

want everyone to know that my appreciation, my affection, and my total admiration for JAY ROCKEFELLER is like no other Senator. He is a wonderful human being. I so appreciate his willingness to do this job. Not everyone runs and tries to get to be chairman of the Intelligence Committee, but he does it because he thinks it is the right thing to do for the country. We in the Democratic caucus think there is no one better to lead us in that behalf.

I will simply say that the relationships with Senator BOND and Senator ROCKEFELLER have been extremely pleasant, and that makes this most difficult job better for all of us.

RESERVATION OF LEADER TIME

The ACTING PRESIDENT pro tempore. Under the previous order, the leadership time is reserved.

FISA AMENDMENTS ACT OF 2008

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

The legislative clerk read as follows:

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

Pending:

Bingaman amendment No. 5066, 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.

Specter amendment No. 5059, 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.

Dodd amendment No. 5064, to strike title II.

The ACTING PRESIDENT pro tempore. Who yields time?

The Senator from Missouri is recognized.

Mr. BOND. Mr. President, I ask unanimous consent to speak on my time, followed immediately by Senator HATCH, who will speak for 10 minutes, and that my remaining time be reserved after that.

The ACTING PRESIDENT pro tempore. Is there objection?

Mr. REID. What was the request?

Mr. BOND. The request was that I speak on my time and that Senator HATCH be given 10 minutes.

Mr. REID. Mr. President, is that additional time to what we have?

Mr. BOND. No. That is off of my time.

Mr. REID. I appreciate that. But should we not be going back and forth? Because Senator FEINGOLD has been here waiting.

Mr. BOND. How long will Senator FEINGOLD speak?

Mr. REID. My understanding is 30 minutes.

Mr. BOND. Responding to the distinguished leader, Senator HATCH had to leave a Judiciary Committee hearing. He was only going to speak 10 minutes. And I am going to be about 10 minutes.

Mr. FEINGOLD. As long as my 30 minutes is blocked.

The ACTING PRESIDENT pro tempore. The Senator's time is locked in under the unanimous consent.

Is there objection to the sequence of speakers?

Mr. FEINGOLD. As long as my 30 minutes is reserved so I can speak following the time of the Senator from Utah.

The ACTING PRESIDENT pro tempore. Is there objection to the request as modified?

Without objection, it is so ordered.

The Senator from Missouri.

Mr. BOND. Mr. President, I thank the distinguished leader who has done a remarkable job of helping us to get to this point in what has been, let us say, a challenging 15-month debate. And I concur with him in the very kind and generous words he said about my friend and colleague, the chairman of the committee, Senator ROCKEFELLER.

I expressed my appreciation to the Republican leader for his very kind words, and I agree with him that it is absolutely essential that we defeat these amendments today. But, finally, after sporadic filibuster attempts over a period of 15 months by several Members, Members whom I respect for their tenacity and conviction in this matter, we are poised today to conclude work on the FISA Amendments Act of 2008.

Yesterday I detailed my views on aspects of this legislation, and I walked through six tweaks to the legislation that were made to the bipartisan Senate bill that the Senate passed in February, earlier this year, that have resulted in the bill before us today.

I am happy that the tweaks to the bill did not change the bill much. I am proud to negotiate with the House to bring back to the Senate essentially the same bipartisan bill today that both the chairman and I crafted with the help of an overwhelming bipartisan majority of our Intelligence Committee.

This ensured that today we have a major bipartisan victory of which all sides can be proud, exemplifying what can be accomplished in Washington when there is bipartisan negotiation.

I thank all of those who worked so hard to bring us to the cusp of sending this legislation to the President. I appreciate the hard work of House Majority Leader STENY HOYER, who was critical in the House; Republican Whip ROY BLUNT, and Congressmen PETE HOEKSTRA and LAMAR SMITH, as well as the efforts of my colleagues in the Senate, Senators ORRIN HATCH, SAXBY CHAMBLISS, Senate Republican Leader MITCH MCCONNELL, and Chairman ROCKEFELLER for his strong support and leadership.

