against us. We buy duct tape and plastic sheeting. We plan escape routes for our families. We make decisions about whether to go to public events or ride a subway, or do all kinds of things. Does it change our lives or not? We are not even sure of that yet.

In times such as this, we in Congress have a special responsibility. We must be vigilant in our lawmaking and our oversight to make certain that the executive branch, our intelligence, and law enforcement agencies have all the legitimate tools to do their jobs in an efficient and effective way.

But our responsibility does not end there. It is easy to write laws to remove obstacles to prevent the Government from obtaining information. We have done that. Our challenge is to write laws that strengthen our security without undermining privacy and liberty. This is something our Nation has never faced before in the way which it is now going to be facing for the next several years.

It is our responsibility to look very closely at every piece of legislation related to fighting terrorism and ask: Do we need it? Does it make us feel safer? Yes. But do we really need it? Does it accomplish the goals we are seeking? And does it go too far?

I have cosponsored the Feinstein substitute amendment to S. 113 because I believe the language of the substitute

is crafted carefully—very carefully—to accomplish our goals in the fight against terrorism without going too far.

Mr. President, I would like to explain why I believe that.

The Foreign Intelligence Surveillance Act of 1978 was designed to regulate the collection of foreign intelligence inside the United States using electronic wiretaps. Later, physical searches were added to the law.

Before FISA, the Foreign Intelligence Surveillance Act, the executive branch ran wiretaps for national security purposes without judicial review, without approval of any sort. Such wiretaps were potentially unconstitutional and, because of that, threatened the viability of espionage prosecutions and raised serious questions regarding civil liberties.

The Congress enacted FISA with the recognition that our national security required the collection of foreign intelligence in the United States through intrusive means under different circumstances and using different standards than in the criminal warrant context, and the courts have upheld the constitutionality of FISA.

The purpose of FISA is the collection of foreign intelligence. The standard used to distinguish between FISA collection and wiretaps related to criminal activity involves a determination that the target is a “foreign power” or linked to a “foreign power.” In the case of terrorists, the Government must show the target is an “agent of a foreign power,” a terrorist group operating overseas.

Both S. 113 and the Feinstein substitute address and solve the following problem: What if you have a non-U.S. person in the United States who is engaging in or preparing to engage in international terrorist activities, but the Government does not have enough evidence to link him to an overseas group?

Both S. 113 and the Feinstein substitute eliminate the requirement that the Government produce to the FISA court evidence showing a direct link between the target and a foreign terrorist group.

So why is the Feinstein substitute better?

Under S. 113, the Kyl-Schumer bill, a key principle of FISA is eliminated. Even if the Government has actual evidence that the target is not connected to a foreign terrorist group, under Kyl-Schumer, the Government can still get a FISA wiretap order. This simply goes too far, and it is not necessary, in the judgment of this Senator.

If we know for certain a person really has no foreign connections, if he or she is a true “lone wolf”—a foreign “Unabomber,” for example—then it is a straightforward criminal investigation. There is no foreign intelligence to be gotten at all, and that person is not a valid target under FISA.

The Feinstein substitute gets the Government everything it wants with-

out changing FISA in a way that damages its basic premise; to wit, FISA is for the collection of foreign intelligence and should not be used when the only objective at hand is the collection of criminal evidence.

Mr. President, I commend the carefully crafted solution offered by the Senator from California to a very difficult problem. As the vice chairman of the Intelligence Committee, I am proud to cosponsor this amendment, and I urge my colleagues to vote for it.

I thank the Presiding Officer and yield the floor.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. KYL. Mr. President, first, I ask unanimous consent to have printed in the RECORD a letter dated April 30, 2003, to Chairman ORRIN HATCH from the Department of Justice relative to this legislation, and specifically an analysis of the amendment proposed by Senator FEINSTEIN on pages 5 and 6.

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

DEPARTMENT OF JUSTICE,  
OFFICE OF LEGISLATIVE AFFAIRS,  
Washington, DC, April 30, 2003.

Hon. ORRIN G. HATCH,  
Chairman, Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: This is in response to your request for the Administration's views on various proposed amendments to S. 113, a bill that would amend the Foreign Intelligence Surveillance Act of 1978 to permit electronic surveillance and physical searches of so-called “lone wolf” international terrorists—i.e., non-United States persons who engage in international terrorism or activities in preparation therefor without any demonstrable affiliation with an international terrorist group or other foreign power. On March 5, 2003, the Administration sent a letter indicating its support for S. 113 (copy attached). The Administration, however, is greatly concerned that this important FISA amendment would be subject to a sunset provision included in the USA PATRIOT Act of 2001. The Administration opposes the sunset language, and looks forward to working with Congress to ensure that this FISA amendment and those other portions of the USA PATRIOT Act subject to the sunset provision are addressed at the appropriate time. For reasons set forth below, we oppose the proposed amendments to S. 113. In particular, the Administration is concerned that the proposed amendments would weaken the FISA as an important instrument in the arsenal of the United States Government in combating terrorism and the espionage activities of foreign powers.

Authority of the FISC and FISCR. The first proposed amendment to S. 113, entitled “Sec. 2. Additional Improvements to Foreign Intelligence Surveillance Act of 1978,” would add a provision to 50 U.S.C. §1803 to grant the Foreign Intelligence Surveillance Court (“FISC”) authority to “establish such rules and procedures, and take such actions, as are reasonably necessary to administer their responsibilities under this Act.” The Administration opposes this grant of authority to a court that has an extremely limited statutory function of approving or disapproving applications made by the Government of orders with respect to electronic surveillance and search. Granting rulemaking authority by statute to the FISC and the FISCR—courts that operate in secret and that are of

very limited jurisdiction that is specified in detail in the FISA—is inappropriate.

Reporting Requirements. A second group of related amendments would require additional reporting concerning the use of FISA. Each is objectionable for reasons discussed below.

a. The first reporting amendment would require public disclosure of the number of United States persons targeted under various provisions of FISA. Under current law, the Department publicly reports the annual aggregate number of FISA searches and surveillances, but does not disclose publicly how many of those searches and surveillances involved United States persons. See 50 U.S.C. §§ 1807, 1826. The proposal also would require public disclosure of the number of times the Attorney General authorized the use of FISA information in a criminal proceeding—a statistic that currently is reported to the Intelligence Committees as part of a longstanding, carefully constructed, and balanced accommodation between the Executive and Legislative branches and in accordance with the FISA itself. See 50 U.S.C. § 1808(a)(2)(A). Finally, the provision would require disclosure of portions of FISA pleadings and orders that deal with significant questions of law (not including discussion of facts) “in a manner consistent with the protection of the national security of the United States.” Each of these three reporting requirements is addressed below.

