White House knows, if they open it, it becomes public domain. So secrecy is what this administration lives by.

This is a blatant example of where they want to keep secret an illegal program. I don't think we should be complicit. I don't think we should enable them to avoid the constitutional scrutiny of our Federal courts. We can't sacrifice—we can't—the truth for convenient expediency. It is not American. We have a system of government that is built not only on our Constitution but on the notion of checks and balances. The Federal courts are doing their job by checking this administration's broad exercise of Executive power. That is why I will be supporting other amendments that will be coming up that deal with this matter.

Last week, Chief Judge Walker, of the Northern District of California, issued an opinion rejecting this administration's claim to have ''inherent authority'' to eavesdrop on Americans outside of statutory law. What does this Senate want to do? A lot of the leaders you hear speaking on this want to make it possible to give retroactively to this administration the inherent authority to eavesdrop on Americans outside the law. In the future, we are fixing it. Good, I am glad. I am happy. But you can't then say, but we are going to look back and change the law. It is not right.

Listen to what Judge Walker wrote:

> Congress appears clearly to have intended to establish the exclusive means for foreign intelligence activities to be conducted. Whatever power the executive might otherwise have had in this regard, FISA limits the power of the executive branch to conduct such activities and it limits the executive branch's authority to assert the State secrets privilege in response to challenges to the legality of its foreign intelligence surveillance activities.

So we, Congress, limited the power of the executive. We said: You can't assert the state secrets privilege in response to challenges to the legality of its foreign intelligence activities. And here we are rolling over with bravado to say to this administration—and by the way, I would feel the same way whoever was the President, this administration or any administration—oh, you are the absolute ruler, the King. You can do whatever you want. You can roll over. You can do all of that.

We need to protect this country from terrorists. We must. I voted to go to war against bin Laden, and I will not rest until he is gone and we break the back of al-Qaida. Unfortunately, that has gone awry. I will be very willing to have our Government listen in on conversations of the bad actors out there, but I don't want good people being spied on. That was the whole reason FISA came into being in the first place. People seem to forget the original FISA was to protect the people from being spied on, ordinary people. Suddenly, it has been turned on its head. I believe the current process works. Our system of government works. The Federal courts are exercising their constitutional duty to review Executive power.

So why in this bill are we seeking to stop that process? Why are we attempting to tie the capable hands of the Federal courts and deny our citizens their day in court? Covering up the truth is not the way to gain or regain the trust of the American people. The truth is the basis of the American ideal.

I always marveled, as a little girl and as a young woman, growing up, watching as the truth came out about America. I remember my dad, who loved this country so much, saying to me: Honey, you just watch this country. We are not afraid to admit a mistake. We are not fearful of giving people rights. We will stand up and tell the truth, even when we make the biggest mistakes.

Covering up the truth is not the way to gain the trust of the American people. Since learning, in late 2005, that the President violated the trust of our people by spying on our citizens, Congress and the American people have struggled to find out what happened. Last week, we celebrated the day we adopted the Declaration of Independence, Independence Day, July 4. In that historic document is the following phrase:

> To secure these rights, governments are instituted among men deriving their just powers from the consent of the governed.

''The consent of the governed,'' that means the law has to be behind you when you undertake to do something such as this administration did. They didn't care about the consent of the governed. They didn't care about the law that was in place. Truth is the centerpiece of justice. I don't see how we ever get to the truth if we grant this immunity. I don't. It is not, to me, about the punishment.

As I said, I will be happy to have substitution, to have the Government step in. That is not the issue. We need to get to the truth, and we all know how that happens in our country. The immunity provision in this bill sweeps the warrantless program under the carpet. It hides the truth. The people deserve better from us.

I will close with a quote by former Supreme Court Justice Sandra Day O'Connor:

> It is during our most challenging and uncertain moments that our nation's commitment to due process is severely tested. It is in those times we must preserve our commitment at home to the principles for which we fight abroad.

I hope we will support the Dodd amendment to strike the immunity provision.

I thank the Chair.

The ACTING PRESIDENT pro tempore. The Senator from Missouri.

Mr. BOND. Mr. President, I understand we are coming up on a hard break, as they say in television, for the party lunches.

The ACTING PRESIDENT pro tempore. That is correct.

Mr. BOND. Mr. President, I note only before we go into that break that the Senator from Pennsylvania has made a number of comments on time for the supporters of the bill that actually deserve a response.

One clear point that needs to be made in response to the Senator from Pennsylvania and the Senator from California is that Judge Walker's actions will not be dismissed if retroactive liability protection is accorded carriers. It is a case against the United States, not a case against the telephone companies.

Furthermore, I would say that the dictum in Judge Walker's opinion is contrary to higher, more authoritative courts. So Judge Walker was not correct, and I believe should his case go up on appeal, he will be found not to be accurate. But that does not go, as my colleague from West Virginia has said, to the issue of whether carriers deserve retroactive liability protection. So I will reserve my comments, and I will ask to be recognized when—when will the Senate return to session?

The ACTING PRESIDENT pro tempore. At 2:15 p.m.

Mr. BOND. Mr. President, I ask unanimous consent that I be recognized for what remains of time on this side.

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

RECESS

The ACTING PRESIDENT pro tempore. Under the previous order, the Senate stands in recess until 2:15 p.m.

Thereupon, the Senate, at 12:31 p.m., recessed until 2:15 p.m. and reassembled when called to order by the Presiding Officer (Mr. CARPER).

FOREIGN INTELLIGENCE SURVEILLANCE AMENDMENTS ACT OF 2008—Continued

The PRESIDING OFFICER. Under the previous order, the Senator from Missouri is recognized for 29 minutes.

Mr. BOND. Thank you, Mr. President. I appreciate the recognition.

To begin, to clarify for the floor and our colleagues the arrangement the chairman and I have on this bill, I ask unanimous consent that Senator ROCKEFELLER manage the time in opposition to the Specter amendment and that I manage the time in opposition to the Dodd and Bingaman amendments.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

Mr. BOND. Mr. President, as I mentioned earlier today, the Senate is poised to wrap up consideration of the Foreign Intelligence Surveillance Amendments Act of 2008 in the form of H.R. 6304. Now, most of my colleagues know this legislation has had a way of hanging around for quite awhile, being caught up in the congressional process. Many, including myself, believe we should have passed it well before now, but it appears that we are on about the

5 yard line and ready to move it across into the end zone. As one who believes this badly needed update to FISA will enhance our Nation's security and advance and protect America's civil liberties and privacy rights, I certainly hope a strong majority of the Senate will pass this legislation unamended tomorrow.

Some of my colleagues have been intent on using Senate procedures to slow this legislation to a snail's pace. They have succeeded in doing so, first by choosing to ignore the Director of National Intelligence—and I will call him the DNI from now on—the DNI's pleas for modernization of the Foreign Intelligence Surveillance Act, or FISA, as we will call it, in April 2007, for over 3 months, until August of 2007, and back in December of 2007 when a Democratic Member filibustered us past the end of the year and into the recess, into 2008. It came to the floor in February when it took us several weeks to work out a way to move forward; then, once again, over the past few weeks, with another Democratic Member filibuster of sorts that pushed us past last week's recess. Up until now, we have been delayed, but one thing is sure in the Senate. Just as they say in military and basic training: No matter what you do, you can't stop the clock. Now that some of my colleagues are out of time in delaying any further, the Senate will move ahead this week, despite all of these delays.

I am very proud of the comprehensive compromise legislation before us today which passed out of the House with a strong bipartisan vote of 293 to 129. That was almost 3 weeks ago. As with the Senate's original FISA bill that passed several months ago, the compromise that is before us required a little give from all sides but, in essence, what we have before us today is basically the Senate bill all over again. Everyone who studied the language recognizes that. I have here a detailed legislative history that I will ask unanimous consent to be printed in the RECORD that explains the provisions of the bill. Chairman ROCKEFELLER submitted his own legislative history before the recess, and while we largely agree on the description of the legislation, we do have a few key differences. So as Vice Chairman of the Intelligence Committee, I believe it is important to make my views and those of several other Senators a part of the legislative history of this bill by including it in the RECORD. I therefore ask unanimous consent to have this legislative description printed in the RECORD as part of my remarks.

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

H.R. 6304, FISA AMENDMENTS ACT OF 2008

SECTION-BY-SECTION ANALYSIS AND EXPLANATION

This section-by-section analysis is based almost entirely upon the good work of Senator John D. Rockefeller IV, Chairman of the Select Committee on Intelligence. Time did not permit us to reach an agreement on text that may have been mutually agreeable to both of us, so I have modified his section-by-section analysis to reflect my own perspective as a co-manager on this important legislation. A careful comparison of these two versions will reveal that there are fewer areas in which our analyses diverge than in which they agree.

The consideration of legislation to amend the Foreign Intelligence Surveillance Act of 1978 (''FISA'') in the 110th Congress began with the submission by the Director of National Intelligence (''DNI'') on April 12, 2007 of a proposed Foreign Intelligence Surveillance Modernization Act of 2007, as Title IV of the Administration's proposed Intelligence Authorization Act for Fiscal Year 2008. The DNI's proposal was the subject of an open hearing on May 1, 2007 and subsequent closed hearings by the Senate Select Committee on Intelligence, but was not formally introduced. It is available on the Committee's website: http://intelligence.senate.gov/070501/bill.pdf.

In May 2007, a decision by the Foreign Intelligence Surveillance Court (FISA Court) led to the creation of significant gaps in our foreign intelligence collection. As a result of this decision, throughout the summer of 2007, the DNI asked Congress to consider his FISA modernization legislation. In response to the DNI's concerns, Congress passed the Protect America Act of 2007, Pub. L. 110–55 (August 5, 2007) (''Protect America Act''). As a result of the Protect America Act, the Intelligence Community was able to close immediately the intelligence gaps that had been created by the court's decision. While the Protect America Act provided important authorities for the collection of foreign intelligence, it did not contain any retroactive civil liability protections for those electronic communication service providers who had assisted with the President's Terrorist Surveillance Program following the September 11th terrorist attacks on our nation.

The Protect America Act included a sunset of February 1, 2008. After the passage of the Protect America Act, the Chairman and Vice Chairman began to draft permanent FISA legislation. S. 2248 was reported by the Select Committee on Intelligence on October 26, 2007 (S. Rep. No. 110–209 (2007)), and then sequentially reported by the Committee on the Judiciary on November 16, 2007 (S. Rep. No. 110–258 (2008)). In the House, the original legislative vehicle was H.R. 3773. It was reported by the Committee on the Judiciary and the Permanent Select Committee on Intelligence on October 12, 2007 (H. Rep. No. 110–373 (Parts 1 and 2) (2007)). H.R. 3773 passed the House on November 15, 2007. S. 2248 passed the Senate on February 12, 2008, and was sent to the House as an amendment to H.R. 3773. On March 14, 2008, the House returned H.R. 3773 to the Senate with an amendment.

No formal conference was convened to resolve the differences between the two Houses on H.R. 3773. Instead, following an agreement reached without a formal conference, the House passed a new bill, H.R. 6304, which contains a complete compromise of the differences on H.R. 3773.

H.R. 6304 is a direct descendant of the Protect America Act and S. 2248, which became the basis for the Senate amendment to H.R. 3373 (February 12, 2008) and influenced the House amendment to H.R. 3373 (March 18, 2008). The Protect America Act, H.R. 3773, as well as the original Senate bill, S. 2248, and the legislative history of those measures constitutes the legislative history of H.R. 6304.

The section-by-section analysis and explanation set forth below is based on the analysis and explanation in the report of the Select Committee on Intelligence on S. 2248, at S. Rep. No. 110–209, pp. 12–25, as expanded and edited to reflect the floor amendments to S. 2248 and the negotiations that produced H.R. 6304.

OVERALL ORGANIZATION OF ACT

The FISA Amendments Act of 2008 (''FISA Amendments Act'') contains four titles.

Title I includes, in Section 101, a new Title VII of FISA entitled ''Additional Procedures Regarding Certain Persons Outside the United States.'' This new title of FISA (which will sunset in four and a half years) is a successor to the Protect America Act, with amendments. Sections 102 through 110 of the Act contain a number of amendments to FISA apart from the collection issues addressed in the new Title VII of FISA. These include a provision that FISA is the exclusive statutory means for electronic surveillance, important streamlining provisions, and a change in the definitions section of FISA (in Section 110 of the bill) to facilitate foreign intelligence collection against proliferators of weapons of mass destruction.

Title II establishes a new Title VIII of FISA, entitled ''Protection of Persons Assisting the Government.'' This new title establishes a long-term procedure, in new FISA Section 802, for the Government to implement statutory defenses and obtain the dismissal of civil cases against persons, principally electronic communication service providers, who assist elements of the intelligence community in accordance with defined legal documents, namely, orders of the FISA Court or certifications or directives provided for and defined by statute. Section 802 also incorporates a procedure with precise boundaries for civil liability relief for electronic communication service providers who are or may be defendants in civil cases involving an intelligence activity authorized by the President between September 11, 2001, and January 17, 2007. In addition, Title II provides for the protection, by way of preemption, of the federal government's ability to conduct intelligence activities without interference by state investigations.

Title III directs the Inspectors General of the Department of Justice, the Department of Defense, the Office of National Intelligence, the National Security Agency, and any other element of the intelligence community that participated in the President's Surveillance Program authorized by the President between September 11, 2001, and January 17, 2007, to conduct a comprehensive review of the program. The Inspectors General are required to submit a report to the appropriate committees of Congress, within one year, that addresses, among other things, all of the facts necessary to describe the establishment, implementation, product, and use of the product of the President's Surveillance Program, including the participation of individuals and entities in the private sector related to the program.

Title IV contains important procedures for the transition from the Protect America Act to the new Title VII of FISA. Section 404(a)(7) directs the Attorney General and the DNI, if they seek to replace an authorization under the Protect America Act, to submit the certification and procedures required in accordance with the new Section 702 to the FISA Court at least 30 days before the expiration of such authorizations, to the extent practicable. Title IV explicitly provides for the continued effect of orders, authorizations, and directives issued under the Protect America Act, and of the provisions pertaining to protection from liability, FISA Court jurisdiction, the use of information acquired, and Executive branch reporting requirements, past the statutory sunset of that act. Title IV also contains provisions on the

continuation of authorizations, directives, and orders under Title VII that are in effect at the time of the December 31, 2012, sunset, until their expiration within the year following the sunset.

TITLE I. FOREIGN INTELLIGENCE SURVEILLANCE

Section 101. Targeting the Communications of Persons Outside the United States

Section 101(a) of the FISA Amendments Act establishes a new Title VII of FISA. Entitled ''Additional Procedures Regarding Certain Persons Outside the United States,'' the new title includes, with important modifications, an authority similar to that granted by the Protect America Act as temporary sections 105A, 105B, and 105C of FISA. Those Protect America Act provisions had been placed within FISA's Title I on electronic surveillance. Moving the amended authority to a title of its own is appropriate because the authority involves not only the acquisition of communications as they are being carried but also while they are stored by electronic communication service providers.

Section 701. Definitions

Section 701 incorporates into Title VII the definition of nine terms that are defined in Title I of FISA and used in Title VII: ''agent of a foreign power,'' ''Attorney General,'' ''contents,'' ''electronic surveillance,'' ''foreign intelligence information,'' ''foreign power,'' ''person,'' ''United States,'' and ''United States person.'' It defines the congressional intelligence committees for the purposes of Title VII. Section 701 defines the two courts established in Title I that are assigned responsibilities under Title VII: the FISA Court and the Foreign Intelligence Surveillance Court of Review. Section 701 also defines ''intelligence community'' as found in the National Security Act of 1947. Finally, Section 701 defines a term, not previously defined in FISA, which has an important role in setting the parameters of Title VII: ''electronic communication service provider.'' This definition is connected to the objective that the acquisition of foreign intelligence pursuant to this title is meant to encompass the acquisition of stored electronic communications and related data.

Section 702. Procedures for Targeting Certain Persons Outside the United States Other than United States Persons

Section 702(a) sets forth the basic authorization in Title VII, replacing Section 105B of FISA, as added by the Protect America Act. Unlike the Protect America Act, the collection authority in Section 702(a) cannot be exercised until the FISA Court has conducted its review in accordance with subsection (i)(3), or the Attorney General and the DNI, acting jointly, have made a determination that exigent circumstances exist, as defined in Section 702(c)(2). Following such determination and subsequent submission of a certification and related procedures, the Court is required to conduct its review expeditiously. Authorizations must contain an effective date and may be valid for a period of up to one year from that date.

Subsequent provisions of the Act implement the prior order and effective date provisions of Section 702(a): in addition to Section 702(c)(2) which defines exigent circumstances, Section 702(i)(1)(B) provides that the court shall complete its review of certifications and procedures within 30 days (unless extended under Section 702(j)(2)); Section 702(i)(5)(A) provides for the submission of certifications and procedures to the FISA Court at least 30 days before the expiration of authorizations that are being replaced, to the extent practicable; and Section 702(i)(5)(B) provides for the continued effectiveness of expiring certifications and procedures until the court issues an order concerning their replacements.

Section 105B and Section 702(a) differ in other important respects. Section 105B authorized the acquisition of foreign intelligence information ''concerning'' persons reasonably believed to be outside the United States. To make clear that all collection under Title VII must be targeted at persons who are reasonably believed to be outside the United States, Section 702(a) eliminates the word ''concerning'' and instead authorizes ''the targeting of persons reasonably believed to be located outside the United States to collect foreign intelligence information.''

Section 702(b) establishes five related limitations on the authorization in Section 702(a). Overall, the limitations ensure that the new authority is not used for surveillance directed at persons within the United States or at United States persons. The first is a specific prohibition on using the new authority to target intentionally any person within the United States. The second provides that the authority may not be used to conduct ''reverse targeting,'' the intentional targeting of a person reasonably believed to be outside the United States if the purpose of the acquisition is to target a person reasonably believed to be in the United States. If the purpose is to target a person reasonably believed to be in the United States, then the electronic surveillance should be conducted in accordance with FISA or the criminal wiretap statutes. The third bars the intentional targeting of a United States person reasonably believed to be outside the United States. In order to target such United States person, acquisition must be conducted under three subsequent sections of Title VII, which require individual FISA court orders for United States persons: Sections 703, 704, and 705. The fourth limitation goes beyond targeting (the object of the first three limitations) and prohibits the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States. The fifth is an overarching mandate that an acquisition authorized in Section 702(a) shall be conducted in a manner consistent with the Fourth Amendment to the U.S. Constitution, which provides for ''the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.''

Section 702(c) governs the conduct of acquisitions. Pursuant to Section 702(c)(1), acquisitions authorized under Section 702(a) may be conducted only in accordance with targeting and minimization procedures approved at least annually by the FISA Court and a certification of the Attorney General and the DNI, upon its submission in accordance with Section 702(g). Section 702(c)(2) describes the ''exigent circumstances'' in which the Attorney General and Director of National Intelligence may authorize targeting for a limited time without a prior court order for purposes of subsection (a). Section 702(c)(2) provides that the Attorney General and the DNI may make a determination that exigent circumstances exist because, without immediate implementation of an authorization under Section 702(a), intelligence important to the national security of the United States may be lost or not timely acquired and time does not permit the issuance of an order pursuant to Section 702(i)(3) prior to the implementation of such authorization. Section 702(c)(3) provides that the Attorney General and the DNI may make such a determination before the submission of a certification or by amending a certification at any time during which judicial review of such certification is pending before the FISA Court.

Section 702(c)(4) addresses the concern, reflected in Section 105A of FISA as added by the Protect America Act, that the definition of electronic surveillance in Title I might prevent use of the new procedures. To address this concern, Section 105A redefined the term ''electronic surveillance'' to exclude ''surveillance directed at a person reasonably believed to be located outside of the United States.'' In contrast, Section 702(c)(4) does not change the definition of electronic surveillance, but clarifies the intent of Congress to allow the targeting of foreign targets outside the United States in accordance with Section 702 without an application for a court order under Title I of FISA. The addition of this construction paragraph, as well as the language in Section 702(a) that an authorization may occur ''notwithstanding any other law,'' makes clear that nothing in Title I of FISA shall be construed to require a court order under that title for an acquisition that is targeted in accordance with Section 702 at a foreign person outside the United States.

Section 702(d) provides, in a manner essentially identical to the Protect America Act, for the adoption by the Attorney General, in consultation with the DNI, of targeting procedures that are reasonably designed to ensure that collection is limited to targeting persons reasonably believed to be outside the United States. As provided in the Protect America Act, the targeting procedures are subject to judicial review and approval. In addition to the requirements of the Protect America Act, however, Section 702(d) provides that the targeting procedures also must be reasonably designed to prevent the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States. Section 702(d)(2) subjects these targeting procedures to judicial review and approval.

Section 702(e) provides that the Attorney General, in consultation with the DNI, shall adopt, for acquisitions authorized by Section 702(a), minimization procedures that are consistent with Section 101(h) or 301(4) of FISA, which establish FISA's minimization requirements for electronic surveillance and physical searches. Unlike the Protect America Act, Section 702(e)(2) provides that the minimization procedures, which are essential to the protection of United States persons, shall be subject to judicial review and approval.

Section 702(f) provides that the Attorney General, in consultation with the DNI, shall adopt guidelines to ensure compliance with the limitations in Section 702(b), including prohibitions on the acquisition of purely domestic communications, targeting persons within the United States, targeting United States persons located outside the United States, and reverse targeting. Such guidelines shall also ensure that an application for a court order is filed as required by FISA. It is intended that these guidelines will provide clear requirements and procedures governing the appropriate implementation of the authority under this title of FISA. The Attorney General is to provide these guidelines to the congressional intelligence committees, the judiciary committees of the House of Representatives and the Senate, and the FISA Court. Subsequent provisions implement the guidelines requirement. See Section 702(g)(2)(A)(iii) (certification requirements); Section 702(l)(1) and 702(l)(2) (Attorney General and DNI assessment of compliance with guidelines); and Section 707(b)(1)(G)(ii) (reporting on noncompliance with guidelines).

Section 702(g) requires that the Attorney General and the DNI provide to the FISA Court, prior to implementation of an authorization under subsection (a), a written certification, with any supporting affidavits. In

exigent circumstances, the Attorney General and DNI may make a determination that, without immediate implementation, intelligence important to the national security may be lost or not timely acquired prior to the implementation of an authorization. It is expected that the Attorney General and the DNI will utilize this ''exigent circumstances'' exception as often as necessary to ensure the protection of our national security. For this reason, the standard to use this authority is much lower than in traditional emergency situations under FISA. In exigent circumstances, if time does not permit the submission of a certification prior to the implementation of an authorization, the certification must be submitted to the FISA Court no later than seven days after the determination is made. The seven-day time period for submission of a certification in the case of exigent circumstances is identical to the time period by which the Attorney General must apply for a court order after authorizing an emergency surveillance under other provisions of FISA, as amended by this Act.

Section 702(g)(2) sets forth the requirements that must be contained in the written certification. The required elements are: (1) the targeting and minimization procedures have been approved by the FISA Court or will be submitted to the court with the certification; (2) guidelines have been adopted to ensure compliance with the limitations of subsection (b); (3) those procedures and guidelines are consistent with the Fourth Amendment; (4) the acquisition is targeted at persons reasonably believed to be outside the United States; (5) a significant purpose of the acquisition is to obtain foreign intelligence information; and (6) an effective date for the authorization that in most cases is at least 30 days after the submission of the written certification. Additionally, as an overall limitation on the method of acquisition permitted under Section 702, the certification must attest that the acquisition involves obtaining foreign intelligence information from or with the assistance of an electronic communication service provider.

Requiring an effective date in the certification serves to identify the beginning of the period of authorization (which is likely to be a year) for collection and to alert the FISA Court of when the Attorney General and DNI are seeking to begin collection. Section 702(g)(3) permits the Attorney General and DNI to change the effective date in the certification by amending the certification.

As with the Protect America Act, the certification under Section 702(g)(4) is not required to identify the specific facilities, places, premises, or property at which the acquisition under Section 702(a) will be directed or conducted. The certification shall be subject to review by the FISA Court.

Section 702(h) authorizes the Attorney General and the DNI to direct, in writing, an electronic communication service provider to furnish the Government with all information, facilities, or assistance necessary to accomplish the acquisition authorized under Section 702(a). It is important to note that such directives may be issued only in exigent circumstances pursuant to Section 702(c)(2) or after the FISA Court has conducted its review of the certification and the targeting and minimization procedures and issued an order pursuant to Section 702(i)(3). Section 702(h) requires compensation for this assistance and provides that no cause of action shall lie in any court against an electronic communication service provider for its assistance in accordance with a directive. It also establishes expedited procedures in the FISA Court for a provider to challenge the legality of a directive or the Government to enforce it. In either case, the question for the court is whether the directive meets the requirements of Section 702 and is otherwise lawful. Whether the proceeding begins as a provider challenge or a Government enforcement petition, if the court upholds the directive as issued or modified, the court shall order the provider to comply. Failure to comply may be punished as a contempt of court. The proceedings shall be expedited and decided within 30 days, unless that time is extended under Section 702(j)(2).

Section 702(i) provides for judicial review of any certification required by Section 702(g) and the targeting and minimization procedures adopted pursuant to Sections 702(d) and 702(e). In accordance with Section 702(i)(5), if the Attorney General and the DNI seek to reauthorize or replace an authorization in effect under the Act, they shall submit, to the extent practicable, the certification and procedures at least 30 days prior to the expiration of such authorization.

The court shall review certifications to determine whether they contain all the required elements. It shall review targeting procedures to assess whether they are reasonably designed to ensure that the acquisition activity is limited to the targeting of persons reasonably believed to be located outside the United States and prevent the intentional acquisition of any communication whose sender and intended recipients are known at the time of acquisition to be located in the United States. The Protect America Act had limited the review of targeting procedures to a ''clearly erroneous'' standard; Section 702(i) omits that limitation. For minimization procedures, Section 702(i) provides that the court shall review them to assess whether they meet the statutory requirements. The court is to review the certifications and procedures and issue its order within 30 days after they were submitted unless that time is extended under Section 702(j)(2). The Attorney General and the DNI may also amend the certification or procedures at any time under Section 702(i)(1)(C), but those amended certifications or procedures must be submitted to the court in no more than 7 days after amendment. The amended procedures may be used pending the court's review.

If the FISA Court finds that the certification contains all the required elements and that the targeting and minimization procedures are consistent with the requirements of subsections (d) and (e) and with the Fourth Amendment, the court shall enter an order approving their use or continued use for the acquisition authorized by Section 702(a). If it does not so find, the court shall order the Government, at its election, to correct any deficiencies or cease, or not begin, the acquisition. If acquisitions have begun, they may continue during any rehearing en banc of an order requiring the correction of deficiencies. If the Government appeals to the Foreign Intelligence Surveillance Court of Review, any collection that has begun may continue at least until that court enters an order, not later than 60 days after filing of the petition for review, which determines whether all or any part of the correction order shall be implemented during the appeal.

Section 702(j)(1) provides that judicial proceedings are to be conducted as expeditiously as possible. Section 702(j)(2) provides that the time limits for judicial review in Section 702 (for judicial review of certifications and procedures or in challenges or enforcement proceedings concerning directives) shall apply unless extended, by written order, as necessary for good cause in a manner consistent with national security.

Section 702(k) requires that records of proceedings under Section 702 shall be maintained by the FISA Court under security measures adopted by the Chief Justice in consultation with the Attorney General and the DNI. In addition, all petitions are to be filed under seal and the FISA Court, upon the request of the Government, shall consider ex parte and in camera any Government submission or portions of a submission that may include classified information. The Attorney General and the DNI are to retain directives made or orders granted for not less than 10 years.

Section 702(l) provides for oversight of the implementation of Title VII. It has three parts. First, the Attorney General and the DNI shall assess semiannually under subsection (l)(1) compliance with the targeting and minimization procedures, and the Attorney General guidelines for compliance with limitations under Section 702(b), and submit the assessment to the FISA Court and to the congressional intelligence and judiciary committees, consistent with congressional rules.

Second, under subsection (l)(2)(A), the Inspector General of the Department of Justice and the Inspector General (''IG'') of any intelligence community element authorized to acquire foreign intelligence under Section 702(a) are authorized to review compliance of their agency or element with the targeting and minimization procedures adopted in accordance with subsections (d) and (e) and the guidelines adopted in accordance with subsection (f). Subsections (l)(2)(B) and (l)(2)(C) mandate several statistics that the IGs shall review with respect to United States persons, including the number of disseminated intelligence reports that contain references to particular known U.S. persons, the number of U.S. persons whose identities were disseminated in response to particular requests, and the number of targets later determined to be located in the United States. Their reports shall be submitted to the Attorney General, the DNI, and the appropriate congressional committees. Section 702(l)(2) provides no statutory schedule for the completion of these IG reviews; the IGs should coordinate with the heads of their agencies about the timing for completion of the IG reviews so that they are done at a time that would be useful for the agency heads to complete their semiannual reviews.

Third, under subsection (l)(3), the head of an intelligence community element that conducts an acquisition under Section 702 shall review annually whether there is reason to believe that foreign intelligence information has been or will be obtained from the acquisition and provide an accounting of information pertaining to United States persons similar to that included in the IG report. Subsection (l)(3) also encourages the head of the element to develop procedures to assess the extent to which the new authority acquires the communications of U.S. persons, and to report the results of such assessment. The review is to be used by the head of the element to evaluate the adequacy of minimization procedures. The annual review is to be submitted to the FISA Court, the Attorney General and the DNI, and to the appropriate congressional committees.

Section 703. Certain Acquisition Inside the United States Targeting United States Persons Outside the United States

Section 703 governs the targeting of United States persons who are reasonably believed to be outside the United States when the acquisition of foreign intelligence is conducted inside the United States. The authority and procedures of Section 703 apply when the acquisition either constitutes electronic surveillance, as defined in Title I of FISA, or is of stored electronic communications or stored electronic data. If the United States person returns to the United States, acquisition under Section 703 must cease. The Government may always, however, obtain an

order or authorization under another title of FISA.

The application procedures and provisions for a FISA Court order in Sections 703(b) and 703(c) are drawn from Titles I and III of FISA. Key among them is the requirement that the FISA Court determine that there is probable cause to believe that, for the United States person who is the target of the surveillance, the person is reasonably believed to be located outside the United States and is a foreign power or an agent, officer, or employee of a foreign power. The inclusion of United States persons who are officers or employees of a foreign power, as well as those who are agents of a foreign power as that term is used in FISA, is intended to permit the type of collection against United States persons outside the United States that has been allowed under Executive Order 12333 and existing Executive branch guidelines. The FISA Court shall also review and approve minimization procedures that will be applicable to the acquisition, and shall order compliance with such procedures.

As with FISA orders against persons in the United States, FISA orders against United States persons outside of the United States under Section 703 may not exceed 90 days and may be renewed for additional 90–day periods upon the submission of renewal applications. Emergency authorizations under Section 703 are consistent with the requirements for emergency authorizations in FISA against persons in the United States, as amended by this Act; the Attorney General may authorize an emergency acquisition if an application is submitted to the FISA Court in not more than seven days.

Section 703(g) is a construction provision that clarifies that, if the Government obtains an order and targets a particular United States person in accordance with Section 703, FISA does not require the Government to seek a court order under any other provision of FISA to target that United States person while that person is reasonably believed to be located outside the United States.

Section 704. Other Acquisitions Targeting United States Persons Outside the United States

Section 704 governs other acquisitions that target United States persons who are outside the United States. Sections 702 and 703 address acquisitions that constitute electronic surveillance or the acquisition of stored electronic communications. In contrast, Section 704 addresses any targeting of a United States person outside of the United States under circumstances in which that person has a reasonable expectation of privacy and a warrant would be required if the acquisition occurred within the United States. It thus covers not only communications intelligence, but, if it were to occur, the physical search for foreign intelligence purposes of a home, office, or business of a United States person by an element of the United States intelligence community, outside of the United States.

Pursuant to Section 704(a)(3), if the targeted United States person is reasonably believed to be in the United States while an order under Section 704 is in effect, the acquisition against that person shall cease unless authority is obtained under another applicable provision of FISA. The Government may not use Section 704 to authorize an acquisition of foreign intelligence inside the United States.

Section 704(b) describes the application to the FISA Court that is required. For an order under Section 704(c), the FISA Court must determine that there is probable cause to believe that the United States person who is the target of the acquisition is reasonably believed to be located outside the United States and is a foreign power, or an agent, officer, or employee of a foreign power. An order is valid for a period not to exceed 90 days, and may be renewed for additional 90–day periods upon submission of renewal applications meeting application requirements.

Because an acquisition under Section 704 is conducted outside the United States, or is otherwise not covered by FISA, the FISA Court is expressly not given jurisdiction to review the means by which an acquisition under this section may be conducted. Although the FISA Court's review is limited to determinations of probable cause, Section 704 anticipates that any acquisition conducted pursuant to a Section 704 order will in all other respects be conducted in compliance with relevant regulations and Executive Orders governing the acquisition of foreign intelligence outside the United States, including Executive Order 12333 or any successor order.

Section 705. Joint Applications and Concurrent Authorizations

Section 705 provides that if an acquisition targeting a United States person under Section 703 or 704 is proposed to be conducted both inside and outside the United States, a judge of the FISA Court may issue simultaneously, upon the request of the Government in a joint application meeting the requirements of Sections 703 and 704, orders under both sections as appropriate. If an order authorizing electronic surveillance or physical search has been obtained under Section 105 or 304, and that order is still in effect, the Attorney General may authorize, without an order under Section 703 or 704, the targeting of that United States person for the purpose of acquiring foreign intelligence information while such person is reasonably believed to be located outside the United States.

Section 706. Use of Information Acquired Under Title VII

Section 706 fills a void that has existed under the Protect America Act which had contained no provision governing the use of acquired intelligence. Section 706(a) provides that information acquired from an acquisition conducted under Section 702 shall be deemed to be information acquired from an electronic surveillance pursuant to Title I of FISA for the purposes of Section 106 of FISA, which is the provision of Title I of FISA that governs public disclosure or use in criminal proceedings. The one exception is for subsection (j) of Section 106, as the notice provision in that subsection, while manageable in individual Title I proceedings, would present a difficult national security question when applied to a Title VII acquisition. Section 706(b) also provides that information acquired from an acquisition conducted under Section 703 shall be deemed to be information acquired from an electronic surveillance pursuant to Title I of FISA for the purposes of Section 106 of FISA; however, the notice provision of subsection (j) applies. Section 706 ensures a uniform standard for the types of information acquired under the new title.

Section 707. Congressional Oversight

Section 707 provides for additional congressional oversight of the implementation of Title VII. The Attorney General is to fully inform ''in a manner consistent with national security'' the congressional intelligence and judiciary committees about implementation of the Act at least semiannually. Each report is to include any certifications made under Section 702, the reasons for any determinations made under Section 702(c)(2), any directives issued during the reporting period, a description of the judicial review during the reporting period to include a copy of any order or pleading that contains a significant legal interpretation of Section 702, incidents of noncompliance and procedures to implement the section. With respect to Sections 703 and 704, the report must contain the number of applications made for orders under each section and the number of such orders granted, modified and denied, as well as the number of emergency authorizations made pursuant to each section and the subsequent orders approving or denying the relevant application.

Section 708. Savings Provision

Section 708 provides that nothing in Title VII shall be construed to limit the authority of the Government to seek an order or authorization under, or otherwise engage in any activity that is authorized under, any other title of FISA. This language is designed to ensure that Title VII cannot be interpreted to prevent the Government from submitting applications and seeking orders under other titles of FISA.

Section 101(b). Table of Contents

Section 101(b) of the bill amends the table of contents in the first section of FISA.

Subsection 101(c). Technical and Conforming Amendments

Section 101(c) of the bill provides for technical and conforming amendments in Title 18 of the United States Code and in FISA.