Further, we could not be here today without the hard work of staff, from the House, Jen Stewart from House Minority Leader BOEHNER's office; Brian Duffel from House Minority Whip BLUNT's office; Chris Donesa from Mr. HOEKSTRA's office; Caroline Lynch from Mr. SMITH's office; Mariah Sixkiller with the House Majority Leader's office; and Jeremy Bash from Mr. REYES' office, along with an assortment and large number of deputies and others who assisted them in producing the language that their Members would support.

As to my own staff, I thank my staff director Louis Tucker and staffer Jacqui Russell from the Intelligence Committee; a very special thanks to two FISA counsels, Jack Livingston and Kathleen Rice, who brought invaluable expertise into this process as lawyers who participated in the FISA process from the executive branch perspective while working in the FBI.

Thanks to Senator ROCKEFELLER's counsels, Mike Davidson, Christine Healey, and Alissa Starzak, as well as to Jesse Baker with Senator HATCH; to Tom Hawkins and John Abegs with Leader MCCONNELL's office; and to the many other staff who helped make this happen, too many to name now in the short time we have before we vote on the upcoming amendments.

I believe it is necessary to reinforce a few points that Senator ROCKEFELLER and I made yesterday in urging our colleagues to defeat the three amendments before us that would kill this bill by altering the title II liability protections, and potentially putting us in the disastrous situation we faced a year ago.

First, yesterday we heard from supporters of these amendments that decimating the title II civil liability protections for our telecommunications providers would have no effect on the title I portion of the bill that modernizes FISA collection methodologies because title I contains directives that are enforceable by court order.

Such statements demonstrate a lack of understanding about the intelligence community's dependence upon our third-party partners. We know from our experience when the Protect America Act expired in February that is simply not the case. We lost days' worth of intelligence while the partners ceased cooperating momentarily until they were assured that authorizations and corresponding immunity tie would last until August. If we do not have their voluntary cooperation by giving them liability protection, then it is much harder and we get much less in trying to compel them.

Second, we heard yesterday that it is "bad lawyering" to apply the substantial evidence standard to the title II liability. The Senate's bill had an abuse of discretion standard for title II liability, which I believe was the appropriate standard, but House Democrats offered this other standard.

It is an appellate standard, not a factual standard, as my colleague from

Rhode Island asserted yesterday. The court will not be holding a trial or hearing from witnesses. There is no adversarial process in the true sense of the word. These steps and safeguards are necessary to ensure that our intelligence sources and methods remain protected.

Third, while my colleague from Rhode Island asserted that the TSP is a cause for deep anger at the administration, I submit that deep anger should be redirected away from tearing down experienced, dedicated American officials and toward tearing down our foreign enemies who are intent on destroying our Nation and our way of life.

The TSP enabled our intelligence community to prevent further attacks on our homeland, and I and the leaders of the intelligence community believe it is the key reason why we have not been attacked for nearly 7 years since September 11.

Despite what some far-left editorial writers say, the TSP only allowed warrantless interception of phone calls from terrorists reasonably believed to be overseas.

Intercepts of Americans and other U.S. persons in the United States required a warrant from the FISA Court.

To suggest yesterday, as was suggested on the floor, that it enabled collection of communications among innocent American citizens is flat wrong. The bill before us will keep us safe and protect civil liberties. So it should not be a moment of anger but, rather, one of bipartisanship and pride that we worked together to produce the best legislation possible to keep America safe and to protect her rights further.

Others assert that leaking the program was good. Well, I dispute that. The intelligence agencies noticed a significant drop in collection when the terrorists found out we could listen in on them. The CIA Director, at his confirmation hearing, when I asked him how badly the intelligence community had been hurt, said: We are applying the Darwinian theory to terrorists; we are only intercepting the dumb ones.

Both Democratic and Republican leaders were read in on this program early on, the Big Eight, and had the opportunity through congressional options to delay or scrutinize the program, if necessary.

I understand they advised the administration it would take too long to go through the legislative process to modernize FISA. From what I have seen over the past 15 months in how long it has taken us to get here today, that seems to have been very good advice.