We oppose a requirement to disclose publicly the number of FISA targets that are United States persons. Congress has in the past considered and rejected proposals to require disclosure of this information to the general public rather than to the Intelligence Committees. In 1984, the Senate Select Committee on Intelligence was “asked by the American Civil Liberties Union to consider making public the number of U.S. persons who have been FISA surveillance targets.” S. Rep. No. 98-660, 98th Cong., 2d Sess. 25 (1984). The Committee rejected that proposal because “the benefits of such disclosure for public understanding of FISA’s impact would [not] outweigh the damage to FBI foreign counterintelligence capabilities that can reasonably be expected to result.” *Ibid.* As the Committee explained, “[a]ny specific or approximate figure would provide significant information about the extent of the FBI’s knowledge of the existence of hostile foreign intelligence agents in this country. As in other areas of intelligence oversight, the Committee must attempt to strike a proper balance between the need for public accountability and the secrecy required for effective intelligence operations.” *Ibid.* This analysis is at least as applicable to foreign terrorist organizations today as for foreign intelligence organizations and the Administration continues to support the balance that was struck in 1978 and reaffirmed in 1984.

We also oppose a requirement to disclose publicly the number of times the Attorney General has authorized the disclosure of FISA information for law enforcement purposes. This provision is problematic primarily because it is not confined to cases in which FISA information is actually used in a proceeding. Revealing the number of Attorney General authorizations for such use—as opposed to the use itself—is troubling because that information could involve classified and non-public matters with ongoing operational significance—e.g., an investigation that has not yet resulted in a public indictment or trial, or in which no indictment or trial ever will occur. Thus, these numbers potentially could reveal information about the Department’s classified, operational efforts to protect against the activities of foreign spies and terrorists.

Finally, we believe that the disclosure of FISA pleadings and orders that deal with significant questions of law is inherently inconsistent with “the protection of the national security of the United States.” Virtually the entirety of each application to the FISC discusses the facts, techniques, or pleading of highly classified FISA operations. As we noted in our letter of August 6, 2002, on predecessor legislation in the 107th Congress, “[a]n interpretation by the FISC of the applicability of FISA to a technique or circumstance, no matter how conceptually drawn, could provide our adversaries with clues to relative safe harbors from the reach of FISA.” A copy of our earlier letter is attached for your convenience.

b. A separate but similar proposal, entitled “Sec. 2. Public Reporting Requirements Under the Foreign Intelligence Surveillance Act of 1978” and proposed by Senator Feingold, also would impose public reporting obligations. Instead of requiring the Department to report the number of FISA targets who are United States persons, it would require reporting of the number who are not United States persons, broken out by the type of FISA activity involved—e.g., electronic surveillance and physical search. This proposal also would require the Department to identify individuals who “acted wholly alone.” Like the proposal discussed above, this proposal would require the Department to report the number of times the Attorney General authorized the use of FISA information in a criminal proceeding, and portions of FISA pleadings and orders that deal with significant questions of law “in a manner consistent with the protection of the national security of the United States.” The objections set forth above apply equally to this proposal.

c. Finally, a very recent reporting proposal, also proposed by Senator Feingold, would require an annual report on FISA to the Intelligence and Judiciary Committees. The report would include the classified statistical information described above—including numbers of non-U.S. persons targeted under each major provision of FISA—and would also require submission of portions of FISA pleadings and court orders. For reasons stated above and in our letter of August 6, 2002, we continue to oppose any requirement to submit portions of FISA pleadings and orders. More broadly, we strongly oppose the amendment because it threatens to upset the delicate balance between the Executive and Legislative Branches of government in the area of intelligence and intelligence-related oversight and reporting.

The FISA statute prescribes the types of information that must routinely be provided to the Judiciary Committees. Under current law, the Department of Justice provides to the Judiciary Committees and makes public “the total number of applications made for orders and extensions of orders” approving electronic surveillance and physical searches under FISA, and “the total number of such orders and extensions either granted, modified, or denied.” 50 U.S.C. § 1807; see 50 U.S.C. § 1826; 50 U.S.C. § 1846 (similar reporting requirement for numbers of pen-trap applications and orders); 50 U.S.C. § 1862 (similar reporting requirement for numbers of applications and orders for tangible things). The Department has, of course, consistently met these statutory requirements.

The FISA reporting obligations concerning the Intelligence Committees are much broader. Under 50 U.S.C. § 1808, the Attorney General must “fully inform” the House and Senate Intelligence Committees “concerning all electronic surveillance” conducted under FISA, and under 50 U.S.C. § 1826 he must do so “concerning all physical searches” conducted under the statute. In keeping with

this standard, the Department submits extremely lengthy and detailed semi-annual reports to the Intelligence Committees, including specific information on “each criminal case in which information acquired [from a FISA electronic surveillance] has been authorized for use at trial,” 50 U.S.C. § 1808(a)(2)(B), and “the number of physical searches which involved searches of the residences, offices, or personal property of United States persons,” 50 U.S.C. § 1826(3). The reports also review significant legal and operational developments that have occurred during the previous six months. These classified reports are painstakingly prepared in the Justice Department and are obviously, from the questions and comments they generate, closely scrutinized by the Intelligence Committees. See generally S. Res. No. 400, 94th Cong., 2d Sess. (1976); H.R. Res. No. 658, 95th Cong., 1st Sess. (1977).

