

to remove it if there are no other options presented. If we do not modify title II, reluctantly I will not be able to support the compromise legislation that has been presented.

I urge my colleagues to try to get this done right. This is an important bill. Unfortunately, it is fatally flawed with the legislation that is before us.

I yield the floor.

CONCLUSION OF MORNING BUSINESS

The ACTING PRESIDENT pro tempore. Without objection, morning business is closed.

FISA AMENDMENTS ACT OF 2008

The ACTING PRESIDENT pro tempore. Under the previous order, the Senate will resume consideration of H.R. 6304, which the clerk will report.

The legislative clerk read as follows:

A bill (H.R. 6304) to amend the Foreign Intelligence Surveillance Act of 1978 to establish a procedure for authorizing certain acquisitions of foreign intelligence, and for other purposes.

The ACTING PRESIDENT pro tempore. Under the previous order, the motion to proceed is agreed to and the motion to reconsider is made and laid on the table.

The Senator from Wisconsin.

Mr. FEINGOLD. Mr. President, I ask unanimous consent that the time I consume be allocated to the Dodd amendment.

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

Mr. FEINGOLD. Mr. President, I strongly support Senator DODD's amendment to strike the immunity provision from this bill, and I especially thank the Senator from Connecticut for his leadership on this issue. Both earlier this year, when the Senate first considered FISA legislation, and again this time around, he has demonstrated tremendous resolve on this issue, and I have been proud to work with him.

Some have tried to suggest that the bill before us will leave it up to the courts to decide whether to give retroactive immunity to companies that allegedly participated in the President's illegal wiretapping program. But make no mistake, this bill will result in immunity being granted—it will—because it sets up a rigged process with only one possible outcome. Under the terms of this bill, a Federal district court would evaluate whether there is substantial evidence that a company received . . .

a written request or directive from the Attorney General or the head of an element of the intelligence community indicating that the activity was authorized by the President and determined to be lawful.

We already know, from the report of the Senate Intelligence Committee that was issued last fall, that the companies received exactly such a request

or directive. This is already public information. So under the terms of this proposal, the court's decision would actually be predetermined.

As a practical matter, that means that regardless of how much information the court is permitted to review, what standard of review is employed, how open the proceedings are, and what role the plaintiffs are permitted to play, it won't matter. The court will essentially be required to grant immunity under this bill.

Now, our proponents will argue that the plaintiffs in the lawsuits against the companies can participate in briefing to the court, and this is true. But they are not allowed any access to any classified information. Talk about fighting with both hands tied behind your back. The administration has restricted information about this illegal wiretapping program so much that roughly 70 Members of this Chamber don't even have access to the basic facts about what happened. Do you believe that? So let's not pretend that the plaintiffs will be able to participate in any meaningful way in these proceedings in which Congress has made sure their claims will be dismissed.

This result is extremely disappointing. It is entirely unnecessary and unjustified, and it will profoundly undermine the rule of law in this country. I cannot comprehend why Congress would take this action in the waning months of an administration that has consistently shown contempt for the rule of law—perhaps most notably in the illegal warrantless wiretapping program it set up in secret.

We hear people argue that the telecom companies should not be penalized for allegedly taking part in this illegal program. What you don't hear, though, is that current law already provides immunity from lawsuits for companies that cooperate with the Government's request for assistance, as long as they receive either a court order or a certification from the Attorney General that no court order is needed and the request meets all statutory requirements. But if requests are not properly documented, the Foreign Intelligence Surveillance Act instructs the telephone company to refuse the Government's request, and it subjects them to liability if they instead decide to cooperate.

When Congress passed FISA three decades ago, in the wake of the extensive, well-documented wiretapping abuses of the 1960s and 1970s, it decided that in the future, telephone companies should not simply assume that any Government request for assistance to conduct electronic surveillance was appropriate. It was clear some checks needed to be in place to prevent future abuses of this incredibly intrusive power; that is, the power to listen in on people's personal conversations.

At the same time, however, Congress did not want to saddle telephone companies with the responsibility of determining whether the Government's re-

quest for assistance was legitimate. So Congress devised a good system. It devised a system that would take the guesswork out of it completely. Under that system, which is still in place today, the company's legal obligations and liability depend entirely on whether the Government has presented the company with a court order or a certification stating that certain basic requirements have been met. If the proper documentation is submitted, the company must cooperate with the request and it is, in fact, immune from liability. If the proper documentation, however, has not been submitted, the company must refuse the Government's request or be subject to possible liability in the courts.

This framework, which has been in place for 30 years, protects companies that comply with legitimate Government requests while also protecting the privacy of Americans' communications from illegitimate snooping. Granting companies that allegedly cooperated with an illegal program this new form of retroactive immunity in this bill undermines the law that has been on the books for decades—a law that was designed to prevent exactly the type of abuse that allegedly occurred here.

Even worse, granting retroactive immunity under these circumstances will undermine any new laws we pass regarding Government surveillance. If we want companies to obey the law in the future, doesn't it send a terrible message, doesn't it set a terrible precedent, to give them a "get out of jail free" card for allegedly ignoring the law in the past?

Last week, a key court decision on FISA undercut one of the most popular arguments in support of immunity; that is, that we need to let the companies off the hook because the State secrets privilege prevents them from defending themselves in court. A Federal Court has now held that the State secrets privilege does not apply to claims brought under FISA. Rather, more specific evidentiary rules in FISA govern in situations such as that. Shouldn't we at least let these cases proceed to see how they play out, rather than trying to solve a problem that may not even exist?

That is not all. This immunity provision doesn't just allow telephone companies off the hook; it will also make it that much harder to get at the core issue I have been raising since December 2005, which is that the President broke the law and should be held accountable. When these lawsuits are dismissed, we will be that much further away from an independent judicial review of this illegal program.

On top of all this, we are considering granting immunity when roughly 70 Members of the Senate still have not been briefed on the President's wiretapping program. The vast majority of this body still does not even know what we are being asked to grant immunity for. Frankly, I have a hard