Section 102. Statement of Exclusive Means by which Electronic Surveillance and Interception of Certain Communications May Be Conducted

Section 102(a) amends Title I of FISA by adding a new Section 112 of FISA. Under the heading of ''Statement of Exclusive Means by which Electronic Surveillance and Interception of Certain Communications May Be Conducted,'' the new Section 112(a) states: ''Except as provided in subsection (b), the procedures of chapters 119, 121 and 126 of Title 18, United States Code, and this Act shall be the exclusive means by which electronic surveillance and the interception of domestic wire, oral, or electronic communication may be conducted.'' New Section 112(b) of FISA provides that only an express statutory authorization for electronic surveillance or the interception of domestic wire, oral, or electronic communications, other than as an amendment to FISA or chapters 119, 121, or 206 of Title 18 shall constitute an additional exclusive means for the purpose of subsection (a). The new Section 112 is based on a provision which Congress enacted in 1978 as part of the original FISA that is codified in Section 2511(2)(f) of Title 18, United States Code, and which will remain in the U.S. Code.

Section 102(a) strengthens the statutory provisions pertaining to electronic surveillance and interception of certain communications to clarify the express intent of Congress that these statutory provisions are the exclusive means for conducting electronic surveillance and interception of certain communications. This section makes it clear that any existing statute cannot be used in the future as the statutory basis for circumventing FISA. Section 102(a) is intended to ensure that additional exclusive means for surveillance or interceptions shall be express statutory authorizations.

In accord with Section 102(b) of the bill, Section 109 of FISA that provides for criminal penalties for violations of FISA, is amended to implement the exclusivity requirement added in Section 112 by making clear that the safe harbor to FISA's criminal offense provision is limited to statutory authorizations for electronic surveillance or the interception of domestic wire, oral, or electronic communications which are pursuant to a provision of FISA, one of the enumerated chapters of the criminal code, or a

statutory authorization that expressly provides an additional exclusive means for conducting the electronic surveillance. By virtue of the cross-reference in Section 110 of FISA to Section 109, that limitation on the safe harbor in Section 109 applies equally to Section 110 on civil liability for conducting unlawful electronic surveillance.

Section 102(c) requires that, if a certification for assistance to obtain foreign intelligence is based on statutory authority, the certification provided to an electronic communication service provider is to include the specific statutory authorization for the request for assistance and certify that the statutory requirements have been met. This provision is designed to assist electronic communication service providers in understanding the legal basis for any government request for assistance.

In the section-by-section analysis of S. 2248, the report of the Select Committee on Intelligence (S. Rep. No. 110–209, at 18) described and incorporated the discussion of exclusivity in the 1978 conference report on the original Foreign Intelligence Surveillance Act, in particular the conferees' description of the analysis in *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U.S. 579, 637 (1952) and the application of the principles described there to the current legislation. That full discussion should be deemed incorporated in this section-by-section analysis.

Section 102 of the bill will not—and cannot—preclude the President from exercising his Article II constitutional authority to conduct warrantless foreign intelligence surveillance. At most, this exclusive means provision only places the President at his ''lowest ebb'' under the third prong of the Youngstown case analysis. That is exactly where the President was when FISA was passed back in 1978 and the ''revised'' exclusive means provision in this bill does not change this fact. Even at his lowest ebb, the President's authority with respect to intercepting enemy communications is still quite strong, especially when compared to the nonexistent capability of Congress to engage in similar interception activities.

Further, Section 102(c) actually reinforces the President's Article II authority, stating that ''if a certification . . . for assistance to obtain foreign intelligence information is based on statutory authority, the certification shall identify the specific statutory provision and shall certify that the statutory requirements have been met.'' The implication from such language is that if a certification is not based on statutory authority, then citing statutory authority would be unnecessary. This language thus acknowledges that certifications may be based on something other than statutory authority, namely the President's inherent constitutional authority.

Section 103. Submittal to Congress of Certain Court Orders under the Foreign Intelligence Surveillance Act of 1978

Section 6002 of the Intelligence Reform Act and Terrorism Prevention Act of 2004 (Pub. L. 108–458), added a Title VI to FISA that augments the semiannual reporting obligations of the Attorney General to the intelligence and judiciary committees of the Senate and House of Representatives. Under Section 6002, the Attorney General shall report a summary of significant legal interpretations of FISA in matters before the FISA Court or Foreign Intelligence Surveillance Court of Review. The requirement extends to interpretations presented in applications or pleadings filed with either court by the Department of Justice. In addition to the semiannual summary, the Department of Justice is required to provide copies of court decisions, but not orders, which include significant interpretations of FISA. The importance of the reporting requirement is that, because the two courts conduct their business in secret, Congress needs the reports to know how the law it has enacted is being interpreted.

Section 103 adds to the Title VI reporting requirements in three ways. First, as significant legal interpretations may be included in orders as well as opinions, Section 103 requires that orders also be provided to the committees. Second, as the semiannual report often takes many months after the end of the semiannual period to prepare, Section 103 accelerates provision of information about significant legal interpretations by requiring the submission of such decisions, orders, or opinions within 45 days. Finally, Section 103 requires that the Attorney General shall submit a copy of any such decision, order, or opinion, and any pleadings, applications, or memoranda of law associated with such decision, order, or opinion, from the period five years preceding enactment of the bill that has not previously been submitted to the congressional intelligence and judiciary committees. The Attorney General, in consultation with the Director of National Intelligence, may authorize redactions of documents submitted in accordance with subsection 103(c) as necessary to protect national security.

OVERVIEW OF SECTIONS 104 THROUGH SECTION 109; FISA STREAMLINING

Sections 104 through 109 amend various sections of FISA for such purposes as reducing a paperwork requirement, modifying time requirements, or providing additional flexibility in terms of the range of Government officials who may authorize FISA actions. Collectively, these amendments are described as streamlining amendments. In general, they are intended to increase the efficiency of the FISA process without depriving the FISA Court of the information it needs to make findings required under FISA.

Section 104. Applications for Court Orders

Section 104 of the bill strikes two of the eleven paragraphs on standard information in an application for a surveillance order under Section 104 of FISA, either because the information is provided elsewhere in the application process or is not needed.

In various places, FISA has required the submission of ''detailed'' information, as in Section 104 of FISA, ''a detailed description of the nature of the information sought and the type of communications or activities to be subjected to the surveillance.'' The DNI requested legislation that asked that ''summary'' be substituted for ''detailed'' for this and other application requirements, in order to reduce the length of FISA applications. In general, the bill approaches this by eliminating the mandate for ''detailed'' descriptions, leaving it to the FISA Court and the Government to work out the level of specificity needed by the FISA Court to perform its statutory responsibilities. With respect to one item of information, ''a statement of the means by which the surveillance will be effected,'' the bill modifies the requirement by allowing for ''a summary statement.''

In aid of flexibility, Section 104 increases the number of individuals who may make FISA applications by allowing the President to designate the Deputy Director of the Federal Bureau of Investigation (''FBI'') as one of those individuals. This should enable the Government to move more expeditiously to obtain certifications when the Director of the FBI is away from Washington or otherwise unavailable.

Subsection (b) of Section 104 of FISA is eliminated as obsolete in light of current applications. The Director of the Central Intelligence Agency is added to the list of officials who may make a written request to the Attorney General to personally review a FISA application as the head of the CIA had this authority prior to the establishment of the Office of the Director of National Intelligence.

Section 105. Issuance of an Order

Section 105 strikes from Section 105 of FISA several unnecessary or obsolete provisions. Section 105 strikes subsection (c)(1)(F) of Section 105 of FISA which requires minimization procedures applicable to each surveillance device employed because Section 105(c)(2)(A) requires each order approving electronic surveillance to direct the minimization procedures to be followed.

Subsection (a)(6) reorganizes, in more readable form, the emergency surveillance provision of Section 105(f), now redesignated Section 105(e), with a substantive change of extending from 3 to 7 days the time by which the Attorney General must apply for and obtain a court order after authorizing an emergency surveillance. The purpose of the change is to ease the administrative burdens upon the Department of Justice, the Intelligence Community, and the FISA Court currently imposed by the three-day requirement.

Subsection (a)(7) adds a new paragraph to Section 105 of FISA to require the FISA Court, on the Government's request, when granting an application for electronic surveillance, to authorize at the same time the installation and use of pen registers and trap and trace devices. This change recognizes that when the Intelligence Community seeks to use electronic surveillance, pen register and trap and trace information is often essential to conducting complete surveillance, and the Government should not need to file two separate applications.

Section 106. Use of Information

Section 106 amends Section 106(i) of FISA with regard to the limitations on the use of unintentionally acquired information. Currently, Section 106(i) of FISA provides that unintentionally acquired radio communication between persons located in the United States must be destroyed unless the Attorney General determines that the contents of the communications indicates a threat of death or serious bodily harm to any person. Section 106 of the bill amends subsection 106(i) of FISA by making it technology neutral on the principle that the same rule for the use of information indicating threats of death or serious harm should apply no matter how the communication is transmitted.

Section 107. Amendments for Physical Searches

Section 107 makes changes to Title III of FISA: changing applications and orders for physical searches to correspond to changes in Sections 104 and 105 on reduction of some application paperwork; providing the FBI with administrative flexibility in enabling its Deputy Director to be a certifying officer; and extending the time, from 3 days to 7 days, for applying for and obtaining a court order after authorization of an emergency search.

Section 303(a)(4)(C), which will be redesignated Section 303(a)(3)(C), requires that each application for physical search authority state the applicant's belief that the property is ''owned, used, possessed by, or is in transmit to or from'' a foreign power or an agent of a foreign power. In order to provide needed flexibility and to make the provision consistent with electronic surveillance provisions, Section 107(a)(1)(D) of the bill allows the FBI to apply for authority to search property that also is ''about to be'' owned, used, or possessed by a foreign power or agent of a foreign power, or in transit to or from one.

Section 108. Amendments for Emergency Pen Registers and Trap and Trace Devices

Section 108 amends Section 403 of FISA to extend from 2 days to 7 days the time for applying for and obtaining a court order after an emergency installation of a pen register or trap and trace device. This change harmonizes among FISA's provisions for electronic surveillance, search, and pen register/trap and trace authority the time requirements that follow the Attorney General's decision to take emergency action.

Section 109. Foreign Intelligence Surveillance Court

Section 109 contains four amendments to Section 103 of FISA, which establishes the FISA Court and the Foreign Intelligence Surveillance Court of Review.

Section 109(a) amends Section 103 to provide that judges on the FISA Court shall be drawn from ''at least seven'' of the United States judicial circuits. The current requirement—that the eleven judges be drawn from seven judicial circuits (with the number appearing to be a ceiling rather than a floor) has proven unnecessarily restrictive or complicated for the designation of the judges to the FISA Court.

Section 109(b) amends Section 103 to allow the FISA Court to hold a hearing or rehearing of a matter en banc, which is by all the judges who constitute the FISA Court sitting together. The Court may determine to do this on its own initiative, at the request of the Government in any proceeding under FISA, or at the request of a party in the few proceedings in which a private entity or person may be a party, i.e., challenges to document production orders under Title V, or proceedings on the legality or enforcement of directives to electronic communication service providers under Title VII.

Under Section 109(b), en banc review may be ordered by a majority of the judges who constitute the FISA Court upon a determination that it is necessary to secure or maintain uniformity of the court's decisions or that a particular proceeding involves a question of exceptional importance. En banc proceedings should be rare and in the interest of the general objective of fostering expeditious consideration of matters before the FISA Court.

Section 109(c) provides authority for the entry of stays, or the entry of orders modifying orders entered by the FISA Court or the Foreign Intelligence Surveillance Court of Review, pending appeal or review in the Supreme Court. This authority is supplemental to, and does not supersede, the specific provision in Section 702(i)(4)(B) that acquisitions under Title VII may continue during the pendency of any rehearing en banc and appeal to the Court of Review subject to the requirement for a determination within 60 days under Section 702(i)(4)(C).

Section 109(d) provides that nothing in FISA shall be construed to reduce or contravene the inherent authority of the FISA Court to determine or enforce compliance with an order or a rule of that court or with a procedure approved by it. The recognition in subsection (d) of the FISA Court's inherent authority to determine or enforce compliance with a court order, rule, or procedure does not authorize the Court to assess compliance with the minimization procedures used in the foreign targeting context. This conclusion is based upon three observations.

First, Section 702 contains no explicit statutory provision that authorizes the FISA Court to assess compliance with the minimization procedures in the foreign targeting context. If it had so desired, Congress could have included a specific statutory authorization like those included in Sections 105(d)(3), 304(d)(3), and 703(c)(7). In fact, there were several unsuccessful efforts during the legislative process to include a specific statutory authorization in this bill.

Second, the Court's inherent authority to review and approve minimization procedures in the context of domestic electronic surveillance or physical searches is different from its inherent authority to review and approve minimization procedures in the foreign targeting context. In the domestic context, the Court must direct that the minimization procedures be followed. See Sections 105(c)(2)(A), 304(c)(2)(A), and 703(c)(5)(A). There is no such requirement in the foreign targeting context. Instead, the Court's judicial review is limited to assessing whether the procedures meet the definition of minimization procedures under FISA. See Section 702(i)(2)(C). When the Court issues an order under Section 702, it merely enters an order approving the use of the minimization procedures for the acquisition. See 702(i)(3)(A). This limitation on the scope of the Court's order in the foreign targeting context should be interpreted as not providing the Court with any inherent authority to assess compliance with the approved minimization procedures in the foreign targeting context.

Finally, assessing compliance with minimization procedures in the foreign targeting context has historically been a responsibility performed by the Executive branch. This bill preserves that responsibility by requiring the Attorney General and the Director of National Intelligence to assess compliance with the minimization procedures on a semi-annual basis. See Section 702(l)(1). Inspectors General of each element of the Intelligence Community are authorized to review compliance with the adopted minimization procedures. See Section 702(l)(2). Also, the heads of each element of the Intelligence Community are required to conduct an annual review to evaluate the adequacy of the minimization procedures used by their element in conducting a particular acquisition. See Section 702(l)(3). Conversely, the FISA Court has little, if any, historical experience with assessing compliance with minimization in the context of foreign targeting. There are significant differences between the scope, purpose, and means by which the acquisition of foreign intelligence is conducted in the domestic and foreign targeting contexts. While the FISA Court is well-suited to assess compliance with minimization procedures in the domestic context, such assessment is better left to the Executive branch in the foreign targeting context.

Section 110. Weapons of Mass Destruction

Section 110 amends the definitions in FISA of foreign power and agent of a foreign power to include individuals who are not United States persons and entities not substantially composed of United States persons that are engaged in the international proliferation of weapons of mass destruction. Section 110 also adds a definition of weapon of mass destruction to the Act that defines weapons of mass destruction to cover explosive, incendiary, or poison gas devices that are designed, intended to, or have the capability to cause a mass casualty incident or death, and biological, chemical and nuclear weapons that are designed, intended to, or have the capability to cause illness or serious bodily injury to a significant number of persons. Section 110 also makes corresponding technical and conforming changes to FISA.

TITLE II. PROTECTIONS FOR ELECTRONIC COMMUNICATION SERVICE PROVIDERS

This title establishes a new Title VIII of FISA. The title addresses liability relief for electronic communication service providers who have been alleged in various civil actions to have assisted the U.S. Government between September 11, 2001, and January 17, 2007, when the Attorney General announced the termination of the Terrorist Surveillance Program. In addition, Title VIII contains provisions of law intended to implement statutory defenses for electronic communication service providers and others who assist the Government in accordance with precise, existing legal requirements, and provides for federal preemption of state investigations. The liability protection provisions of Title VIII are not subject to sunset.

Section 801. Definitions

Section 801 establishes definitions for Title VIII. Several are of particular importance.

The term ''assistance'' is defined to mean the provision of, or the provision of access to, information, facilities, or another form of assistance. The word ''information'' is itself described in a parenthetical to include communication contents, communication records, or other information relating to a customer or communications. ''Contents'' is defined by reference to its meaning in Title I of FISA. By that reference, it includes any information concerning the identity of the parties to a communication or the existence, substance, purport, or meaning of it.

The term ''civil action'' is defined to include a ''covered civil action.'' Thus, ''covered civil actions'' are a subset of civil actions, and everything in new Title VIII that is applicable generally to civil actions is also applicable to ''covered civil actions.'' A ''covered civil action'' has two key elements. It is defined as a civil action filed in a federal or state court which (1) alleges that an electronic communication service provider (a defined term) furnished assistance to an element of the intelligence community and (2) seeks monetary or other relief from the electronic communication service provider related to the provision of the assistance. Both elements must be present for the lawsuit to be a covered civil action.

The term ''person'' (the full universe of those protected by Section 802) is necessarily broader than the definition of electronic communication service provider. The aspects of Title VIII that apply to those who assist the Government in accordance with precise, existing legal requirements apply to all who may be ordered to provide assistance under FISA, such as custodians of records who may be directed to produce records by the FISA Court under Title V of FISA or landlords who may be required to provide access under Title I or III of FISA, not just to electronic communication service providers.

Section 802. Procedures for Implementing Statutory Defenses

Section 802 establishes procedures for implementing statutory defenses. Notwithstanding any other provision of law, no civil action may lie or be maintained in a federal or state court against any person for providing assistance to an element of the intelligence community, and shall be promptly dismissed, if the Attorney General makes a certification to the district court in which the action is pending. (If an action had been commenced in state court, it would have to be removed, pursuant to Section 802(g) to a district court, where a certification under Section 802 could be filed.) The certification must state either that the assistance was not provided (Section 802(a)(5)) or, if furnished, that it was provided pursuant to specific statutory requirements (Sections 802(a)(1–4)). Three of these underlying requirements, which are specifically described in Section 802 (Sections 802(a)(1–3)), come from existing law. They include: an order of the FISA Court directing assistance, a certification in writing under Sections 2511(2)(a)(ii)(B) or 2709(b) of Title 18, or directives to electronic

communication service providers under particular sections of FISA or the Protect America Act.

The Attorney General may only make a certification under the fourth statutory requirement, Section 802(a)(4), if the civil action is a covered civil action (as defined in Section 801(5)). To satisfy the requirements of Section 802(a)(4), the Attorney General must certify first that the assistance alleged to have been provided by the electronic communication service provider was in connection with an intelligence activity involving communications that was (1) authorized by the President between September 11, 2001 and January 17, 2007 and (2) designed to detect or prevent a terrorist attack or preparations for one against the United States. In addition, the Attorney General must also certify that the assistance was the subject of a written request or directive, or a series of written requests or directives, from the Attorney General or the head (or deputy to the head) of an element of the intelligence community to the electronic communication service provider indicating that the activity was (1) authorized by the President and (2) determined to be lawful. The report of the Select Committee on Intelligence contained a description of the relevant correspondence provided to electronic communication service providers (S. Rep. No. 110–209, at 9).

The district court must give effect to the Attorney General's certification unless the court finds it is not supported by substantial evidence provided to the court pursuant to this section. In its review, the court may examine any relevant court order, certification, written request or directive submitted by the Attorney General pursuant to subsection (b)(2) or by the parties pursuant to subsection (d).

If the Attorney General files a declaration that disclosure of a certification or supplemental materials would harm national security, the court shall review the certification and supplemental materials in camera and ex parte, which means with only the Government present. A public order following that review shall be limited to a statement as to whether the case is dismissed and a description of the legal standards that govern the order, without disclosing the basis for the certification of the Attorney General. The purpose of this requirement is to protect the classified national security information involved in the identification of providers who assist the Government. A public order shall not disclose whether the certification was based on an order, certification, or directive, or on the ground that the electronic communication service provider furnished no assistance. Because the district court must find that the certification—including a certification that states that a party did not provide the alleged assistance—is supported by substantial evidence in order to dismiss a case, an order failing to dismiss a case is only a conclusion that the substantial evidence test has not been met. It does not indicate whether a particular provider assisted the government.

Subsection (d) makes clear that any plaintiff or defendant in a civil action may submit any relevant court order, certification, written request, or directive to the district court for review and be permitted to participate in the briefing or argument of any legal issue in a judicial proceeding conducted pursuant to this section, to the extent that such participation does not require the disclosure of classified information to such party. The authorities of the Attorney General under Section 802 are to be performed only by the Attorney General, the Acting Attorney General, or the Deputy Attorney General.

In adopting the portions of Section 802 that allow for liability protection for those electronic communication service providers who may have participated in the program of intelligence activity involving communications authorized by the President between September 11, 2001, and January 17, 2007, the Congress makes no statement on the legality of the program. The extension of immunity in Section 802 also reflects the Congress's determination that the electronic communication service providers acted on a good faith belief that the President's program, and their assistance, was lawful. Both of these assertions are in accord with the statements in the report of the Senate Intelligence Committee. S. Rep. No. 110–209, at 9.

Section 803. Preemption of State Investigations

Section 803 addresses actions taken by a number of state regulatory commissions to force disclosure of information concerning cooperation by state regulated electronic communication service providers with U.S. intelligence agencies. Section 803 preempts these state actions and authorizes the United States to bring suit to enforce the prohibition.

Section 804. Reporting

Section 804 provides for oversight of the implementation of Title VIII. On a semi-annual basis, the Attorney General is to provide to the appropriate congressional committees a report on any certifications made under Section 802, a description of the judicial review of the certifications made under Section 802, and any actions taken to enforce the provisions of Section 803.

Section 202. Technical Amendments

Section 202 amends the table of contents of the first section of FISA.

TITLE III. REVIEW OF PREVIOUS ACTIONS

Title III directs the Inspectors General of the Department of Justice, the Office of the Director of National Intelligence, the Department of Defense, the National Security Agency, and any other element of the intelligence community that participated in the President's surveillance program, defined in the title to mean the intelligence activity involving communications that was authorized by the President during the period beginning on September 11, 2001, and ending on January 17, 2007, to complete a comprehensive review of the program with respect to the oversight authority and responsibility of each Inspector General.

The review is to include: (1) all of the facts necessary to describe the establishment, implementation, product, and use of the product of the program; (2) access to legal reviews of the program and information about the program; (3) communications with, and participation of, individuals and entities in the private sector related to the program; (4) interaction with the FISA Court and transition to court orders related to the program; and (5) any other matters identified by any such Inspector General that would enable that inspector general to complete a review of the program with respect to the Inspector General's department or element. While other versions of this Inspector General audit provision may have included the requirement that the Inspectors General review the ''substance'' of the legal reviews or opinions regarding the President's Terrorist Surveillance Program, this bill expressly excludes that language. Thus, it is not intended for the Inspectors General to determine or consider the legality of the Terrorist Surveillance Program.

The Inspectors General are directed to work in conjunction, to the extent practicable, with other Inspectors General required to conduct a review, and not unnecessarily duplicate or delay any reviews or audits that have already been completed or are being undertaken with respect to the program. In addition, the Counsel of the Office of Professional Responsibility of the Department of Justice is directed to provide the report of any investigation of that office relating to the program, including any investigation of the process through which the legal reviews of the program were conducted and the substance of such reviews, to the Inspector General of the Department of Justice, who shall integrate the factual findings and conclusions of such investigation into its review.

The Inspectors General shall designate one of the Senate confirmed Inspectors General required to conduct a review to coordinate the conduct of the reviews and the preparation of the reports. The Inspectors General are to submit an interim report within sixty days to the appropriate congressional committees on their planned scope of review. The final report is to be completed no later than one year after enactment and shall be submitted in unclassified form, but may include a classified annex.

TITLE IV. OTHER PROVISIONS

Section 401. Severability

Section 401 provides that if any provision of this bill or its application is held invalid, the validity of the remainder of the Act and its application to other persons or circumstances is unaffected.

Section 402. Effective Date

Section 402 provides that except as provided in the transition procedures (Section 404 of the title), the amendments made by the bill shall take effect immediately.

Section 403. Repeals

Section 403(a) provides for the repeal of those sections of FISA enacted as amendments to FISA by the Protect America Act, except as provided otherwise in the transition procedures of Section 404, and makes technical and conforming amendments.

Section 403(b) provides for the sunset of the FISA Amendments Act on December 31, 2012, except as provided in Section 404 of the bill. This date ensures that the amendments by the Act will be reviewed during the next presidential administration. The subsection also makes technical and conforming amendments.

Section 404. Transition Procedures

Section 404 establishes transition procedures for the Protect America Act and the Foreign Intelligence Surveillance Act Amendments of 2008.

Subsection (a)(1) continues in effect orders, authorizations, and directives issued under FISA, as amended by Section 2 of the Protect America Act, until the expiration of such order, authorization or directive.

Subsection (a)(2) sets forth the provisions of FISA and the Protect America Act that continue to apply to any acquisition conducted under such Protect America Act order, authorization or directive. In addition, subsection (a) clarifies the following provisions of the Protect America Act: the protection from liability provision of subsection (l) of Section 105B of FISA as added by Section 2 of the Protect America Act; jurisdiction of the FISA Court with respect to a directive issued pursuant to the Protect America Act, and the Protect America Act reporting requirements of the Attorney General and the DNI. Subsection (a) is made effective as of the date of enactment of the Protect America Act (August 5, 2007). The purpose of these clarifications and the effective date for them is to ensure that there are no gaps in the legal protections contained in that act, including for authorized collection following the sunset of the Protect America Act, notwithstanding that its sunset provision was only extended once until February

16, 2008. Additionally, subsection (a)(3) fills a void in the Protect America Act and applies the use provisions of Section 106 of FISA to collection under the Protect America Act, in the same manner that Section 706 does for collection under Title VII.

In addition, subsection (a)(7) makes clear that if the Attorney General and the DNI seek to replace an authorization made pursuant to the Protect America Act with an authorization made under Section 702, as added by this bill, they are, to the extent practicable, to submit a certification to the FISA Court at least 30 days in advance of the expiration of such authorization. The authorizations, and any directives issued pursuant to the authorization, are to remain in effect until the FISA Court issues an order with respect to that certification.

Subsection (b) provides similar treatment for any order of the FISA Court issued under Title VII of this bill in effect on December 31, 2012.

Subsection (c) provides transition procedures for the authorizations in effect under Section 2.5 of Executive Order 12333. Those authorizations shall continue in effect until the earlier of the date that authorization expires or the date that is 90 days after the enactment of this Act. This transition provision is particularly applicable to the transition to FISA Court orders that will occur as a result of Sections 703 and 704 of FISA, as added by this bill.

Mr. BOND. Mr. President, before the recess I mentioned how the press picked up on the similarities between this bill and the Senate bill and how they kept asking me to help find out the big changes in the bill that no one could find. Well, they stopped asking me that question because they realized there is not much that is significantly different, save some cosmetic fixes that satisfied the House Democratic leadership. Since we started with a bipartisan product here in the Senate, that means we still have a very strong bipartisan bill before us.

I am very pleased that the strong liability protections the Senate bill offered are still in place and our vital intelligence sources and intelligence methods will be safeguarded. I am pleased this compromise preserves the ability of the intelligence community to collect foreign intelligence quickly and in exigent circumstances without any prior court review. I am also pleased that the 2012 sunset—3 years longer than any sunset previously offered in any House bill—will give our intelligence collectors the certainty they need and the tools they use to keep us safe. I am confident that the few changes we made to the Senate bill in H.R. 6304 will not diminish the intelligence community's ability to target terrorists overseas, and the Director of National Intelligence—the DNI—and the Attorney General agree.

I will highlight for my colleagues five of the six main tweaks to the Senate bill that we find in the bill before us, as nuanced as they may be. I say ''five'' because one of these tweaks I explained in detail before the recess. I trust all of my colleagues remember that discussion very clearly. It was that the civil liability protection provision was slightly modified but still ensures that the companies who may, in good faith, have assisted the Government in the terrorist surveillance program, or TSP, will receive relief. Another way to describe it is that we have essentially provided the district court with an appellate standard review just as we did in the Senate bill. Congress affirms in this legislation that the lawsuits will be dismissed unless the district court judge determines that the Attorney General's certification was not supported by substantial evidence based on the information the Attorney General provides to the court. The intent of Congress is clear. The Intelligence Committee found that the companies deserve liability protection. They were asked by legitimate Government authorities to assist them in a program to keep our country safe. They did it, and now they are being thanked by lawsuits designed not only to destroy their reputation but to destroy the program.

There are several misconceptions that were brought up in the discussions today. Several have said that we don't know what we are granting immunity for; we shouldn't grant it without reviewing the litigation; and there were 70 Members of the Senate who haven't even been briefed on the program. Well, the reason the Senate Select Committee on Intelligence was set up was to review some of the most important and highly classified intelligence-gathering activities of the intelligence community. It was agreed, as we all believe very strongly, that these are very important tools. No. 1, they must be overseen carefully to make sure that the constitutional rights, the privacy rights of American citizens, are protected, and at the same time, within the constitutional framework, the ability of the limited authority of the intelligence community to collect the intelligence is not inhibited. That is what the Senate Intelligence Committee has done in reporting out this bill on a 13-to-2 vote. I am very pleased that our colleagues showed confidence in us by passing this, essentially the same measure, 68 to 29 in February.

There are some who say we don't even know whom we are granting immunity to or what we are granting it to. Very simply, the people—the carriers, the good citizens—who responded to the request to protect our country from terrorist acts are now being sued, and some of them who didn't even participate may be sued. They can't say whether they participated. We are only saying if the Attorney General provides information to be judged on an appellate standard that is not without substantial supporting evidence, then these companies should be dismissed, either because they didn't participate or they participated in good faith.

It does not, as I pointed out, say the Government cannot be sued. There are some who believe—and I think they are wrong—that the President's TSP was unlawful. That can be litigated in the court system. It is being litigated. I will discuss further Judge Walker's opinion and why I think it is wrong and it will not stand up, but that doesn't change the fact that at the time the Attorney General told these American companies, these good citizens, that it was lawful for them to participate and they needed that help, they provided that help, and helped to keep our country safe. We should not thank them by slapping them with lawsuits that would not only destroy their reputation, endanger their personnel here and abroad, but potentially disclose even more of the operations of our very sensitive electronic surveillance program. The more the terrorists who wish to do us harm learn about it, the better able they are to defend against it.

These three amendments all seek to destroy that protection provided by good corporate citizens, patriotic Americans who are responding to a directive of the President, approved by the Attorney General.

Moving on to the first of the five items I haven't discussed, the first item is the concept of prior court review that was included in this language. It is important for all of us to understand that prior court review is not prior court approval. Prior court approval occurs when the court approves the actual acquisition of electronic surveillance as it does in the domestic FISA context. Prior court review, on the other hand, is limited to the court's review of the Government's certification and the targeting and minimization procedures. The prior court review contained in this bill is essentially the same as it was under the bipartisan Senate bill. However, the timing has been changed to allow the court to conduct its review before the Attorney General and the DNI authorize actual acquisition.

The bottom line here is that what many of us feared in prior court approval scenarios has been avoided. To ensure that will always remain the case, we have included a generous ''exigent circumstances'' provision offered by House Majority Leader HOYER that allows the Attorney General and the DNI to act immediately if intelligence may be lost or not timely acquired. I thank Leader HOYER for that suggestion. Thus, a finding of exigent circumstances requires a much lower threshold than an emergency under traditional FISA.

One of our nonnegotiables in reaching this agreement is that the continued intelligence collection would be assured and uninterrupted by court procedures and delays. It is only because this broad ''exigent circumstances'' exemption allows for continuous collection that I can wholeheartedly support this nuanced version of prior court review of the DNI and the AG authorizations.

Second, we agreed to language insisted upon by House Speaker PELOSI regarding an ''exclusive means'' provision. I am confident that the exclusive means provision we have agreed to will not—and indeed cannot—preclude the

President from exercising his constitutional authority to conduct warrantless foreign intelligence surveillance. That is the President's article II constitutional power that no statute can remove, and case law, including recent statements in opinions by the FISA Court itself, reaffirmed this.

I am aware, as several people have discussed, of the district court's ruling last week in California where, in a suit against the Government, the judge stated in dicta that:

> Congress appears clearly to have intended to—and did—establish the exclusive means for foreign intelligence surveillance activities to be conducted.

Interestingly, Judge Walker ignored legislative history which acknowledged the President's inherent constitutional authority. Even though it may have been placed at the lowest ebb, if you agree with that interpretation of the constitutional limitations cited in the Senate Intelligence Committee report on the Senate FISA bill, he still has that authority.

For a variety of reasons, I strongly believe Judge Walker's decision will not stand on appeal. As to the court's comments on exclusive means, there is a fair amount of dictum standing in opposition to his opinion. I happen to think it is right.

For example, the FISA Court in 2002 ruled In re: Sealed Case—a very important decision which I urge everybody to read, if they have time—noted with approval the U.S. Fourth Circuit's holding in the Truong case that the President does have ''inherent authority to conduct warrantless searches to obtain foreign intelligence information.''

The Truong case involved a U.S. person in the United States, and the surveillance was ordered by the Carter administration without getting a warrant. The Fourth Circuit upheld that action in the criminal prosecution of Truong.

These decisions, along with others like them, were ignored by the analysis of the district court judge last week. At most, this exclusive means provision only places the President at his lowest ebb under the third prong of the steel seizure case analysis, which I do not accept as being valid. But if you use that test, it still exists.

That is exactly where the President was when FISA was passed in 1978, and the revised exclusive means provision in this bill does not change that fact.

We should remember, however, even at its lowest ebb, the President's authority with respect to intercepting enemy communications is still quite strong, especially when compared to the nonexistent capability of Congress to engage in similar interception activities.

It has been said that the President initiated this without any congressional notice. I was not among them at the time, but I understand the Gang of 8 was thoroughly briefed before they started this program. The Gang of 8, for those who may be listening and may not be aware, consists of the Republican and Democratic leaders and second leaders in this body and the other body and the Democratic and Republican leaders of the House and the Senate Intelligence Committees. I believe these people were briefed on this program, and I understand that advice was given in that meeting that we could not change the FISA statute to enable the collection of vital information in any timely fashion; that we could not wait to start listening in on foreign terrorists abroad, possibly plotting against this country, until we passed it.

I think they were right. It has been 15 months since we were told that we needed to revise FISA. Outside of one 6-month, 15-day patch that we elected to adopt last August, we have not been able to change it. I hope a mere 15 months will allow us to change it. But the fact is, had we not had the concurrence of the Gang of 8 in the TSP, it is likely we would not be talking with shock and horror about 9/11, but we would be talking about other similar incidents occurring in the United States.

I believe with respect to the Speaker's own language, conditional language that she offered to us, it actually reinforces the President's article II authority. That bill language we accepted states:

> If a certification . . . for assistance to obtain foreign intelligence information is based on statutory authority, the certification shall identify the specific statutory provision and shall certify that the statutory requirements have been met.

The obvious implication from this language is if a certification is not based on statutory authority, then citing statutory authority would be unnecessary. This language acknowledges that certifications may be based on something other than statutory authority; namely, the President's inherent constitutional authority. Furthermore, the DNI and Attorney General have assured me there will not be any operational impediments due to this provision. From a constitutional perspective, this language actually improved upon what we were looking at before in the Senate.

What Congress is clearly saying in this language is FISA is the exclusive statutory means for conducting electronic surveillance for intelligence purposes.

I am well aware that some will argue that there is no nonstatutory or constitutional means, but I can remember a long time ago when I was in a basic constitutional law course in law school that the Constitution trumps statutes. What the Constitution gives in rights or powers or authority cannot be exterminated, eliminated, or taken out by statute.

The courts have clearly said the President has that constitutional authority. I mentioned the Carter administration and the Truong case, but on a historical note, it is interesting to note that when President Clinton ordered a warrantless physical search, not electronic eavesdropping but a more intrusive, actual physical search of Aldrich Ames' residence in 1993, Congress responded by seeking to bolster the President's authority by updating FISA to include physical searches.

Aldrich Ames is a U.S. citizen, probably still in prison. Let's pause and think about that: President Clinton ordered a warrantless physical search of an American citizen inside the United States, and what did Congress do? Congress sought to assist the President instead of accuse him of illegal activity. It sought to help him. I would hope some of my colleagues would take a similar approach as we did with President Clinton before.