The “fully inform” standard that governs Intelligence Committee oversight of FISA is the same standard that governs Congressional oversight of the Intelligence Community in general. See S. Rep. No. 95-604, 95th Cong., 1st Sess. 60-61 (1977); S. Rep. No. 95-701, 95th Cong., 2d Sess. 67-68 (1978); see also H.R. Rep. No. 95-1283, Pt. 1, 95th Cong., 2d Sess. 96 (1978). The requirement to “fully inform” the Intelligence Committees, rather than Congress as a whole, is consistent with the long-standing legal framework and historical practice for Intelligence Community reporting to, and oversight by, Congress on matters relating to intelligence and intelligence-related activities of the United States government. Consistent with the President’s constitutional authority to protect national security information, Congress and the President established reporting and oversight procedures that balance Congress’ oversight responsibility with the need to restrict access to sensitive information regarding intelligence sources and methods. The delicate compromise—embodied in FISA and more generally in Title V of the National Security Act of 1947, 50 U.S.C. §§ 413-415, and based on the preexisting practice of providing only the intelligence committees with sensitive information regarding intelligence operations—established procedures for keeping Congress “fully and currently informed” of intelligence and intelligence-related activities. Under these procedures, the Intelligence Community provides general, substantive, and, often, classified finished intelligence information to several committees of Congress, but generally provides classified operational information only to the Intelligence committees. Even with regard to the Intelligence Committees, the Director of Central Intelligence and the heads of other intelligence agencies are, under Title V, to provide such information only “to the extent consistent with due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters. 50 U.S.C. §§ 413a(a), 413b(b).

Senator Feingold’s reporting proposals would, in sum, distort and damage the effective, longstanding accommodation between the President and Congress, and between the Intelligence and Judiciary Committees, over the handling of classified operational intelligence information within Congress. It is noteworthy that the current leadership of both the House and Senate Judiciary Committees have expressed their approval of the existing accommodation. In a press release dated October 17, 2002, the Chairman of the House Judiciary Committee stated that the existing accommodation provides for “reasonable, limited access, subject to appropriate security procedures, to FISA information through [the House Intelligence Committee].” In addition, your letter of February 27, 2003, to Senators Leahy, Grassley

and Specter on FISA matters stated that the existing congressional oversight standards relating to FISA reflect a "careful balance between the need for meaningful oversight and the need for secrecy and information security in the government's efforts to protect this country from foreign enemies." Moreover, you stated that your years of service on both the Senate Judiciary Committee and the Senate Select Committee on Intelligence have led you to conclude that the existing accommodation allows Congress to exercise "appropriate, vigorous, robust and detailed oversight of the FISA process."

Reporting on National Security Letters. The next proposed amendment to S. 113, entitled "Sec. 3. Improvement of Congressional Oversight of Surveillance Activities," would require additional reporting specifically addressing the use of 18 U.S.C. §2709(e) in the context of requests made to schools and public libraries. We are concerned that a reporting requirement at this level of formality and specificity would unduly increase the risk of public exposure of the information, thereby jeopardizing our counterintelligence and counterterrorism efforts.

Presumption. Another proposal is presumably intended as a substitute for S. 113 and would create a "presumption that certain non-United States persons engaging in international terrorism are agents of foreign powers for purposes of the Foreign Intelligence Surveillance Act of 1978." Under the proposal, the FISC would be instructed that it "may presume" that a non-United States person engaged in international terrorism or activities in preparation therefor "is an agent of a foreign power" as defined in FISA.

By providing that the FISC "may presume" the target is acting for or on behalf of an international terrorist group, the proposal would confer discretion on the FISC without any standards to guide the exercise of that discretion. Accordingly, the effect of the proposal is uncertain. It is conceivable that the FISC (or a reviewing court) would indulge the presumption only where the Government had established probable cause or something near to probable cause that the target in fact was working for or on behalf of a terrorist group. In that event, the proposal would be useless or nearly useless. The unpredictability inherent in the proposal also would significantly reduce its value even if, in the end, the FISC and later courts interpreted it more expansively in any particular case.

Nor do we believe that there is a reason to use a presumption—even a mandatory presumption—instead of the straightforward approach of S. 113 itself. In particular, we see no constitutional benefit likely to arise from the use of a presumption. Our letter of July 31, 2002 (copy attached), which explained the constitutionality of an earlier version of S. 113 (which would have made a lone-wolf terrorist a "foreign power" rather than an "agent of a foreign power") applies equally to the current version of S. 113. We do not believe that the use of a presumption significantly changes the constitutional analysis, nor adds any significant protection to civil liberties, except to the extent that the presumption is read narrowly to mirror current law, in which case the presumption is of little or no value for reasons explained in the previous paragraph.

Discovery. The next proposal would change the standards governing discovery of FISA materials in suppression litigation arising from the use of FISA information in a legal proceeding such as a criminal trial. We strongly object to this proposal. The proposal could harm the national security by inhibiting cooperation between intelligence and law enforcement efforts to stop foreign spies and terrorists. It could deter the Gov-

ernment from using information obtained or derived from FISA in any proceeding—civil, criminal, immigration, administrative, or even internal Executive branch proceedings. These overwhelming and potentially catastrophic costs would be incurred for very little benefit, because current law amply protects individual rights.

It may be helpful to begin by reviewing current law in this area and the ways in which it protects individual rights. Currently, FISA requires high-level approval from the Executive and Judicial branches before the Government conducts a search or surveillance. Each FISA application must contain a certification signed individually and personally by the Director of the FBI (or another high-ranking official accountable to the President) and must be individually and personally approved by the Attorney General or the Deputy Attorney General. 50 U.S.C. §§1804(a), 1823(a), 1801(g). Under the statute, the Government must apply to a judge of the FISC for approval before conducting electronic surveillance or physical searches of foreign powers or agents of foreign powers inside the United States. 50 U.S.C. §§1804–1805 (electronic surveillance), 1823–1824 (physical searches). Judges of the FISC are selected by the Chief Justice from among the judges on United States District Courts, who as United States district judges are protected by Article III of the Constitution. 50 U.S.C. §§1803(a), 1822(c).

A second round of judicial review occurs before the Government may use FISA information in any proceeding. The Government must provide notice to the FISA target or other person whose communications were intercepted or whose property was searched before using any information obtained or derived from the surveillance or search in any proceeding against that person "before any court, department, officer, agency, regulatory body, or other authority of the United States." 50 U.S.C. §§1806(c), 1825(d). After receiving notice, the person may file a motion to suppress in a United States District Court and may seek discovery of the FISA applications filed by the Government and the authorization orders issued by the FISC. 50 U.S.C. §§1806(e)–(f), 1825(f)(g). Discovery may be granted freely unless the Attorney General personally files an affidavit under oath asserting that discovery would harm the national security. If the Attorney General files such an affidavit, as he has in every case litigated to date, the district judge must review the FISA application and order in camera, without granting discovery, unless "disclosure is necessary to make an accurate determination of the legality" of the search or surveillance. 50 U.S.C. §§1806(f), 1825(g). If discovery is granted, the court must impose "appropriate security procedures and protective orders." *Ibid.* No court has ever ordered disclosure.