My colleague from Pennsylvania asserted earlier that only 30 Senators have been read in. But the chairman did a little quick math and said 37 have been read in. It is unusual to have more than one-third of the Senate briefed on some of our most sensitive intelligence collection strategy.

Oversight of these areas is why the Senate created the Senate Select Com-

mittee on Intelligence. We on the committee oversee hundreds of programs that the rest of our colleagues know little about. And even though we invite them over for briefings, they usually have too many other responsibilities to have time to accept our invitation.

Finally, my colleague from Pennsylvania asserted we do not know what we are granting immunity for, and only courts can decide that matter. That is simply not true. The committee's bipartisan review makes it clear to whom retroactive civil liability protection is being granted. And the courts are not the appropriate standard to make those judgments.

The Senator's statements clearly indicated that he wants to challenge the Government, the President's use of the TSP. Well, we do not block suits against the Government, against Government employees or officials. It would be unfair and potentially disastrous to use the patriotic electronic carriers as punching bags to try to get at the administration. That will destroy our intelligence community's ability to collect with their assistance, and it would potentially lead to a serious gap in the program. It would put the people of the collecting agencies at great risk, civilians who do not go into battle with protection, with gear and with training.

That is an absolutely outrageous assertion that they should be willing to undergo the hazards of war in matters of national security. It is appropriate and imperative that the oversight committees act as they have in reporting such legislation to the entire body.

My friend repeatedly inquired if Congress had ever done anything such as this before. But, in fact, we only need to look back to 2005 when Congress passed the Protection of Lawful Commerce in Arms Act. It essentially granted immunity to gun manufacturers, distributors, dealers, and others against lawsuits seeking money damages and other relief for harm caused by misuse of firearms.

It still allowed those defendants to be sued for their own negligence, violation of sale and marketing statute, breach of contract or warranty, design defect, et cetera. The immunity provision was held to be constitutional, not a violation of due process, equal protection, or takings, in *Ileto v. Glock*, a 2006 California court case. So beyond the rhetoric in opposition to the legislation before us, I believe Senators need to take a fair look at what is before us today.

I strongly encourage my colleagues to vote down the three amendments before us and to support this bill. This bill gives our intelligence operators and law enforcement officials the tools they need to conduct surveillance on foreign terrorists in foreign countries planning to conduct attacks inside the United States against our troops and allies. It is the balance we need to protect our civil liberties without handcuffing intelligence professionals.

Let's do the right thing, pass this bill without amendments.

I yield the floor.

The ACTING PRESIDENT pro tempore. The Senator from Utah.

Mr. HATCH. Mr. President, it was Kierkegaard, a number of years ago, who said that venture causes anxiety, but not to venture is to lose one's self.

From the outset let me be crystal clear in voicing my strong opposition to all three pending amendments to H.R. 6304. But before I discuss these amendments, let me address a few things said on this floor yesterday. One of my colleagues said the Congress shouldn't "jam this bill through." If working on a bill for over 440 days is jamming it through, then Webster's dictionary should prepare a new definition for the word. We also heard comments yesterday which were critical of the fact that not every Senator has been fully briefed on the activities of the intelligence community. I guess since this same argument didn't stick the first time it was offered back in December, more desperate attempts would be made. If at first you don't succeed, try, try again.

Memories are short around here, and we should appreciate that the very creation of the Intelligence Committee was controversial. The committee was created so a limited number of Members would have oversight of our intelligence agencies. During the 10 days of debate on the resolution creating this committee, numerous Senators openly worried about possible leaks in providing highly classified material to a large number of individuals. Here is what Senator Milton Young said in May of 1976:

It is my understanding that on this new committee, staff would have access to the most sensitive information. Human nature is such that when too many people have access to this information, someone is bound to leak parts of it to an ambitious and inquisitive press.