Third, as a part of our compromise with the House Democrats, we agreed to replace our version of what we call a carve-out from the definition of electronic surveillance with their definition of a carve-out which they call construction. Operationally, there is no difference between the two approaches, but we think our approach is more forthright with the American people because we put our carve-out right up front instead of burying it several chapters later in title VII of FISA as they wanted to do.

Why did they do this? I am sure this is not of great moment to anybody here, but let me say that it was clear from negotiations the other side wanted to be able to come out of the negotiations and say: We wrestled the Republicans back to the original definition of ''electronic surveillance'' in the 1978 FISA Act, but they failed to mention they buried their carve-out deep in this legislation, and it has the same effect.

They also failed to remind folks it was the original language of the 1978 FISA Act that, due to technology changes, got us into this mess in the first place.

Last year, when the DNI first asked us to modernize FISA, he requested we create a technology-neutral definition of ''electronic surveillance.'' I believed then and I still believe we should redefine ''electronic surveillance.'' FISA is complicated enough, and we should be forthright with the American people.

But some other leaders prefer for political reasons to bury construction provisions deep within the bill instead of presenting an upfront, crystal-clear carve-out. One consequence of their approach is that the same acquisition activities the Government uses to target non-U.S. persons overseas will trigger both the definition of electronic surveillance in title I of FISA and the construction provision in section 7.

Essentially, we have agreed to build an unnecessary internal inconsistency in statute as a political compromise. I reluctantly agreed to do this because the DNI and the Attorney General assured us that going for the carve-out

now would not create any operational problems for the intelligence community, but we should fix this in the future during less politically charged times.

For historical note, it should be remembered that the American Government was able to intercept radio communications long before we got into this stage of the intercepts without getting court orders. They were intercepting overseas communications which might have been coming into the United States, and they followed the same procedure that we do now. That was called the procedure of minimization for innocent conversations. Just like the case back when the radio interceptions were going forward, there is not, as I have said before, any evidence that we have seen that innocent Americans were being listened in on.

The bugaboo that this gives the intelligence community the right to listen in on ordinary citizens' conversations willy-nilly, without any limitations, is absolutely false. That is why we built in the protections in the law. That is why we have the layers of supervision to make sure it does not happen.

Fourth, we included a provision for coordinated inspector general audits of the TSP. However, the IGs will not review the substance of the legal reviews related to the President's TSP. In other words, they will not review whether the program was lawful.

I know some colleagues are saying the opposite in the media, but I encourage them to read the language because it is accurate. It is accurate that the IGs will not review whether the program was lawful.

The Senate Intelligence Committee already conducted an exhaustive review of the TSP and found no legal or unlawful conduct. There is no need for an IG audit to second-guess the bipartisan determination. Numerous IGs have already conducted reviews, and several reviews are ongoing. I cannot imagine the IG finding out anything different than they already have or that the Intelligence Committee has found for that matter. But it does make for good politics in an election year to say Congress mandated these reviews even if, in some cases, they will simply be doing reviews that have already been done. To reach agreement, we reluctantly agreed to a more redundant review on the overly taxed intelligence community.

I offer to those who want to challenge the lawfulness of the President's Terrorist Surveillance Program that this bill does not block plaintiff suits against the Government or Government officials. We only offer civil liability protection for providers in the bill. The court case I mentioned earlier against the Government will be able to proceed unaffected by this legislation.

Fifth, and finally, we agreed to a 5-year sunset instead of 6 years. I don't like sunsets. As intelligence community leaders have told us, there are no sunsets in fatwahs against the United States issued by al-Qaida leaders. I only agreed to a 6-year sunset in the Senate bill as a bipartisan compromise. But even with a 5-year sunset, Congress is unlikely to take up FISA reform again in the fall of a Presidential election year, and I trust they will have the good wisdom to push the sunset out longer so they don't find themselves in an election year going through the same drill. Regardless, there is little operational impact.

Remember, it is the job of the House and Senate Intelligence Committees to conduct ongoing, continuing oversight of electronic surveillance, as well as the rest of the intelligence community's programs. If we see the need to make changes before sunset, we will. A sunset does not change that.

In the end, I am proud to say we accomplished our collective goals of making sure we have a bill with clear authorities for foreign targeting, with strong protections for U.S. persons, and with civil liability protection for those providers who allegedly assisted with the President's TSP. We are in a better position today than we were a few months ago legislatively because we not only have the Senate bill before us in essence all over again—and one that received 68 votes the last time—but we have it before us already having passed the House. We know we have a bill we can send straight to the President that the Attorney General and DNI would support and the President can sign into law.

Should we fail to do so, there is a real danger we could fall back into the trap we were in last summer when because of the existing underlying outmoded FISA bill, we put the intelligence community out of business of collecting much vital intelligence during a brief period, far too long, but brief nevertheless.

Why is having essentially the Senate bill with minor tweaks before us all over again a major bipartisan victory? I answer: Because the Senate bill we passed a few months ago was the delicate bipartisan compromise that took months to produce. We had the bipartisan product that increased civil liability protections more than ever before and gave our intelligence operators the tools they needed to keep us safe. I am proud of that bipartisan bill, proud to have negotiated with the House to bring it back to the Senate with essentially the same position in a major bipartisan victory for all sides.

Mr. President, I will reserve the rest of my comments in appreciation of my colleagues. I thank the Chair, and I yield the floor.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. SPECTER. Mr. President, I ask if the Senator from Missouri will yield for two questions?

The PRESIDING OFFICER. The Senator from Missouri has used his time.

Mr. SPECTER. Will the Chair repeat that?

The PRESIDING OFFICER. The Senator from Missouri has used his entire 29 minutes allocated under the previous order.

Mr. SPECTER. Mr. President, I will yield myself 5 minutes from my time on the amendment which is scheduled later this afternoon.

The PRESIDING OFFICER. Does the Senator from Missouri consent to being questioned by the Senator from Pennsylvania?

Mr. BOND. Of course. I would be honored.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. SPECTER. The first question I have relates to the Senator's contention that the action by the Intelligence Committee is sufficient.

We know from the representations made earlier today that some 70 Members of the Senate have not been briefed on this subject, and the House leadership has said that the majority of the House Members have not been briefed on this subject. There is no question that a Member's constitutional authority cannot be delegated to another Member. Under the procedures of the Senate and the House but focusing on the Senate, which is where we are, the committees hear the matters, they file reports, they make disclosure to the full body, and the full body then acts.

The question I have for the Senator from Missouri is: How can some 70 Members of the Senate be expected to cast an intelligent vote granting retroactive immunity to a program that the Senators have not been briefed on and don't know about, in light of the clear-cut rule that we cannot delegate our constitutional responsibilities?

Mr. BOND. Well, to reply to my friend—who served in the past on the Intelligence Committee, I believe—that committee was set up to handle matters that involved the most critical classified information. The committee was set up, long before I came to the Senate, to provide a forum, a bipartisan group of Senators with a very able staff, to go over everything that was done in the intelligence community, to oversee it, to make sure it was proper, to make sure it stayed within the guidelines and to provide support and change it where necessary.

Now, I have fought very strongly, alongside my colleague, the chairman, to get the full committee briefed on all these programs. As I have said before, the terrorist surveillance program was not briefed to the full committee, it was briefed and then oversight held with eight people. This, to me, was a mistake. I believe it should have been briefed to the entire committee, but the members of that group of eight did know about it and were briefed about it.

Now, I might say to my good friend, the Senator from Pennsylvania, that we have many important committees putting out legislation on the floor. No person can participate in all the committee work. No person can be involved

in every committee. So we have to take the reports, and usually on a bipartisan agreement or disagreement, based on what our colleagues in those committees have studied, have reviewed, and have found to be the case. In this case, an overwhelmingly bipartisan majority of 13 to 2, after studying the bill and the question for 6 months and engaging in about 2 solid months of hard work, found out it was appropriate to give retroactive liability protection to these companies that had acted in good faith.

We were shown the certifications and the authorizations that went to them, and I believe, based on my legal background, that those were adequate and sufficient for these companies to participate. Let us remember, these were critical times. We had just experienced an attack. We were being threatened with more attacks. The Government went to some of these—not all of them but some—companies and said: Please help us. You must help us. We believe in the committee that their actions should not be punished but should be rewarded by preventing them from being harassed by lawsuits.

The legality of the program, if it is to be judged, was not one for a judgment for those companies to make, but it will be played out in Judge Walker's and other courtrooms.

Mr. SPECTER. Mr. President, on my time, which we are on, may I say, before moving to the second brief question, that I admire what the Senator from Missouri has done as vice chairman. I see his diligent work, and I know what the Intelligence Committee is involved with because I served on it for 8 years and chaired it in the 104th Congress. But when the Senator from Missouri delineates even the fewer members within the Intelligence Committee who were briefed, it underscores my point, and that is that most Senators haven't been briefed.

While it is true every Senator does not know what is in every committee report, at least every Senator has access to it, and it is not a matter where there are secret facts and there has been no briefing of them, or where there has been no disclosure and they are called upon to vote. Significantly, the Senator does not deny that no Senator can delegate his constitutional authority, and that is exactly what 70 Senators will be doing.

Let me move within my 5-minute time limit because time is fleeting and there is a great deal to argue.

The PRESIDING OFFICER. The Senator has used 6 minutes. There is 4 minutes remaining.

Mr. SPECTER. We have here litigation which has been ongoing in the Federal court in San Francisco for several years, and a very extended opinion was filed on July 20 of 2006 by Chief Judge Walker on the telephone case on the state secrets doctrine, and that case is now on appeal to the Court of Appeals for the Ninth Circuit.

Here we have a context where the Congress has been totally ineffective in limiting executive authority, where the Executive has violated the specific mandate of the National Security Act of 1947 to brief all members of the Intelligence Committee. It hasn't been done. The Congress has been ineffective on the Foreign Intelligence Surveillance Act, where the Supreme Court denied cert, as I said earlier today, and ducked the decision. Although from the dissenting opinion in the Sixth Circuit, they could have found the requisite standing. Now we have Chief Judge Walker coming down with a 56-page opinion last Wednesday, which does bear on the telephone case. I concede, as the Senator from Missouri has said, that the telephone companies have been good citizens. But there is a way to save them harmless with the amendment I offered in February to substitute the Government in the shoes of the telephone companies.

Have they had problems with their reputation? Well, perhaps so, but they can withstand that. Have they had legal expenses? Well, those can be compensated by indemnity from the Government. We are all called upon to make sacrifices. My father, who served in World War I, was wounded in action. My brother served in World War II. I served 2 years in the Korean war, stateside. I don't think the telephone companies, given their positions, as regulated companies, have been asked for too much. I think it is highly unlikely they would ever have to pay a dime, but that could all be handled by substitution, so we look at a situation where we can both have this electronic surveillance program continue and not give up court jurisdiction through court stripping.

So that brings me to my question: Does the Senator from Missouri now know of any case—there have been jurisdictional issues of a variety of sorts—but any case involving constitutional rights, which has been pending for more than 3 years and is in midstream on appeal to the Court of Appeals for the Ninth Circuit—from a very learned opinion handed down by Chief Judge Walker in 2006—when the Congress has stepped in and taken the case away from the courts, in a context where there is no other way to get a judicial determination on the constitutionality of this conduct?

Mr. BOND. Mr. President, I am happy to answer my colleague. He has stated that the Executive has violated the laws. Not under the constitutional authority that I have outlined. The FISA Court itself recognized what he fails to understand; that it is not a question of the carriers being held liable for any amount of money. Because I agree with him, they are not going to find anybody liable. But what they would do, by continuing having this out in open hearing, is to disclose the most secretive methods and procedures used by our intelligence community, giving the terrorists and those who seek to do us harm a roadmap for getting around it and avoiding those intercepts.

Now, what it would also do is expose those companies to tremendous public scorn and possibly even to injury to their property or to their personnel. Where they operate overseas, they might be attacked. When we started this debate, my colleague, the senior Senator from Illinois, was talking about how an unwarranted disclosure of a question about one of the vitally important exchanges operating in Chicago had cost billions of dollars to that exchange.

When you leak out something that is classified, when you leak out something that is secret, you can have a tremendous impact, and every shareholder of that exchange and every shareholder, whether it be in your pension fund or anyone else, of one of the carriers that might be drawn out and drawn into court in one of these actions, would lose significantly.

Now, to answer the question put specifically by the Senator from Pennsylvania, the cases against the Government are not blocked. The cases against the Government are not blocked. If we are looking for a means of determining the constitutionality, which I believe exists—he obviously doesn't believe exists. OK, we have a disagreement. He is a learned lawyer, and I studied constitutional law a long time ago. We have different views. I can line up a bunch of constitutional law professors on my side. I am sure he can do the same. But that court can go forward because a suit really is a suit against the government.

I think he is right when he is saying he doesn't want to hurt the companies. I don't believe any significant number of Members of this body want to hurt the employees or their shareholders of the companies that may have participated because they were true American heroes. But if he wants to solve the problem that he has—getting court review—then there is no bar in this legislation to a suit against the Government, a Government officer, or a Government agent.

Mr. SPECTER. Mr. President, on my time.

The PRESIDING OFFICER. The Senator from Pennsylvania is advised he has used all his time—13 minutes.

Mr. SPECTER. I yield myself 3 more minutes.

The PRESIDING OFFICER. The Senator has 3 minutes.

Mr. SPECTER. On my time, Mr. President.

When the Senator from Missouri talks about being exposed to risks or physical harm, that is happening to American soldiers every day around the world, as we know. It happened to my father serving in World War I. There are certain risks, physical or otherwise, which have to be sustained in a democracy doing our duty. We talk about money, about costs. Dollars and cents don't amount to a hill of beans when you are talking about constitutional rights.

When the Senator from Missouri talks about the case can continue

against the Government, that is a fallacious argument. The Government has the defense of governmental immunity. The telephone companies do not have that.

I offered the amendment in February to have the Government step into the shoes of the telephone companies with no different defenses. They would have state secrets but no governmental immunity. That was turned down. It is a very different matter to drop suits as to the telephone companies. They do not have governmental immunity. It is very different. Significantly, when challenged for any case which has been going on for years, with these kinds of opinions by the Chief Judge in San Francisco and on appeal to the Court of Appeals for the Ninth Circuit, for the Congress to step in and take away jurisdiction is an anathema. In the context of congressional ineffectiveness on oversight on separation of powers and in the context of the Supreme Court of the United States, which, as I elaborated earlier today, has ducked it, the only way to get this decision is to let the courts proceed. Congress is ineffective on curtailing executive authority. That is why I think it is so important that we can both keep this surveillance program and at the same time protect constitutional rights.

Mr. President, how much time do I have remaining?

The PRESIDING OFFICER. The Senator has consumed 15 minutes, so he has 45 minutes remaining on his amendment.

Mr. SPECTER. I yield the floor.

The PRESIDING OFFICER. The Senator from New Mexico is recognized.

Mr. BINGAMAN. Mr. President, could the Presiding Officer please indicate what the order of sequence of events is at this point?

The PRESIDING OFFICER. The Senator from New Mexico is authorized to offer his amendment with 1 hour of debate equally divided.

Mr. BINGAMAN. Let me defer to my friend from Michigan. Let me indicate I will plan to use the first 15 minutes of the 30 minutes allocated to me to make a statement now, and then Senator CASEY from Pennsylvania will take 5 minutes, and then Senator LEVIN from Michigan will have the remaining 10 minutes. That is my plan.

I believe the Senator from Michigan wanted to state a question.

Mr. LEVIN. Mr. President, parliamentary inquiry. I thank my friend from New Mexico.

The PRESIDING OFFICER. The Senator from Michigan is recognized.

Mr. LEVIN. Under the plan that was just stated, if 10 minutes is yielded to this Senator, can the 10 minutes be used at any time this afternoon or must it follow immediately in sequence to either Senator CASEY or Senator BINGAMAN?

The PRESIDING OFFICER. The 10 minutes would have to be used sometime this afternoon.

Mr. LEVIN. At any time this afternoon. I thank the Presiding Officer.

AMENDMENT NO. 5066

Mr. BINGAMAN. Mr. President, I ask to call up amendment No. 5066.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from New Mexico [Mr. BINGAMAN], for himself, Mr. CASEY, and Mr. SPECTER, proposes an amendment numbered 5066.

Mr. BINGAMAN. I ask unanimous consent that the reading of the amendment be dispensed with.

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

The amendment is as follows:

(Purpose: To stay pending cases against certain telecommunications companies and provide that such companies may not seek retroactive immunity until 90 days after the date the final report of the Inspectors General on the President's Surveillance Program is submitted to Congress)

Beginning on page 88, strike line 23 and all that follows through page 90, line 15, and insert the following:

''(a) REQUIREMENT FOR CERTIFICATION.—

''(1) IN GENERAL.—Notwithstanding any other provision of law other than paragraph (2), a civil action may not lie or be maintained in a Federal or State court against any person for providing assistance to an element of the intelligence community, and shall be promptly dismissed, if the Attorney General certifies to the district court of the United States in which such action is pending that—

''(A) any assistance by that person was provided pursuant to an order of the court established under section 103(a) directing such assistance;

''(B) any assistance by that person was provided pursuant to a certification in writing under section 2511(2)(a)(ii)(B) or 2709(b) of title 18, United States Code;

''(C) any assistance by that person was provided pursuant to a directive under section 102(a)(4), 105B(e), as added by section 2 of the Protect America Act of 2007 (Public Law 110–55; 121 Stat. 553), or 702(h) directing such assistance;

''(D) in the case of a covered civil action, the assistance alleged to have been provided by the electronic communication service provider was—

''(i) in connection with an intelligence activity involving communications that was—

''(I) authorized by the President during the period beginning on September 11, 2001, and ending on January 17, 2007; and

''(II) designed to detect or prevent a terrorist attack, or activities in preparation for a terrorist attack, against the United States; and

''(ii) the subject of a written request or directive, or a series of written requests or directives, from the Attorney General or the head of an element of the intelligence community (or the deputy of such person) to the electronic communication service provider indicating that the activity was—

''(I) authorized by the President; and

''(II) determined to be lawful; or

''(E) the person did not provide the alleged assistance.

''(2) LIMITATION ON IMPLEMENTATION.—

''(A) IN GENERAL.—The Attorney General may not make a certification for any civil action described in paragraph (1)(D) until after the date described in subparagraph (C).

''(B) STAY OF CIVIL ACTIONS.—During the period beginning on the date of the enactment of the FISA Amendments Act of 2008 and ending on the date described in subparagraph (C), a civil action described in paragraph (1)(D) shall be stayed by the court in which the civil action is pending.

''(C) DATE DESCRIBED.—The date described in this subparagraph is the date that is 90 days after the final report described in section 301(c)(2) of the FISA Amendments Act of 2008 is submitted to the appropriate committees of Congress, as required by such section.''.

Mr. BINGAMAN. Mr. President, this is an amendment cosponsored by Senators CASEY and SPECTER. The main thrust of this amendment is to make a point that this legislation which is currently before us puts the cart before the horse. As soon as we enact the legislation, it essentially grants telecommunications companies retroactive immunity for their past actions, but then after the fact, after they have been granted that retroactive immunity, it requires that an in-depth investigation occur regarding what those activities actually were.

The purpose of the amendment I am offering is simply to put the horse and the cart in the right order. I believe this chart makes the case very well. Let me just allude to this chart.

First, let's look at the process for dismissing lawsuits under the current bill, the way the bill now pends. That is the top line here. You can see the first step would be to enact provisions that would set up a procedure for the telecom companies to seek the retroactive immunity.

Second, in the middle here, in accordance with the underlying provisions, the pending civil cases would almost certainly be promptly dismissed as soon as the Attorney General makes the necessary certifications.

Then the last step, over here at the right—it is very difficult to read from any distance, but the last step says, ''IG's investigation and report to Congress.'' The last step would be investigation about whether the companies' participation in the President's warrantless wiretapping program was lawful and whether the relevant inspectors general can report back to Congress with their findings within a year. That is a requirement in the bill, that they do that report within 1 year.

Basically, the current bill's approach is to grant the immunity first and investigate later, after the companies have already been provided with legal liability protection for whatever it is later determined they have been engaged in. The amendment I am offering would change this by modifying the timing of the process that enables these telecom companies to seek immunity, and it changes it so that the investigation of what has occurred would occur first. Only after that investigation has been completed would we allow the immunity to be granted.

Under the amendment—this is the bottom part of this chart—the first step would still be to enact the legislation establishing the procedures for companies to seek immunity. At the same time, the amendment would stay all of the pending court cases against the telecom companies, thereby putting all those cases on hold. The second

step would be to allow the inspectors general—that is, from each of these Federal agencies that are designated in the statute—allow the inspectors general to conduct their investigation and to inform Congress about what they found. The amendment would then give Congress 90 days to review those findings, after which time the companies could go ahead and seek dismissal of their lawsuits. So the dismissal of the lawsuits would be the last step and not the first step and could only occur after the investigation was complete and after Congress had an opportunity to review their report that has been done.

The bill does recognize that it is important to understand all the facts surrounding the President's warrantless program. I am glad the legislation requires that the relevant inspectors general come to Congress with a report on the subject. This review will cover the establishment and implementation and use of the surveillance program, as well as the participation of private telecom companies.

However, as I have discussed, the bill also allows the same telecom companies to immediately seek and to obtain retroactive immunity for their participation in the program as soon as the bill becomes law. And that is a mistake, in my view. I find it troubling that Congress would confer immunity before the full extent of the companies' participation in the program is known. Maybe these companies acted in good faith, as some of my colleagues have argued. Maybe they did not. I don't know, myself, what the facts are, but, like most Members of Congress who do not sit on the Intelligence Committee or the Judiciary Committee, I received very little information regarding what actually did occur. I do know, however, that their participation in an unlawful, warrantless surveillance program is a serious issue. It deserves the in-depth review we call for in this legislation, but it deserves that review before we grant those companies blanket protection for their past actions. If we go down this path without first conducting the thorough review, we may very well look back with great regret.

To me, a much more sensible approach would be to have the comprehensive IG report submitted to Congress before companies are allowed to seek dismissal of their suits. The amendment would stay all of the civil cases against the telecom companies. It would allow time for the inspectors general to investigate the circumstances surrounding the President's warrantless surveillance program. It would give Congress the 90 days to review what is found in the IG's report.

While retaining the overall substance and structure of the bill, this would give Congress an opportunity, even though it is a brief opportunity, to at least review the inspectors general report before the companies would be permitted to apply for immunity. If Congress does not affirmatively pass legislation within 90 days of getting the report from the inspectors general, then the companies would be free to seek relief from the court.

I would also like to take just a minute to discuss what the amendment would not do. The amendment is not a deal breaker. The amendment would not remove or alter the substantive provisions in the immunity title of the bill. With passage of this amendment, those provisions would remain intact. Personally, I am opposed to retroactive immunity, but the amendment I am offering does not change the substance of those provisions.

Additionally, by staying the pending lawsuits, the companies would not be subject to the costs of litigation during the development of the IG report or while Congress reviews the report's findings. Proceedings in these cases would be suspended until the called-for report is delivered to Congress and the 90 days have passed.

Some of my colleagues have expressed concerns that unless we immediately grant the telecom companies retroactive immunity, they will refuse to provide assistance in the future. I think that is unfounded. Clearly they are under an obligation to do so under the language of this bill.

Regardless of whether Senators generally favor the legislation or are adamantly opposed to it; that is, the underlying legislation, I hope my colleagues will agree that this amendment is a reasonable modification which would, in fact, improve the bill.

Let me point out one other red herring that has come up. In a letter to Senate leadership dated yesterday, July 7, the administration urged that my amendment:

> . . . fails to address the risk that on-going litigation will result in the release of sensitive national security information, a risk that, if realized, could cause grave harm to the national security.

I suggest the Attorney General and the Director of National Intelligence need to read the amendment I am offering. As I stated, the amendment puts all of the cases on hold. There would be no ongoing activity during the time that proceedings in these cases were stayed, so there is no activity that could create a risk of releasing sensitive information.

This is a good amendment. It would improve this bill. It would make it more logical and certainly improve our ability to understand what it is we are being asked to grant immunity for. I urge my colleagues to support it.

I yield the floor.

The PRESIDING OFFICER (Mr. SANDERS). The Senator from Missouri is recognized.

Mr. BOND. Mr. President, I yield myself 10 minutes in opposition.

When the inspector general audit provisions were first discussed in the House and Senate, there was a great concern that these audits would be used to delay or deny essential civil liability protections. Unfortunately, this amendment shows that these concerns were justified.

When negotiating this compromise legislation with House Majority Leader HOYER, I agreed in good faith to a limited inspector general review of the President's terrorist surveillance program even though this program has been reviewed up and down on a bipartisan basis by the Senate Intelligence Committee and no abuse or wrongdoing had been found.

Now, in what I could only assume is a political move to undermine the critical civil liability protections in this bill, this amendment delays any liability protection until 90 days after the inspector general review of the bill is completed. What is supposed to happen after that is anything but clear, but I can only assume that will be followed by yet another effort to delay liability relief. That is extraordinarily and unacceptably unfair to those providers that assisted the Government in the aftermath of the September 11 terrorist attacks. We owe them our thanks, not our continued partisan maneuvering.

Earlier, we heard a justification for exposing these providers to public light, having participated in a classified program. The assertion was made: It is like our troops who go abroad and go under fire. Mr. President, as the father of a son who spent 20 months in the last 3 years as a marine sniper in Iraq, I can tell you that they go under tremendous threat and tremendous danger. But they are extremely well trained, they are extremely well supported, and they are extremely well armed.

To say with a straight face that we can subject private companies to that, private companies with American citizens working for them, and that we don't care if they are attacked when they don't have any protection, they don't have any weapons, they don't have any training, I think goes way too far.

That is not reasonable. Let's not hear any more of that stuff, that they should be put in the same position as our trained military men and women who go into battle accepting the risks of battle. These people, these good American citizens, did not expect to be under physical attack.

How often are we going to tell those patriotic Americans we have to delay further any halt to the lawsuits so we can ''review'' the terrorist surveillance program? Enough is enough. Inspectors general have very clear roles in our Government. They determine if there is waste, fraud, or abuse. Their review under title IV of this bill is essentially for these purposes. They will not determine whether the TSP was lawful. They will not determine whether the providers acted in good faith. That is for the court to do.

So exactly what purpose does it serve to delay liability relief to these companies? The only purpose I can think of is to appease these liberal activists who

have tried repeatedly throughout this FISA debate to tie the hands of the intelligence community and punish these companies with frivolous lawsuits.

What message are we sending to all of those private partners who help our intelligence community, our military, our law enforcement community on a daily basis far beyond the FISA context: Help us now, but we cannot guarantee that years later you will not be taken to the cleaners because you did. Is that an incentive? Is that the way we want to deal with fellow Americans whose help we need?

I appreciate there is serious debate about whether the President has article II authority to conduct surveillance. But this is a debate that should not impact whether these providers, who trusted their Government, who in good faith, on the word of the Attorney General, helped to ensure our homeland did not suffer another terrorist attack. And we think they should be treated fairly and protected.

We need to remember the Senate Intelligence Committee conducted an exhaustive review of the TSP. It found no evidence of illegal or unlawful conduct either by the providers or the Government. We agreed on a bipartisan basis, ratified by the Senate, that the providers acted in good faith. So I do not see how waiting to give them the fair and just relief they deserve advances any goals. It is more likely, the longer these lawsuits, these frivolous lawsuits go on, that our most sensitive sources and methods will be revealed. It becomes much more likely that the providers who helped us will refuse to do so unless we go through a lengthy process to compel them.

We went without cooperation for some time when the act expired, and it was only on the assurance of prompt action that they were able to withstand shareholder pressure and the advice of lawyers not to worry.

The Attorney General and the DNI sent a letter on July 7. It says:

> Any FISA modernization bill must contain effective legal protection for those companies sued because they're believed to have helped the Government prevent terrorist attacks. Liability protection, a fair and just result, is necessary to ensure the continued assistance of the private sector.
>
> H.R. 6304 contains such protection, but the amendment addressed in this letter

Essentially the Bingaman amendment—

> would unnecessarily delay implementation of the protections with the purpose of deferring any decision on this issue for more than a year.
>
> Accordingly, we as well as the President's other senior advisors will recommend that the President veto any bill that includes such an amendment. The Intelligence Committee has recognized the intelligence community cannot obtain intelligence it needs without assistance from these companies. We recognize that the companies in the future may be less willing to assist the Government if they face the threat of lawsuits, and we know that a delay could result in the very degradation and the cooperation that this bill was designed to provide. Continued delay in protecting those who provided assistance will be invariably noted by those who may some day be called upon to help us again.
>
> Finally, by raising the prospect that the litigation at issue could eventually proceed, this amendment fails to address the risks that ongoing litigation will result in release of national security sensitive information, a risk that if realized could cause grave harm to national security.

I reserve the remainder of my time on this side. I ask unanimous consent that after the Senator from Pennsylvania is recognized, the chairman of the committee be recognized for 10 minutes.

I ask unanimous consent that this letter addressed to Leader REID from the DNI and the Attorney General be printed in the RECORD.

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

JULY 7, 2008.

Hon. HARRY REID,
Majority Leader, U.S. Senate, Hart Senate Office Building, Washington, DC.

DEAR MR. LEADER: This letter presents the views of the Administration on an amendment to the Foreign Intelligence Surveillance Act of 1978 (''FISA'') Amendments Act of 2008 (H.R. 6304) that was not covered in our letter of June 26, 2008. As we stated in that letter, we strongly support enactment of H.R. 6304, which would represent an historic modernization of FISA to reflect dramatic changes in communications technology over the last 30 years. This bill, which passed the House of Representatives by a wide margin of 293–129, is the result of a bipartisan effort that will place the Nation's foreign intelligence effort in this area on a firm, long-term foundation. The bill provides our intelligence professionals the tools they need to protect the country and protects companies whose assistance is vital to this effort from lawsuits for past and future cooperation with the Government.

As we have previously noted, any FISA modernization bill must contain effective legal protections for those companies sued because they are believed to have helped the government prevent terrorist attacks in the aftermath of September 11, 2001. Liability protection is the fair and just result and is necessary to ensure the continued assistance of the private sector. H.R. 6304 contains such protection, but the amendment addressed in this letter would unnecessarily delay implementation of the protections with the purpose of deferring any decision on this issue for more than a year. This amendment would reportedly foreclose an electronic communication service provider from receiving retroactive liability protection until 90 days after the Inspectors General of various departments, as required by section 301 of H.R. 6304, complete a comprehensive review of, and submit a final report on, communications intelligence activities authorized by the President between September 11, 2001, and January 17, 2007. The final report is not due for a year after the enactment of the bill. Any amendment that would delay implementation of the liability protections in this manner is unacceptable. Providing prompt liability protection is critical to the national security. Accordingly, we, as well as the President's other senior advisors, will recommend that the President veto any bill that includes such an amendment.

Continuing to deny appropriate protection to private parties that cooperated in good faith with the Government in the aftermath of the attacks of September 11 has negative consequences for our national security. The Senate Intelligence Committee recognized that ''the intelligence community cannot obtain the intelligence it needs without assistance from these companies.'' That committee also recognized that companies in the future may be less willing to assist the Government if they face the threat of private lawsuits each time they are alleged to have provided assistance, and that the ''possible reduction intelligence that might result from this delay is simply unacceptable for the safety of our Nation.'' These cases have already been pending for years, and delaying implementation of appropriate liability protection as proposed by the amendment would mean that the companies would still face the prospect of defending against multi-billion-dollar claims and would continue to suffer from the uncertainty of pending litigation. Indeed, the apparent purpose of the amendment is to postpone a decision on whether to provide liability protection at all. Such a result would defeat the point of the carefully considered and bipartisan retroactive liability protections in H.R. 6304—to provide for the expeditious dismissal of the relevant cases in those circumstances in which the Attorney General makes, and the district court reviews, the necessary certifications—and could result in the very degradation in private cooperation that the bill was designed to prevent. The intelligence community, as well as law enforcement and homeland security agencies, continue to rely ont he voluntary cooperation and assistance of private parties in other areas. Continued delay in protecting those who provided assistance after September 11 will invariably be noted by those who may someday be called upon again to help the Nation. Finally, by raising the prospect that the litigation at issue could eventually proceed, this amendment fails to address the risk that ongoing litigation will result in the release of sensitive national security information, a risk that, if realized, could cause grave harm to the national security.

Deferring a final decision on retroactive liability protection for 15 months while the Inspectors General complete the review required by H.R. 6304 is also unnecessary. The Senate Intelligence Committee conducted an extensive study of the issue, which included the review of the relevant classified documents, numerous hearings, and testimony. after completing this comprehensive review, the Committee determined that providers had acted in response to written requests or directives stating that the activities had been authorized by the President and had been determined to be lawful, and that the providers ''had a good faith basis'' for responding to the requests for assistance they received. Accordingly, the Committee agreed to the necessary legal protections on a 13–2 vote. Similarly, the Intelligence Committee of the House of Representatives has been extensively briefed and has exercised thorough oversight in regard to these intelligence matters. We also have made extraordinarily sensitive information available to the Judiciary Committees of both the Senate and House.

The Senate passed a prior version (S. 2248) of the current pending bill, which included retroactive liability protection, by a vote of 68–29. Both Houses of Congress, by wide bipartisan margins, have now made the judgment that retroactive liability protection is the appropriate and fair result. The Congress has been considering this issue for over two years and conducted extensive oversight in this area. During this period, we have emphasized the critical nature of private sector cooperation in protecting our national security and the difficulties of obtaining such cooperation while issues of liability protection remained unresolved. Further delay will damage our intelligence capabilities.

Thank you for the opportunity to present our views on this crucial bill. We reiterate our sincere appreciation to the Congress for working with us on H.R. 6304, a long-term FISA modernization bill that will strengthen the Nation's intelligence capabilities while protecting the liberties of Americans. We strongly support its prompt passage.

Sincerely,

MICHAEL B. MUKASEY,
Attorney General.
J.M. MCCONNELL,
Director of National Intelligence.

The PRESIDING OFFICER. The Senator from New Mexico.

Mr. BINGAMAN. Mr. President, is there any time remaining on the 15 minutes that I had set aside?

The PRESIDING OFFICER. The Senator has 6 minutes remaining.

Mr. BINGAMAN. I ask the Senator from Pennsylvania that I use two of those to respond to this latest statement. Then I will defer to him for his statement.

Mr. President, I want to respond to the statement by the Senator from Missouri about what all of the reports from the inspectors general would essentially deal with. I believe he said waste, fraud, and abuse, which is sort of the general purview of inspectors general.

That is not my understanding. I understand the inspectors general have been asked to essentially do a review of this.

The Inspectors General of the Department of Justice, the Office of the Director of National Intelligence, the National Security Agency, the Department of Defense, and any other elements of the intelligence community that participated in the President's surveillance program—

Shall all work together to do a report which will look into—

all of the facts necessary to describe the establishment, implementation, product, and use of the product of the Program;

access to legal reviews of the Program and access to information about the Program;

communications with, and participation of, individuals and entities in the private sector related to the Program;

interaction with the Foreign Intelligence Surveillance Court and transition to court orders related to the Program; and

any other matters identified by any such Inspector General that would enable that Inspector General to complete a review of the Program with respect to such Department of element.

I believe the review we are talking about here, and that we are legislating or proposing to legislate, is intended to tell the Congress and tell anybody who reads the report what this program consisted of. That is information we do not have today. And it is entirely appropriate that we get that report before we grant immunity.

That is the thrust of my amendment, I hope all of my colleagues will support it. I appreciate my colleague from Pennsylvania yielding me additional time to speak in response.

I yield the floor.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. CASEY. Mr. President, I have limited time, and I know my colleague from New Mexico, Senator BINGAMAN, did an excellent job of outlining his amendment. I will skip much of what I was going to read in my statement.