Congress established this standard for discovery after extensive and careful deliberation in 1978. See H.R. Rep. No. 1283, Part I, 95th Cong., 2d Sess. 90 (1978) (hereinafter House Report); S. Rep. No. 604, 95th Cong., 1st Sess. 57–59 (1977) (hereinafter Senate Judiciary Report); S. Rep. No. 701, 95th Cong., 2d Sess. 62–65 (1978) (hereinafter Senate Intelligence Report). As the 1978 conference report on FISA explains, "an in camera and ex parte proceeding is appropriate for determining the lawfulness of electronic surveillance in both criminal and civil cases . . . [and] the standard for disclosure . . . adequately protects the rights of the aggrieved person." H.R. Rep. No. 1720, 95th Cong., 2d Sess. 32 (1978) (hereinafter Conference Report). As the Senate Judiciary Committee explained in 1978: "The Committee views the procedures set forth in this subsection as striking a reasonable balance between an en-

tirely in camera proceeding which might adversely affect the defendants's ability to defend himself, and mandatory disclosure, which might occasionally result in the wholesale revelation of sensitive foreign intelligence information." Senate Judiciary Report at 58.

The proposal would replace FISA's current standard with a new one under which discovery is required unless it "would not assist in determining any legal or factual issue" in the litigation. The "would not assist" standard is inappropriate for use in FISA, in particular, because it is lower than the standard for disclosure of informants' names in ordinary criminal cases. That standard at least requires a balancing of the public interest in confidentiality against the individual defendant's interest in disclosure. As the Supreme Court explained in *McCray v. Illinois*, 386 U.S. 300, 311 (1967), extending its earlier decision in *Roviaro v. United States*, 353 U.S. 53, 60–61 (1957), "this Court was unwilling to impose any absolute rule requiring disclosure of an informer's identity even in formulating evidentiary rules for federal criminal trials [in *Roviaro*]. Much less has the Court ever approached the formulation of a federal evidentiary rule of compulsory disclosure where the issue is the preliminary one of probable cause." Indeed, the "would not assist" standard is lower even than the standards that govern various civil privileges, all of which require some kind of balancing of the interests in disclosure against the interests in confidentiality. See, e.g., *In re Sealed Case*, 121 F.3d 729, 738 (D.C. Cir. 1997). In effect, the "would not assist" standard is the appropriate standard for discovery of unclassified and non-privileged information, because no discovery of any kind is justified unless it would assist the litigation.

The "would not assist" standard could have very dangerous consequences for the national security. At the outset, we are concerned that the standard could lead to discovery being granted in nearly every case, because it is extremely hard to prove the negative fact that disclosure "would not assist" in any way. Such routine disclosure could be catastrophic: FISC applications contain some of the Government's most sensitive national security information, including information concerning human intelligence sources, sophisticated technical collection methods, and the details of ongoing investigations. Given the enormous sensitivity of that information and the details of ongoing investigations. Given the enormous sensitivity of that information, when the Attorney General personally files an affidavit under oath asserting that disclosure would harm the national security, ordering disclosure unless it "would not assist" in any way is inappropriate. In view of the protections in FISC and the requirement of an affidavit filed personally by the Attorney General, the "necessary" standard of current law should be retained.

Indeed, precisely because it may lead to discovery in virtually every case, the proposal would create an incentive for the Government to withhold sensitive information from its FISC applications. Under the "would not assist" standard, the Government might have to choose between excluding sensitive information from an application and risking a denial of search and surveillance authority from the FISC, or including the sensitive information and risking public disclosure of that information. Thus, the proposal could fundamentally alter the relationship between the Government and the FISC and could eviscerate the significance of the FISC's careful information security procedures, which are designed to give the Government confidence that full disclosure to the FISC will not result in a compromise of sensitive information.

Since the Government can never completely sanitize a FISC application, the "would not assist" standard would also create strong incentives to avoid suppression litigation and the expanded risk of discovery. That means the Government would lean away from prosecution of a FISC target, even where that was the best way to protect the country. It would thereby reduce the Government's ability to keep the country safe, distorting the vital tactical judgments that must be made. Indeed, the proposal would inhibit more than just prosecutions. In keeping with the scope of FISC's suppression remedy, the proposal would limit the use of FISC information in any proceeding, including immigration proceedings, or even in internal adjudications of security clearances under Executive Order 12968. Here again the Government would face a difficult choice between using FISC information to protect national security and risking disclosure of the information as the cost of doing so.

We appreciate your continuing leadership in ensuring that the Department of Justice and other Federal agencies have the authority they need to combat terrorism effectively. Please do not hesitate to contact me if I can be of further assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

JAMIE E. BROWN,

*Acting Assistant Attorney General.*

Mr. HATCH. Mr. President, I rise in opposition to Senator FEINSTEIN's amendment. While I appreciate the efforts by Senator FEINSTEIN to draft a fix to the lone wolf terrorist problem under the Foreign Intelligence Surveillance Act of 1978, referred to as "FISA", the amendment simply will not do the job and will continue to expose our country to great national security risks. I will not and cannot accept such risks.

Let me be more specific as to my concerns. First, as drafted, the amendment would create only a permissive presumption to authorize a court to approve a Foreign Intelligence Surveillance Act, "FISA", application when presented with a lone wolf situation. As drafted, the proposal would provide only that the court "may" find the existence of a "presumption" that a non-U.S. person engaged in sabotage or international terrorism is an agent of a foreign power under FISA.

A permissive presumption creates a significant risk that the FISA court may not be authorized—or may feel constrained to exercise its discretion—to approve a FISA application when presented with a lone wolf terrorist who would otherwise be covered by the Kyl-Schumer-Biden-DeWine approach.

Second, the amendment does not clearly delineate how a permissive presumption would be applied by the FISA court. Assuming that the FISA court exercises its discretion and makes a finding that the presumption applies, the FISA court would then have to consider additional evidence in order to grant the application.

The amendment does not specify beyond the permissive presumption what specific evidence or what other find-

ings would have to be made in order for the FISA court to approve the application.