Also, in 1976, here is what another Senator said. This is Senator Walter Mondale on the need for a Senate Intelligence Committee on May 13, 1976:

We have the worst possible system for congressional oversight of intelligence. Responsibility and authority are fragmented in several cases; it is impossible to look at intelligence as a whole; because authority and responsibility are not welded together, we are incapable of dealing with problems privately, and there is the inevitable temptation to deal with them through leaks.

Thirty two years later, these statements contain points that are still vitally important to this discussion. Is this the system of oversight that we should go back to? Those that argue that we should not vote until every Member gets some sort of vague access are essentially saying that all 535 Members of Congress, plus hundreds of cleared staff, should be read into all highly classified programs whose jurisdiction is otherwise limited to the Intelligence Committees. If you want to guarantee future leaks, this would be a good approach.

This sort of logic begs the question: Why do we have the Intelligence Committee? The answer is obvious, and I urge my colleagues to remember the extensive efforts of our predecessors which created a committee with the authority to review these materials.

While the issue of civil liability protection for telecoms has been debated extensively over the last 9 months, the three final amendments before us all attempt to alter or remove the carefully crafted bipartisan civil liability provision. I agree with the comments from both sides of the aisle in opposition to these amendments.

The Bingaman amendment, for example, would needlessly delay the liability provision. I believe the amendment is unwise, as its purpose disregards the extensive work that Congress has already conducted on this issue. By my last count, Congress has conducted over 27 hearings on the TSP and FISA over the last few years.

Let there be no doubt; the IG review will not, and cannot, determine the legality of the terrorist surveillance program. Any suggestion that the review will do so is absolutely incorrect. Inspectors general are not qualified and lack jurisdiction to review the legality of intelligence programs. As further evidence of this obvious point, let's look at this quote by the DOJ inspector general on conducting legal analysis:

That's not our role as the Inspector General.

In addition, the IG review will not publicly reveal which companies elected to participate in this program, as that information remains highly classified. Simply put, attempts to alter the FISA compromise based on a misperception of the eventual IG review should be strongly rejected, and we should do so this morning.

Close inspection of the lawsuits against the telecoms reveals quite dubious claims. As has previously been stated, the plaintiffs persistently confuse speculative allegations and untested assertions for established facts.

It is very simple, Congress should not condone oversight through litigation.

The lawsuits seize on the President's brief comments about the existence of a limited program to go on a fishing expedition of NSA activities. But this is really worse than a fishing expedition; this is draining the Loch Ness to find a monster. Sometimes what you are looking for just doesn't exist.

Yet we consistently hear as justification for the apparent paranoia that some wiretaps were warrantless. But lest we forget, the fourth amendment does not proscribe warrantless searches, it proscribes unreasonable searches.

Here's a quick example from a few blocks from here: Waiting for warrantless searches at the National Archives; waiting to be served before viewing the fourth amendment itself. That is a warrantless search.

The fact is that the President created an early warning system to prevent fu-

ture attacks; essentially a terrorist smoke detector. But rather than appreciate the protection it offered, critics rushed to pull out the batteries so that it could not work.

My feelings of admiration and respect for the companies who did their part to defend America are well known. As I have said in the past, any company who assisted us following the attacks of 9/11 deserves a round of applause and a helping hand, not a slap in the face and a kick to the gut.

When companies are asked to assist the intelligence community based on a program authorized by the President himself and based on assurances from the highest levels of government that the program has been determined to be lawful, they should be able to rely on those representations.

In the over 40 outstanding civil lawsuits, is there any proof that any litigant was specifically targeted by the government? Can any of the plaintiffs show that they are "aggrieved persons" under the definition of FISA? The answer to both questions is no. Rather, many of the lawsuits utilize the following logic: I have long distance service, so I am going to sue because I think you listened to my calls. Even though they have no proof; even though the government has more important things to do than listen to their random phone calls, they push on in their desire to justify their view of self-importance and irrational belief in government conspiracy. I don't want to bruise anyone's ego, but if al-Qaida is not on your speed dial the government is probably not interested in you.