Basically, what we are talking about is a time out. We are giving the Congress the opportunity to review the inspectors general report before the Congress chooses to authorize limited immunity for the telecom firms.

It is actually very simple. Basically, what we are saying is, the amendment simply allows the Congress to say: Wait a minute. Hold on. We should take a deep breath before we decide to authorize a Federal district court to grant telecom firms legal immunity for their actions related to the administration's warrantless surveillance program.

Let's figure out what this program entailed. Let's figure out what happened. Let's figure out what the telecom firms actually did, what they actually did when it came to wiretapping and surveillance.

So under this amendment, the pending lawsuits would remain stayed while the inspectors general complete their report. If the firms did nothing wrong, as they have proclaimed, they will be vindicated by the final inspectors general report. Then the Congress will have the confidence to grant these firms the immunity for which they ask.

So I think many Members of this body would have buyer's remorse if they voted for limited immunity without the understanding of what the President's surveillance program did and did not do. This amendment would prevent that buyer's remorse by allowing the Congress to better understand the conduct of the telecommunications firms before we decide to grant sweeping legal immunity for such conduct.

I encourage my colleagues, all Members of the Senate, to vote for this amendment. It strikes the right balance. It is about accountability. It is also about the rule of law. It is a reasonable balance to strike on very important issues, the issues of security and how we are going to implement any kind of program which involves wiretapping and surveillance.

The PRESIDING OFFICER. The Senator from West Virginia is recognized.

Mr. ROCKEFELLER. Mr. President, I ask Senator BOND, the vice chairman of the committee, to yield me 10 or 11, potentially even 12 minutes.

Mr. BOND. I make a very generous allotment of 12 minutes. If he needs more, I am anxious to hear what he has to say.

Mr. ROCKEFELLER. I appreciate my colleague yielding me time.

Mr. President, Senator BINGAMAN, who I greatly respect in all ways, has offered an amendment altering the liability protections of title II. That is it. His amendment would postpone the implementation of the liability provisions of the bill until 90 days after the submission of the final report of the inspectors general required under title II.

Now, I appreciate the Senator's desire to have more information out there. But I want the Senator to contemplate, and the Senate as a whole to contemplate, what we are asking. We are talking about a year for the inspectors general to complete their reports.

Does it really work that way? Is it really a flat year? Are we going to send out Federal marshals to have them all do their reports on the exact day? Probably it will stretch a little bit. Maybe it will not; maybe it will.

But you cannot assume it will not. Then you have to add on 90 days. Then you can get to the question of the immunity. I am really baffled by that because what it, in effect, says is, we are almost certainly going to be going through a period of something, which I have not heard discussed today during this entire debate, and that is the actual collection of intelligence that involves highly classified material of a foreboding nature for a long period of time until the Senator from New Mexico and/or the Senate can be convinced that it is worthwhile to give immunity or to understand this program.

Now, I want to make an even more basic point: By inserting this amendment, requesting this amendment be passed, I hope the good Senator does understand that he is undoing a very carefully calibrated compromise between the Senate-passed bill and the House-passed bill that is on title II, taking months and months of negotiations to get to the point where Speaker PELOSI, for example, who was violently against the bill, and title II in particular, and STENEY HOYER, who was very much against title II, the immunity portion of the bill, where they could say, on the floor of the House: We think sufficient progress has been made in the negotiations that we will vote for this bill, which the House did by about 70 percent.

Now, that is going from the House not even considering title II. I mean, they considered and rejected it. It was a sea change.

It was a sea change, and one has to have been there to see how the change took place, the good faith bargaining on the part of Vice Chairman BOND, myself, our mutual staffs, working with the DNI and others, long hours and long days with which we have arrived at something which, if we pass this today, will go to the President to be signed. If we accept this amendment or, for that matter, accept the Specter amendment that follows, it will have to go back to the House, which will not take it up, which will not consider it, which will undo everything, and there will be no bill.

Is that important? Yes, it is. Why is it important? Because the chance of not being able to collect on extremely foreboding matters around this world will come to a halt, either because the PATRIOT Act terms have expired or because the companies will withdraw in disgust. In any event, the bill would be vetoed, as the vice chairman said.

So it would be the end of the bill. Therefore, I oppose this amendment.

As I will say about each of these amendments—well, I just did—it undoes everything that has been done for the purpose of making a perfecting amendment to satisfy a particular need of a particular Senator. I also must oppose this amendment because there is no reason for delaying the liability protection provisions. There is not a sufficient reason. It is true the Select Committee struggled to get access to details about the President's surveillance program for many months, but in the end we succeeded. We went from maybe eight, more likely four, sometimes six, to all four committees in the House and the Senate, Judiciary and Intelligence. We heard the necessary testimony. We went to the EOP. We read all the documents, and our chiefs of staff were allowed to do the same thing. We read the legal reasoning used to justify within the executive branch and the role of the private sector. We did all of that, not only our committee but also the House Intelligence Committee, and both Judiciary Committees spent considerable time looking at this issue. I am satisfied we have a basis for taking action now.

On national security grounds, we have to, in my judgment. We haven't talked about that today. We have talked about refined points of constitutional niceties and all the rest of it. I don't denigrate that, but there is something called the protection of the Nation. I take that very seriously. I take that very, very seriously. So a form of liability protection has passed the Senate and the House of Representatives a total of three times, once in the Senate and twice in the House. We should not now reverse these actions by passing the provisions of suspension.

Let me be clear. I strongly support the requirement in this bill for a comprehensive review of the President's surveillance program by the inspectors general. They will be very tough and very thorough and embarrass a lot of people. A report on their general review is one of the best ways to inform the American people about the facts. Litigation is an imperfect mechanism to bring facts to the public, rather a terrible mechanism, because of something called the State secrets privilege which is involved, which means the people can't know anything, that a lot of people dealing with the court can't know anything, that the companies can't know anything. It is a closedown. People have to understand that. It is not an open court. You are not getting a traffic ticket. It is a highly complex, nuanced matter which is rigidly guarded by rules. You could argue the rules, but there they are. Unfortunately, if this amendment passes, the fact that litigation is still pending may have the effect of limiting the amount of information that will be released to the public in the report of the inspectors general, the opposite of what the distinguished Senator wants. Certain facts that might be releasable if the litigation were resolved might be held back, if the Government anticipated a continuing need to assert the State secrets privilege in litigation, which it would.

It is also important to note that this amendment, if it were to pass, the liability protection provisions that the Senator is trying to get at would not go away. In other words, if his amendment passed and we took this long delay, nothing would affect the progress of the liability legislation and that possibility. So it is an amendment which doesn't accomplish anything. The provisions would still go into effect after 90 days, unless new legislation is passed. Let's hope that doesn't happen. The new Congress, thus, might be launched into a contentious debate next summer, instead of working with the new President on a new agenda. That is the point of the Cardin amendment, that the date was changed to December 2012, so that the next President, whoever it might be—it is very close—will have a chance to review and perhaps act upon what we have done here in the next term, which is good. I urge defeat of the amendment.

I have one more thing to say, with the indulgence of my colleague. The senior Senator from Pennsylvania and I were engaged in earlier debate over the access Senators have had, both with myself and with the vice chairman, to the Government letter sent to the telecommunications companies requesting their cooperation during the period of 9/11 to January of 2007. The Senator from Pennsylvania lamented the fact that these documents were kept to only the members of the Intelligence and Judiciary Committees and not shared with the full Senate.

I share the view of the Senator that these documents should be viewed by all Senators, and I have advocated this very position to senior officials of the Bush administration for many months. But recognizing the administration's unwillingness to extend this access, the Senate Intelligence Committee did the next best thing. We were able to get declassified the relevant facts upon which the committee and, ultimately, the full Senate reached the judgment that a narrowly drawn immunity bill remedy might be appropriate.

For the record, our committee report, 110–209, accompanying S. 2248, the FISA amendments——

The PRESIDING OFFICER. The time of the Senator has expired.

Mr. ROCKEFELLER. I ask unanimous consent for 1 additional minute.

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

Mr. ROCKEFELLER. And dated October 26, 2007, includes a lengthy declassified explanation of the committee's review and conclusions as well as a description of the representations made by the Government in the letters sent to the companies during the period of time covered by the bill. So for the past 8 months, this public report has been available not only to all Senators—here it is, I have labeled it, pages 8 through 12, right here—but to the general public as well.

I ask unanimous consent that that portion be printed in the RECORD.

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

TITLE II OF THE FISA AMENDMENTS ACT OF 2007

Title II of this bill reflects the Committee's belief that there is a strong national interest in addressing the extent to which the burden of litigation over the legality of surveillance should fall on private parties. Based on a review of both current immunity provisions and historical information on the President's program, the Committee identified three issues relating to the exposure of electronic communication service providers to liability that needed to be addressed in this bill.

First, the Committee considered the exposure to liability of providers who allegedly participated in the President's surveillance program. Second, the Committee considered the absence, in current law, of a procedural mechanism that would give courts an appropriate role in assessing statutory immunity provisions that would otherwise be subject to the state secrets privilege. Third, the Committee sought to clarify the role of state public utility commissions in regulating electronic communication service providers' relationships with the intelligence community. The Committee addressed these three issues, respectively, in sections 202, 203, and 204 of the bill.

RETROACTIVE IMMUNITY

Sections 201 and 202 of the bill provide focused retroactive immunity for electronic communication service providers that were alleged to have cooperated with the intelligence community in implementing the President's surveillance program. Only civil lawsuits against electronic communication service providers alleged to have assisted the Government are covered under the provision. The Committee does not intend for this section to apply to, or in any way affect, pending or future suits against the Government as to the legality of the President's program.

Section 202 was narrowly drafted to apply only to a specific intelligence program. Section 202 therefore provides immunity for an intelligence activity involving communications that was designed to detect or prevent a terrorist attack, or activities in preparation for a terrorist attack, that was authorized in the period between September 11, 2001 and January 17, 2007, and that was described in written requests to the electronic communication service provider as authorized by the President and determined to be lawful.

The extension of immunity in section 202 reflects the Committee's determination that electronic communication service providers acted on a good faith belief that the President's program, and their assistance, was lawful. The Committee's decision to include liability relief for providers was based in significant part on its examination of the written communications from U.S. Government officials to certain providers. The Committee also considered the testimony of relevant participants in the program.

The details of the President's program are highly classified. As with other intelligence matters, the identities of persons or entities who provide assistance to the U.S. Government are protected as vital sources and methods of intelligence. But it reveals no secrets to say—as the Foreign Intelligence Surveillance Act, this bill, and Title 18 of the U.S. Code all make clear—that electronic

surveillance for law enforcement and intelligence purposes depends in great part on the cooperation of the private companies that operate the Nation's telecommunication system.

It would be inappropriate to disclose the names of the electronic communication service providers from which assistance was sought, the activities in which the Government was engaged or in which providers assisted, or the details regarding any such assistance. The Committee can say, however, that beginning soon after September 11, 2001, the Executive branch provided written requests or directives to U.S. electronic communication service providers to obtain their assistance with communications intelligence activities that had been authorized by the President.

The Committee has reviewed all of the relevant correspondence. The letters were provided to electronic communication service providers at regular intervals. All of the letters stated that the activities had been authorized by the President. All of the letters also stated that the activities had been determined to be lawful by the Attorney General, except for one letter that covered a period of less than sixty days. That letter, which like all the others stated that the activities had been authorized by the President, stated that the activities had been determined to be lawful by the Counsel to the President.

The historical context of requests or directives for assistance was also relevant to the Committee's determination that electronic communication service providers acted in good faith. The Committee considered both the extraordinary nature of the time period following the terrorist attacks of September 11, 2001, and the fact that the expressed purpose of the program was to ''detect and prevent the next terrorist attack'' in making its assessment.

On the basis of the representations in the communications to providers, the Committee concluded that the providers, in the unique historical circumstances of the aftermath of September 11, 2001, had a good faith basis for responding to the requests for assistance they received. Section 202 makes no assessment about the legality of the President's program. It simply recognizes that, in the specific historical circumstances here, if the private sector relied on written representations that high-level Government officials had assessed the program to be legal, they acted in good faith and should be entitled to protection from civil suit.

The requirements of section 202 reflect the Committee's determination that cases should only be dismissed when providers acted in good faith. Section 202 applies only to assistance provided by electronics communication service providers pursuant to a ''written request or directive from the Attorney General or the head of an element of the intelligence community. . . that the program was authorized by the President and determined to be lawful.''

Section 202 also preserves an important role for the courts. Although the bill reflects the Committee's determination that, if the requirements of section 202 are met, the provider acted in good faith, the section allows judicial review of whether the Attorney General has abused the discretion provided by statute in certifying that a provider either furnished no assistance or cooperated with the Government under the terms referenced in the section.

In determining whether to provide retroactive immunity, the Committee weighed the incentives such immunity would provide. As described above, electronic communication service providers play an important role in assisting intelligence officials in national security activities. Indeed, the intelligence community cannot obtain the intelligence it needs without assistance from these companies. Given the scope of the civil damages suits, and the current spotlight associated with providing any assistance to the intelligence community, the Committee was concerned that, without retroactive immunity, the private sector might be unwilling to cooperate with lawful Government requests in the future without unnecessary court involvement and protracted litigation. The possible reduction in intelligence that might result from this delay is simply unacceptable for the safety of out Nation.

At the same time, the Committee recognized that providers play an essential role in ensuring that the Government complies with statutory requirements before collecting information that may impact the privacy interests of U.S. citizens. Because the Government necessarily seeks access to communications through the private sector, providers have the unparalleled ability to insist on receiving appropriate statutory documentation before agreeing to provide any assistance to the Government.

The Committee sought to maintain the balance between these factors by providing retroactive immunity that is limited in scope. The provision of retroactive immunity was intended to encourage electronic communication service providers who acted in good faith in the particular set of circumstances at issue to cooperate with the Government when provided with lawful requests in the future. Restricting that immunity to discrete past activities avoids disrupting the balance of incentives for electronic communication service providers to require compliance with statutory requirements in the future. Under this bill and existing statutory provisions, providers will only be entitled to protection from suit for their future activities if they ensure that their assistance is conducted in accordance with statutory requirements.

The Committee believes that adherence to precise, existing statutory forms is greatly preferred. This preference is reflected in section 203 of the bill, which establishes procedures by which civil actions against those who assist the Government shall be dismissed upon a certification by the Attorney General that any assistance had been provided pursuant to a court order or a statutorily-prescribed certification or directive. The action the Committee proposes for claims arising out of the President's program should be understood by the Executive branch and providers as a one-time response to an unparalleled national experience in the midst of which representations were made that assistance to the Government was authorized and lawful.

PROCEDURES FOR IMPLEMENTING STATUTORY DEFENSES

Section 203 of this bill provides a procedure that can be used in the future to seek dismissal of a suit when a defendant either provided assistance pursuant to a lawful statutory requirement, or did not provide assistance. This section, a new section 802 of FISA, reflects the Committee's recognition that the identities of persons or entities who provide assistance to the intelligence community are properly protected as sources and methods of intelligence.

Under the existing statutory scheme, wire or electronic communication providers are authorized to provide information and assistance to persons with authority to conduct electronic surveillance if the providers have been provided with (1) a court order directing the assistance, or (2) a certification in writing signed by the Attorney General or certain other officers that ''no warrant or court order is required by law, that all statutory requirements have been met, and that the specific assistance is required.'' See 18 U.S.C. 2511(2)(a)(ii). Current law therefore envisions that wire and electronic communication service providers will play a lawful role in the Government's conduct of electronic surveillance.

Section 2511(2)(a)(ii) protects these providers from suit as long as their actions are consistent with statutory authorizations. Once electronic communication service providers have a court order or certification, ''no cause of action shall lie in any court against any provider of wire or electronic communication service . . . for providing information, facilities, or assistance in accordance with the terms of a court order, statutory authorization, or certification under this chapter.'' Id. The Protect America Act and Title I of this bill provide similar protections from suit for providing information or assistance in accordance with statutory directives. All of these immunity provisions are designed to ensure that wire and electronic communication service providers assist the Government with electronic surveillance activities when necessary, and recognize the good faith of those providers who assist the Government in accordance with the statutory scheme.

To the extent that any existing immunity provisions are applicable, however, providers have not been able to benefit from the provisions in the civil cases that are currently pending. Because the Government has claimed the state secrets privilege over the question of whether any particular provider furnished assistance to the Government, an electronic communication service provider who cooperated with the Government pursuant to a valid court order or certification cannot prove it is entitled to immunity under section 2511(2)(a)(ii) without disclosing the information deemed privileged by the Executive branch. Thus, electronic communication providers are prohibited from seeking immunity under section 2511(2)(a)(ii) for any assistance they may have provided to the intelligence community, with the approval of the FISA Court, after January 17, 2007. Providers who did not assist the Government are similarly unable to extract themselves from ongoing litigation, because the assertion of the state secrets privilege makes it impossible for them to demonstrate their lack of involvement.

By addressing the situation in which an entity is prohibited from taking advantage of existing immunity provisions because of Government restrictions on disclosure of the information, Section 203 seeks to ensure that existing immunity provisions have their intended effect. The Committee also intends to reassure providers that as long as their assistance to the Government is conducted in accordance with statutory requirements, they will be protected from civil liability and the burden of further litigation.

The procedure in section 203 allows a court to review a certification as to whether an individual either assisted the Government pursuant to a lawful statutory requirement or did not assist the Government, even when public disclosure of such facts would harm the national security. Because an assertion of state secrets over the same facts would likely prevent all judicial review over whether, and under what authorities, an individual assisted the Government, this provision serves to expand judicial review to an area that may have been previously non-justiciable. In addition, the statute explicitly allows the court to review for abuse of discretion the Attorney General's certification that a person either did not assist the Government or cooperated with the Government pursuant, to statutory requirements.

PREEMPTION

Section 204 of the bill preempts state investigations or required disclosure of information about the relationship between individual electronic communication service providers and the intelligence community. The provision reflects the Committee's view that, although states play an important role in regulating electronic communication service providers, they should not be involved in regulating the relationship between electronic communication service providers and the intelligence community.

Mr. ROCKEFELLER. I hope very much that the Senator's amendment will be defeated. I thank the Chair.

Mr. BOND. I suggest the absence of a quorum and ask unanimous consent that the time be charged equally to both sides.

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

The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

Mr. ROCKEFELLER. Mr. President, with the goodwill of the vice chairman, he has granted me a couple of moments to enter a couple documents in the RECORD. We have had several good days of debate or good hours of debate on the FISA bill going back to before the recess. I guess that would be several months. In the course of a discussion of a bill as lengthy and complex as this, several arguments have been made that warrant response, but there isn't always time to give the response. In the interest of establishing an accurate legislative history to accompany the bill, as manager of the bill, I ask unanimous consent to print in the RECORD a statement providing such clarifications and corrections.

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

H.R. 6304, FISA AMENDMENTS ACT OF 2008, RESPONSE TO VARIOUS POINTS IN PRE-RECESS DEBATE, JULY 8, 2008

Mr. President, prior to the recess, we had several good days of debate on the FISA bill. Inevitably, in the course of discussion of a bill as lengthy and detailed as this, several arguments have been made that warrant a response in the interest of an accurate legislative history. As a manager of the bill, I would like to take a few moments to clear up several matters.

EXCLUSIVITY

Sections 102(a) and (b) are the bill's main exclusivity provisions. Section 102(a) strengthens present exclusivity law by providing, in a new section 112 of FISA, that only an express statutory authorization for electronic surveillance or the interception of domestic communications shall constitute an exclusive means in addition to specifically listed statutes. Section 102(b) amends section 109 of FISA, the Act's key criminal offense provision, so that the criminal offense and the exclusivity provision dovetail exactly.

These main parts of section 102 are well understood. There has been some confusion, however, about a conforming amendment in section 102(c), which performs a useful but distinctly minor role in the overall exclusivity section.

Section 102(c) adds a detail to the section of the U.S. criminal code (18 USC 2511), which gives immunity from suit to companies who have received a certification from the Attorney General. It requires the Government to identify in the certification the specific statutory provision that authorizes the company's assistance ''if a certification . . . for assistance to obtain foreign intelligence information is based on statutory authority.''

Several colleagues have suggested, or at least strongly intimated, that this language acknowledges the President's constitutional authority to conduct warrantless surveillance of the kind involved in the President's Terrorism Surveillance Program. Any such argument is inconsistent with both the language of the provision and the intent of its drafters.

To understand the purpose of section 102(c), we need to look at the course of negotiations about it. In its proposed amendment to our Intelligence Committee bill, the Senate Judiciary Committee recommended the following language: ''A certification . . . for assistance to obtain foreign intelligence information shall identify the specific provision of the Foreign Intelligence Surveillance Act of 1978 . . . that provides an exception from providing a court order, and shall certify that the statutory requirements of such provision have been met.''

As the Judiciary Committee pointed out in its report, this language responded to the need of providers to have clarity regarding the legality of their actions and entitlement to immunity.

After the Judiciary Committee sequentially reported our bill, there were extensive discussions with the administration about this language. In the course of those discussions, the Department of Justice noted that FISA, as drafted in 1978, was only intended to regulate particular activities, those that constitute ''electronic surveillance,'' a term that is carefully defined in FISA. Indeed, the nuance in FISA's definition of electronic surveillance, as well as its very detailed parameters, led us to decide not to alter the definition of electronic surveillance in FISA in this compromise bill. Activities that do not constitute electronic surveillance within the meaning of FISA, or the interception of domestic wire, oral or electronic communications, were not restricted by FISA's original exclusivity provision and the same will be true under this bill. Thus, theoretically there may be activities that fall outside of the statute's restrictions but are not subject to an explicit statutory ''exception from providing a court order,'' as that term was used in the Judiciary Committee amendment.

These discussions led to the language in the current bill, which was included as part of Senator Feinstein's exclusive means amendment in the original Senate debate in February. The amendment was intended to ensure that the provider has as much information as possible, while still recognizing that, going back to the birth of FISA, activities may be conducted side-by-side with FISA, although not under the authority of FISA, if they do not fall within FISA's definition of electronic surveillance.

Section 102(c) was not intended to permit, and its language would not permit, any activities that would violate the main parts of the exclusive means provision, whatever the legal justification. Any suggestion that Congress would take away in a conforming amendment the central achievement of the overall exclusivity section makes no sense.

Indeed, the bill makes it painstakingly clear: any person who engages in electronic surveillance outside of FISA or the U.S. criminal code is committing a criminal offense. Given this statutory requirement, the Attorney General cannot lawfully certify that electronic surveillance outside of FISA satisfies ''all statutory requirements,'' as is required and will continue to be required for a certification in section 2511 of title 18.

Whether or not the President has constitutional authority to conduct surveillance—and there is widespread disagreement here on that point—the language of section 102(c) simply cannot be read to recognize any authority to conduct electronic surveillance that is inconsistent with FISA.

ASSESSMENT OF COMPLIANCE

In debate on the bill, the question has been raised whether the decision not to include in the final compromise a provision specifically addressing the authority of the FISA court to assess compliance with minimization procedures in section 702 represents a determination that the court should not have that authority.

Minimization procedures are specific procedures that are reasonably designed to minimize acquisition and retention, and prohibit dissemination, of nonpublic information concerning United States persons consistent with the need to obtain, produce, and disseminate foreign intelligence information. Compliance with them is central to the protection of the privacy of Americans. The Protect America Act failed to provide for court review and approval of minimization procedures. This bill corrects that omission. The PAA also failed to provide for rules on the use of information acquired under it. This bill corrects that omission by making section 106 of FISA applicable to collection under its foreign targeting provisions. That section explicitly mandates that federal employees may only use or disclose information concerning U.S. persons in accordance with required minimization procedures.

Although section 702 does not have a provision that mandates compliance reviews, as the original House bill contained, the bill before us today recognizes the authority of the FISA court to assess compliance with the procedures that it has approved. The courts of the United States are not advisory bodies. All of them, including the FISA court, have the inherent authority of any other court that exercises the judicial power of the United States to ensure that the parties before them are complying with their orders and the procedures they approve.

An amendment to the original bill that was offered by Senator Whitehouse, who had strongly advocated on the Senate floor in support of judicial review of compliance with minimization procedures, makes the Congress's recognition of this inherent court authority clear. That language, which the Senate adopted by unanimous consent and which is section 109(d) in the final bill, specifically states that no provision of FISA will be construed to reduce or contravene the inherent authority of the FISA court ''to determine or enforce compliance with an order or rule of such court, or with a procedure approved by such court.''

The decision in negotiating the compromise of this bill not to include in section 702 a separate provision for minimization compliance reviews by the court, should be understood, as we understood in the Senate when considering Senator Whitehouse's amendment, to represent satisfaction that the amendment adequately recognizes the authority of the FISA court to assess compliance.

EXIGENT CIRCUMSTANCES

The next issue that deserves clarification is the exigent circumstances exception to prior court approval. The bill requires the

Government to obtain prior court approval of targeting and minimization procedures before beginning collection under the new procedures. There is one exception to this requirement: in exigent circumstances, the Attorney General and Director of National Intelligence may authorize collection to begin immediately.

In section 702(c)(2), the bill describes an exigent circumstances determination to be ''a determination by the Attorney General and the Director of National Intelligence that exigent circumstances exist because, without immediate implementation of an authorization under subsection (a) [of section 702], intelligence important to the national security may be lost or not timely acquired and time does not permit the issuance of an order pursuant to subsection (i)(3) prior to the implementation of such authorization.''

In both Houses, there has been some discussion about the meaning of the phrase ''exigent circumstances'' and the expectations of Members about the use of this authority. While the bill does not define the phrase ''exigent circumstances'' standing alone, it does describe the limits of the appropriate use of the authority: a determination by the Nation's highest law enforcement official, the Attorney General, and highest intelligence official, the DNI, that (a) without immediate implementation ''intelligence important to the national security may be lost or not timely acquired'' and (b) time does not permit the issuance of a FISA court approval order prior to implementation.

To the extent that auxiliary aids are needed to assist in defining ''exigent circumstances,'' at least three are available.

First, section 702 as a whole demonstrates the clear intent of Congress that prior judicial approval is strongly preferred. To the extent practicable, the Government's submissions of certifications and procedures to the FISA court with regard to annual authorizations shall precede the effective date of those authorizations by at least 30 days. On receiving Government submissions, the FISA court is to complete action on them within 30 days unless the court exercises its limited extension authority.

Those provisions, working together, implement the design of the Congress to ensure that judicial review will ordinarily precede implementation. The benefit of doing so is obvious. The intelligence community, telecommunication providers who are asked to implement Government directives, and the American public will be assured that the procedures and certifications that ensure the lawfulness of collection have been approved before collection begins. In light of the centrality of prior review in section 702, and the significant benefits flowing from it, exceptions should be rare.

Second, if more is needed to define ''exigent circumstances,'' the dictionary definition of ''exigent'' is a tool of first resort outside the text and structure of the Act. For example, the Random House College Dictionary defines ''exigent'' as ''requiring immediate action or aid; urgent, pressing.'' ''Urgent'' in turn is defined as ''pressing, compelling or requiring immediate action or attention; imperative.''

Third, the interpretation of the bill by agencies charged with its administration is an acknowledged guide, particularly, as here, where that interpretation has been offered to the Congress in the course of the legislative process. In writing to the Speaker on June 19, the Attorney General and the DNI explained: ''The exigent circumstances exception is critical to allowing the Intelligence Community to respond swiftly to changing circumstances when the Attorney General and the Director of National Intelligence determine that intelligence may be lost or not timely acquired. Such exigent circumstances could arise in certain circumstances where an unexpected gap has opened in our intelligence collection efforts.''

The recognition that the ''exigent circumstances'' provision is an ''exception'' to prior court approval that it is applicable to ''changing circumstances'' and ''unexpected gaps,'' when considered in the light of the text and structure of section 702 and the ordinary meaning of ''exigent,'' all convey, as I believe, that this authority should be used only rarely, when urgent and unexpected action is truly required.

We intend to monitor the use of this authority carefully, so that we can address any abuses at the time of the sunset, if necessary.

TITLE II—DOCUMENTARY SUPPORT FOR ATTORNEY GENERAL CERTIFICATION

During the pre-recess debate, a suggestion was made that the bill establishes clear limits on what documents the district court may review in determining whether substantial evidence supports a certification by the Attorney General on a provider's entitlement to immunity.

The burden is on the Attorney General to provide to the court the equivalent of an administrative record that satisfies the substantial evidence test. While I agree that the parties cannot seek discovery to provide the court with information as to whether the substantial evidence test is met, the bill does not limit what the Attorney General may submit, in his or her discretion, to provide substantial evidence to support the certification.

A certification under section 802 shall be given effect unless the court, in accordance with subsection (b), finds that it is not supported by substantial evidence ''provided to the court pursuant to this section.'' The phrase ''this section'' covers the entire section. Thus, the scope of the evidence that the Attorney General may submit to sustain the substantial evidence burden is not dependent on any particular subsection of section 802 but is drawn from the entirety of the section including, importantly, all of the substantive requirements for the implementation of liability protection.

Section 802(b)(2) provides that in reviewing a certification under section 802 the court may examine the court order, certification, written request, or directive described in the substantive provisions of section 802. This authority ensures that the court will be able to examine those documents. But it does not limit the Attorney General to those documents in supporting a certification under section 802. For example, the Attorney General may determine that providing substantial evidence to support a certification that a person did not provide assistance requires evidence that is not included in communications with that person. Section 802 therefore should not be read as a limit on what may be submitted to the court by the Attorney General. As for the method by which additional information may be provided, section 802 imposes no limit on what the Attorney General may include within a certification or annexed to it.

Mr. ROCKEFELLER. I also point out, there was an op-ed piece in support of the FISA bill in today's New York Times which I call to the attention of my colleagues. It was written by Mr. Morton Halperin and entitled ''Listening to Compromise.'' Mr. Halperin, in addition to being executive director of the Open Society Policy Center, has a lengthy career of public service in both Democratic and Republican administrations.

Mr. President, I ask unanimous consent to have printed in the RECORD Mr. Halperin's op-ed in support of the bill as it appeared in today's New York Times.

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

[From the New York Times, July 8, 2008]

LISTENING TO COMPROMISE

(By Morton H. Halperin)

Two years ago, I stated my belief that the Bush administration's warrantless wiretapping program and disregard for domestic and international law poses a direct challenge to our constitutional order, and ''constitutes a far greater threat than the lawlessness of Richard Nixon.''

That was not a casual comparison. When I was on the staff of the National Security Council, my home phone was tapped by the Nixon administration—without a warrant—beginning in 1969. The wiretap stayed on for 21 months. The reason? My boss, Henry Kissinger, and the director of the F.B.I., J. Edgar Hoover, believed that I might have leaked information to this newspaper. Even after I left government, and went to work on Edmund Muskie's presidential campaign, the F.B.I. continued to listen in and made periodic reports to the president.

I was No. 8 on Richard Nixon's ''enemies list''—a strange assemblage of 20 people who had incurred the White House's wrath because they had disagreed with administration policy. As the presidential counsel John Dean explained it in 1971, the list was part of a plan to ''use the available federal machinery to screw our political enemies.'' My guess is that I earned this dubious distinction because of my opposition to the Vietnam War, though no one ever said for sure.

Because I rejected the Nixon administration's use of national security as a pretext for broad assertions of unchecked executive power, I became engaged with the Foreign Intelligence Surveillance Act when it was proposed in the early 1970s. And because I reject the Bush administration's equally extreme assertions of executive power at the expense of civil liberties, I have been engaged in trying to improve the current legislation.

The compromise legislation that will come to the Senate floor this week is not the legislation that I would have liked to see, but I disagree with those who suggest that senators are giving in by backing this bill.

The fact is that the alternative to Congress passing this bill is Congress enacting far worse legislation that the Senate had already passed by a filibuster-proof margin, and which a majority of House members were on record as supporting.

What's more, this bill provides important safeguards for civil liberties. It includes effective mechanisms for oversight of the new surveillance authorities by the FISA court, the House and Senate Intelligence Committees and now the Judiciary Committees. It mandates reports by inspectors general of the Justice Department, the Pentagon and intelligence agencies that will provide the committees with the information they need to conduct this oversight. (The reports by the inspectors general will also provide accountability for the potential unlawful misconduct that occurred during the Bush administration.) Finally, the bill for the first time requires FISA court warrants for surveillance of Americans overseas.

As someone whose civil liberties were violated by the government, I understand this legislation isn't perfect. But I also believe—and here I am speaking only for myself—that it represents our best chance to protect I

both our national security and our civil liberties. For that reason, it has my personal support.

Mr. ROCKEFELLER. Mr. President, I thank the Presiding Officer and yield the floor.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. Mr. President, I would like to speak for a little while about one part of the bill, and I will have more to say tomorrow. I strongly oppose the blanket grant of immunity that is contained in this bill. I would hope Senators would reject what is an ill-advised legislative effort to engineer specific outcomes in ongoing Federal judicial proceedings. Basically, we are telling another branch of Government: Here is the way you have to come out in your decisions.

There is a way to cure that problem. Instead of the Congress telling the courts how they have to rule, we could adopt the Dodd-Feingold-Leahy amendment to strike title II from the bill. This would strike the retroactive immunity provisions, and it would allow for accountability for those who violated Americans' rights and violated the law. It would send a strong message that no one stands above the law in the United States.

I am not out to get the telephone companies. I just want us to know who it was in the administration who said: You may break the law. The American people ought to know who in the White House said, ''You may break the law,'' who it was who made the decision that somehow this President stands above the law.

The administration circumvented the law by conducting warrantless surveillance of Americans for more than 5 years. They were breaking the law, and then they got caught. The press reported this illegal conduct in late 2005. The Republican-controlled Congress did not ask the questions to find it out. The press found it out. Had they not done so, I have to assume this unlawful surveillance would still be going on today.

When the public found out that the Government had been spying on the American people outside of FISA for years, the Government and the providers were sued by citizens who believed their privacy rights were violated. They said: You are violating our privacy. We want you to be held accountable. But, of course, that is why the Founders created a system of Federal courts through the Constitution—so people can assert their rights before a fair and neutral tribunal without interference from the other branches of Government, so they have some way to say: I am not a Democrat. I am not a Republican. I am not rich. I am not poor. I am an American. I am seeking to have my rights upheld.

Title II of this bill would effectively terminate these lawsuits and those rights. It seeks to reduce the role of the court to a rubber stamp. So long as the Attorney General certifies that the Government requested the surveillance and indicated that it had been ''determined to be lawful,'' the cases will be dismissed and everybody is off the hook. It is not the court that says whether you followed the law. No, this bill allows the government to say: Oh, you are looking at us? Ah, we certify we followed the law. So, therefore, you courts have to let us off the hook because, after all, we said, whether we broke the law or not, we are following the law, so we are home free.

That is not a meaningful judicial inquiry. Thinking back to my days as a prosecutor in Vermont, that would be as if the police caught someone in a burglary, I charged them, and the defendant then told the judge: But I have determined that for me, your Honor, the burglary laws do not apply, so you have to let me go. I can't be prosecuted. I can't be held accountable. Nobody would take that seriously. We should not take this seriously. We should not do something that does not give the plaintiffs their day in court. It is not just a heavy thumb on the scales of justice; it is a whole hand and an arm on the scales of justice, and I cannot support it.

If we look at the publicly available information about the President's program, it becomes clear that title II is designed to tank these lawsuits, pure and simple, but then to allow the administration to avoid any accountability for their actions. The Senate Intelligence Committee said in a report last fall that the providers received letters from the Attorney General stating that the activities had been ''authorized by the President'' and ''determined to be lawful.''

Guess what. These are precisely the ''magic'' words that will retroactively immunize the providers under title II of this bill. Mr. President, the fix is in. The bill is rigged, based on what we already know, to ensure that the providers get immunity and the cases get dismissed.

What it says is, if you are in charge, you can just go out and break the law, and then when they look at you, send a letter to the court saying: I have determined that when I broke the law, I did not really break the law, so you have to let me off the hook.