In sum, by injecting a significant level of uncertainty into the FISA process, the amendment simply creates or even exacerbates the problem which it is intended to fix. We simply cannot take such a risk given the potential devastating consequences posed by the lone wolf terrorist.

I would note here that in a letter dated April 30, 2003, the administration opposed this proposal, citing the fact that the effect of the proposal was unclear and that the proposal did not provide any standards to the FISA court to guide the exercise or its discretion.

In contrast, the Kyl-Schumer-Biden-DeWine proposal creates clear definitions and would minimize uncertainty in an area where ambiguity could have devastating consequences—that is, where we are in danger of a terrorist attack by a lone wolf.

For these reasons, I oppose the Feinstein amendment and urge my colleagues to vote against the Feinstein amendment.

I yield the floor.

Mr. KYL. Mr. President, the proponents of the bill urge our colleagues to vote against the Feinstein amendment. And from our perspective, I think we are ready to have that vote.

I ask Senator FEINSTEIN if she is ready, as well?

Mrs. FEINSTEIN. Through the Chair, I think we can yield back the remainder of our time, I say to the Senator, and hold the vote, if everybody so desires.

Mr. KYL. Mr. President, I yield back the remainder of my time on both the amendment and on the bill itself.

The PRESIDING OFFICER. All time has been yielded back.

The question is on agreeing to amendment No. 537.

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

The PRESIDING OFFICER. Is there a sufficient second?

There appears to be a sufficient second.

The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. MCCONNELL. I announce that the Senator from Alaska, (Ms. MURKOWSKI) is necessarily absent.

Mr. REID. I announce that the Senator from Delaware (Mr. BIDEN), the Senator from Florida (Mr. GRAHAM), the Senator from Massachusetts (Mr. KENNEDY), the Senator from Massachusetts (Mr. KERRY) and the Senator from Connecticut (Mr. LIEBERMAN) are necessarily absent.

I further announce that, if present and voting, the Senator from Delaware (Mr. BIDEN) would vote "no."

I further announce that, if present and voting, the Senator from Massachusetts (Mr. KERRY) would vote "aye."

The result was announced—yeas 35, nays 59, as follows:

[Rollcall Vote No. 145 Leg.]

YEAS—35

Akaka	Durbin	Murray
Baucus	Edwards	Nelson (FL)
Bayh	Feingold	Nelson (NE)
Bingaman	Feinstein	Pryor
Boxer	Harkin	Reed
Byrd	Hollings	Reid
Cantwell	Jeffords	Rockefeller
Clinton	Johnson	Sarbanes
Corzine	Lautenberg	Stabenow
Daschle	Leahy	Sununu
Dayton	Levin	Wyden
Dodd	Mikulski	

NAYS—59

Alexander	DeWine	Lott
Allard	Dole	Lugar
Allen	Domenici	McCain
Bennett	Dorgan	McConnell
Bond	Ensign	Miller
Breaux	Enzi	Nickles
Brownback	Fitzgerald	Roberts
Bunning	Frist	Santorum
Burns	Graham (SC)	Schumer
Campbell	Grassley	Sessions
Carper	Gregg	Shelby
Chafee	Hagel	Smith
Chambliss	Hatch	Snowe
Cochran	Hutchison	Specter
Coleman	Inhofe	Stevens
Collins	Inouye	Talent
Conrad	Kohl	Thomas
Cornyn	Kyl	Voivovich
Craig	Landrieu	Warner
Crapo	Lincoln	

NOT VOTING—6

Biden	Kennedy	Lieberman
Graham (FL)	Kerry	Murkowski

The amendment (No. 537) was rejected.

Mr. BIDEN. Mr. President, I am pleased to support final passage of S. 113, a bill to amend the Foreign Intelligence Surveillance Act, FISA, to provide needed tools to detect and combat terrorists bent on attacking this Nation and killing our citizens. First, let me commend my colleagues, Senators KYL and SCHUMER, for their relentless efforts in bringing this important issue to the floor of the U.S. Senate. Since the tragic events of September 11, all of us have tried to turn a critical eye toward our laws and the workings of government to discern how we might avert such a dreadful attack in the future. That attempt to fix what may be wrong with our existing system of intelligence-gathering and law enforcement is perhaps the greatest tribute we can offer to the victims of that fateful day and their families.

This bill, as amended, is a good example of how we can make basic, common-sense changes to existing law that will have a tremendous impact on our fight against terrorism. I was proud to be one of the authors of FISA in 1978. We worked long and hard to strike the right balance between protecting civil liberties on the one hand and deterring terrorist acts on the other. Since FISA permits the physical and electronic surveillance of suspected foreign agents, in some instances under a more generous standard than that allowed in Title III surveillances, an amendment to FISA should be carefully tailored to maintain its careful balance. I do not take lightly amending FISA, but believe that this bill does so in a manner that is both constitutional and narrowly tailored.

I want to thank the sponsors of this legislation for their willingness to work with me to improve their original bill. I proposed two amendments, both of which were accepted by Senators KYL and SCHUMER—and which the Judiciary Committee adopted without a dissenting vote on April 29, 2003. I believe my amendments improve S. 113 in three ways:

First, the original legislation—which would have amended FISA to expand the definition of “foreign power” under 50 U.S.C. §1801(a)(4) to include non-U.S. persons who are engaged in international terrorism—would have allowed the government to extend the initial surveillance order for a period up to 1 year. The 1-year period constitutes the maximum period allowed under the statute and is only invoked under certain circumstances typically limited to groups and entities. More commonly, an order to conduct surveillance of individuals is only extended for a period up to 90 days. Instead, the amendment we offered on April 29, 2003, amended the definition for “agent of a foreign power” by creating a new 50 U.S.C. §1801(b)(1)(C). This amendment would apply the default 90-day period to this new category of surveillance targets, which is far more sensible and consistent with the way we treat other individual targets, as opposed to groups, under the statute.

Second, by amending 50 U.S.C. §1801(a), the original legislation would have precluded individuals who are improperly subjected to surveillance or about whom surveillance information has been inappropriately disclosed from filing suit. My amendment, on the other hand, allowed aggrieved individuals who are improperly targeted under this new provision to seek redress in the courts and, where appropriate, recover damages. This modification to Senator KYL’s original bill is consistent with the typical and intended treatment of individuals under 18 U.S.C. §1801(b). *See* H.R. Rep. No. 95-1283, at pt. 1, 98 (1978) (noting that the only aggrieved persons “barred from the civil remedy will be primarily those persons who are themselves immune from criminal or civil liability because of their diplomatic status”).