The possible disclosure of classified materials from ongoing court proceedings is a grave threat to national security, and the very point of these lawsuits is to prove plaintiffs' claims by disclosing such classified information. Simply put, you do not tell your enemies how you track them. This is why the NSA and other government agencies will not say what they do, how they do it, or who they watch. Nor should they. To confirm or deny any of these activities, which are at the heart of the civil lawsuits, would harm national security. We should not discuss what our capabilities are.

If the identities of the companies are revealed and officially confirmed through litigation, they will face irreversible harm; harm in their business relations with foreign governments and companies, and possible physical harm to their employees both here and abroad, who are truly soft targets for attackers.

I have come to this floor on numerous occasions during the last year to discuss the issue of FISA modernization and am hopeful that the need to continue to do so will finally end tomorrow. I am confident that when the Congress considers this issue, we will finally send this vitally important legislation to the President to be signed into law.

I compliment the distinguished chairman and vice chairman of the

committee, Senators ROCKEFELLER and BOND. They have had to handle this matter through all kinds of vicissitudes and false logic. They have done an exceptionally good job. They and their staff have stood and tried to let America know what is involved.

The fact is, these two leaders have done a great job on this committee. They have previously passed bipartisan legislation overwhelmingly. This original Senate FISA modernization bill would have passed the House pretty much overwhelmingly, had it been brought up, and, of course, hopefully this version will be passed today without any of these three amendments which would cause a veto.

I thank those who vote for this bill and those who have been considerate enough to look at all the important arguments and support this legislation which is much needed, certainly much needed before August and should have been passed a long time ago.

I thank all those who have stood up on this bill.

I yield the floor.

The ACTING PRESIDENT pro tempore. The Senator from Wisconsin.

Mr. FEINGOLD. Mr. President, I ask unanimous consent that Senator LEAHY be recognized following my remarks, to be followed by Senator SPECTER for 10 minutes.

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

Mr. FEINGOLD. Mr. President, I yield myself such time as I may consume. Before I get into my formal remarks, let me react a bit to the remarks of the Senator from Utah. He is a great colleague, a very cordial man. I have enjoyed the 16 years I have served with him, especially on the Judiciary Committee. But I will use an unsenatorial word for one of the arguments he made. The word is "wow." The notion that roughly 70 Senators would not be briefed on something we are voting on and the notion that the briefing of the Intelligence Committee, which, of course, I am a member of and which I support, is a justification for having 70 Senators not knowing what they are voting on is a very bizarre interpretation of why the Intelligence Committee was created. It was not created as a replacement for the Senate when it comes to voting on the laws governing the fundamental rights of the American people. If that is the best they can come up with, when 70 Senators don't even know the fundamentals of the program that this immunity issue is addressing, it is incredible. Let me get into the merits, but first I should also address that we have apparently been lumped in as part of the black helicopter crowd. I assure you the coalition in this country that has concerns about this bill is much broader than any such characterization.

A number of Senators came to the floor prior to the Fourth of July recess to debate the FISA legislation, and more debate has occurred this week.

We heard arguments for and against this legislation, and Senators have cited a variety of reasons for their positions.

Several have defended the bill by arguing the legislation includes improvements compared to the Senate bill we passed earlier this year. Of course, I was not surprised to hear that line of argument. I agree, there are some improvements to the Senate bill contained in the legislation we are now considering. But Mr. President, those changes, as you well know, are not nearly enough to justify supporting the bill, as I will explain in a few moments.

I was, however, surprised to hear several Senators still defending the legality of the President's warrantless wiretapping program and still arguing that Congress had somehow signed off on this program years ago because the so-called Gang of 8 group was notified.

I thought we were well past these arguments. Two and a half years after this illegal program became public, I cannot believe we are still debating the legality of this program on the Senate floor and that anyone—anyone—seriously believes that merely notifying the Gang of 8—eight Senators and Congressmen—while keeping the full Intelligence Committees in the dark, somehow represents congressional approval.

It could not be clearer that this program broke the law and that this President—this President—broke the law. Not only that, but this administration affirmatively misled the Congress and the American people about it for years before it finally became public. So if we are going to go back and discuss these issues that I thought had long since been put to rest, let's take a few minutes to cover the full history.