Lewis Carroll once wrote a book about that. I think it was called ''Alice in Wonderland.'' So what if Americans' rights were violated. So what if statutes were violated. So what if those privacy-protecting statutes provide for damages. This bill makes our courts the handmaidens to a coverup, and it is wrong. It tells the courts—the U.S. Federal courts—it tells them: Take part in a coverup. I cannot support something that does that. It is wrong.

Make no mistake, if title II becomes law, there will be no accountability for this administration's actions in a court of law. We would take away the only viable avenue for Americans to seek redress for harms to their privacy and liberties.

Those who claim that American citizens can still pursue their privacy claims against the Government know that sovereign immunity is a roadblock. They know that cases against the Government have already been dismissed for lack of standing. They know about the Government's ability to assert the state secrets doctrine and various other legal defenses and protections for Government officials. They know these suits will go nowhere. They know, and it is wrong for them to suggest otherwise. This is a red herring if there ever was one.

The report of the Select Committee on Intelligence in connection with its earlier version of the bill that also included retroactive immunity is telling. The Select Committee on Intelligence wrote:

> The Committee does not intend for this section to apply to, or in any way affect, pending or future suits against the Government as to the legality of the President's program.

And later wrote:

> Section 202 makes no assessment about the legality of the President's program.

But neither that bill nor this one makes any allowance for such suits against the Government to proceed to a decision on its merits. That is precisely what is lacking in this measure: an avenue to obtain judicial review and accountability.

Now, those who support retroactive immunity for the telecommunications carriers and dismissal of the suits against them without providing an effective avenue to challenge the program or obtain judicial review of its legality—well, what they are doing is supporting unaccountability, pure and simple. They are saying: Everybody is off the hook. I am not out to get the telephone companies. All I want to know is, who in our Government said: You may break the law. And this bill is going to make sure we never find out.

In fact, the case that did proceed to decision in the Federal court in Michigan was appealed by the Government, was vacated and dismissed for lack of ''standing.'' So the judicial decision on the merits that the President's program of warrantless wiretapping of Americans was a violation of law and the Constitution was effectively wiped from the books.

I note again that the proponents of this retroactive immunity have not and cannot say that the administration acted lawfully. They do not say the administration acted lawfully because they know the administration did not act lawfully.

Even if one believes the telephone companies merit protection, there is simply no good reason why Congress must act now to deal with the issue of the ongoing lawsuits against providers. The claim that these lawsuits will somehow ''bankrupt'' the providers is belied by the record demonstrating the financial health of these companies today despite the ongoing litigation.

Even the most alarmist critics of the lawsuits acknowledge it would be years

and probably at least two trips to the U.S. Supreme Court before we have any enforceable final judgments.

If there is such a risk, well, what does that say? It says there were violations and that people's rights were violated. Now, I have said before that I would support the Government stepping into the shoes of these defendants, of these telephone companies, if we want to protect them. It is simple. If you are that concerned about the telephone companies, exclude them. Substitute the U.S. Government. But we should not protect them if the cost of protecting them is all accountability and the cost of never getting a judicial determination on the merits of the cases whether the Government violated the law.

Americans have a right to know.

The PRESIDING OFFICER. The Senator's 10 minutes have expired.

Mr. LEAHY. Mr. President, I ask unanimous consent for an additional 30 seconds.

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

Mr. LEAHY. I believe the rule of law is important. I trust our courts to handle even the most difficult and sensitive disputes. That is the courts' role in our constitutional scheme, not ours. Title II of this bill would have Congress decide these cases by legislative fiat.

We do not want to diminish our Federal judiciary and risk selling out large numbers of Americans whose fundamental rights may have been violated. We should not pass this bill unamended. I urge my colleagues to cast a vote for accountability and support the Dodd-Feingold-Leahy amendment.

I strongly oppose the immunity provisions contained in this bill, and I have supported every effort to strike them. But if we cannot eliminate these ill-advised provisions, then I agree that Senator BINGAMAN's amendment to delay a decision on immunity until after the inspectors general have conducted their review of the warrantless surveillance program makes good sense.

I worked hard to include the inspectors general amendment as a part of this FISA bill. For that provision to have its full effect, we should delay any grant of retroactive immunity until we know what the final report says.

Senator BINGAMAN's amendment would stay all pending cases against the telecom companies related to the warrantless surveillance program and delay the effective date of the immunity provisions in title II of the bill until 90 days after Congress receives the inspectors general reports.

I have maintained throughout this debate that it makes little sense for Senators—many who have never been given the opportunity to view key documents relevant to the warrantless surveillance program—to cast an uninformed vote on retroactive immunity. That is buying a pig in a poke. To mix farm metaphors, the Bingaman amendment puts the horse back in front of the cart.

First, let's get the facts. And then, only after reviewing the relevant facts that the administration claims support granting retroactive immunity, determine whether Congress should attempt to legislatively determine the result of the 40 or so Federal cases alleging violations of fundamental rights of Americans.

Again, I believe the retroactive immunity provisions in this bill should be stripped entirely. But if that cannot be accomplished, then I support Senator BINGAMAN's amendment as a commonsense way to ensure that the Senate makes a fully informed decision on retroactive immunity.

I yield the floor.

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

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. SPECTER. 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. 5059

Mr. SPECTER. Mr. President, I now call up my amendment No. 5059.

The PRESIDING OFFICER. Without objection, the pending amendment is set aside.

The clerk will report.

The legislative clerk read as follows:

The Senator from Pennsylvania [Mr. SPECTER] proposes an amendment numbered 5059.

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

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

The amendment is as follows:

(Purpose: To limit retroactive immunity for providing assistance to the United States to instances in which a Federal court determines the assistance was provided in connection with an intelligence activity that was constitutional)

On page 90, strike lines 17 through 21 and insert the following:

''(1) REVIEW OF CERTIFICATIONS.—

''(A) IN GENERAL.—Except as provided in subparagraph (B), a certification under subsection (a) shall be given effect unless the court finds that such certification is not supported by substantial evidence provided to the court pursuant to this section.

''(B) COVERED CIVIL ACTIONS.—In a covered civil action relating to assistance alleged to have been provided in connection with an intelligence activity involving communications that was authorized by the President during the period beginning on September 11, 2001, and ending on January 17, 2007, a certification under subsection (a) shall be given effect unless the court—

''(i) finds that such certification is not supported by substantial evidence provided to the court pursuant to this section; or

''(ii) determines that the assistance provided by the applicable electronic communication service provider was provided in connection with an intelligence activity that violated the Constitution of the United States.

Mr. SPECTER. Mr. President, I believe that history will look back at the period of time between 9/11 and the present as the greatest expansion of the executive authority in the history of this country. We have seen the unauthorized military commissions. We have seen the extraordinary rendition to the frequent invocation of state secrets, privilege, and the misuse of so-called signing statements.

The signing statements represent a fundamental failure of the Congress to utilize its constitutional authority. When the Constitution provides that there is a presentment by both Houses, the President either signs it or vetoes it, and the widespread practice has now come into play where the President signs and issues a signing statement undercutting key provisions of the legislation. I introduced a bill to give Congress standing to challenge that in court. It has gone nowhere because of the impossibility of overriding a veto and because of the considerations of case in controversy.

We have seen, in the context of the evolving issues, the total ill-effectiveness of Congress to provide the oversight of the Intelligence Committees. The National Security Act of 1947 expressly provides that matters such as the terrorist surveillance program should be submitted to the Intelligence Committees, but that has not been done. Only a portion of the Intelligence Committees have been briefed. Most of the limited briefing was done only when the administration needed some support for the confirmation of General Hayden as CIA Director. We have seen the provisions of the Foreign Intelligence Surveillance Act of 1978 bypassed by the executive branch on a claim of constitutional authority under article II, power as Commander in Chief, contrasted with the congressional authority under article I.

A Detroit Federal court declared the terrorist surveillance program unconstitutional. The Court of Appeals for the Sixth Circuit reversed, in a 2-to-1 decision on the ground of the lack of standing, with the dissenter filing an opinion showing ample basis for standing. The Supreme Court of the United States refused to review the case. They called it a denial of certiorari. That is the major constitutional confrontation of our era, between the President asserting article II powers as Commander in Chief and the explicit statutory provision enacted by Congress in 1978 providing for the exclusive means of having wiretapping. Instead, we have warrantless wiretapping.

The legislation pending now would provide retroactive immunity. I suggest retroactive immunity in a context that we could both preserve the electronic surveillance and leave the court with jurisdiction in one of two ways. One, by substituting the Federal Government as the party defendant of the telephone companies, in the shoes of the telephone companies with no more, no less rights; or secondly, requiring, as my amendment does, that the Federal district court would decide constitutionality. No one is denying the

telephone companies have been good citizens.

The argument has been made that, well, there may be money damages or there is a matter of public image which is involved. Well, monetary damages and public image, in my judgment, don't measure up to the right of privacy. Just as Oliver Wendell Holmes, in a 1928 case almost a century ago, said that wiretapping was ''dirty business''—and it remains dirty business—it may be necessary on national security grounds, but it has to be done within the confines of the law. That can be decided only by the courts, especially in the atmosphere that we have where the Congress has been so ineffective and where the Supreme Court of the United States ducked the issue on the case coming out of the Sixth Circuit, where there was ample grounds for finding standing to proceed with that case.

Within the past 6 days, there has been a major development on this issue as a result of a judgment handed down by Chief Judge Vaughn Walker of the U.S. district court in San Francisco. Judge Walker is the same judge who has the telephone company cases which were consolidated and sent to him under Federal rules on a multidistrict panel. Judge Walker found flatly that the President exceeded his constitutional authority when he ignored the Foreign Intelligence Surveillance Act. This is the exact language in the 56-page opinion:

> Congress appears clearly to have intended to—and did—establish the exclusive means for foreign intelligence surveillance activities to be conducted. Whatever power the executive may otherwise have had in this regard, FISA—

The Foreign Intelligence Surveillance Act—

> limits the power of the executive branch to conduct such activities.

So now we have the judge who is hearing these telephone cases having said that such surveillance is unconstitutional. FISA covers not only the traditional wiretaps but explicitly covers pen registers and trap-and-trace devices which could include whatever it is the telephone companies were allegedly doing. On that subject, we do not know the full extent of what the telephone companies are doing. All we have are the allegations and the legal papers. Here, Congress is being asked to pass upon a program on which most Members have not been briefed. As stated earlier on the floor today, 70 Members of the Senate would be called upon to vote on a program when they don't even know what it is. The House leadership has pointed out that most of the Members of the House of Representatives have not been briefed.

In an exchange with the Senator from Missouri today, I raised the fundamental constitutional point that Members' constitutional responsibilities cannot be delegated. You can't delegate them to a minority of the Senate, but that is what we are being asked to do. It is a pig in a poke. The old expression describes it very well. We don't even know what the program is, and we are being asked to ratify it.

The issue was put to the Senator from Missouri, the chief defender of this bill, of any precedent where you have a case pending before Judge Walker, an extended opinion in July of 2006 on appeal to the Court of Appeals for the Ninth Circuit. If this act is passed, it will be unceremoniously jerked out from under the court. I asked him if there is any case in history, and I would repeat that challenge to the distinguished chairman of the committee.

What we have left is judicial review. Without judicial review, there is no way to effectuate the constitutional doctrine of separation of powers, which is so fundamental in our society. Even when the proponents of the bill talk about money and business reputation—no one is challenging the good citizenship of the telephone companies, and the likelihood of monetary damages is extremely remote. But if the Government were to be substituted as the party defendant, that is a matter of dollars and cents which hardly comports to the fundamental issues which are involved in civil liberties.

It is understandable that Congress continues to support law enforcement powers because of the continuing terrorist threat. No one wants to be blamed for another 9/11. My own briefings on the telephone companies' cooperation with the Government have convinced me of the program's value so that I voted for it, even though my amendment to substitute the Government for the telephone companies was defeated in the Senate's February vote. Similarly, I am prepared to support it again as a last resort, even if it cannot be improved by providing for judicial review, the pending amendment. However, since Congress has been so ineffective in providing a check and balance, I will fight hard—and I am fighting hard—to secure passage of this amendment to keep the courts open. It is our last refuge, our last big stand when the stakes are high, and they invariably are. When Congress addresses civil liberties and national security, Members frequently must choose between the issues of two imperfect options. Unfortunately, we too often back ourselves into these corners by deferring legislation until there is a looming deadline. Perhaps that is why so many of my colleagues have resigned themselves to accepting the current bill without seeking to improve it further.

Although I am prepared to stomach this bill if I must, I am not yet ready to concede that the debate is over. Contrary to the conventional wisdom, I do not believe it is too late to make this bill better. Perhaps the Fourth of July holiday will inspire the Senate to exercise its independence from the executive branch, now that we are back in Washington.

How much time do I have remaining, Madam President?

The PRESIDING OFFICER (Mrs. MCCASKILL). There are 32 minutes remaining.

Mr. SPECTER. I reserve the remainder of my time.

The PRESIDING OFFICER. The Senator from Rhode Island.

Who yields time to the Senator from Rhode Island?

Mr. ROCKEFELLER. I yield as much time as the Senator requires.

Mr. WHITEHOUSE. Madam President, I appreciate very much the courtesy of my chairman in allowing me some time. I should not take more than 10 minutes.

Once more we find ourselves debating President Bush's warrantless wiretapping program, a self-inflicted wound that this administration has visited upon our Government.

The way this Senator sees it at least, the Bush administration broke faith with the American people with its warrantless surveillance program, and now we in Congress are meant to clean up the administration's mess. Unfortunately, we are doing so with a legislative fix that in one critical area—immunity for the phone companies—misapplies the substantial evidence standard, trespasses constitutional boundaries, and breaks dangerous new ground in American law.

We would not be in this position if the Bush administration had sought and received a court order in the first place, as it easily could have. There would be no debate over granting immunity since a company following a court order is protected. Or the Bush administration could have used FISA procedures to seek and receive lawful assistance from telecommunications companies. But the administration chose to go outside the law. I suspect the administration wanted to prove a point about the President's article II authority, so it deliberately avoided these well-established mechanisms. If so, the Bush administration deliberately walked these telecommunications companies into this problem and this litigation to vindicate ideological ambitions. But the problem is now before us.

I have worked diligently and across the aisle to try to develop thoughtful solutions to the problem. In February, with the distinguished Senator from Pennsylvania, Senator ARLEN SPECTER, the learned ranking member of the Judiciary Committee, I offered a bipartisan amendment that would have substituted the U.S. Government for the telecommunications companies if it was determined they acted in good faith and with the reasonable belief that compliance was lawful.

Similarly, I supported an amendment offered by Senators DIANNE FEINSTEIN and BILL NELSON, drawn from the Specter-Whitehouse amendment, that offered immunity to those companies that acted, again, in good faith and with the reasonable belief that compliance was lawful.

Good faith is the proper standard here. It is the standard repeatedly referenced by respected Members in this

Chamber who have asserted that any telecommunications company that assisted the Government acted in good faith.

My friend, Senator MARTINEZ, said:

> The fact is that these companies acted in good faith, and they acted in good faith when they were called upon to assist our intelligence professionals.

My friend on the Judiciary Committee, Senator KYL, noted:

> [t]he general rule that private citizens acting in good faith to assist law enforcement are immune from suit.

Senator CHAMBLISS, my colleague on the Intelligence Committee, argued that America's telecommunications carriers ''should not be subjected to costly legal battles and potentially frivolous cases . . . merely for their good faith-assistance to the Government.''

Senator ALLARD said that ''the U.S. Government owes these patriotic companies and their executives protections based on the good-faith effort they made in working with our intelligence community.''

Senator BOND, vice chairman of the Intelligence Committee, noted that ''the intelligence community advised us . . . that these companies acted in good faith, and we in the committee agreed with them.''

We seem to have agreement amongst Members in this body that good faith is the proper standard. So we should let a court, which has available to it the procedural mechanisms necessary to get to the bottom of this in a confidential manner, make the determination, the fundamental determination: Did these companies, if they received Government requests, act in good faith? We may in this body assume it to be true, but it is not our role as Members of Congress to decide on the good faith of an individual litigant in a matter that is before a court.

Many Senators have not even been read into the classified materials that would allow us to reach an informed conclusion about good faith. We as a body are incapable of making an informed conclusion because as a body, we have not had access to the necessary materials. So we should provide a fair mechanism for a finding of good faith by a proper judicial body with the proper provisions for confidentiality.

This simple determination can be made with limited proceedings based largely on the record of any documents provided to the companies. We ask so little—a proper hearing, applying a proper standard. Unfortunately, the Bush administration opposed this option, and I have not had the chance to offer this amendment. For all its talk, the Bush administration was evidently and tellingly not confident that a good-faith threshold could be met.

So instead of requiring a finding of good faith, the bill states that immunity will be granted if the Attorney General's certification is ''supported by substantial evidence.'' It is worth drilling down to some lawyering for a moment to reflect on what ''substantial evidence'' means in this context.

The first point is that ''substantial evidence'' standard is essentially a meaningless standard, given the minimal showing necessary to be granted immunity. The elements as to which substantial evidence must exist are these: The intelligence activity was ''authorized by the President''; ''designed to detect or prevent a terrorist attack''; and ''the subject of a written request or directive . . . indicating that the activity was (I) authorized by the President; and (ii) determined to be lawful.''

That is it. That is achieved by simply putting into evidence the piece of paper containing the Attorney General's certification.

But the substantial evidence standard implies more than that, and it is out of place here. This standard is typically applied in what is called a ''sufficiency challenge''—a judicial inquiry into whether there is substantial evidence to support a jury verdict. I cannot tell you how many sufficiency challenges I have withstood as an attorney general and U.S. attorney. It is standard fare in criminal cases.

The substantial evidence standard is also frequently used for judicial review of an administrative agency's adjudication or rulemaking.

So the substantial evidence standard is used to review the results of adversarial proceedings where the parties had a chance to make their case and build their record, and the court then reviews to determine whether there is substantial evidence to support the agency's or jury's determination.

The substantial evidence standard is a standard used to weigh the result of an adversarial process. Not so here. Here the court will apply the substantial evidence standard to an Attorney General's unilateral certification. That is bad lawyering. That is discouraging, when it would have been so easy to get this right.

Let me close with a few words about the constitutionality of title II. It is a core principle of our system of separated powers that no branch of Government may exercise powers allocated to another branch. The United States Supreme Court has said that the Framers of the Federal Constitution felt in drafting our Constitution ''the sense of a sharp necessity to separate the legislative from the judicial power.'' This sense of sharp necessity, the Court said, was ''prompted by the crescendo''—the words the Court used—''the crescendo of legislative interference with private judgment of the courts.''

If you wish to see a case of legislative interference with private judgment of the courts, look no further than what we are doing today.

Plaintiffs in the telecom litigation have brought causes of action alleging that their core constitutional rights were violated. By providing immunity, Congress is telling the judicial branch: You cannot hear an entire category of constitutional claims. Congress is intruding upon a core function of the judicial power—the resolution of constitutional disputes.

The U.S. Supreme Court has warned on more than one occasion, most recently in the 1988 case of Webster v. Doe, that ''a serious constitutional question would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim.''

This statute has as its very purpose to deny a judicial forum to these colorable constitutional claims.

I further note that Congress stepping in to pick winners and losers in ongoing litigation on constitutional rights not only raises separation of powers concerns but it veers near running afoul of the due process and takings clauses. Article II of this bill is the most extreme measure Congress, as best as I can find, has ever taken to interfere in ongoing litigation. Congress usually provides at least a figleaf of an alternative remedy when it takes away the judicial one. For example, in the National Childhood Vaccine Injury Act, Congress put a stop to Federal court actions but provided an alternative path for claims to be heard. The Public Readiness and Emergency Preparedness Act eliminated liability for people who take certain countermeasures during or after a pandemic outbreak. But a special fund for victims was established by Congress.

Today's effort is a naked intrusion into ongoing litigation. Where will that stop? Will Congress be able to rove at will through litigation anywhere in the judicial branch, picking winners and losers as we like? We don't just trespass on the separation of powers; we trespass onto dangerous ground.

If I were a litigant, I would challenge the constitutionality of the immunity provisions of this statute, and I would expect a good chance of winning.

I spoke before the Independence Day recess about article I of this bill, how proud I am of the work that went into it and the exemplary results we have achieved. Chairman ROCKEFELLER, in particular, but many others as well, deserves commendation, first for resisting the Bush administration's unseemly efforts to create a legislative stampede and, second, for thoughtfully crafting an improved and modernized FISA Act that contains many new important protections for Americans. I will incorporate my reference of my previous remarks on that subject, but suffice it to say as an attorney general and a U.S. attorney who has run wiretap vehicles, article I is a fine piece of legislation which makes it all the more disappointing that the Bush administration will not tolerate an amendment to article II that allows for a proper hearing before the proper court set to the proper standard. It would be so easy to get article II right. So close and yet so far.

I close by reiterating my deep anger that the Bush administration unnecessarily created this mess in the first place, my frustration with the solution that Congress has established to the immunity question, and my hope that our great judicial branch will vindicate the error we in the legislative branch make today.

Mr. SPECTER. Madam President, I had hoped to ask a couple questions of the distinguished Senator from Rhode Island. I consulted with the chairman, who wants to be recognized next. It would be my request, if I may have Senator WHITEHOUSE's attention, that he stay on the floor to engage in a discussion, a colloquy with me when the chairman has concluded.

The PRESIDING OFFICER. The Senator from West Virginia.

Mr. ROCKEFELLER. Madam President, Senator SPECTER has offered an amendment altering the liability protections of title II. His amendment would require the district court to assess the constitutionality of the President's warrantless wiretapping program before it could dismiss cases against telecommunications companies that met statutory requirements for liability protection.

Although I appreciate the Senator's desire to ask the court to address the constitutionality of the President's program once and for all, he has picked the wrong mechanism to ask the court to answer his question.

First, Senator SPECTER's amendment would completely undermine, as I said before, the delicate compromise in front of us today. People say: Well, we are freshly back in town, newly minted, widely open. I am sorry, this was a bill which just got through on a thread, and it will probably get close to 70 votes, a compromise already accepted by the House with 70 percent of their votes, and I think that balances the protection of liberties and also does something I have stated I think is rather important; that is, it allows the collection of intelligence to continue in order to protect the United States of America.

Senator SPECTER's amendment also would require the court to consider a difficult constitutional question that otherwise would not be at issue in the cases.

Title II does not cover cases against Government actors. This exclusion was intentional. Cases against the Government for any unlawful or unconstitutional actions Government actors may have undertaken should be allowed to proceed. Arguments over the constitutionality of the President's actions can and should be litigated in those proceedings.

The amendment, however, injects this complicated constitutional question about the interplay of the fourth amendment and separation of powers into cases requesting civil damages from private companies. The amendment does not require that there be a relationship between the companies and this constitutional question. It does not ask whether the companies were aware of the scope of the President's program, nor does it ask whether the companies' actions were done in good faith or even whether they were legal. Indeed, if the court finds that the President's program violated the Constitution, the cases against the company will not be dismissed even if that company had no involvement in the unconstitutional components of the President's program.

Madam President, this is simply unfair. A company should not be subjected to liability solely because the Government acted unconstitutionally. A company should not be subjected to liability solely because the Government acted unconstitutionally. Any accountability and liability should be based on actions of the company, which is what title II is about.

Imposing this barrier to liability protection is also inconsistent with our expectation about the role companies are expected to play when they receive Government requests for information. Our existing statutory approach is based on the idea that the Government requires prompt cooperation from the telecommunications companies. Although we expect those companies to seek documentation from the highest levels of Government, they are not expected to assess the constitutionality of particular requests on which they lack, to say the least, complete information.

The ongoing litigation is complicated by classified information issues that make it virtually impossible for the cases to move forward. But if the cases could proceed without regard to the classified information at issue, the court would not consider the question of whether the President's program was constitutional. Instead, it would ask whether the companies were entitled to immunity based on existing law.

In addition, a case against any particular company is necessarily limited to the facts relevant to that company. The court would, therefore, not be provided a comprehensive look at the President's program in any of those cases.

We should not ask the district court to assess whether the President's program is constitutional when the answer to that question is unnecessary to resolve the underlying litigation between the plaintiffs and the carriers, and the court does not have sufficient facts to address that far-reaching question of constitutionality. We are talking about apples and oranges, but it is apples here that we are concerned with.

I urge my colleagues to oppose this amendment.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. SPECTER. Madam President, I do wish to engage in a colloquy with the Senator from Rhode Island, but first, with the chairman having just completed, I would like to respond to some of his contentions and engage in a question or two with the chairman.

When the Senator from West Virginia argues that my amendment would undermine the delicate compromise which the Intelligence Committees have reached, that is what the full Senate is supposed to do. The committees deliberate, the House and the Senate come to a conference report, they bring the matter to the Senate, and then it is up to the full body to make a determination. So there is nothing unusual about disagreeing with the compromise, however delicate.

The chairman argues that it would require the courts to consider difficult constitutional issues. That is exactly what the courts are supposed to do. The full impact of Chief Judge Vaughn Walker's decision and how far-reaching it goes has not been felt, understood, or analyzed in the course of only 6 days—an opinion which runs more than 50 pages. We are dealing with court-stripping in the middle of litigation that has been going on for years. Judge Walker's opinion concerning the telecom companies was in July 2006, with the telephone companies now on appeal.

It really goes back to the fundamental principle of Marbury v. Madison, when Chief Justice Marshall made the determination that it is up to the courts to decide what the Constitution means, and we would be undercutting that judicial process in midstream.

Earlier, I posed a question to the Senator from Missouri, which if the chairman wishes to answer would be fine. I know and I admire what Senator ROCKEFELLER has done. I have worked with him since he was elected in 1984, and we worked together on the Veterans' Committee and on intelligence matters and on many major matters. When the history is written, there will be a famous handwritten letter disclosed by Senator ROCKEFELLER to the administration about how deeply he feels and how deeply he cares about these matters. But I questioned the Senator from Missouri, who is a member of the bar and quite a scholar on constitutional law, if there had been any case known to him picked up in midstream after years of work in the district court and pending on appeal. It really goes right to the heart of Marbury vs. Madison.

You have Chief Judge Walker having flatly decided that the terrorist surveillance program is unconstitutional, and you have Chief Judge Walker leaving aside the issues of standing but saying:

> Plaintiff amici hint at the proper showing when they refer to ''independent evidence disclosing that plaintiffs have been surveilled'' and a ''rich lode of disclosure to support their claims.''

Going to the standing issue. Although not decided, why not let the courts finish it? You have these decisions. Why not keep the current program in effect and not interrupt the courts and have the judicial decision?

So when the chairman raises the point that it would require the courts to consider difficult constitutional questions, I agree with him, but that is what the Federal courts are supposed to do, and it really is untoward for the Congress to step into the middle of it. I know of no case like it. And here we are being asked to strip the court of jurisdiction when they are in midstream, where they may well find some important facts to some important matters in the course of the judicial decisions which would influence Congress.

We have the amendment offered by the distinguished Senator from New Mexico, Mr. BINGAMAN, which would call upon the inspector general to find out what the facts are on immunity since, as I say, we are being asked to pass on this when we don't know the full import. And I support the Bingaman amendment. I am an original cosponsor of it. Well, similarly, what Chief Judge Walker may find here may be very important.

But let me raise the first of two questions with the chairman.

Mr. ROCKEFELLER. May I respond to the Senator's observation?

Mr. SPECTER. Certainly. I will yield.

Mr. ROCKEFELLER. I would say to my distinguished friend from Pennsylvania that Judge Walker's case is not, under any circumstance, going to be stopped by whatever happens here. It will not happen, and it will, therefore, continue. The bill only addresses cases against carriers, is the point I was trying to make. Judge Walker—his case is a case against the Government. This bill is not against the Government. It is against what happens to the carriers, or in this particular case whether they get liability. The Government is not the point. The carriers are the point. The case continues, and we have not intervened in a malicious or malevolent way.

Mr. SPECTER. Well, Madam President, by way of reply, I understand that this provision only concerns the telephone companies, and I understand the chairman's argument about good faith. But good faith is not determinative in and of itself. If the conduct violates the Constitution, there is a constitutional violation no matter how good the faith may be. It would be a good reason to indemnify, to substitute, to hold them harmless, but not to exonerate them for a constitutional violation.

The chairman says companies should not be held liable if the Government acted unconstitutionally. That is not correct as a matter of law. Where the telephone companies are aiders and abetters and accessories before and after the fact and really act jointly with the Government, they can be liable.

Mr. ROCKEFELLER. That is quite an assumption to make, I say to the Senator.

Mr. SPECTER. Let me finish the reply, and I will be glad to yield again.

When the argument is made that only the case against the telephone companies is involved, that is not quite accurate. It is being dismissed. It is no coincidence that Chief Judge Walker handed this opinion down a few days—6 days—before it was publicly known that the Senate would be taking up this issue. And he went out of his way to raise the issue about standing and the rich lode of disclosure. So if this act is passed and retroactive immunity is granted, it will remove the telephone companies, true, and there will be another case standing, but there will be no judicial determination of the constitutionality of what the telephone companies did.

Chief Judge Walker has those cases against the telephone companies too, and he has pretty well given a roadmap as to what he is going to do because he said the terrorist surveillance program is unconstitutional and the Foreign Intelligence Surveillance Act covers pen registers and trap-and-trace devices, covering whatever it is the telephone companies did here; although, again, we do not know for sure. So where he said the terrorist surveillance program is unconstitutional and the statute covers pen registers and trap-and-trace devices, to remove the case from him at this stage will eliminate a determination of the constitutionality of whatever it is the telephone companies did and really flies in the face of the historic role of the courts since 1803 in Marbury vs. Madison.

Now I am glad to yield to the chairman.

Mr. ROCKEFELLER. I will just reply very briefly with three points, and when you are finished, I would like to yield to—or hopefully the vice chairman will yield to the senior Senator from Virginia.

The one point is that this is not a bill we are addressing here about the Government. We are doing it about carriers, and particularly in title II.

Secondly, I am interested in what the ranking member of the Judiciary Committee feels might be the result if we went the Judge Walker route regardless of its inapplicability, in my view, to this situation when it went through the appeal process.

I am not a lawyer. Right now I wish I were, but I am not. Usually, I am glad I am not. But it seems to me that you would be looking at a period of appeals going right on up to the Supreme Court that might last 3 or 4 years. I am not experienced in how long these things take. But this is a matter that might take that kind of time and that causes me to raise again the question I have raised several times with the vice chairman this afternoon: The only thing that we appear to be discussing in the Senate is rights and liberties. I think I have yet to hear almost any word about the security of the Nation and what the purpose of the Intelligence Committee is, what the purpose of intelligence is, what the purpose of collection is, how the collection is done, who does it, how important is it to how we gauge our situation in the world, where we need to deploy, where we need to be watching.

This is extraordinarily serious stuff but not a word does it get in the Senate, which is two-thirds made up of lawyers—and I honor every one of them. But we are picking at ''would the Constitution allow'' this or that. I am looking at something which to me is very clear. This is all about carriers, this particular bill. My name isn't Judge Walker. I haven't issued the opinion. If my name were Judge Walker, and it was an opinion, it would be about constitutionality. We are not addressing that in this bill.

The Senator earlier said: Look, we are here. Why not duke it out and get all the substitutes and arrangements and compromises back on the table again. I know that does work in some fashion. But I think the vice chairman and I and our staffs could say that what was achieved over the last month or so could probably never be achieved again, which is to get the House to agree. JOHN CONYERS is chairman of the Judiciary Committee, who was gracious and polite but unfriendly to this bill. There is the question of the Blue Dogs. You can say always these are questions—on farm bills, on steel bills, on automobile bills, on whatever bills.

This is a particular type of emergency based upon the fact that we are still, under my definition, under attack. Not that we have not been attacked, but we have been able to interdict, because of intelligence, some of those attacks—or all of those attacks. This is a very different matter than running an ordinary piece of legislation through the Senate.

If 20 or whatever Judiciary plus Intelligence is in the Senate—35, whatever that is. No, because there are some cross-memberships. Let's say 20. Understand, the others have not been read in. I have said they could have found out the information that has been available for a full year. Any Senator has the ability to go and read intelligence, if they wish to do that. It sort of implies that the Senate, as a matter of habit, comes to full agreement and full understanding that 80 out of 100, as opposed to 20 or 25 out of a 100, fully understand what is at stake in the amendments to a bill and then to the final passage of a bill.

I think the Senator knows that is not the way it works. I think the Senator, although he says we should not delegate, knows we delegate all the time.

Mr. SPECTER. Will the Senator yield?

Mr. ROCKEFELLER. I will. That takes various forms. Sometimes it will be that I am very much on the edge of how I am going to vote on something, and I go to a particular Senator—it might be the Senator from Pennsylvania—and say: I have this feeling and I have that feeling, I am right on the cusp of which way I should vote.

Mr. SPECTER. Will the Senator yield?

Mr. ROCKEFELLER. I will.

Mr. SPECTER. For the first time, I take sharp distinction with the chairman when he says there has been no recognition about the importance of intelligence or the workings of the Intelligence Committee or of special expertise.

Mr. ROCKEFELLER. I wasn't talking about special expertise—I was talking about: We have not talked about the threat.

Mr. SPECTER. If I may continue?

Mr. ROCKEFELLER. Yes.

Mr. SPECTER. If I may continue, no recognition of the work of the Intelligence Committee—let me limit it to that—which was certainly said.

I take sharp exception because I served 8 years on the committee and served as chairman for 2 years. I think I know what the Intelligence Committee does and what its work is.

I take sharp exception to the suggestion that there is not a full awareness on the part of this Senator as to the terrorism threat. I made that explicit. When I said that if I have to take this bill, I will, because of the threat of terrorism, just as I voted for the bill earlier when my substitution amendment was not adopted.

But when the chairman says that this has gone through a laborious process with the House and is a delicate compromise—that happens all the time. It happens all the time. You are right in the middle of it, you have seen it, and I know, too, because I have been there. I have been here 28 years, and I know exactly what goes on.

When you say this ought to be accepted, I disagree. This bill can be made better.

When you say you deal with the intelligence function and not the constitutional function—again, I sharply disagree. We have to legislate on what is constitutional. We may have a different opinion than Chief Judge Walker, but we cannot ignore the question of constitutionality. If it takes 3 or 4 more years, we are talking about civil rights and constitutional rights.

Mr. ROCKEFELLER. My point.

Mr. SPECTER. This program has been continued on a temporary basis. It has been extended. The intelligence chiefs have been satisfied with that.

I don't like to extend it. I would like to resolve it now. But if it takes the courts longer—the Supreme Court ducked the Detroit case. If it takes them years to decide this, that is the price of constitutional rights.

If you take a look at the history of this country, if you take just one case, Plessy v. Ferguson, in 1896, I believe, to Brown v. Board in 1954, to eliminate separate but equal, you come to a constitutional doctrine.

I am prepared to take my time, if I can find the requisite number of votes in this body.

Madam President, how much time remains on each side?

The PRESIDING OFFICER. The Senator from Pennsylvania has 20 minutes remaining. The Senator from West Virginia has 34 minutes remaining.

Mr. SPECTER. Madam President, this is as good a time as any to move forward with a question or two, which I would like to have in a colloquy with Senator WHITEHOUSE. This issue has been raised before, but I would like your views on it, Senator WHITEHOUSE. You have a distinguished record as an attorney, U.S. attorney, attorney general, serving with distinction on the Judiciary Committee for the past year and a half.

I raised the issue earlier about the constitutional authority of a Member to delegate his authority, recognizing that there are many matters where we accept committee reports, but at least Senators have access to material. When I was chairman of the Judiciary Committee—the tradition is to tell the chairman and the ranking member about a program such as the terrorist surveillance program. I was blindsided by it, in mid-December of 2005. We were on a Friday, the final day of the argument on the PATRIOT Act. We were about to go to final passage, when the New York Times published its paper. That morning Senators said they had been prepared to vote for it but no longer were. As chairman of the committee, I could not be briefed on the program.