Third, my amendment added a sunset provision to the legislation, forcing Congress to re-visit this issue no later than December 31, 2005. The USA Patriot Act (which the Senate overwhelmingly passed a year and a half ago) includes a similar sunset provision for the FISA provisions contained therein. My amendment simply insures that this body will reevaluate the FISA measure on which we are voting today, in the context of its broader re-consideration of those other FISA provisions. Such a review is consistent with our oversight function and, plainly put, ensures that our actions are thoughtful and informed.

Again, I am pleased that Senators KYL and SCHUMER accepted these important revisions to the original text

and, on that basis, am happy to support the amended bill that is before the Senate today.

I also would like to commend my colleague, Senator FEINSTEIN, for her efforts to engage this issue responsibly and thoughtfully. She has proposed an alternative, which makes an important contribution to the debate but with which I happen to disagree, for several reasons.

First, my good friend from California asserts that criminal prosecutors will abuse the FISA process by securing FISA surveillance—with its lower burdens of proof—against garden variety criminal targets, rather than pursuant to Title III. I am simply not persuaded that this will be the case. It should be noted that the new section created in this bill has a very high standard, higher indeed than that required by Title III. That is, the government must show probable cause that the FISA target has engaged in acts of “international terrorism,” which the statute defines as acts which (i) are a violation of the criminal law under the laws of the United States or any state; (ii) appear intended to influence our government or intimidate our citizens; and (iii) which occur outside the United States or transcend national boundaries. Thus, I doubt that a prosecutor would ever be able to seek a FISA warrant under this section where he would not also be able to obtain a Title III warrant. Moreover, I am not convinced that a prosecutor would seek a FISA warrant where their real interest is, not obtaining foreign intelligence information, but rather the eventual prosecution of the FISA target. Given the strict exclusionary rules FISA imposes, prosecutors would be loathe to ever seek a FISA warrant for a target they seek to prosecute out of fear that the judge would suppress the surveillance in a criminal prosecution which was improperly “boot-strapped” from a FISA investigation.

Second, the Feinstein amendment asserts that, under the Kyl-Schumer bill, a judge would be a mere “rubber-stamp” for a governmental request for a FISA warrant. The amendment presumes that judges do not now have discretion to refuse the government’s request, which is not true. Under current law, the judge still must determine that probable cause exists that the individual is an agent of a foreign power engaged in, or in preparation for, acts of international terrorism. S. 113 does nothing to alter that existing requirement. Rather, it makes it clear that any non-U.S. citizen who engages in terrorism or is preparing to engage in terrorism would fall within the definition of an “agent of a foreign power.” Nothing in this bill would curtail a judge’s ability to second-guess, or look behind, the assertions advanced by the government in its application for a warrant. If there is no basis to believe that probable cause exists, the application would be properly denied. Indeed, we rely on judges for this very pur-

pose—namely, to ascertain the veracity of the facts presented by the government.

As opposed to clarifying the definition of “agent of a foreign power,” as the Kyl-Schumer bill does, the Feinstein amendment would allow—but not require—a judge to “presume” that an individual is such an agent, which in my view creates a difference without a real distinction. Rather than afford individual targets any added protections, the Feinstein amendment would inject a considerable amount of murkiness into an otherwise certain process and may result in inconsistent rulings by different judges. Likewise, FISA judges may simply decline to apply the presumption in cases where the government cannot show much, if any, link between the non-U.S. citizen and a foreign power. There has been considerable disagreement over whether the Federal Bureau of Investigation had sufficient evidence to show that Zacarias Moussaoui, the so-called “20th Hijacker,” was an agent of a foreign power. Yet, I am concerned that a FISA judge might decline to exercise the “permissive presumption” in Senator FEINSTEIN’s amendment, and hence deny a FISA warrant, in the case of a true “lone-wolf” terrorist who cannot be shown to have any links to a foreign power. As such, the FISA “loophole” S. 113 seeks to close would be left open. On that basis, I am forced to vote against the amendment.

That is not to say, however, that there is not much more work to be done in this area. We must search for creative ways to give investigators the tools they need to gather information and seek out terrorists living among us, while at the same time vigilantly protect important civil rights and liberties. Toward that end, I welcome the oversight hearings that my friend Senator HATCH, chairman of the Judiciary Committee, has pledged to convene on the implementation of FISA and offer my continued service.

It is my hope that the Senate’s action today will assist our government in its effort to detect and root out foreign terrorists bent on violent acts against this great country. I support this bill and urge my colleagues to vote for it.

Mr. HATCH. Mr. President, I commend Senators KYL, SCHUMER, BIDEN and DEWINE for their bipartisan cooperation in supporting S. 113. This bill will provide a critical tool needed by law enforcement and intelligence agencies to fight the war against terrorism. Specifically, S. 113 will address a glaring omission in the Foreign Intelligence Surveillance Act of 1978 referred to as FISA, to authorize the gathering of foreign intelligence information relating to a lone-wolf terrorist, that is, a non-U.S. person who is engaged in international terrorism or preparation thereof. In recognition of the critical need to support law enforcement and intelligence agencies in

the war against terrorism, the Judiciary Committee passed S. 113 by a bipartisan, unanimous vote of 19 to 0.

This bipartisan proposal will enhance the ability of the FBI and intelligence agencies to investigate, detect, and prevent terrorists from carrying out devastating attacks on our country. Specifically, S. 113 will amend the Foreign Intelligence Surveillance Act to include lone-wolf terrorists who engage in international terrorism or activities in preparation thereof without a showing of membership in or affiliation with an international terrorist group. A significant gap in the current statute exists with respect to application of the foreign power requirement to lone-wolf terrorists. S. 113 would authorize FISA surveillance or searches when law enforcement and intelligence agents identify an individual involved in international terrorism but cannot link the terrorist to a specific group.

The administration strongly supports amending FISA to include non-U.S. lone-wolf terrorists. On March 4, 2003, at a Judiciary Committee hearing examining the war on terrorism, both Attorney General Ashcroft and FBI Director Mueller indicated their strong support for fixing this glaring omission in the FISA statute. In fact, Director Mueller testified, both before the Judiciary Committee and previously before the Senate Select Committee on Intelligence, there is an increasing threat of lone extremists who have the motive and ability to carry out devastating attacks against our country.