Here is the part of this story that somehow seems to have been forgotten. In January 2005, 11 months before the New York Times broke the story of the illegal wiretapping program, I asked then-White House Counsel Alberto Gonzales at his confirmation hearing to be Attorney General whether the President had the power to authorize warrantless wiretaps in violation of the criminal law. Neither I nor the vast majority of my colleagues knew it then, but the President had authorized the NSA program 3 years before, and Mr. Gonzales was directly involved in that issue as White House Counsel.

At his confirmation hearing, he first tried to dismiss my question—if you can believe it—as “hypothetical,” though he knew exactly what was going on. He then testified:

[I]t's not the policy or the agenda of this President to authorize actions that would be in contravention of our criminal statutes.

The President's wiretapping program was in direct contravention of our criminal statutes. Mr. Gonzales knew that, but he wanted the Senate and the American people to think the President had not acted on the extreme legal theory that the President has the power as Commander in Chief to disobey the criminal laws of this country.

The President, too, misled the Congress and the American public. In 2004 and 2005, when Congress was considering the reauthorization of the USA PATRIOT Act, the President went out of his way—I remember this very clearly—to assure us that his administration was getting court orders for wiretaps, all the while knowing full well that his warrantless wiretapping program was ongoing.

Here is what the President said on April 20, 2004:

Now, by the way, any time you hear the United States government talking about [a] wiretap, it requires—a wiretap requires a court order. Nothing has changed, by the way. When we're talking about chasing down terrorists, we're talking about getting a court order before we do so.

Those are the words of the President of the United States to the American people.

Again, on July 14, 2004:

The government can't move on wiretaps or roving wiretaps without getting a court order.

And listen to what the President said on June 9, 2005:

Law enforcement officers need a federal judge's permission to wiretap a foreign terrorist's phone, a federal judge's permission to track his calls, or a federal judge's permission to search his property. Officers must meet strict standards to use any of these tools. And these standards are fully consistent with the Constitution of the U.S.

So please, let's not pretend that the highly classified notification to the Gang of 8, delivered while the President himself was repeatedly presenting a completely different picture to the public, suggests that Congress somehow acquiesced to this program. As the Members of this body well know, several Members of the Gang of 8 at the time raised concerns when they were told about this, and several have since said they were not told the full story. And, of course, all of them—all of them—were instructed not to share what they had learned with a single other person.

I also cannot leave unanswered the arguments mounted in defense of the legality of the NSA program. I will not spend much time on the argument that the authorization for use of military force that Congress passed on September 18, 2001, authorized this program. That argument has been thoroughly discredited. In the AUMF, Congress authorized the President to use military force against those who attacked us on 9/11, a necessary and justified response to the attacks. We did not authorize the President to wiretap American citizens on American soil without going through the judicial process that was set up nearly three decades ago precisely to facilitate the domestic surveillance of spies and terrorists.

Senators have also dragged out the same old, tired arguments about the President's supposed inherent Executive authority to violate the FISA statute. They argue that a law passed by Congress cannot trump the Presi-

dent's power under the Constitution. Now, that argument may sound good, but it assumes what it is trying to prove—that the Constitution gives the President the power to authorize warrantless wiretaps in certain cases. You cannot simply say that any claim of Executive power prevails over a statute—at least, not if you are serious about the rule of law and about how to interpret the Constitution.

The real question is, when a claim of Executive power and a statute arguably conflict, how do you resolve that conflict?

Fortunately, this is not something the Supreme Court has been silent about. The Supreme Court has told us how to answer that question. We are talking about the President acting in direct violation of a criminal statute. That means his power was, as Justice Jackson said in his famous and influential concurrence in the Steel Seizure cases half a century ago, “at its lowest ebb.” The Presidential power, Justice Jackson said, in that circumstance was “at its lowest ebb.” In other words, when a President argues that he has the power to violate a specific law, he is on shaky ground.