Since that time, there has been a change of heart to an extent but, as stated on the floor of the Senate earlier, some 70 Members of this body will be voting on retroactive immunity for a program they do not know or understand. The majority of the House, according to House leadership, has not been briefed on the program.

Do you have any doubt that we may not constitutionally delegate our authorities to vote?

Mr. WHITEHOUSE. Does the distinguished Senator yield me time to reply?

Mr. SPECTER. I would like a reply as to whether it is your view, as a constitutional matter, Members of Congress can delegate their authority to vote.

Mr. ROCKEFELLER. If the Senator from Rhode Island would give me 30 seconds, I would be grateful.

Mr. WHITEHOUSE. I have no objection, of course.

Mr. ROCKEFELLER. The fact of the matter, I say to the senior Senator from Pennsylvania, is that there are 37 Members of the Senate who have been briefed on this matter—not 20 but 37. We decided to do a little bit of homework: Fifteen on the Senate Intelligence Committee, 19 on the Senate Judiciary Committee, that is 34—minus 4 crossover members; 2 leadership on each side, Senator ROBERTS and the Appropriations Committee chairman and, I suspect, vice chairman, plus Senator LEVIN and Senator MCCAIN, who are ex officio.

That is not bad.

Mr. SPECTER. Madam President, the statistics I have are, out of the House there have been 21 House Intelligence Committee members briefed and as many as 40 Judiciary Committee members; in the Senate, 15 on the Intelligence Committee and 19 on the Judiciary Committee for a bicameral total of 95, which is 17.75 percent of the entire Congress. But if you take the chairman's figures, you still have a majority of Members of Congress who have not been briefed, who are, in effect, delegating their authority to vote on a matter where they don't know what they are granting immunity for.

But I refer, again, to the Senator from Rhode Island, if he cares to answer the question.

Mr. WHITEHOUSE. Of course, I did say in my remarks that I believed that this body is incapable of making a determination as to the good faith of the telecommunications companies for the reason the distinguished Senator from Pennsylvania has indicated, to wit, very few of us, less than a majority and certainly not all of us, have been briefed as to what the actual facts are, what was provided, if anything, to the telecommunications companies that would support our finding of good faith.

As I said in my remarks, I think essentially every Senator who has spoken to this question has implicitly referred to good faith, directly referred to good faith as the implicit standard.

I view it, although I defer to the far greater experience and learning of my colleague from Pennsylvania—I see it less as a constitutional issue of deference than one of legislative prudence. I think it is not prudent for us as a Senate to take it upon ourselves to make the good-faith determination. I think that is a determination that should be made by a judicial tribunal, it should be made with appropriate provision for confidentiality, and it should be made by the judicial agency that customarily makes good-faith determinations.

It isn't our legislative role to do that. So I agree with the concern of the distinguished Senator about this. I see it less as a constitutional limitation on my ability as a Senator to cast my vote, which I think is untrammeled. I can cast my vote about things I know nothing about, have not studied on, am totally uninformed, if I wish. It would be bad and imprudent for me to do it, but I do not believe the Constitution prevents me from doing it, so I see it more as a matter of legislative prudence.

Mr. SPECTER. Madam President, one final question. Does the Senator from Rhode Island know of any case which has been pending in the Federal courts for at least 3 years, as the telephone company case has, with the opinion by Chief Justice Walker in July of 2006 and now pending on appeal in the Ninth Circuit, where the Congress stepped in to take away the jurisdiction by a grant of immunity as proposed in this legislation?

Mr. WHITEHOUSE. I am aware of none. I cannot guarantee that our research has been complete and exhaustive. But, certainly, the recent efforts that Congress has done where an immunity from liability has been an issue, either responding to pandemics or responding to vaccines, what Congress has done there is to create an alternative remedy.

I am aware of no precedent for the Congress of the United States stepping into ongoing litigation, choosing a winner and a loser, allowing no alternative remedy. And I believe the constitutional problem with doing that as a separation of powers matter is particularly acute where the cause of action that is being litigated in the judicial branch is a constitutional claim. And Judge Vaughan is listening to constitutional claims. That is the subject matter of the litigation.

So I believe it will be determined by a court that ultimately this section of the legislation is unconstitutional, in violation of the separation of powers, because we may not, as a Congress, take away the access of the people of this country to constitutional determinations heard by the courts of this country.

Mr. SPECTER. Judge Walker is certainly listening to constitutional claims. He may even be listening to the Senate. Somebody may be listening on C–SPAN 2.

I thank the distinguished Senator from Rhode Island for his candid answers.

How much time is remaining?

The PRESIDING OFFICER (Mr. LAUTENBERG.) The Senator has 13 and a half minutes remaining.

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

Mr. LEAHY. Mr. President, I strongly oppose a blanket grant of immunity. I also urge Senators to reject this ill-advised legislative effort to engineer a specific outcome in ongoing Federal judicial proceedings. No one should stand above the law in the United States.

The administration circumvented the law by conducting warrantless surveillance of Americans for more than 5 years. They got caught. The press reported this illegal conduct in late 2005. Had the media not done so, this unlawful surveillance may still be going on today.

When the public found out that the Government had been spying on the American people outside of FISA for years, the Government and the providers were sued by citizens who believed that their privacy rights were violated. That is why we have Federal courts—so people can vindicate their rights before a fair and neutral tribunal, without interference from the other branches of government.

Title II of this bill is apparently designed to terminate these lawsuits. It seems to reduce the role of the court to a rubber stamp. So long as the Attorney General will certify that the Government requested the surveillance and indicated that it had been ''determined to be lawful,'' the cases are to be dismissed and everybody is off the hook. That is not a meaningful judicial inquiry. That doesn't give the plaintiffs their day in court. It is not just a heavy thumb but a whole hand and arm on the scales of justice, and I cannot support it.

Here is what the report of the Select Committee on Intelligence said in connection with reporting its earlier version of retroactive immunity:

> The Committee has reviewed all of the relevant correspondence. The letters were provided to electronic communications service providers at regular intervals. All of the letters stated that the activities had been authorized by the President. All of the letters also stated that the activities had been determined to be lawful by the Attorney General, except for one letter that covered a period of less than sixty days. That letter, which like all the others stated that the activities had been authorized by the President, stated that the activities had been determined to be lawful by the Counsel to the President.

So if anyone had any doubt where the criteria in the bill come from, there it is. Do those words seem familiar? Do the criteria carefully worded for inclusion in the bill now make sense?

I expect that the American people remember the testimony before the Judiciary Committee of James Comey and FBI Director Mueller about the period of time when Attorney General Ashcroft was in the hospital, senior advisers at the Justice Department had advised against extending approval for the warrantless wiretapping program and the Counsel to the President, Alberto Gonzales, went to John Ashcroft's hospital room seeking to get Attorney General Ashcroft to override the acting Attorney General's concerns. Some time thereafter, the program was apparently adjusted in some way, but only after FBI Director Mueller spoke to the President and several high-ranking officers threatened to quit the administration. That period could account for the Select Committee on Intelligence's reference to a letter and period of less than 60 days when it was the Counsel to the President who had ''determined'' the activities ''to be lawful.''

Senator SPECTER has long said that he supported judicial review of the legality of the President's warrantless wiretapping program. During the last Congress, when he chaired the Judiciary Committee, he introduced a bill that would have allowed the courts to review the legality of the administration's warrantless surveillance program. Unfortunately, he later modified the bill in his discussions with the White House that made it unacceptable and ineffective in my view and it was never passed. I have always supported allowing the courts the opportunity to review the legality of those activities.

I believe that independent judicial review will reject the administration's claims to authority from the Authorization for the Use of Military Force that overrides FISA. I believe that the President's claim to an inherent power, a Commander-in-Chief override, derived somewhere from the interstices or penumbra of the Constitution's article II will not prevail over the express provisions of FISA.

Indeed, Chairman ROCKEFELLER seemed to concede as much this morning when he asserted that nothing in his bill should be taken to mean ''that Congress believes that the President's program was legal.'' He characterized the administration as having made ''very strained arguments to circumvent existing law in carrying out the President's warrantless surveillance program.'' At various points Senator ROCKEFELLER alluded to the administration's argument that the Authorization for the Use of Military Force was some sort of statutory override authority and the administration's claim that the President has what Senator ROCKEFELLER called ''his all-purpose powers,'' which I understand to be the administration's argument that inherent authority from article II of the Constitution creates a Commander-in-Chief override, and said that these are not justifications for having circumvented FISA.

Consistent with Justice Jackson's now well-accepted analysis in the Youngstown Sheet & Tube case, when the President seeks to act in an area in which Congress has acted and exercised its authority, the President's power is at its ''lowest ebb.'' So I believe that the President's program of warrantless wiretapping contrary to and in circumvention of FISA will not be upheld based on his claim of some overriding article II power. I do not believe the President is above the law.

What is most revealing is that the administration has worked so feverishly to subvert any such independent judicial review. That sends a strong signal that the administration has no confidence in its supposed legal analysis or its purported claims to legal authority. If it were confident, the administration would not be raising all manner of technical legal defenses but would work with Congress and the courts to allow a legal test of its contentions and the legality or illegality of its actions.

This amendment now offered by Senator SPECTER is more limited than I would have liked. It says its purpose is to allow the courts to review the constitutionality of the assistance provided by the electronic communication services in connection with the program. Exactly how the courts get to such a review is not clear. Although I do not believe that this expressly allows the court to conduct the kind of comprehensive judicial review required to make a real determination about the legality of this program, and a fair decision about the merit of these lawsuits, it nevertheless seeks in spirit to provide judicial review. In the hope that it might provide an avenue to accountability for the illegal actions of this administration, I will support it.

In so doing I should note that I do not believe that Congress can take away the authority of the Federal courts to consider unconstitutionality or illegality in the course of meaningful judicial review. Senator ROCKEFELLER emphasized this morning that the parties to the ongoing cases are to be ensured ''their day in court'' and that they are ''provided the opportunity to brief the legal and constitutional issues before the court.'' These statements do not have meaning unless the legal issues and constitutional issues presented by these cases can be considered. The value of the Specter amendment lies in making the issue of constitutionality explicit.

The PRESIDING OFFICER. The Senator from South Dakota.

Mr. THUNE. Mr. President, I ask unanimous consent to speak as in morning business.

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

ENERGY

Mr. THUNE. Mr. President, like so many of my colleagues, I spent the week of the Fourth of July traveling my State of South Dakota. I met with members of the general public at an energy forum, met with small businesses, folks in the tourism industry. Everywhere I went it was the same story: High gas prices are crippling the American economy.

I remember stopping in the small town of Parkston and visiting with someone who manages a small café there, and visiting with them about the impact that high gas prices are having on their business.

She said: Well, it is not really the weekend travelers, the RV owners, the people who camp, but it is those people who are commuting to work every single day who now do not have the money to eat out nearly as often.

Of course, Parkston is a small town. It is about 20 miles, give or take, from Mitchell, SD. There are a number of people who commute back and forth. It is those commuters who are feeling the most economic hardship as a result of high energy prices.

I attended my parents' 65th wedding anniversary in my hometown of Murdo. In my hometown, tourism, the visitor industry, is the very lifeblood of that community. I grew up in that business, worked in restaurants, motels, that sort of thing. And I even had a forum, as well, with members of the tourism industry in South Dakota in Rapid City when I was home just to gauge the impact of high fuel prices on their individual businesses.

The Rapid City mayor, who owns a campground, said: I think we are going to reach a tipping point where the very foundations of the travel industry could be shaken.

Bill Honerkamp, president of the Black Hills, Badlands and Lakes Association said tourism fell about 7 percent in the region in May, and numbers for the rest of the summer are barely holding steady.

Teddy Hustead, president of the popular South Dakota tourist stop Wall Drug, said tourist stops were down 1 percent in June. But he went on to say that Wall Drug needs to be up 4 to 5 percent to be a healthy, growing, viable concern, and it is hard to grow a business when gas is increasing by 10, 20, and 25 percent every single year.

Sean Casey, the vice president of another popular South Dakota tourist destination, Bear Country USA, noted that visitation is down 7 percent for the year 2008. And he went on to say: Energy is pinching us. I always joke that we are going to a model like the space shuttle—two visitors at $10 million each.

Jo Casky of the Spearfish Convention and Visitors Bureau noted that convention is dropping because of high gas prices. One particular convention was booked with a prediction of 1,200 to 1,400 attendees. That is unlikely now because of the rising pump prices.

Casky said: We are now at about 800. As soon as gas started getting to the $4 mark, we started to see reservations back off.

High gas prices are having a dramatic impact on families, small businesses, the tourism industry, the airline industry, the agricultural industry, and virtually every sector of the American economy.

I toured a UPS facility in Sioux Falls, SD. Many of my colleagues may have heard what they are doing in terms of dealing with the price of fuel. They actually now, as they diagram routes for their drivers, diagram routes that only allow them to make right turns so they do not sit in a left-turn lane and idle thereby using more energy.

My point is that people are taking extraordinary steps to deal with the high cost of energy. Higher costs for companies such as UPS, transportation companies, get passed on to consumers in the form of higher prices for everything they buy. They are looking for leadership in Washington, DC. But instead of leadership, they have seen a decade of inaction, as arguably the most important issue of impacting the American economy has been left unattended.

We have done nothing to affect the basic law of supply and demand. Some argue, and perhaps rightly so, that high energy costs are partly a function of the weak dollar. They would be, as I said, accurate to say that because oil is denominated in dollars. When it takes $1.57 to purchase a Euro, it is going to make anything denominated in dollars more expensive.

There are those who think speculators are driving up the cost of energy in this country, and it is true that trading in energy commodities has increased dramatically over the past 30 years since the exchanges were created. I, for one, happen to believe we need to look for ways to define the degree to which speculation is impacting energy prices in this country and also look at what we can do to address that issue in a way that makes matters better and not worse.

Trading since 2004 on the NYMEX Exchange has nearly tripled. So we need to make sure our farmers, our ranchers, our airlines, our trucking companies, have the opportunity and ability that they need to manage risk. That is what those markets were created for. We also need transparent markets where all traders are subjected to the same sets of rules.

I believe we need more cops on the beat. We need to make sure the CFTC has the funding it needs to do its job and to enforce our laws. I think we can do some things, such as codifying CFTC position limits and transparency for foreign boards of trade. I guess my point is that there are a number of things we can do to address the impact that speculators may be having on the price of energy in this country. And, frankly, I think that is a role and responsibility that Congress should fill.

But if you take the weak dollar, and you take speculators out of the equation, we still have a major problem and a major crisis in this country. That problem is that we have greater demand for energy than we have supply. We use about 86, 85 to 86 million barrels of oil every single day worldwide. Of that amount, the United States uses about 20 million barrels or about 24 percent of the total. Of that amount of 20 million barrels that the United States uses every single day, about 12 million barrels are imported.

In other words, 60 percent of the oil that we use every single day in America comes from outside the United States. We are transporting and shipping and transferring about a half trillion dollars every single year of American wealth outside of the United States to petro dictators who are being enriched by that American wealth and using it in ways that I think most of us would disagree with; in fact, in many ways to support terrorist organizations in places around the world.

Now, we cannot solve our dangerous dependance upon foreign sources of energy absent affecting that basic law and rule of supply and demand. We have to find more energy in this country. We should be taking steps now to add supply and to reduce our demand.

One of the things we need to continue to support and intensify, in my view, is our commitment toward renewable energy. I want to read something that Tom Friedman said in an op-ed on June 29. The op-ed was titled ''Anxious in America.''

But he said:

> My fellow Americans. We are a country in debt and in decline, not terminal, not irreversible, but in decline. Our political system seems incapable of producing long-range answers to big problems or big opportunities. We are the ones who need a better functioning democracy. More than the Iraqis and Afghans, we are the ones in need of nationbuilding as it is our political system that is not working.

He goes on to say:

I continue to be appalled at the gap between what is clearly going to be the next great global industry, renewable energy and clean power, and the inability of Congress and the administration to put in place the bold policies we need to ensure that America leads that industry.

Well, one of the things that we did, and it was a moonshot in terms of renewable energy and making an investment in our future, is the renewable fuels standard. Last December there were 80 Senators who voted to increase the renewable fuels standard to 36 billion gallons by the year 2022. That was a policy that was put in place less than a year ago, and yet already we have people, Members of the Senate, politicians in Washington, who are talking about rolling that back. That could be the absolute worst thing that we do.

We do not need less energy in this country, we need more energy in this country. We need more renewable fuels. The 8 or 9 billion gallons of renewable energy that we produce in this country every single year today is taking pressure off gasoline and oil prices by, according to a study conducted by Merrill-Lynch, up to about 15 percent.

In the current market economy that is about 50 to 60 cents per gallon of gasoline. Someone has said it is ethanol and corn prices that are driving up the cost of everything we buy in this country, and particularly with regard to this whole food-versus-fuel debate. But the American Truckers Association recently did a study which found that in late 2004 it cost about 16 cents per box of cereal to transport that box of cereal to the marketplace. Today it costs about 36 cents per box of cereal. So we have seen a 20-cent increase in the transportation cost for a box of cereal. Couple that with the fact that the amount of corn in a box of Corn Flakes is about 10 cents per box, and you can see what is driving up the cost of everything in our economy. It is the increasing price per barrel of oil, increasing price of energy in this country.

We need to speed cellulosic ethanol to the marketplace. We need to increase the blends of ethanol. We need not fewer gallons of renewable energy in this country, we need more gallons of renewable energy. I hope those in Washington, in the administration and Congress, who are talking about considering rolling back the renewable fuels standard would reconsider that and think about the importance of renewable energy and what it can do for America's future and our dangerous dependence on foreign sources of energy.

The second thing, of course, we have to do is we have to increase our domestic supply. That means the Outer Continental Shelf. That means the oil shale in places in the Western States. It means ANWR. It means coal to liquid. It means nuclear. It means wind. We have all of these domestic energy supplies in this country, and we have heard people say it would take 5 to 100 years to develop some of these energy supplies. Well, that is what they were saying 5 or 10 years ago about many of these same things.

We did not do it then, and now we are paying a price for it. Is it not our job as policymakers to be looking down the road to future generations to make decisions that are in the best interests of America's future. There is not any issue, I would argue, that is more important to America's future than energy security because it ties directly into and correlates directly into our national security.

We have to have more domestic supply, and the last thing we have to do is we have to use less. We have to find more sources of energy, more domestic sources of energy, so we do not continue to get 60 percent of that energy from outside the United States. And we have to figure out ways in this country to use less energy.

I have a bill that I have introduced. I am on a bill that Senator MCCONNELL, the Republican leader, has introduced which has 43 cosponsors. I have introduced a bill of my own to deal with this energy situation. I am working with a group of both Republicans and Democrats. We need to put the politics aside, the partisanship aside, and work on getting a solution for the American people.

In the bill that I introduced, one of the things I include is a provision that requires that of additional Government lands that are leased for energy production—whether they be offshore, whether they be oil shale in the Western States, whether it be ANWR, the lease revenue, half of the lease revenue that comes into the Federal Government be plowed back into research and development and new technologies, in renewables, alternative sources of energy, things like plug-in hybrid cars, cellulosic advanced biofuels, hydrogen fuel cells.

Those are the types of things we also need to be investing in to make sure that not only are we increasing the supply of energy in this country, the amount that we have, but also that we are using less.

We can do this. We can put aside the finger-pointing and the blame game and do something for our energy future. I believe when people come together, and when they decide that this is an important priority for America's future, we can get this done.

But we can't do it by saying no to every proposal put on the table. My colleagues on the other side—many of them; not all, but many—have said no to offshore production, no to oil shale, no to nuclear, no to coal to liquid, no to additional refinery capacity. We can't solve this problem by saying no. We have to start saying yes to more domestic production and to more measures that would allow us to conserve and reduce the amount of energy we use. We have to get serious about this issue. It starts with addressing that fundamental law and rule of supply and demand. We can do all these other things, the dollar can start firming up, we can address the role of speculation in the marketplace. But at the end of the day, we don't solve the problem unless we get serious about increasing our domestic supply of energy and reducing and using less energy. When we do that, we will see the price per barrel start to come down, the price per gallon of gasoline start to come down, and we will see the American economy, in places such as South Dakota, where tourism and agriculture are so critically important, start to rebound and start to draw more visitors to the tourism industry and to make sure our farmers continue to produce food and fiber in a way that allows them to maximize their return on investment and not get choked with high input costs coming from higher energy costs.

I hope before we adjourn for the August recess, we will come together behind an energy proposal and plan that is good for America's future, that emphasizes renewables, more domestic supply and production, and addresses the important issue of conservation. But we can't do that by continuing to say no. I ask my colleagues on both sides to quit saying no and to start saying yes to America's energy independence. Say no to our dangerous dependence upon foreign energy but yes to making America energy independent and making this country more prosperous for America's future.

I yield the floor.

The PRESIDING OFFICER. The Senator from Virginia.

Mr. WARNER. Mr. President, on behalf of the leadership and the floor managers, I have been asked to propound a unanimous-consent request that the following Senators be recognized, assuming they are here on the floor in time to be recognized: I will speak now for about 15 minutes, to be followed by Senator CARPER for 10 minutes. I see my distinguished friend, the Senator from Mississippi; if he could indicate how much time he would like.

Mr. COCHRAN. About 8 minutes.

Mr. WARNER. He is to be joined by Senator WICKER.

Mr. COCHRAN. Yes, he is in the Chamber as well.

Mr. WARNER. All right.

Mr. WICKER. About 8 minutes also.

Mr. WARNER. All right. And Senator STABENOW, I do not see her, but let's put her down for 10, and Senator CORNYN.

Mr. CORNYN. I would need 15 minutes. If I can yield back some time, that would be great.

Mr. WARNER. With that in mind—I do not see any other Senators seeking recognition—I ask it in the form of a unanimous consent.

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

The Senator from Virginia.

Mr. WARNER. Mr. President, I rise, along with the distinguished chairman and ranking member of the Intelligence Committee on which I am privileged to serve. I commend my chairman and ranking member for the extraordinary capability with which they have handled this controversial issue of

the FISA legislation and the bipartisanship they have shown. Our committee voted 13 to 2 on this measure which is now before the Senate. Currently, we have the Bingaman and Specter amendments. I join my chairman and ranking member in opposing these two amendments. They seek in one way or another to remove or render useless one of the most important sections of the FISA Amendments Act which is liability protection for the telecommunication carriers that assisted our Government with the President's terrorist surveillance program or TSP. Without the title II liability protection, the other sections of the FISA Amendments Act would become irrelevant because the carriers would not cooperate in the authorized programs.

This would be unfortunate, because the FISA Amendments Act is a critical piece of legislation for America's present and future security that achieves an important balance between protecting civil liberties and ensuring that our dedicated intelligence professionals have the capabilities they need to protect the Nation. The bill ensures that the intelligence capabilities provided by the Protect America Act, enacted in August 2007, remain sealed in statute.

Reforming FISA has not been an easy process. I would like to thank Chairman ROCKEFELLER and Vice Chairman BOND for the work they have done to garner bipartisan support for the FISA Amendments Act. It would be unfortunate if that work were undone by one of these amendments.

If passed, the Specter amendment would prohibit the dismissal of the lawsuits against the telecommunications carriers if the President's Terrorist Surveillance Program were found to be unconstitutional by the courts. With all due respect to my colleague from Pennsylvania, I believe that whether the President acted within his constitutional authorities should be treated separately from the issue of whether the carriers acted in good faith.

The extensive evidence made available to the Intelligence Committee shows that carriers who participated in this program relied upon our Government's assurances that their actions were legal and in the best interest of the security of America.

Mr. President, I would like to call the Senate's attention to the report which accompanied the version of the FISA Amendments Act passed by the Senate Intelligence Committee by a vote of 13–2. Based on the committee's extensive examination of the President's TSP, the report noted that the executive branch provided written directives to the carriers to obtain their assistance with the program. After its review of all of the relevant correspondence, the committee concluded that the letters ''stated that the activities had been authorized by the President [and] had been determined to be lawful'' The committee report added the following:

> On the basis of the representations in the communications to providers, the Committee concluded that the providers, in the unique historical circumstances of the aftermath of September 11, 2001, had a good faith basis for responding to the requests for assistance they received. Section 202 makes no assessment about the legality of the President's program. It simply recognizes that, in the specific historical circumstances here, if the private sector relied on written representations that high-level Government officials had assessed the program to be legal, they acted in good faith and should be entitled to protection from civil suit.

The Senate Intelligence Committee believed, by a vote of 13–2, that the companies acted in good faith and that they deserve to be protected. I agree and I believe that the TSP was legal, essential, and contributed to preventing further terrorist attacks against our homeland.

But, even if one were to disagree that the President acted within his article II powers, I cannot see the wisdom in seeking to punish the carriers and their shareholders for something the Government called on the carriers to do with the assurance that the action was legal.

The Specter amendment would put the companies, and their millions of shareholders, in legal limbo, waiting while the Government litigates unrelated constitutional claims. Historically, the Supreme Court has been reluctant to adjudicate constitutional disputes between the political branches of our Government, suggesting that a constitutional question could take years to resolve, if it can be resolved. Lawsuits against the companies would likely continue in the interim which would: Have negative ramifications on our intelligence sources and methods; likely harm the business reputations of these companies; and cause the companies to reconsider their participation—or worse—cause them to terminate their cooperation in the future.

I believe it would be unfair to use private companies as a substitute to adjudicate constitutional claims properly directed against the Government. My colleagues should keep in mind that individuals who believe that the Government violated their civil liberties can pursue legal action against the Government, and the FISA Amendments Act does nothing to limit that legal recourse. As noted by my colleague from West Virginia, the case that was before Judge Walker—which addresses a constitutional challenge against the government—can proceed.

Bottom line, companies who participate in this program do so voluntarily to help America preserve its freedom and the safety—individually and collectively—of its citizens. I have long supported the idea of a ''volunteer force'' for our military and I believe a ''volunteer force'' of citizens and businesses who do their part to protect our great Nation from harm is equally important. I fear that if we are forced to draft companies into compliance when our Nation calls them to duty, ultimately our security will suffer. Without this retroactive liability provision, I believe companies will no longer voluntarily participate. This will result in a degradation of America's ability to protect its citizens.

It is for these reasons that I urge my colleagues to oppose the Specter amendment and any other amendment that would change the FISA Amendments Act.

I yield the floor.

I wish to conclude by saying that as I view this situation, I liken the private sector that has responded to the request of the Federal Government, which has been given assurances by the Federal Government, to the all-volunteer military force we have today. It is imperative that within the private sector there be elements, primarily these corporations and companies which have come forward to provide the technical assistance and also the facilities by which to implement the FISA program. They have done it by and large voluntarily. The program could not succeed without their participation. Therefore, they ask no more than what is justly owed to them, and that is protection from the lawsuits. I hope we can turn back these two amendments and proceed to final passage and that the Senate will go on record as supporting the essential nature of the FISA program.

ENERGY CRISIS

Mr. WARNER. Mr. President, I rise to turn to the question that confronts America today; namely, the energy crisis. I use the word ''crisis'' advisedly, because today no less than a third of Americans are absolutely struggling night and day to find the funds necessary to meet ever increasing food prices and ever increasing energy prices. It is for that reason I have taken a step. I wish to repeat that. I have simply taken a step to write the Secretary of Energy and to write the Comptroller General, the head of the GAO, to determine what are the facts relating to the 1973–1974 energy crisis, how America addressed that crisis, and the actions taken by the President and the Congress in 1973–1974. Again, Congress acted unanimously to back the President in imposing a national speed limit, that speed limit for the purpose of lessening the demand for gasoline and hopefully to have consequent savings at the gas pump.

That is a chapter in American history. I remember it quite well. I was privileged at that time to be Secretary of the Navy. Indeed, the Department of Defense, although at war in Vietnam, came forward and participated to try and help America work its way through that energy crisis. The national speed limit was the centerpiece of that program.

I ask unanimous consent now to print in the RECORD the letters I sent to the Secretary of Energy and the Comptroller General at the conclusion of my remarks.

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

(See exhibit 1.)

Mr. WARNER. I thank the Presiding Officer.

Again, I am not taking a position that at this time we should invoke a new initiative in the Congress to pass legislation calling for a national speed limit because I simply do not have the facts. I am on a fact-finding mission. But if those facts come forward, as I believe they will, and show that this will help alleviate and lessen the demand at the pump and the cost to the American citizen, then I am quite likely to try—more than that, I am quite probably going to try—and garner support on both sides of the aisle to push forward with this legislation. I say so because I come back again to about a third of America at this point in time is frantically trying to make ends meet. We have to come up with a solution. We have to lead in the Congress, and hopefully the President will join. We have that duty.

Therefore, these two letters going to, certainly, the GAO, an impartial arbiter of the facts and finder of the facts, will provide this Chamber with the information necessary to make an informed judgment as to whether to go forth with legislation. I deem that the Secretary of Energy will reflect, quite understandably, the policy of an administration toward such a measure to bring about alleviation of the pressures at the gas pump today and on families.

Again, this step is in the category of conservation of energy. My colleagues—and I have participated with them—are looking at, in my opinion, three areas of addressing this problem: short-term, which is conservation, that is the only way to bring about some immediate measure of relief; secondly, intermediate steps, which I outlined in my speech here; and lastly, the long term. Much has been said about long-term steps. I take pride and push aside any sense of humility because for several years I have stood on this floor and urged offshore drilling, even put forth a measure here in this body which was defeated which called for the right of my State, Virginia, and such other States that might wish to join, through the Governor and the State legislature's participation, agreeing to drilling offshore of Virginia for gas. I am not suggesting I brought about a change of thinking in the administration, but the President now supports that concept. Indeed, a number of my colleagues now support that concept. I opine that I believe in due course the Congress will provide the President with legislation to take those important steps. But that offshore drilling will not lessen the price today at the pump.

It will not help a case which was the final straw to decide that I would embark on this course, when I read an article about the meals on wheels program where the shut-ins at home, who for economic reasons and physical reasons and other reasons can't go out and get their meals. They rely upon a system of volunteers to bring the meals to their homes. But that program is beginning to founder because the volunteers simply cannot afford the additional cost of gasoline. I don't know about my colleagues, but this causes me severe heart palpitations and concern. The reporter said to me, when he interviewed me on this an hour or so ago, a national reporter: All right, Senator, are you willing to drive at a slower rate? What sort of car are you driving?

I told him what type of car I drive. I said: There are occasions when I drive over 55 miles an hour, 60 miles an hour, sometimes 65. But I am willing to give up whatever advantage to me to drive at those speeds with the fervent hope that that modest sacrifice on my part will help those people across this land tonight and tomorrow and in the indefinite future dealing with this financial crisis.

I point out also that in 1973–1974, these were automobiles, how well I remember, without growth of the quick production lines that started after World War II. America was flourishing. Then all of a sudden, the Arabs put an oil embargo on this country and took away our ability to get fuel. The President reacted quickly. The Congress reacted quickly. We put in that limit. In due course, the pressure on the pump declined and gas fell to about $2 a gallon. In 1995, 20 years after the enactment of this legislation by the Congress and the President, the 55 miles was lifted. Mind you, it wasn't one President; it was a series of Presidents who endorsed this program of conservation in terms of the reduction of speed. I don't know. At one time I used to be a pretty good mechanic on automobiles, but they have now gotten a degree of complexity that is beyond my grasp. I rely on my son, who has devoted much of his life to auto racing.

He is a wonderful mechanic and an engineer on cars. He said the carburetion system—he argued with me about this when I spent the past weekend with him—shook his fist at me: I don't want this 55-mile-per-hour limit. And that is good advice. But he said the carburetion systems in cars today are better than they were in 1973 and 1974, and I judge that to be the case.

So I asked in my letters: Analyze the technical capabilities of the cars today, and could we anticipate bringing about a savings at the gas pump by virtue of a national speed limit? So we have to get the facts and put them together.

But I ask my colleagues, as they proceed to work on this issue—and I am all for the renewables, but that is long term. Offshore drilling: long term. We have to focus now on what measures we can take to help people now, if not long term.

I know colleagues are getting the same calls and the same letters I am receiving from those people who, frankly, feel very oppressed by this rapid development. Although it has increased basically a dollar a gallon in the last year, so much of it has come on in the last 120 days, unanticipated in speed and causing great hardship here at home.

I yield the floor.

EXHIBIT 1

U.S. SENATE,
Washington, DC, July 3, 2008.

Hon. SAMUEL W. BODMAN,
Secretary of Energy,
Washington, DC.

DEAR SECRETARY BODMAN: I write today with respect to the high cost of gasoline. Today, the average cost of a gallon of regular gasoline is more than $4.10. This is an increase of well over a dollar a gallon from a year ago.

As you know, each and every day, Americans struggle to cope with this rapid, record increase in fuel costs. Across the United States, individual Americans are taking their own initiatives to find ways to reduce gas consumption through driving less, altering daily routines, and even changing or cancelling family vacation plans.

To date, as far as I can determine, the federal government has taken few, if any, initiatives to join in this national effort to help address this ever increasing crisis.

I believe it is essential that we continue to modernize our energy infrastructure and develop a reliable, commonsense American energy strategy—one that includes new supplies from domestic exploration and extraction, encourages conservation, and promotes the use and advancement of clean, renewable energies.

I am among a group of many senators today who are working in a bipartisan fashion to find a solution. For the past several years, I have supported permitting the Commonwealth of Virginia to explore and extract energy offshore if its Governor and General Assembly so desire. This concept has just recently gained the support of the administration and a growing number of colleagues in Congress.

However, the truth is that new technologies and new sources of energy will not provide meaningful relief for years to come as new technologies are developed and as new sources of energy are discovered and extracted. We must be straight with the American public and not raise hopes that these efforts will provide immediate solutions and possible relief.

There are ways to give some immediate relief. In my view: new conservation efforts are the quickest way to see an immediate reduction in the price of gas at the pump. The American public is already doing its part through individual means of cutting back.

On a federal level, on May 22, 2008, Senator Bingaman and I introduced, and the Senate unanimously passed by voice vote, a sense-of-the-Senate resolution (S. Res. 577) that urged the President to initiate, among all federal departments and agencies of the executive branch, a reduction of their daily consumption of gasoline—if only by a small percentage.

To my knowledge, the administration has not responded to the Senate's action. In the absence of pending administration action, Congress should join with the public and make the concepts in the sense-of-the-Senate resolution a mandatory law.

Turning to another concept, I call to your attention action taken by the Congress and the executive branch during a similar petroleum shortage that occurred in 1973 and 1974. In January 1974, the President signed into

law ''The Emergency Highway Energy Conservation Act'' (public Law 93–239), which passed both the House and Senate unanimously. This law was enacted in an effort to conserve fuel.

Specifically, the law put forth inducements for states to reduce speed limits to 55 miles per hour (mph) on all major highways. Failure to do so would jeopardize the ability of states to secure federal highway funds. The law was originally intended to be temporary, ceasing to be in effect if the President declared that there was no longer a fuel shortage or on or after June 30, 1975, whichever occurred first.

According to a Congressional Research Service report, the law resulted in reduced consumption of 167,000 barrels of petroleum a day, a roughly 2 percent reduction in the nation's highway fuel consumption. In addition, the National Academy of Sciences found that the law saved up to 4,000 lives per year from highway accidents. Given the significant increase in the number of vehicles on America's highway system from 1974 to 2008, one could assume that the amount of fuel that could be conserved today is far greater.

Given the fuel savings of the act, and the resulting significant decrease in highway fatalities attributable to the national speed limit, Congress made the national speed limit permanent in December 1974. In 1995, the law was repealed.

The purpose of this letter is to ask you to study this era of conservation, as I have, to determine whether the administration, with the support of Congress; should take similar action today.