We need to provide law enforcement and intelligence agencies with the tools needed to protect our country from deadly terrorist attacks. With our recent success in the war against Iraq, the risk of terrorist attacks against our country may well rise. We need to ensure that our country has the ability to investigate and prevent such attacks if carried out by a lone extremist.

While some interest groups that oppose this measure suggest that such a fix is not needed or claim that the FBI failed to properly apply the law in the Moussaoui investigation, that is simply beside the point: The September 11 attack against our country highlighted the need to fill in this gap in the FISA statute.

FISA provides that electronic surveillance or physical searches may be authorized when there is probable cause to believe that the target is either an agent of, or is himself, a "foreign power"—a term that is currently defined to include only foreign government or international terrorist organizations. Requiring a link to government or international terrorist organizations may have made sense when FISA was enacted in 1978; in that year, the typical FISA target was a Soviet spy or a member of one of the hierarchical, military-style terror groups of that era.

Today the United States faces a much different threat. We are prin-

cipally confronted not by specific groups or governments, but by a movement of Islamist extremists which does not maintain a fixed structure or membership list, and its adherents do not always advertise their affiliation with this cause. Moreover, in response to our country's efforts to fight terrorism worldwide, terrorists are increasingly operating in a more decentralized manner, far different from the terrorist threat that existed in 1978. The threat posed by a lone terrorist may be very real and may involve devastating consequences, even beyond those suffered by our country on September 11. Given this increasing threat, we have to ensure that intelligence and law enforcement agencies have sufficient tools to meet this new—and even more dangerous—challenge.

While I support S. 113, as passed by the Judiciary Committee, I wish to note my concerns about the amendment offered by Senator FEINGOLD, which has been agreed to, as part of consideration of this matter.

The Feingold amendment would impose new FISA reporting requirements on the Justice Department, and require: (1) reports on the number of U.S. persons targeted by FISA order, by specific categories of surveillance, for example, electronic surveillance, physical searches, pen registers, and access to records; (2) identification of individuals who "acted wholly alone;" (3) disclosure of the number of times FISA material was used in a criminal proceeding; and (4) disclosure of portions of FISA pleadings and orders that deal with significant questions of law "in a manner consistent with the protection of the national security of the United States."

As I have indicated on other occasions, I support reporting requirements when necessary for Congress to exercise responsible oversight. We have a duty to conduct meaningful oversight of the FISA process, and I am committed to such oversight and ensuring proper reporting requirements are imposed on the Justice Department.

My concern with the Feingold amendment is that the operation of the amendment is unclear and may create confusion rather than bringing clarity to the issue. I would have preferred that we conduct a more deliberate examination of this issue to ensure that the reporting requirements are not harmful and will not create any significant risk of harm to sensitive law enforcement and intelligence operations against terrorists.

More significantly, I am concerned that the Feingold amendment will alter well-established procedures for Congress's review and handling of classified operational intelligence information, in contrast to Congress's review and handling of "finished" intelligence information. For many years, and in fact the reason for the creation of the Senate Select Committee on Intelligence was to establish a professional, dedicated Intelligence Committee staff

which would handle sensitive operational intelligence information. Congress did so to minimize the potential risk of harm to foreign counterintelligence operations. The accidental or inadvertent disclosure of such material could have a devastating impact on extremely sensitive CIA or FBI counterintelligence operations.

Further, the Senate Select Committee on Intelligence rejected a similar reporting proposal in 1984 because "the benefits of such disclosure for public understanding of FISA's impact would not outweigh the damage to FBI foreign counterintelligence capabilities that can be reasonably expected to result."

The FISA statute already sets forth detailed and specific requirements for the reporting of information to the Intelligence and Judiciary Committees, and there is simply no need to disrupt long-established processes and procedures for FISA reporting between the executive branch and the Intelligence and Judiciary Committees relating to the handling of classified operations intelligence information.

While I have these concerns about the Feingold amendment, on balance, I believe that fixing the FISA statute to address the long-wolf terrorist problem is more important than remedying the deficiencies in the Feingold amendment. The potential harm to our country from a lone-wolf terrorist attack is significant and we must act—and act now by passing A. 113.

Again, I commend Senators KYL, SCHUMER, BIDEN, and DEWINE for this important piece of legislation which reflects our bipartisan commitment to ensuring the safety of our country and the need to be vigilant in protecting our country from deadly and devastating terrorist attacks. I urge my colleagues to vote in favor of S. 113.

The PRESIDING OFFICER (Mr. ENZI). Under the previous order, the committee amendment, as amended, is agreed to.

The committee amendment, in the nature of a substitute, as amended, was agreed to.

The PRESIDING OFFICER. Under the previous order, the question is on the engrossment and third reading of the bill.

The bill was ordered to be engrossed for a third reading and was read the third time.

Mr. REID. Mr. President, I yield back all of our time.

The PRESIDING OFFICER. All time has been yielded back.

Mrs. FEINSTEIN. I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There appears to be a sufficient second.

The bill having been read the third time, the question is, Shall the bill, as amended, pass? The clerk will call the roll.

The legislative clerk called the roll.

Mr. MCCONNELL. I announce that the Senator from Alaska (Ms. MURKOWSKI) is necessarily absent.

Mr. REID. I announce that the Senator from Delaware (Mr. BIDEN), the Senator from Florida (Mr. GRAHAM), the Senator from Massachusetts (Mr. KENNEDY), the Senator from Massachusetts (Mr. KERRY), and the Senator from Connecticut (Mr. LIEBERMAN) are necessarily absent.

I further announce that, if present and voting, the Senator from Delaware (Mr. BIDEN) and the Senator from Massachusetts (Mr. KERRY) would each vote "Aye".

The result was announced—yeas 90, nays 4, as follows:

[Rollcall Vote No. 146 Leg.]