According to the U.S. Department of Energy Web site, engineering data shows that fuel efficiency decreases rapidly above 60 mph. Specifically, for every 5 mph an individual drives over 60 mph, that individual essentially is paying an extra 30 cents per gallon in fuel costs.

As Congress continues to look for ways to ease this national problem, I put to you the following questions. I will share your responses with my colleagues.

(1) Given the significant technological improvements since 1974, at what speed is the typical vehicle traveling on America's highways today most fuel efficient?

(2) If a national speed limit was enacted similar to the 1974 law, but the speed limit under that law was consistent with most fuel efficient speed for the typical vehicle traveling on America's highways, what would be a reasonable projection for total fuel savings? And, what would be the savings for the average citizen who owns and operates a vehicle?

(3) If a new national speed limit was enacted consistent with the two questions listed above, how many fewer barrels of petroleum a day would Americans consume? Is it reasonable to believe that there would be a reduction in price at the pump? And, if so, what are the ranges you could project for cost reductions?

(4) If the federal government took the initiative to reduce its oil consumption, consistent the concepts of the sense-of-the-Senate resolution (S. Res. 577) how many fewer barrels of petroleum a day would be saved by the federal government?

Given that Congress, upon its return next week, will be vigorously considering all options, your response to this request could be of great help to my colleagues and me. Again, years ago, the Emergency Highway Energy Conservation Act worked. The administration's advice, after examining this era and these concepts, would be helpful.

With kind regards, I am

Sincerely,

JOHN WARNER.

U.S. SENATE,
Washington, DC, July 8, 2008.

Hon. GENE DODARO,
Acting Comptroller General of the United States, Government Accountability Office, Washington, DC.

DEAR MR. DODARO: I write today with respect to the high cost of gasoline. Today, the average cost of a gallon of regular gasoline is more than $4.10. This is an increase of well over a dollar a gallon from a year ago.

As you know, each and every day, Americans struggle to cope with this rapid, record increase in fuel costs. Across the United States, individual Americans are taking their own initiatives to find ways to reduce gas consumption through driving less, altering daily routines, and even changing or cancelling family vacation plans.

To date, as far as I can determine, the federal government has taken few, if any, initiatives to join in this national effort to help address this ever increasing crisis.

I believe it is essential that we continue to modernize our energy infrastructure and develop a reliable, commonsense American energy strategy—one that includes new supplies from domestic exploration and extraction, encourages conservation, and promotes the use and advancement of clean, renewable energies.

However, the truth is that new technologies and new sources of energy will not provide meaningful relief for years to come as new technologies are developed and as new sources of energy are discovered and extracted. We must be straight with the American public and not raise hopes that these efforts will provide immediate solutions and possible relief.

There are ways to give some immediate relief. In my view, new conservation efforts are the quickest way to see an immediate reduction in the price of gas at the pump. The American public is already doing its part through individual means of cutting back.

On a federal level, on May 2, 2008, Senator Bingaman and I introduced, and the Senate unanimously passed by voice vote, a sense-of-the-Senate resolution (S. Res. 577) that urged the President to initiate, among all federal departments and agencies of the executive branch, a reduction of their daily consumption of gasoline—if only by a small percentage.

To my knowledge, the administration has not responded to the Senate's action. In the absence of pending administration action, Congress should join with the public and make the concepts in the sense-of-the-Senate resolution a mandatory law.

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Specifically, the law put forth inducements for states to reduce speed limits to 55 miles per hour (mph) on all major highways. Failure to do so would jeopardize the ability of states to secure federal highway funds. The law was originally intended to be temporary, ceasing to be in effect if the President declared that there was no longer a fuel shortage or on or after June 30, 1975, whichever occurred first.

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As Congress continues to look for ways to ease this national problem, I ask you to examine the following questions:

(1) Given the significant technological improvements in automobile design and function since 1974, at what speed is the typical vehicle traveling on America's highways today most fuel efficient?

(2) If a national speed limit was enacted similar to the 1974 law, but the speed limit under that law was consistent with most fuel efficient speed for the typical vehicle traveling on America's highways, what would be a reasonable projection for total fuel savings? And, what would be the savings for the average citizen who owns and operates a vehicle?

(3) If a new national speed limit was enacted consistent with the two questions listed above, how many fewer barrels of petroleum a day would Americans consume? Is it reasonable to believe that there would be a reduction in price at the pump? And, if so, what are the ranges you could project for cost reductions?

(4) If the federal government took the initiative to reduce its oil consumption, consistent the concepts of the sense-of-the-Senate resolution (S. Res. 577) how many fewer barrels of petroleum a day would be saved by the federal government?

Given that Congress is vigorously considering all options, your response to this request could be of great help to my colleagues and me.

With kind regards, I am

Sincerely,

JOHN WARNER.

Mr. SPECTER addressed the Chair.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. SPECTER. Mr. President, the pending business on the Foreign Intelligence Surveillance Act is an amendment which I have pending, No. 5059. We started at 4 o'clock, and we are due for 2 hours. I stepped off the floor for just a few minutes for necessaries and have come back to find a unanimous consent proposal for some six speakers. I have talked to a number of Senators on the floor, and they are in morning business.

It seems to me the orderly procedure would be to allow us to finish our bill. I understand any Senator can come out and ask for unanimous consent. But, candidly, my good friend from Virginia, I wish you had given me notice.

Mr. WARNER. Mr. President, I felt I was acting at the personal request of

Chairman ROCKEFELLER and the ranking member when I did this. I inquired on the floor as to the desires of other Senators. I regret, my dear friend, I would not have done this in any way to deter your ability to do what you feel you have to do on this bill.

So at this point in time, certainly the floor is open to additional unanimous consent. But I do bring to your attention the Senators who are currently in the Chamber are here as a consequence of the UC that I proposed at the request of the two managers.

Mr. SPECTER. Well, with all due respect to my good friend from Virginia, I was on the floor all afternoon, you sitting there and me sitting here. But that is water over the dam.

My request, Mr. President, is that—the only Senator on this list who I have ascertained is going to speak to the bill is Senator CARPER; he is on the list now for 10 minutes—we conclude the bill, or the alternative: to move ahead with the balance of the times reserved until tomorrow morning.

Mr. WARNER. Mr. President, again, Senators on the floor can certainly speak for themselves, but I point out I think the Chair advised the managers as to the time remaining on both sides of the bill.

Am I not correct, I ask the Presiding Officer? Could you inform the Senate as to the times remaining under the UC to which my good friend from Pennsylvania refers?

The PRESIDING OFFICER. The Senator from Pennsylvania has 10 minutes remaining. The Senator from West Virginia has 33 minutes remaining. The Senator from New Mexico has 14 minutes. The Senator from Missouri has 5 minutes. The Senator from Connecticut has 21 minutes.

Mr. WARNER. Mr. President, I leave it to the Chair to address that. I think the Senator from Pennsylvania should be recognized for the purpose of his 10 minutes, but I am not sure we are in a position to foreclose other Senators who have been waiting here patiently to address the Senate on other matters.

It seems to me the Senator from Pennsylvania should revise the request to enable him to have his 10 minutes and Senator CARPER his 10 minutes and then allow the Chamber to proceed with other matters. It seems to me that is a fair resolution to this problem.

Again, I apologize if I was acting—as I was so asked to do—contrary to the Senator's wishes.

Mr. SPECTER. Mr. President, with respect to waiting, I have been here since 11 o'clock this morning on this bill.

Mr. President, I ask unanimous consent that Senator CARPER be recognized, as he is, for 10 minutes, and that the other Senators subject to the unanimous consent request be accorded the time given to them, and that the remainder of the time reserved be scheduled for tomorrow at the discretion of the majority leader.

Mr. WARNER. Mr. President, I will not object. I wish to thank my colleague for what I think is a very fair resolution to this situation.

Mr. CARPER. Mr. President, may I be recognized?

The PRESIDING OFFICER. Is there objection?

Mr. CARPER. Mr. President, reserving the right to object, I am told we cannot shift the time until tomorrow. I am told we need to use the time that has been allocated today. That is my understanding.

Mr. SPECTER. Mr. President, will the Senator repeat his reservation, please.

Mr. CARPER. Mr. President, I understand—and I look to the Parliamentarian and to the Presiding Officer—I am told the Senate is required to use the time that has been allocated for the discussion of these amendments today, and there is additional time for it tomorrow in tomorrow's debate before we begin voting. But we need to use up the time that is allocated for this afternoon and this evening.

I would inquire of the Presiding Officer, is that your understanding as well?

Mr. SPECTER. Mr. President, parliamentary inquiry: I heard the Chair say there is 10 minutes remaining of my time.

The PRESIDING OFFICER. The Senator is correct.

Mr. SPECTER. Well, that time is yielded to Senator CARPER, so that would take all the time allotted to this Senator.

The PRESIDING OFFICER. Does the Senator withdraw his unanimous consent request?

Mr. SPECTER. Well, there has been an objection to it, as I understand.

The PRESIDING OFFICER. Is there objection?

Mr. CARPER. Reluctantly, I must object.

The PRESIDING OFFICER. Objection is heard.

The Senator from Delaware.

Mr. CARPER. Mr. President, I believe under the unanimous consent agreement entered earlier, I am recognized for 10 minutes, and I ask unanimous consent that my time be counted against time controlled by Senator ROCKEFELLER.

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

Mr. CARPER. Mr. President, I rise today to speak in support of the FISA compromise legislation that is before us this week. I believe reasonable people can disagree about this measure, and I certainly respect the views of those who oppose it. But I wish to take a moment this afternoon to explain, first, why I am supporting this bipartisan compromise and, second, to encourage my colleagues and others to do so as well.

All of us know we live in a dangerous world today. We face serious threats to our safety and to our security. At the same time, we face a difficult balancing act between, on the one hand, the need to protect our country and the safety of our citizens and, on the other hand, the need to preserve our civil liberties.

All too often, the Bush administration's approach has been, at least in my judgment, misguided. Many opponents of the FISA legislation before us are rightly concerned that civil liberties have been ignored and in some cases violated.

I believe that is why, to some extent, many critics of this bill have focused so heavily—almost exclusively, in fact—on the legislation's retroactive immunity provisions. I regret the majority of my colleagues in the House and the Senate do not see eye to eye with those critics regarding immunity. However, I wish to take a few minutes to explain why most of us who support this bill in its amended form believe that granting immunity is fair.

During the extraordinary national emergency that followed the September 11 attacks upon our Nation, the Federal Government reached out—

Mr. SPECTER. Mr. President, will the Senator from Delaware yield for a moment?

Mr. CARPER. Mr. President, I am happy to yield to the Senator from Pennsylvania.

Mr. SPECTER. Mr. President, I understand the Senator from Delaware is using time from Senator ROCKEFELLER.

Mr. CARPER. That is correct.

Mr. SPECTER. So my time would remain. I had thought there was 13 minutes remaining. Is there only 10?

The PRESIDING OFFICER. Ten minutes is all that remains.

Mr. SPECTER. I thank the Chair, and I reserve the remainder of my time, however the scheduling may work out.

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

Mr. CARPER. Reclaiming my time, if I may, Mr. President, during the extraordinary national emergency that followed the September 11 attacks upon our Nation, the Federal Government reached out to some of America's major telephone carriers. We asked them to help intercept communications between sources in our country and terrorists located overseas.

A number of our phone companies responded in good faith and agreed to help. They did so, however, only after receiving written directives from our Government's senior national security and law enforcement officials that their cooperation—the cooperation of the telecommunications companies—was both lawful and constitutionally sound.

It does not seem fair, at least to me, that these companies now should be made victims of their own good-faith cooperation and assistance in the ongoing fight against terrorism. That is why I support immunity for phone companies that can demonstrate in Federal court that their participation in the program was found to be lawful by the Bush administration.

With that said, however, I believe the issue of immunity has taken on a significance that goes beyond its actual importance. This is not to suggest that immunity is unimportant, but the more critical aspects of this FISA bill seem to have been overlooked. In my view, those portions of the bill matter more—much more.

Rather than looking backward, at immunity, our real focus should be on what this FISA bill does going forward. I believe this legislation strikes the right balance in providing our intelligence networks with the tools they need to protect our country without diminishing our civil liberties. The administration has overreached on this front before. The FISA legislation before us, though, is a significant improvement over current law and will help to ensure that neither this administration nor the next administration will overreach again.

Now, how does it do that? First of all, this compromise bill makes it crystal clear that FISA is the exclusive means to conduct surveillance, ensuring that neither this President nor our next President can go around the law.

Second, the bill mandates reports by the inspectors general of the Justice Department, the Department of Defense, and our intelligence agencies that will provide the relevant congressional committees here and in the House with the information we need to conduct needed oversight.

Third, the compromise bill—this compromise bill—establishes a shorter sunset period of 4½ years instead of what had been proposed earlier, 6 years. In addition, this compromise bill—for the first time—requires FISA Court warrants for surveillance of Americans overseas.

I applaud both Senator ROCKEFELLER and Senator BOND, as well as my friend, Congressman STENY HOYER of Maryland, for their collective work in negotiating this compromise. They know, as I do, that this compromise is not ideal. It is not perfect. But, in my view, it is the best bill we can agree on at this time. It represents the best chance we have today to protect both our national security and our civil liberties.

For all these reasons, I am supporting this legislation. I hope my colleagues—Democratic and Republican—will join me in supporting the efforts of those who have crafted it.

Mr. President, if I could, I wish to end today with a pledge: Should this bill pass and be signed into law—and I hope it will—I will work with my colleagues in the next Congress and with the next President and his administration to make additional improvements that our country and our citizens may need and deserve.

I yield the floor.

The PRESIDING OFFICER. The Senator from Mississippi.

Mr. COCHRAN. Mr. President, I think under the order there is time for me to speak at this point.

The PRESIDING OFFICER. The Senator has 10 minutes remaining.

MEDICARE

Mr. COCHRAN. Mr. President, I think the Senate should support an 18-month extension of current Medicare law with the inclusion of a 1.1-percent increase in physician reimbursements. We should also make an effort to identify long-term improvements that will strengthen a system that is badly in need of repair.

New legislation is important and urgent because of the expiration on June 30, 2008, of the Medicare, Medicaid, and SCHIP Extension Act. This extension, which was signed on December 29, 2007, delayed cuts to payments under the physician fee schedule from taking effect until July 1, 2008.

Unfortunately, despite the knowledge that bipartisan negotiations were ongoing and could have achieved passage in time to prevent these cuts, the majority leadership chose to force a vote on H.R. 6331, a bill which the administration had promised to veto. My vote against the immediate passage of H.R. 6331 was a vote to protect the beneficiaries of Medicare and ensure their access to affordable and high-quality health care in the future. The fact is that providing health care to the constituents we represent must remain one of our top priorities. It is a priority that should transcend party politics.

In its current form, H.R. 6331 includes over $17 billion in new spending that comes at the expense of some of Medicare's more vulnerable participants, and it restricts seniors' private coverage through cuts to Medicare Advantage plans. Medicare Advantage is an important and widely used program that offers seniors quality health care at a low cost. This bill would result in a $13.6 billion cut from Medicare Advantage over the next 5 years and a $50 billion cut within 10 years. Specifically, over 2 million seniors would lose access to their private fee-for-service plans, reducing benefits to a one-size-fits-all plan and reversing what the program was intended to do in the first place.

This issue is particularly relevant in my State. Seventy-nine percent of the people in my State who are enrolled in Medicare Advantage plans are also enrolled in private fee-for-service plans. I cannot in good conscience vote for a bill that would put their access to health care in jeopardy.

The Senate should work to develop a bill that will accurately reflect the cost of providing quality care. If we don't, we risk a disruption in physician services to those who need care the most and we risk increasing the cost of health care. We must mitigate the negative impact of expiring provisions on providers and benefits.

The first step is to extend the current Medicare law until a compromise can be reached. We all understand that temporary fixes can only carry us so far. We need a long-term solution that fixes the sustainable growth rate to control costs, a long-term solution that recognizes the importance of increasing Medicare reimbursements, and a long-term solution based on bipartisan compromise. Anything less is not sustainable.

UNANIMOUS CONSENT REQUEST—S. 3118

Mr. COCHRAN. Mr. President, I ask unanimous consent that the Senate proceed to the immediate consideration of Calendar No. 776, S. 3118, a bill to preserve Medicare beneficiary access to care. I further ask unanimous consent that the bill be read a third time and passed and the motion to reconsider be laid upon the table.

The PRESIDING OFFICER. Is there objection?

Ms. STABENOW. Reserving the right to object.

The PRESIDING OFFICER. The Senator from Michigan is recognized.

Ms. STABENOW. Mr. President, reserving the right to object, I would first indicate to my friend, the Senator from Mississippi, that, in fact, we have a bill in front of us that had 355 votes—a huge bipartisan majority—that addresses strengthening Medicare for our seniors. We are only 1 vote—1 Republican vote—shy of passing it here in the Senate.

My colleague also raises the concern about cutting Medicare Advantage. There are no Medicare Advantage cuts in the rates in this bill at all. There is a small change that doesn't even start until 2011.

So as a result of the fact that we have in front of us a bill to immediately address the concerns about access that my colleague has raised, I would object to his unanimous consent request.

The PRESIDING OFFICER. Objection is heard.

The Senator from Mississippi is recognized.

Mr. WICKER. Mr. President, I am disappointed that the Senator from Michigan has objected to the unanimous consent request. I certainly hope, though, that we can have a conversation about this issue and move eventually to the consideration of S. 3118 as Senator COCHRAN suggested.

The American Medical Association has requested an 18-month fix—an 18-month extension—to give the medical community and Congress time to enact a permanent fix to the sustainable growth rate formula. This legislation—the Grassley bill—would provide for this 18-month extension. It would also provide an 18-month extension with a one-half percent increase in 2008 and a 1.1-percent increase in 2009 in physician reimbursement. This, I might add, is identical to the provision in the Stabenow bill, S. 2785, the Save Medicare Act, which was, in fact, a bipartisan bill and a bill I was happy to cosponsor.

The bill Senator COCHRAN just asked for unanimous consent to consider also increases Medicare payments for ground ambulance services, it extends the authorization for the Medicare

Rural Hospital Flexibility Program grants, and it provides important provisions for community hospitals and for rural home health care.

The bill does make certain noncontroversial changes to the Medicare Advantage Program. It also extends critical programs involving Medicare, and it eliminates the double IME windfall to Medicare Advantage Programs. But it doesn't contain the controversial provider offsets that the legislation which was offered by the majority leader would have done and which the President promised to veto.

The legislation Senator COCHRAN just asked unanimous consent to consider could be passed tonight, sent to the President for his signature tomorrow, and the Members of the majority party in this Congress could claim a victory, and a bipartisan victory at that.

I believe it is important for people to understand the history of this legislation.

The Senate and House have been legislating to prevent these provider cuts from going into effect since the year 2002. For the past 6 years, as a Member of the House of Representatives, I have voted numerous times to prevent these physician cuts from going into effect, and each time, these cuts have been prevented. That has been done on a nonpartisan, bipartisan basis without political wrangling.

Indeed, this year, just a few days ago, before the Fourth of July recess, Chairman BAUCUS and Ranking Member GRASSLEY were on the verge of presenting a bipartisan package which would have prevented these cuts from going into effect and prevented this entire controversy. They were moments away before the rug was pulled out from under them by the leadership in this body.

Why is it different this year? Why have we been able to do this on a nonpartisan basis, prevent these cuts from going into effect to the providers, to the physicians, and the harm that would ensue to the Medicare recipients in the past? Why is it different this year? It is clear to me that members of the Democratic leadership in this body and in the other body have decided to turn this so-called ''doc fix'' into a political issue.

I was struck by the exchange between the minority and the majority leader on the night of June 26 when Senator MCCONNELL requested of the majority leader, after the cloture had not been invoked, that we have a simple 30-day extension in order to continue to work on this issue. In objecting to that unanimous consent request for a simple 30-day extension so we could continue to work on this, it became obvious to me what a political issue this is becoming. The majority leader, in objecting, mentioned elections this year for three House seats in which the Democrats won. He went on to say that this time next year, there would be 59 Democrats in the Senate at least. He mentioned the President's approval rating—and this is all in the CONGRESSIONAL RECORD, page S6233 of the CONGRESSIONAL RECORD, if Members would like to follow along—he mentioned the President's approval rating. He mentioned numbers of people in the Senate who are up for reelection this year, and he even mentioned polling before suggesting that his Republican friends did not truly want to prevent these cuts from taking effect.

There is not a single Member of the Senate who wants these cuts to take effect. There is not a single Member of the House of Representatives who wants these cuts to take effect. But the majority leader said that night: The only way out of this is to accept this legislation; it is this legislation or nothing, in effect. I will say this much for the distinguished Democratic leader of the Senate: He was open and frank about what is really at issue here. This is very much about this year's elections and less about preventing the cuts to doctors.

Now, what are we wrangling about here? We are wrangling about the offsets to prevent the cuts from going into effect, particularly what it would have done to Medicare Advantage, a program that some 22,000 Mississippians depend upon and a program I would like to protect for them.

Now, we have a disagreement. The Senator from Michigan sees this differently than I do. There are people who would tell you that the bill offered to us that night would have gutted the Medicare Advantage Program. Medicare Advantage offers seniors a choice between regular Medicare and traditional insurance in the form of Medicare Advantage. These insurers offer the same services as traditional Medicare, but in addition, they offer options Medicare does not. In Mississippi, this means seniors may choose to have increased coverage of things such as diabetes management, increased cancer screening, or lower cost-sharing in the form of lower premiums and copays.

Admittedly, Medicare Advantage is not a perfect program. I believe there is a certain bipartisan consensus that we should take a look at the plan's enrollment and billing practices. Physicians back home in my State of Mississippi tell me this, and I want to work with them. The amount of payments to these plans is also an issue that needs to be looked at. But the Medicare bill that the majority leader would have forced upon us on that Thursday night of June 26, 2008, would have included provisions that did not enjoy bipartisan support. If that bill had passed, American seniors and Mississippi seniors would have lost their choices. They would have been told: Take it or leave it.

Fewer choices and less competition are not good for America's seniors and certainly not good for our health care system. If Medicare Advantage needs adjusting, we should consider standalone Medicare Advantage legislation.

The PRESIDING OFFICER. The junior Senator from Mississippi must know that his time has expired.

Mr. WICKER. I wonder if I may have an additional 2 minutes, Mr. President. I don't see anyone here at this moment. I wonder if I may have an additional 2 minutes to wrap up.

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

Mr. WICKER. I thank the Chair.

There is overwhelming support for fixing the sustainable growth rate. Doctors deserve better than to be involuntarily paired with a poison pill provision that cannot pass this Congress on its own merits. I repeat, there is not a single Member of this Senate who wants these cuts to go into effect.

The issue of Medicare Advantage is so important because of the competition. If we are ever going to solve the future of funding on the issue of Medicare as a whole, if we are going to have that goal that the AMA wants of 18 months to look at a permanent fix to this issue, if we are going to prevent the train wreck that looms a few short years from now on the funding of Medicare as a whole, then we are going to have to inject competition. But let's not use it as a political football. Let's not adopt offsets on which there have been no hearings. Let's not change basic Medicare policy in the form of a pay-for for a temporary fix.

What we are looking at is two vastly different approaches to health care reform: the traditional Medicare, one size fits all, take it or leave it, that would lead us to a Canadian-style, single-payer type plan for the entire United States of America, or injecting this little bit of competition to see if we can help control the cost of the Medicare Program. That is what we are making this stand about, and that is why I hope eventually we will adopt the unanimous consent request Senator COCHRAN has made and move to a bipartisan plan we can all support and prevent these doctor cuts from going into effect.

I yield the floor. I thank the Chair for indulging me on the time.

The PRESIDING OFFICER (Mr. MENENDEZ). The Senator from Michigan.

Ms. STABENOW. Mr. President, I ask unanimous consent that following the remarks of Senator CORNYN, who I understand will be speaking after myself, Senator LEVIN be recognized as under the previous order, and Senator CHAMBLISS be recognized to speak for up to 10 minutes.

The PRESIDING OFFICER. Without objection, it is so ordered. The Senator from Michigan is recognized.

Ms. STABENOW. Mr. President, it is important to understand what the choices in front of us are. Always we have a choice in terms of priorities, of how to proceed. As the person who has coauthored the bill in the last several sessions that would change completely the way we provide physician payments, I certainly support long-term

solutions, something called the SGR, sustainable growth rate. I believe the way it is set up, it is wrong, and we need to fundamentally change and stop this process of trying to make sure we don't see cuts happen in Medicare every single year. I certainly agree with that position.

What we have in front of us is a choice—a choice between a bill that has 355 votes in the House on a bipartisan basis—there are not a whole lot of times we see 355 people coming together on an issue such as this in the House, and 59 Members of the Senate. We had a majority. We had 59 votes. We have seen an effort to continue to filibuster the process from moving forward, and we are tomorrow going to see whether we will have one more additional Republican who stands with us, stands with the AARP, the American Medical Association, who stands with, most importantly, our seniors, who stands with the disability community, who stands with those who are concerned about access to Medicare in this country. We only need one vote. That is where we are right now.

I find it interesting, when we look at the motion that was made before about the bill my Republican colleagues wish to bring to the floor, in that bill, we see cuts in oxygen services, in speciality wheelchairs, large cuts in graduate medical education in order to pay for the bill. That is one choice. Or we have the choice in front of us that passed with 355 votes in the House and has 59 votes right now in the Senate which would take some smaller cuts out of graduate medical education and would do something very small and in the future to Medicare Advantage.

What is Medicare Advantage? In my mind, Medicare Advantage is part of the effort to privatize Medicare. We all remember former Speaker Newt Gingrich saying we cannot directly stop Medicare, so we are going to make sure it withers on the vine. Part of that withering has been to divert more and more dollars away from physicians and away from community care into private for-profit companies, private fee-for-service companies.

The argument was in the beginning that competition from the private sector, more choice will bring down costs and that they would be able to take 97 percent of the normal Medicare rate because it would cost less to bring down prices because of competition.

What has happened? What have we heard from the Congressional Budget Office? What have we heard from those who only analyze this issue? In fact, the exact opposite is happening. More and more rate increases have occurred. We now have a group that was getting 97 percent of the full rates, supposedly lowering costs, now on average getting 113 percent, and the Congressional Budget Office told us if we cap the rate to these private businesses at 150 percent of regular Medicare, we would still save money.

Because of the strong feeling of the Republicans and the President indicating he wants to protect them at all costs, in this particular bill we are not addressing the rates. There is no inability for people to get a choice through private care. There is none of that. There is no rate reduction, even though, in my mind, we ought to be doing that.

All that is done in this bill is a process that does not even take effect until 2011—not next year, not the year after, but the year after that—which is a process called deeming. I will not go into all of it now except to say it addresses how the private companies interact with those that are not part of their group or part of their network. That is all this addresses in Medicare Advantage. One would think the sky is falling based on what we have heard.

The reality is, AARP—a pretty good barometer of what seniors are thinking in this country—and a wide variety of organizations have come together very strongly in support of the bill in front of us that only needs one vote. Why? Because that is the bill that will strengthen Medicare for the future.

We need to act now. We are past time to act on this issue because, in fact, there are consequences already, even though the physician cut has not taken effect.

I received a letter this week and I wish to read it. I received a letter recently from a constituent named Kay about her father. Her father needs his physical therapy as part of his treatment for Parkinson's. I know what that is like. My grandmother died of Parkinson's. It is a very tough disease. He lives at home confined to a wheelchair most of the time due to Parkinson's. Despite rising gas prices, Kay and her sister drive her father three times a week—about 80 miles round trip—for his therapy. But last week, they were informed that Medicare would not pay for his therapy because the Medicare exemption process for physical therapy had expired.

We only need one more vote. If we had one more vote, Kay would not be worried about whether her father with Parkinson's can get the physical therapy he needs.

Kay wrote me:

> I will go down swinging to help my dad. Can you go back in and fight for us? We need these services extended. Please fight for us . . . go back onto the floor and reopen this.

And vote again.

Our leader, I am proud to say, understands all of the stories, not only of Kay but of all the seniors across the country who are so desperately worried about what is going to happen with Medicare. Our leader has come to the floor and said we are going to vote ''yes'' again. We are only one vote short, only one vote.

The practical reality is, in my home State alone, it affects 1.4 million seniors and people with disabilities and over 90,000 veterans who are TRICARE beneficiaries, people who have served in our military. Military health care, TRICARE, is tied to Medicare. So if the Medicare cuts take effect, our veterans also will be affected and there will be a cut.

This is serious. We are past time, at this point, to be debating this issue. We need to vote, we need to pass it, and we need to send it to the President.

There are so many positive provisions in this bill for the future. It addresses assets for low-income seniors; preventive services; rural services which are so important to so many parts of Michigan; also the effort to move ahead and modernize the system with e-prescribing, so we can actually read the physician's handwriting, so we can actually have an electronic system that speaks to the future; and also telehealth which in so many parts of our country—again, Michigan is a real example of focusing on telehealth and the way to expand services to rural communities; expanding mental health services. There are so many important pieces to this bill.

Fundamentally, the difference between what was suggested by my Republican friend from Mississippi and from what is in front of us is whether we are going to have any kind of accountability at all for this effort that has begun to privatize Medicare.

We know from the testimony we received from the Congressional Budget Office that for 85 percent of the seniors in traditional Medicare, they actually pay more in premiums because of the overpayments on Medicare Advantage. Again, that is not even in this bill. That is not even in this bill. We still need to address that point. There is a small change that does not take effect until 2011, but because of that, colleagues on the other side of the aisle are willing to let this whole bill go down and a dramatic cut in physicians' services take effect. They are willing to let us lose the help for rural America, the effort to modernize Medicare with electronic e-prescribing, with telehealth, to focus on seniors who need mental health services. They are willing to let the whole thing go down and, in fact, have proposed, as I said earlier, an alternative plan, that rather than touch the for-profit folks in the health care system right now that are, in my mind, too many times undermining what is happening in traditional Medicare—not always; there are some positive aspects, but too many times. Instead of that, they bring forward an alternative that focuses on oxygen services and specialty wheelchairs and other areas in which to receive their cuts.

Mr. President, I ask unanimous consent for 2 additional minutes, as my colleague from Mississippi did prior to me.

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

Ms. STABENOW. I thank the Chair.

I feel so strongly about this, Mr. President. We spent a lot of time and effort and a lot of goodwill. A lot of people have worked together on both sides of the aisle, with good decisions

and good ideas that have come together on how to strengthen Medicare through this bill. It is obviously something that has wide bipartisan support because, again, we are talking about a huge overwhelming vote in the House of Representatives—355 people. Now we have the opportunity in front of us tomorrow, with all of our physician community, health care providers, senior organizations, AARP, disability groups, those who serve the Parkinson's patients and other patients who are suffering from particular diseases, consumer groups all across America coming together and saying this makes sense.

We need to make sure Medicare is available for our seniors. These are Draconian cuts and we want to stop them and we are willing to do it in a very balanced way. I thank our chairman of the Finance Committee for his leadership on something that is reasonable and balanced. We know him to be a reasonable person who does things in a balanced way. This doesn't gut Medicare or Medicare Advantage. It doesn't even touch the rates. It doesn't touch the companies, other than to address one part of the way they deal with those who are out of State or out of service through the process called ''deeming,'' that doesn't take effect until 2011.

Frankly, if that is the only part people disagree with, these cuts are now. These physical therapy cuts started last week. I would urge my colleagues, step up and be the one vote. We have until 2011 to change that part of the bill they do not like. But the therapy cuts started last week, and the physician cuts are going to start in a couple of weeks. That is the sense of urgency we should feel if we are concerned about the seniors in this country—about Medicare beneficiaries. Now is the time. It is real simple. It is real simple.

Tomorrow afternoon we will have the opportunity to vote yes on something overwhelmingly supported by the people of this country, and I urge my colleagues to step up. We only need, Mr. President, one more vote.

The PRESIDING OFFICER. The Senator from Texas.

Mr. CORNYN. Mr. President, Medicare provides important health care benefits for our Nation's seniors. Since 1965, the Federal Government has promised that those over the age of 65 years, or those afflicted with certain disabilities, will have access to health care. Unfortunately, Congress has had a checkered history of keeping that promise.

The vote we had 2 weeks ago, to which the distinguished Senator from Michigan just alluded, and one we will apparently have tomorrow afternoon, should be an embarrassment to Congress but not for the reasons that she and others have suggested. We should be looking to solve the looming problems with Medicare permanently, not just with temporary patches or fixes. We need a permanent solution. We should keep our promise to seniors that they can rely on Medicare and provide fair compensation for the physicians to make sure our seniors will actually have access to that coverage.

I have repeatedly heard from seniors in Texas who depend on Medicare that they find it hard to even find a physician who will accept below-market Medicare reimbursement rates. Even if we pass an 18-month extension now, I am not optimistic Congress will seriously consider permanent reform before the next round of scheduled cuts. And I shudder to think whether we can prevent the 20-percent cut that will occur 18 months from now.

This, of course, should not be about partisan politics, which it has become, because this is about people's lives. The Medicare Program, simply put, is in a nosedive headed for bankruptcy. As this chart demonstrates, without a long-term solution, the future is bleak indeed for Medicare providers.

This chart depicts how the practice costs of physicians continue to go up year after year. Yet because of a law Congress passed in 1997, Medicare reimbursement rates continue to be projecting downward. You can see the gap here. No wonder many physicians are no longer able to accept Medicare patients.

In Texas recently, a survey of physicians indicated that only 58.1 percent of physicians currently accept new Medicare patients because reimbursement rates are so low that they are below market and physicians cannot afford to accept those patients and those low Medicare reimbursement rates.

Congress needs to step up with a permanent solution, not the kind of shameful temporary patches and fixes that require physicians and other health care providers to come hat in hand to Congress every 6 months or 12 months or 18 months and that leave Medicare beneficiaries in doubt—our seniors—about whether, in fact, Congress will do its duty.

No one gets to conduct their business this way, other than the Congress. If you were in the private sector, a small or large business, you would be out of business or behind bars if you tried to operate your business the same way Congress has dealt with Medicare reimbursement rates.

The Medicare trustees expect future costs to increase at a faster pace than both workers' earnings and the economy overall. As a matter of fact, the Medicare Hospital Insurance Fund will be exhausted by 2019, and Part B premiums will have to increase rapidly to match expected expenditure growth. The Medicare trustees have warned Congress more than once to act, cautioning that the sooner the solutions are enacted, the more flexible and gradual they can be.

Mr. President, Medicare is a ticking time bomb. Today, Congress should be all about debating and preserving Medicare. Instead, we have been presented a bill that turns a blind eye to this smoldering powder keg of long-term Medicare problems and the terribly flawed physician payment system. Rather than real reform, the majority party—the Democratically controlled Senate—has presented us with a bill that prolongs damaging and rigid price controls, sets up increased premiums and increased taxes, abandons some private sector options, and keeps Medicare on the path toward more health care rationing.

Why would anyone be proud of this? The distinguished Senator from Michigan was saying that all they needed is one more vote to pass this partisan bill. Why would anyone be proud of this temporary fix, these price controls, along with submarket reimbursement rates, so that while we make the promise of Medicare coverage, the actuality of access is diminishing with each day?

This partisan bill bypassed not only the minority in the Senate, it bypassed the Senate Finance Committee as well. Now we are told by the majority leader that he will refuse the opportunity to offer any amendments when the bill comes to the floor. The Democratic-controlled majority has not held one hearing or introduced one piece of legislation in the last 6 months that begins to address the long-term problems.

Mr. President, I intend to offer a bill that will begin the process of reform and permanently eliminate the periodic cuts that are almost never allowed to go into effect. I think seniors and physicians and the American people deserve explanations and answers, and ultimately solutions, rather than more posturing and just kicking the can down the road.

It is worth taking a few minutes to recall how we got here in the first place.