YEAS—90

Akaka	DeWine	Lugar
Alexander	Dodd	McCain
Allard	Dole	McConnell
Allen	Domenici	Mikulski
Baucus	Dorgan	Miller
Bayh	Edwards	Murray
Bennett	Ensign	Nelson (FL)
Bingaman	Enzi	Nelson (NE)
Bond	Feinstein	Nickles
Boxer	Fitzgerald	Pryor
Breaux	Frist	Reed
Brownback	Graham (SC)	Reid
Bunning	Grassley	Roberts
Burns	Gregg	Rockefeller
Campbell	Hagel	Santorum
Cantwell	Hatch	Sarbanes
Carper	Hollings	Schumer
Chafee	Hutchison	Sessions
Chambliss	Inhofe	Shelby
Clinton	Inouye	Smith
Cochran	Jeffords	Snowe
Coleman	Johnson	Specter
Collins	Kohl	Stabenow
Conrad	Kyl	Stevens
Cornyn	Landrieu	Sununu
Corzine	Lautenberg	Talent
Craig	Leahy	Thomas
Crapo	Levin	Voivovich
Daschle	Lincoln	Warner
Dayton	Lott	Wyden

NAYS—4

Byrd	Feingold
Durbin	Harkin

NOT VOTING—6

Biden	Kennedy	Lieberman
Graham (FL)	Kerry	Murkowski

The bill (S. 113), as amended, was passed, as follows:

The title was amended so as to read:

To amend the Foreign Intelligence Surveillance Act of 1978 to cover individuals, other than United States persons, who engage in international terrorism without affiliation with an international terrorist group.

EXECUTIVE SESSION

NOMINATION OF JOHN G. ROBERTS, JR., OF MARYLAND, TO BE UNITED STATES CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT

Mr. HATCH. I ask unanimous consent that the Senate immediately proceed to executive session to consider the nomination of John Roberts, to be a circuit judge for the DC Circuit.

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

Mr. HATCH. Mr. President, I am pleased that we are considering the nomination of John Roberts, who has been nominated by President Bush to serve on the United States Court of Appeals for the District of Columbia.

Mr. Roberts was first nominated to this post by President George H.W. Bush in 1992. He has been nominated for this post by two different Presidents on three separate occasions, and has waited more than 11 years for his confirmation, so I am glad to see that this day has finally come when we can expect a vote by the full Senate on his nomination.

Mr. Roberts has exceptional experience as a Supreme Court and appellate advocate. He has argued an astounding 39 cases before the Supreme Court and has argued in every Federal circuit court of appeals. His Supreme Court practice consists of seeking and opposing Supreme Court review, preparing amicus curiae briefs, and helping to prepare other counsel to argue before the Court. His clients have included large and small corporations, trade organizations, nonprofit organizations, States, and individuals.

Mr. Roberts is one of the most accomplished and brilliant legal minds that I have seen in my 27 years as a member of the Senate Judiciary Committee. Not surprisingly, the ABA awarded him its highest possible rating of unanimously well-qualified. He is widely regarded as one of the best appellate attorneys of his generation. After reviewing his legal accomplishments it is easy to see why his colleagues have such respect and admiration for him. I would like to read excerpts from a few of the many letters his colleagues have sent the committee discussing his professionalism, character, and open-mindedness.

The first letter is from 156 members of the Bar of the District of Columbia, including such legal powerhouses as Boyden Gray, who was counsel to the first President Bush, and Lloyd Cutler, who was counsel to President Carter and Clinton. The letter states:

Although, as individuals, we reflect a wide spectrum of political party affiliation and ideology, we are united in our belief that John Roberts will be an outstanding federal court of appeals judge and should be confirmed by the United States Senate. He is one of the very best and most highly respected appellate lawyers in the nation, with a deserved reputation as a brilliant writer and oral advocate. He is also a wonderful professional colleague both because of his enormous skills and because of his unquestioned integrity and fair-mindedness. In short, John Roberts represents the best of the bar and, we have no doubt, would be a superb federal court of appeals judge.

The committee also received a letter signed by 13 of his former colleagues at the Office of the Solicitor General. The letter states:

Although we are of diverse political parties and persuasions, each of us is firmly convinced that Mr. Roberts would be a truly superb addition to the federal court of appeals. As the Committee will doubtless hear from many quarters, John is an incomparable appellate lawyer. Indeed, it is fair to say that he is one of the foremost appellate lawyers in the country. . . . The Office then, as now, comprised lawyers of every political affiliation—Democrats, Republicans, and Independents. Mr. Roberts was attentive to and

respectful of all views, and he represented the United States zealously but fairly. He had the deepest respect for legal principles and legal precedent—instincts that will serve him well as a court of appeals judge.

Now I would like to make a few comments about Mr. Roberts's impressive background. He entered Harvard College with sophomore standing, where he earned a bachelor's degree in history, summa cum laude, then a law degree, magna cum laude. While in law school, he was an editor of the Harvard Law Review.

Following graduation, Mr. Roberts clerked for Judge Henry Friendly on the Second Circuit and for then-Justice William Rehnquist on the Supreme Court. His public service career included terms as Associate Counsel to President Reagan and Principal Deputy Solicitor General. He currently heads the appellate practice group for the prestigious DC law firm Hogan and Hartson, where his practice has focused on Federal appellate litigation.

Mr. Roberts has been involved with a variety of high-profile and significant legal cases. He has argued on different sides of a variety of different issues, firmly establishing his reputation as a lawyer's lawyer.

Beyond being considered by many to be one of the premier Supreme Court litigators of his generation, the record of John Roberts establishes that he is undeniably mainstream and fair. In fact, while in private practice Mr. Roberts has repeatedly been hired by Democratic public officials and has repeatedly argued what many consider to be the so-called liberal side of cases.

In protecting the environment during the 2002 case of Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, Mr. Roberts successfully argued in the U.S. Supreme Court, on behalf of a State regulatory agency, in favor of limits on property development and in support of protection of the pristine Lake Tahoe Basin area. Environmental groups hailed the majority decision, saying it would help protect America's countryside from suburban sprawl.

In supporting consumer rights during the 2001 landmark Microsoft antitrust case, Mr. Roberts argued on behalf of the Clinton Department of Justice and a group of primarily Democratic State attorneys general that Microsoft's business practices violated the Sherman Act.

In addition, Mr. Roberts has devoted much of his time to pro bono work. For instance, he represented a class of District of Columbia residents receiving welfare benefits, arguing that a particular change in eligibility standards that resulted in a termination of welfare benefits without an individual hearing denied class members procedural due process.

In another pro bono case, United States v. Halper, Mr. Roberts was invited by the Supreme Court to represent Mr. Halper, who had been previously convicted under Federal criminal law for filing false Medicaid claims.