In 1997, Congress was struggling with rising costs under Medicare and passed the Balanced Budget Act, which established something called the sustainable growth rate, or a formula which was intended to serve as a restraint on Medicare spending. Thus, the Federal Government instituted arbitrary price controls in an effort to reduce Medicare spending. What was the result? Well, the SGR—the sustainable growth rate—formula and arbitrary price controls have reduced access to quality care for beneficiaries.

While the first 2 years after implementation the SGR resulted in positive updates for physician payments, decreases in payments have been required every year since 2002. But what has been the experience of Congress? This chart indicates that except for the first year, in 2002, Congress has acted to reverse the cuts that have come with a temporary patch, and temporary fix after temporary fix. In fact, I think one could be forgiven for wondering whether Congress ever intended these cuts to take effect in the first place.

Thank goodness we haven't because continuing to cut into the muscle and

then into the bone of the Medicare system means that the promise of Medicare coverage is a hollow one indeed for patients, for seniors, who are increasingly having a very difficult time finding physicians who can accept Medicare rates because they are so low.

As you can see from this chart, not only has Congress, except for 2002, not allowed these cuts to go into effect based on temporary patches, it has actually provided a very modest update in most years, except for 2007, when it just got back to zero. But the fact is, Congress never really intended or was never prepared to allow these cuts to go into effect. Most of the time, if you look for how Congress has attempted to ''pay for'' or find revenue to offset this reversal of these cuts, all it amounts to is budgetary gimmicks and games.

As the American Medical Association has noted, ''every temporary intervention has increased the cost of a permanent solution.'' Thus, seniors and physicians find themselves coming back to Congress every 6 months or every 18 months hat in hand seeking to prevent these cuts with the kind of histrionics that we see on the Senate floor today and that we saw by the majority leader just 2 weeks ago after the failed cloture vote—not a serious discussion of public policy but, rather, a political action designed to gain partisan advantage.

At this point, to repeal the SGR formula created by Congress will cost an estimated $250 billion or more. That is a big number, and a major reason Congress has been unable to pass, or more likely unwilling to even debate, a long-term solution. While many of my colleagues have spoken at great length about their grandiose plans to reform the entirety of America's health care system, they seem to whistle past the Medicare graveyard.

We can and we must do better. What good is Medicare if there is no access to coverage? Even with reversing the Draconian cuts in reimbursement, as I said, many doctors refuse to even see patients with Medicare because the payments are so low. Yet Congress is seen patting itself on the back saying: Didn't we do a good job? Only to have more and more seniors unable to find doctors willing to accept Medicare payments.

Physician reimbursement cuts have been looming over the heads of seniors and physicians for years. Yet Congress repeatedly puts off until tomorrow what desperately needs to be done today.

What does the bill before use to pay for reversing these cuts for 18 months? Well, it undermines the one private sector alternative to traditional Medicare—Medicare Advantage—currently subscribed to by about 450,000 Texas seniors, leading to less choices, fewer services, and, yes, more government control.

We have a choice. Do we pass the hot potato once again, praying that we are not the ones who get burned, or do we stand up, do the responsible thing, and actually take decisive action by reforming the broken SGR formula for Medicare reimbursement?

While some in Congress seem determined to have the Government control all health care decisions, competition in the private sector holds real promise for the future of health care, and we do not have to look very far to find the proof. All we have to do is look at Medicare Part D, the prescription drug program that we passed a few short years ago.

The Congressional Budget Office recently released a report showing how effective Part D has been in lowering drug prices for seniors. This year, Part D expenses will be almost half that of the original projections 2 years ago. Competition by private companies that provide benefits for seniors under Medicare Part D has actually created about $40 billion in savings this year. What's more, Part D will be returning roughly $4 billion this year in unused funds due to cheaper than expected drug purchases.

Still, with the resounding success of Medicare Part D and the competition we should look to as a model, not one to be discarded or gutted or cannibalized in an effort to pay for this temporary patch, many of my colleagues want to give up on the private sector alternatives to traditional Medicare. Competition created by programs such as Medicare Advantage has the potential to save more money in the long run and to provide more choices and better quality services to Medicare beneficiaries.

I would be the first one to say that Medicare Advantage is far from perfect. As a matter of fact, I have heard from many of my constituent physicians who have complaints about the way Medicare Advantage is run. But it would be a terrible mistake to gut it. We ought to fix it, not gut it.

Rather than abandoning the principles of the benefits of competition in health care, we should work to make it better. With the results of Medicare Part D as an example, we should work to increase the role of nongovernment entities in lowering costs and increasing access and affordability of health care.

These are only a few of the reasons why, over 3 months ago, in anticipation of the looming physician payment cuts set for July 1, I introduced legislation that solves this problem permanently. This legislation I called Ensuring the Future Physician Workforce Act of 2008. It provides positive reimbursement updates for providers, it eliminates the ineffectual expenditure cap, and increases incentives for physician data reporting. At the same time, this bill facilitates adoption of health information technology by addressing costs and legislative barriers; it educates and empowers physicians and beneficiaries of Medicare spending and benefits usage, and studies ways to realign the way that Medicare pays for health care.

My bill does not mandate whether physician payments should be based on utilization, performance, care coordination or any other methodology, but it does start to lay down a new path toward reform, innovation, and restoration of the eroded physician-patient relationship. It does say the providers and beneficiaries should not be the ones to be punished by Congress's failure to act. We have to decide now.

Mr. President, I ask unanimous consent for 3 additional minutes to speak.

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

Mr. CORNYN. Mr. President, we have to decide now whether Medicare is worth protecting or whether political gamesmanship and partisan politics are going to take over. While it is costly to fix Medicare and the SGR, stalling will be far more expensive. So while some of my colleagues on the other side of the aisle may be content with another shortsighted, short-term fix, I suggest we debate and pass a bipartisan solution that will keep the promise of Medicare for seniors but also make sure there will be access to that coverage by providing fair compensation for physicians. Why should we, and why should they, settle for less?

I yield the remainder of my time.

The PRESIDING OFFICER. The Senator from Michigan.

Mr. LEVIN. Mr. President, title II of the bill before us, which amends the Foreign Surveillance Intelligence Act, would authorize retroactive immunity for telecommunications companies that collected intelligence information inside the United States in defiance of the clear requirements of the Foreign Surveillance Intelligence Act as it was then on the books.

The argument has been made that we must provide such immunity because these telecommunications companies responded to requests from the Government in a time of great uncertainty, after the events of September 11, 2001. I have some sympathy for their situation, but I also have sympathy for innocent Americans who may have had their privacy rights violated as a result of illegal actions taken by telecommunications companies at the behest of an administration that has all too frequently tried to place itself above the law.

The bill before us makes no effort to reconcile these competing interests. Instead, it requires the dismissal of all civil suits against telecommunications companies that may have illegally disclosed confidential communications of their customers at the behest of U.S. Government officials. Dismissal would also be required even if the disclosure violated the constitutional rights of innocent U.S. citizens whose confidential communications were illegally disclosed.

The so-called judicial review authorized in this bill is totally unsatisfactory. Under title II of the bill, the FISA Court would be permitted to review these cases only to determine

whether the Attorney General or the head of an element of the intelligence community told telecommunications companies that the Government request had been authorized by the President and ''determined to be lawful,''—presumably determined by anybody—even if nobody could reasonably have believed that the request actually was lawful. A judicial review that is limited to determining whether the administration claimed that its actions were legal is a sham review that provides no justice at all. Of course the administration claimed its actions were legal. Indeed, the Intelligence Committee report on this bill specifically states that the administration's letters requesting assistance from telecommunications companies made the claims that they were legal.

I do not believe this congressional grant of retroactive immunity is fair. I do not believe it is wise. And I do not believe it is necessary.

Retroactive immunity is not fair because it leaves innocent American citizens who may have been harmed by the unlawful or unconstitutional conduct of telecommunications companies at the behest of the administration without any legal remedy. It is hard to understand how the Attorney General can claim, as he does in a letter dated July 7, 2008, that this is a ''fair and just result.''

Those who have been harmed are not likely to have any recourse against the Government officials who asked telecommunications companies to disclose the private information of their customers because the Government officials enjoy qualified immunity for actions taken in their official capacity. These officials do not even have the burden of demonstrating that their actions were legal and constitutional to be immune from suit.

Nor is retroactive immunity wise, because it sets a dangerous precedent of retroactively eliminating rights of U.S. citizens and precludes any judicial review of their claim. If we act here to immunize private parties who cooperated with executive branch officials in a program that appears to have been illegal on its face, our laws and their prohibitions will be less of a deterrent to illegal activities in the future. This would be a terrible precedent if a future administration is as inclined as the current one to place itself above the law.

Finally, retroactive immunity is not necessary for the intelligence community to collect intelligence against terrorists using newly available technology. They have the right to use newly available technology—''they'' being the intelligence community—under title I of this bill. Title I provides that the Attorney General and the Director of National Intelligence direct telecommunications companies to assist in collection programs, and these directives are enforceable by court order as has been the case since the Protect America Act was adopted last August.

We are collecting needed intelligence information today pursuant to that act, without any retroactive immunity for telecommunications companies, and there is no reason why we cannot continue to do so in the future under title I of the bill without the retroactive immunity provided in title II.

The administration argues that if we do not provide retroactive immunity to telecommunications providers, ''companies in the future may be less willing to assist the Government.''

But let's be clear what we are talking about here. Telecommunications companies have prospective immunity if they assist the Government in a manner that is authorized by this bill. Moreover, they can be compelled to do so under the bill, as has also been the case since the enactment of the Protect America Act. What companies might be less willing to do is to assist the Government in intelligence gathering efforts that are illegal. And what is wrong with that? Do we want to encourage companies to assist a future administration in unlawful intelligence-gathering efforts?

Nor is retroactive immunity necessary to protect telecommunications companies that acted in good-faith reliance on representations from administration officials. There are other ways in which we can recognize their equity without insulating misconduct from judicial review and without denying any relief to innocent U.S. citizens who may have been harmed.

For example, we can safeguard these interests by substituting the United States as the defendant in cases against telecommunications companies, or by requiring that the United States indemnify telecommunications companies for any damages in such cases. In either case, we could cap damages to make sure that the taxpayers are not required to pay an unreasonable burden as a result of unlawful decisions by the administration. We could also provide a measure of protection to American citizens whose rights have been violated by limiting the immunity provided to those cases where the telecommunications companies demonstrate that they had a reasonable basis for a good-faith belief that the assistance they were providing was lawful, a requirement that is notably absent from the bill before us.

The Bingaman amendment is a very modest proposal which does not decide the retroactive immunity question or remove the retroactive immunity provision from the bill. It leaves the retroactive immunity provision in the bill but postpones the effective date of that immunity until 90 days after Congress receives the comprehensive inspector general report required by the bill.

This amendment, the Bingaman amendment, does not have any effect at all on title I of the bill, which allows the intelligence community to collect information using newly available technology. The Bingaman amendment allows title I to go into law without change and without delay. The inspector general report may give us important information that helps us understand the extent to which the administration's actions were illegal or unconstitutional, and the extent to which innocent U.S. citizens may have been damaged by these actions. The delayed effective date in the Bingaman amendment would give us the opportunity to consider this information, not just assurances of administration officials, before retroactive immunity goes into effect and cases are dismissed. That information required to be provided to us by the inspector general is surely relevant to this issue.

If we adopt the Bingaman amendment, we will have highly relevant information about the extent to which illegal or unconstitutional actions were taken against innocent American citizens and the extent to which those citizens were harmed by those actions. The Bingaman amendment gives us the opportunity to take this additional information into account before retroactive immunity takes effect, while at the same time preventing any harm to telecommunications companies by staying any litigation against them until the information becomes available.

We can pass this bill and we can ensure that the intelligence community continues to have the authority to collect information on suspected terrorists without surrendering the rights of Americans whose privacy may have been violated.

I support the Bingaman amendment as a way to introduce a bit of balance into the process of protecting the privacy of innocent Americans while recognizing some equity in the position of the telecommunications companies.

I yield the floor and yield back my time.

The PRESIDING OFFICER. The Senator from Georgia is recognized.

Mr. CHAMBLISS. Mr. President, I rise today to discuss H.R. 6304, the FISA Amendments Act. I am disappointed that after so many months of negotiations, after the Senate passed similar legislation in February, and after the House passed this bill by 293–129, the Senate is stalling enactment of necessary changes to FISA by debating amendments which would gut this bill of a valuable provision liability relief for our telecommunications carriers.

The three amendments we debate today would singularly undermine months of hard work by the Senate Intelligence Committee and the House to reach an agreement on this bill. In particular, Senators DODD and FEINGOLD have offered an amendment striking title II of the bill which provides liability relief to those telecommunication carriers who currently face lawsuits for their alleged assistance to the Government after September 11. Senator SPECTER has offered an amendment that would require the courts to determine the constitutional merits of the

President's terrorist surveillance program, TSP in cases against private parties. And, Senator BINGAMAN has offered an amendment which would needlessly delay liability relief for a review of the President's TSP to be completed, which Members of this body have already done. I do not support any of these amendments.

Over 40 lawsuits have been filed against our communications providers alleging statutory and constitutional violations, seeking billions of dollars in damages. These suits are not intended to bring justice to any individual; rather, they are a fishing expedition. The lawyers who brought these cases hope to use our court system to discover some claim or discover some standing for their clients; yet none of the plaintiffs in any of these lawsuits have any evidence to illustrate that they were subjects of the President's TSP or that they suffered any harm. As a result, I wonder how a court could uphold that any of these individuals even have a claim to raise. The President has stated repeatedly that in the wake of 9/11, the TSP intercepted communications of suspected terrorists, including those communicating with individuals inside the U.S. or whose communications pass through the U.S. To date, this program has been reviewed by numerous Inspectors General, the Department of Justice, our intelligence community and Congress. Do we need to add the courts to the list? The Foreign Intelligence Surveillance Court is already on that list.

As a member of the Select Committee on Intelligence, I had access to the classified documents, intelligence, and legal memorandum, and heard testimony, related to the President's TSP program. After careful review, as stated in the committee report accompanying the Senate's FISA legislation, the committee determined ''that electronic communication service providers acted on a good faith belief that the President's program, and their assistance, was lawful.'' The committee reviewed correspondence sent to the electronic communication service providers stating that the activities requested were authorized by the President and determined by the Attorney General to be lawful. The committee concluded that granting civil liability relief to the telecommunications providers was not only warranted, but required to maintain the regular assistance our intelligence and law enforcement professionals seek from them and others in the private sector. It was clear in discussions within the committee that most of us were concerned about the harm the Government could face if it cannot rely on the private sector. Without this provision, the harm faced by the Government will become a reality.

I cannot understate the importance of this assistance, not only for intelligence purposes but for law enforcement too. The Director of National Intelligence and the Attorney General stated, ''Extending liability protection to such companies is imperative; failure to do so could limit future cooperation by such companies and put critical intelligence operations at risk. Moreover, litigation against companies believed to have assisted the Government risks the disclosure of highly classified information regarding extremely sensitive intelligence sources and methods.'' There is too much at stake for us to deny those who assist the Government the liability relief they need, and deserve, or to delay its implementation.

Senator SPECTER'S amendment asks the courts to review and determine the constitutionality of the President's TSP before dismissing any lawsuit against the telecommunication carriers. This amendment not only severely undermines the findings of this body, but also calls into question the activities of the other political branch in our Government, the executive. The courts would be granted access to highly sensitive, executive branch intelligence activities, which they are not experienced in, and be required to make a legal determination on the constitutional authorities of the President. The courts usually avoid these types of decisions, and rightfully so. Moreover, the courts should not issue mere advisory opinions, yet this amendment requires the court to determine the constitutionality of a Presidential program when the government is not a party to these actions. Even with the passage of this bill the government or a Government official can still be sued for a TSP violation. If a plaintiff brought an action against the Government, the courts could then determine the constitutionality of the program; however, Congress should not hold America's private companies hostage until the courts review what Congress and others already have found. Further, regardless of the Government's program, our companies should not be held liable for assistance that they were assured was lawful. Let the Government carry the burden for its own actions.

Similarly, Senator BINGAMAN'S amendment would stay all of the lawsuits brought against the communications carriers until the inspectors general conducted a review of the TSP. Various inspectors general have reviewed already the President's program. The review called for by the FISA Amendments Act is nothing new. I see no reason to delay liability relief like this. The scope of the IGs' review included by this legislation is not intended to be a legal determination of the TSP. Instead, the FISA Amendments Act calls for the IGs to review each respective agency's access to the legal reviews of the program and grants the IGs access to communications with the private sector related to the program. Any review conducted pursuant to this legislation will have no impact on the lawsuits brought against private corporations. The only thing this amendment does is hold the cases up in court for over a year while the reviews are completed. This is purely political and Congress should not play games with our national security, or even when U.S. companies and their customers' money are involved.

Finally, Senators DODD and FEINGOLD offer the same amendment that they did in February, to completely strike Title II of the bill which provides this liability relief. This same amendment failed to pass the Senate in February by 31–67. As I have stated, I support Title II, and believe the Senate has already shown its lack of support for this amendment.

Mr. President, I oppose all three amendments offered to the FISA Amendments Act and urge my colleagues to do the same. It is time for the Senate to stop delaying enactment of a FISA bill and to reject these amendments which would gut the bill of much needed relief for our telecommunications providers.

The PRESIDING OFFICER. The majority leader.

Mr. REID. Mr. President, I will use leader time for my presentation.

The PRESIDING OFFICER. The leader is recognized.

Mr. REID. Mr. President, the Senate will soon vote on the FISA bill, which represents a final result of negotiations among the White House and Democrats and Republicans in Congress.

I opposed the version originally passed by the Senate. Although improvements have been made in the version now before this body, the legislation continues to contain provisions that will lead to immunity to the telecommunications companies that cooperated with the Bush administration's warrantless wiretapping program. For that reason, I have no choice but to vote no.

Having said that, I am pleased that President Bush and the congressional Republicans finally agreed to negotiate a better bill. For months, the President insisted it was his way or the highway. The White House refused to come to the negotiating table, repeatedly demanding that the House simply pass the Senate's bill. I commend our Democratic colleagues in the House for standing up to insist on more protections for the privacy of innocent Americans.

This debate has shown once again that protecting the American people is not a Democratic or Republican issue. Democrats want to provide our intelligence professionals all the tools they need to fight terrorism. We must also protect the privacy of law-abiding Americans and protect against abuses of our Constitution.

We all know that in the darkest corners of the Earth lie evil people who seek to harm our country and our people. We all agree on the need to monitor the communications of terrorists in order to protect the American people. But despite what the President insists, America is strengthened by our

reverence for our law and our Constitution.

I am grateful for the efforts of congressional leaders who have worked tirelessly, and at times it may have seemed endlessly, to craft this compromise bill. Senators FEINGOLD and DODD deserve special recognition for reminding us that our Constitution must always come first. I have to compliment Senator ROCKEFELLER—a very difficult assignment he has, being the chairman of this most important committee, but he does it with great dignity.

This version of this legislation is better than the bill the Senate passed in February and better than the flawed Protect America Act signed by the President last summer.

This legislation now includes Senator FEINSTEIN's amendment to reaffirm FISA as the exclusive means by which the executive branch may collect surveillance. This provision is Congress's direct response to the strained argument of President Bush's lawyers that Congress meant to repeal the very clear and specific requirements of FISA when Congress passed the authorization for the use of military force in Afghanistan. Congress flatly rejects that argument as having no basis in fact or in law.

This bill includes Senator LEAHY's important amendment requiring a comprehensive IG review of the President's program as well as greater judicial supervision.

This bill requires the U.S. Attorney General to develop guidelines to ensure compliance with the fourth amendment and prevent reverse targeting; that is, targeting someone abroad when the real purpose is to acquire the communications of a person here in the United States.

This bill provides for increased congressional oversight, requiring extensive reporting to the Judiciary Committee and Intelligence Committees about the implementation of the new provisions and their impact on U.S. persons.

This bill rejects changes to the definition of electronic surveillance, a change sought by the administration that could have had unforeseen and far-reaching consequences for FISA's protections for the privacy of law-abiding Americans.

This bill ensures that the law expires in 4 years, requiring the next President and Congress to evaluate its effectiveness.

Let me in passing say that Senator LEAHY, the chairman of the Judiciary Committee, worked hard on this. As you know, there was a joint referral. Again, Senator LEAHY worked, as he does on all pieces of legislation, tirelessly and for the good of this country.

These changes I have mentioned add checks on the expansive executive powers contained in the original bill. But, as I said, despite these improvements, this legislation certainly needs more work. That is why I oppose it and why I am committed to working with the new President to improve it.

Congress should not wait until the 2012 expiration to improve this legislation. I will work to ensure that Congress revisits FISA well before 2012, informed by the oversight that will be conducted in the coming months by the Judiciary Committee and the Intelligence Committees and by the reports of the inspectors general. Next year, for example, Congress will be required to revisit a number of provisions of the PATRIOT Act. That may provide a suitable occasion to review the related issues in this FISA legislation.

While the bill before us does include some improvements to title I's intelligence collection procedures, I oppose totally title II. I think it is just way out of line.

Title II establishes a process where the likely outcome is immunity to the telecommunications carriers that participated in the President's illegal warrantless wiretapping program. That is what it was. The bill does not provide any protection for the Government officials who designed and authorized the program. That is good. It also, of course, does not preclude a challenge to the constitutionality of the legislation in Federal district court.

Nobody should read title II of this bill as a judgment on the legality of the President's warrantless wiretapping program because it is not. Nobody should expect that a grant of immunity is anything other than a one-time action. This was made clear in the Senate Intelligence Committee report that accompanied an earlier version of this legislation. Service providers should clearly understand that no grant of immunity will be forthcoming if they cooperate with future Government requests that do not comply with the procedures outlined in this legislation.

The current lawsuits against the telecom companies seek accountability.

These lawsuits could have been a vehicle to achieve a public accounting of the President's illegal warrantless wiretapping program. That is why it is important that the Democratic negotiators forced the President to submit his program to a comprehensive inspectors general review. That review should finally provide a full airing of this entire sorry episode. The bill requires the inspectors general of the relevant agencies to complete a comprehensive review of the President's surveillance program within a year. By the time that report is issued, President Bush will have left office. Although his term will have come to an end, the work of uncovering this administration's abuses of power is just beginning. Future Presidents, future Congresses, and the American people will learn from President Bush's abuses of power in a positive fashion.

The debate on this FISA legislation may be nearing an end, but the history books are yet to be written. Throughout this fight, a small number of lonely voices insisted that there is no contradiction between liberty and security. As new facts have become known, their numbers have swelled, and the voices have grown louder. I am confident that when it is all known, the condemnation of President Bush's blatant disregard for the Constitution will be deafening. I hope that because those voices refused to be silenced, the next President and all future Presidents will not waiver from a path that protects the American people without compromising our core American values based upon our Constitution.

The PRESIDING OFFICER. The Senator from Connecticut.

AMENDMENT NO. 5064

(Purpose: To strike title II)

Mr. DODD. Mr. President, before the Majority Leader leaves the floor, I thank him personally but also collectively for his leadership on this issue. This is an act of courage on his behalf, given the arguments made by the other side, and his leadership on this created the possibility for us to offer this amendment to strike title II. I share his thoughts. He expressed them very well. I wish to identify myself with them. This is not at all about questioning the need for security. We all understand that. This is a simple question. Should the telecom industry be granted immunity, without us being able to determine whether their actions are legal? It may come out that the courts determine they were legal. If so, we move forward. All we are asking is that the opportunity be given to determine the legality of their actions.

The majority leader has made it clear why it is important. This is about the Constitution and the rule of law. It seems to me a very simple request and, as such, I ask unanimous consent to lay the pending amendment aside and call up amendment No. 5064.

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

The clerk will report.

The assistant legislative clerk read as follows:

The Senator from Connecticut [Mr. DODD], for himself, Mr. FEINGOLD, Mr. LEAHY, Mr. REID, Mr. HARKIN, Mrs. BOXER, Mr. SANDERS, Mr. WYDEN, Mr. KENNEDY, and Mr. DURBIN, proposes an amendment numbered 5064.

Strike title II.

Mr. DODD. Mr. President, it is very simple. Strike that section of the bill that grants immunity to a number of telecommunications companies that, for a period of roughly 5 or 6 years, literally vacuumed up phone conversations, faxes, e-mails, photographs, on a wholesale basis, of virtually every American citizen. The only reason it has come to a halt is because there was a whistleblower who identified the program. Otherwise the program would be ongoing. Again, none of us argue, at least I don't argue at all, about the importance of having the ability to get the cooperation of an industry that could help us identify those who would do us harm. That is not the debate.

The debate is whether there is an appropriate means by which those warrants are sought before these telecom companies would begin to turn over the private conversations, e-mails, and communications of American citizens. That is what this debate is about. It is a simple debate on whether we keep this section of the bill or strike it out and allow the judicial branch, a coequal branch of Government, to determine whether the acts by the executive branch were constitutional and if they were they legal.

If this amendment is not adopted, it will be a vote by the legislative body that determines whether they were legal. We are not competent or the appropriate constitutionally delegated body to perform that function. That is why we have three coequal branches of Government. The executive branch made this decision. We in the legislative branch have an obligation to insist that the judicial branch determine the legality of the actions taken.

I wish to thank as well my colleague, Senator FEINGOLD of Wisconsin, my lead cosponsor, but also to mention, if I may, Senator LEAHY, who has been a stalwart on this effort and always a great crusader against those who would do harm to the rule of law. I also want to thank Senator REID, the Majority Leader, and Senators HARKIN, BOXER, SANDERS, WYDEN, KENNEDY, DURBIN, KERRY, and CLINTON for their support for this amendment. I also thank, if I may, JAY ROCKEFELLER, who chairs this committee. While I am highly critical of title II of the bill, I have great respect for him and the work he has tried to do in leading the Intelligence Committee on this difficult issue. While I still have major reservations about title I of this bill, the fact that title II still exists in this bill makes it impossible to be supportive of this legislation, if that is retained in the bill that we vote on tomorrow.

For many Americans, the issue may seem a very difficult one to follow. It may seem like another squabble over a corporate lawsuit. But in reality, it is so much more than that. This is about choosing between the rule of law and the rule of men. You heard our colleague, Senator LEVIN, and the Majority Leader eloquently describe the situation as it presently exists.

For more than 7 years, President Bush has demonstrated time and time again, unfortunately, that he neither respects the role of Congress nor does he apparently respect the rule of law on these matters. Today, we are considering legislation which will grant retroactive immunity to the telecommunications companies that are alleged to have handed over to this administration the personal information of virtually every American, every phone call, every e-mail, every fax, and every text message, and all without warrant.

Some may argue that, in fact, the companies received documentation from the administration stating that the President authorized the wiretapping program and that, therefore, it is automatically legal. These advocates will argue that the mere existence of documentation justifies retroactive immunity; that because a document was received, companies should be retroactively exonerated from any wrongdoing. But as the Intelligence Committee has already made clear, we already know that the companies received some form of documentation with some sort of legal determination.

But that logic is deeply flawed. Because the question is not whether the companies received a document from the White House. The question is, were those actions legal?

It is a rather straightforward and surprisingly uncomplicated question. Did the companies break the law? Why did the administration not go to the FISA Court as they were required to do under the Foreign Intelligence Surveillance Act?

Since 1978, that court has handled 18,748 warrants, and they have rejected 5 since 1978, in almost 30 years, according to a recent published report in the Washington Post. So the issue raised for me is, why didn't these companies go before that court to determine whether a warrant was justified? Why did they decide merely to rely on some letter or some documentation, none of which has ever been established as a legal justification for their actions?

Either the companies complied with the law as it was at the time or they didn't. Either the companies and the President acted outside the rule of law or they followed it. Either the underlying program was legal or it was not. If we pass retroactive immunity, not a single one of these questions will ever be answered—ever. Because of this so-called compromise, Federal judges' hands will be tied and the outcome of these cases will be predetermined. Retroactive immunity will be granted.

So this is about finding out what exactly happened between these companies and the administration. It is about holding this administration to account for violating the rule of law and our Constitution. It is about reminding this administration that where law ends, tyranny begins. Those aren't my words, where the law ends, tyranny begins. Those words were spoken by the former British Prime Minister, Margaret Thatcher.

It is time we say no more, no more trampling on our Constitution, no more excusing those who violate the rule of law. These are our principles. They have been around since the Magna Carta, even predating the Constitution. They are enduring. What they are not is temporary. And what we should not do at a time when our country is at risk is abandon them. That is what is at stake this evening and tomorrow when the vote occurs.

Allowing retroactive immunity to go forward is, by its very nature, an abandonment of those principles. Similar to generations of American leaders before us, we too are confronted with a choice. Does America stand for all that is right with our world or do we retreat in fear? Do we stand for justice that secures America or do we act out of vengeance that weakens us?

Whatever our political party, Republican or Democratic, we are all elected to ensure that this Nation adheres to the rule of law. That is our most fundamental obligation as Members of this great body, to uphold the rule of law—not as partisans but as patriots serving our Nation. The rule of law is not the province of any one political party or any particular Member of the Senate but is, rather, the province of every American who has been safer because of it.

President Bush is right about one thing. The debate is about security. But not in the way he imagines. He believes we have to give up certain rights in order to be safer. This false dichotomy, this false choice that to be more secure, you must give up rights is a fundamentally flawed idea. In fact, the opposite is true. To be more secure, you must defend your rights.

I believe the choice between moral authority and security is a false choice. I believe it is precisely when you stand up and protect your rights that you become stronger, not weaker. The damage done to our country on 9/11 was both tragic and stunning, but when you start diminishing the rights of your people, you compound that tragedy. You cannot protect America in the long run if you fail to protect the Constitution of the United States. It is that simple.

As Dwight Eisenhower, who served our country as both President and as the leader of our Allied forces in Europe during World War II, said:

> The clearest way to show what the rule of law means to us in everyday life is to recall what has happened when there is no rule of law.

That is why I believe history will judge this administration harshly for their disregard for our most cherished principles. If we do not change course and stand for our Constitution at this hour, for what is best for our country, for what we know is just and right, then history, I am confident, will most certainly decide that it was those of us in this body who bear equal responsibility for the President's decisions—for it was we who looked the other way, time and time again.

This is the moment. At long last, let us rise to it. Support the amendment I am offering on behalf of myself and the other Members I mentioned earlier. We must put a stop to this idea of retroactive immunity. It is time we stood for the rule of law. That is what is at stake. The FISA Courts were created specifically to strike the balance between a secure nation and a nation defending its rights. That is why the law has done so well for these past 30 years, amended many times, to keep pace with the changes of those who would do us great harm.

At this very hour, in the wake of 9/11, to say we no longer care about that, that we will decide by a simple majority vote to grant retroactive immunity to companies who decided that a letter alone was enough legal authority for them to do what they did is wrong.

I have pointed out before in lengthy debate, not every phone company participated in the President's warrantless wiretapping program. Not everyone did. There were those who stood up to the administration and said, without a warrant, without proper legal authority, we will not engage in the vacuuming up of the private information of American citizens. They should be recognized and celebrated for standing for the rule of law.

For those who decided they were going to go the other way, let the courts decide whether that letter, that so-called documentation, was the legal authority that allowed them to do what they did for more than 5 long years.

Tomorrow we will vote around 11 o'clock on this amendment. I commend Senator BINGAMAN and Senator SPECTER. They have offered amendments as well dealing with other parts of this legislation for which I commend them. But I hope my colleagues, both Democrats and Republicans, would think long and hard about this moment. Senator CARL LEVIN of Michigan said something very important toward the conclusion of his remarks: That this in itself becomes a precedent, that some future administration, fearing they would not get permission from a FISA Court to engage in an activity that violated the privacy of our fellow citizens will no doubt use the vote tomorrow, if, in fact, those who are for retroactive immunity prevail. They will cite that act by this body as a legal justification for some future administration circumventing the FISA Courts in order to do exactly what was done in this case. It becomes a legal precedent.

So there is a great deal at risk and at stake with this vote tomorrow. It is about the rule of law. It is not about whether you care about the security of our Nation. Every one of us cares deeply about that, and we want to do everything we can to thwart those who would do us great harm. This is about the simple issue of whether a court of law ought to determine whether these companies violated the Constitution. Did they or didn't they? If they did not, so be it. If they did, then those to whom they did harm ought to be compensated at what marginal or minimal level one would decide. But let the court decide this. Let's not decide it by a simple vote here and set the precedent that I think we would regret for years and years to come.

With that, Mr. President, I yield the floor.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

MOTORCOACH SAFETY

Mr. BROWN. Mr. President, today the National Transportation Safety Board presented its final report on the Atlanta motorcoach accident involving the Bluffton University baseball team last March.

The crash resulted in the deaths of five players on that team: Tyler Williams, Cody Holp, Scott Harmon, Zack Arend, and David Joseph Betts. The driver, Jerome Niemeyer, and his wife Jean were also killed in the crash. Many of the other passengers—33 in all—were treated for injuries.

For the families of those who lost loved ones and the families whose sons survived but now struggle with the aftermath, today has been highly anticipated.

Only hours after news of the accident hit home, these families pledged to improve safety measures on motorcoaches so that preventable—preventable—fatalities would not occur in the future.

For John Betts, who lost his son David in the crash, it was important to take the accident and make it into something positive in honor of his son and the other bright, talented young men who died that morning. Motorcoach safety became his crusade.

I spoke to Mr. and Mrs. Betts today and their son and daughter and talked to other parents of survivors and one who had died, and I think about their courage and their commitment and their passion to do this in the names of their sons, to fight for motorcoach safety so this tragedy does not befall other families. The Betts family sees upgrading the safety laws for motorcoaches as an opportunity to save the lives of future riders. Mr. Betts sees it also as a way to memorialize David and his teammates and, as he puts it, to make the world they lived in better than it was when they left it.

The Motorcoach Safety Enhancement Act, which I introduced last November along with Senator HUTCHISON from Texas, would address the shortfall in safety regulations for motorcoaches.

Today's final report echoes the recommendations the NTSB has been publishing for years and aligns itself with the safety improvements incorporated into our legislation. Specifically, the National Transportation Safety Board underscored major safety shortfalls that the Motorcoach Safety Enhancement Act addresses, such as development of a motorcoach occupant protection system, improved passenger safety standards, enhanced safety equipment and devices, and required onboard recorders with the capability to collect crash data.

Many of the injuries sustained in motorcoaches could be prevented by incorporating high-quality safety technologies that exist today but are not widely used, such as crush-proof roofing and glazed windows to prevent ejection. More basic safety features, such as readily accessible fire extinguishers and seatbelts—simple seatbelts—for all passengers, are still not required on motorcoaches. As a father of four, I find it particularly disturbing to know students are still riding in vehicles without even the option of buckling up. Seatbelts, window glazing, fire extinguishers—these are not new technologies. These are commonsense safety features that are widely used. Yet mandating them, as recommended by the NTSB, has been languishing for years.

The Motorcoach Safety Enhancement Act would instruct the Secretary of Transportation to enact these and other safety features and to establish a timeframe so these safety requirements do not spend any more time in limbo.

Sadly, the Bluffton University baseball team's fatal accident was not unique. We have witnessed story after story about motorcoach accidents. One happened in Texas, which precipitated Senator HUTCHISON's involvement in this effort. This bill takes the lessons learned from the tragic events of the Bluffton University baseball team's motorcoach accident and aims to correct them for future riders.

It is my hope that in the future parents will not have to endure the anguish and the grief that the Betts family members experienced and the family members of Tyler Williams and Cody Holp and Scott Harmon and Zack Arend and, as I said, the Betts family. I applaud the Betts family and the other Bluffton University parents for their courageous fight, for their persistence, and for their dedication to improving motorcoach safety in the midst of so much personal pain. Those families are truly remarkable.

I urge this body to swiftly pass the Motorcoach Enhanced Safety Act.

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

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

MORNING BUSINESS

Mr. REID. Mr. President, I ask unanimous consent that the Senate proceed to a period for the transaction of morning business, with Senators allowed to speak therein for up to 10 minutes each.

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