That is, obviously, not just my opinion. It is what the Supreme Court has made clear. No less an authority than the current Chief Justice of the United States, John Roberts, repeatedly recognized in his confirmation hearings—over and over again—that Justice Jackson's three-part test is the appropriate framework for analyzing questions of Executive power.

In early 2006, a distinguished group of law professors and former executive branch officials wrote a letter pointing out that “every time”—every time—“the Supreme Court has confronted a statute limiting the Commander-in-Chief's authority, it has upheld the statute.” It has upheld the act of Congress over the claims of Executive power that overreach and conflict with the power of this Congress to make the laws in this country.

The Senate reports issued when FISA was enacted confirm the understanding that FISA overrode any preexisting inherent authority of the President. The 1978 Senate Judiciary Committee report stated that FISA “recognizes no inherent power of the President in this area” and “Congress has declared that this statute, not any claimed Presidential power, controls.”

Contrary to what has been said on this floor, no court has ever approved warrantless surveillance in violation of FISA based on some theory of article II authority. The *Truong* case that is so often hauled out to make this argument was a Vietnam-era case based on surveillance that occurred before FISA was enacted, so it could not have decided this issue. And the issue before the FISA Court of Review in 2002 had nothing to do with inherent Presidential authorities. Yet these cases are repeatedly cited by supporters of the President, complete with large charts

of the supposedly relevant quotations. But the fact is, not a single court—not the Supreme Court or any other court—has considered whether, after FISA was enacted, the President nonetheless somehow has the authority to bypass it and authorize warrantless wiretaps.

In fact, as the Senator from Pennsylvania and I discussed on the Senate floor yesterday, just last week a Federal district court strongly indicated that were it to reach that issue, it would find that the President must in fact follow FISA. The court was considering whether the state secrets privilege applies to claims brought under the FISA civil liability provisions, and it found that it does not. Its reasoning was based on the conclusion, again, that Congress had spoken clearly that it intended FISA and the criminal wiretap laws to be the exclusive means—the exclusive means—by which electronic surveillance is conducted, and it fully occupied the field in this area, replacing any otherwise applicable common law.

Now, here is what the court said:

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

And another court, a district court in Michigan, has also held that the President's wiretapping program was unconstitutional, although that decision was reversed on procedural grounds by the Sixth Circuit. So to the extent there is any case law that actually addresses this issue, it totally undercuts the administration's arguments. And, of course, it certainly does nothing to support those arguments.

We have also heard that past American Presidents have cited Executive authority to order warrantless surveillance. But, of course, those past Presidents—Presidents Wilson and Roosevelt are often cited—were acting before the Supreme Court decided in 1967 that our communications are protected by the Fourth Amendment and before Congress decided in 1978 that the executive branch can no longer unilaterally decide which Americans to wiretap. So those examples are simply not relevant to this debate.

In sum, the arguments that the President has inherent Executive authority to violate the law are baseless. It is not even a close case. And the repeated efforts in the Senate to pretend otherwise are very discouraging.

It may seem that I am going over ancient history because this program is no longer operating outside the law. But this is directly relevant to the current debate. The bill the Senate is considering would actually grant retroactive immunity to any companies that cooperated with a blatantly illegal program that went on for more than 5 years and about which the administration repeatedly misled Congress.

So if Congress short-circuits these lawsuits, we will have lost a prime opportunity to finally achieve accountability for these many years of lawbreaking. That is why the administration has been fighting so hard for this immunity. It knows that the cases that have been brought directly against the Government face much more difficult procedural barriers and are unlikely to result in rulings on the merits that would allow us to get to this direct question of the legality of the President's warrantless wiretapping program.

These lawsuits involving the telephone companies may be the last chance to obtain a judicial ruling on the lawfulness of the warrantless wiretapping program. It is bad enough that Congress abdicated its responsibility to hold the President accountable for breaking the law. Now it is trying to absolve those who allegedly participated in his lawlessness. This body should be condemning this administration for its lawbreaking—not letting the companies that allegedly cooperated off the hook.

This body certainly should not grant the Government new, overexpansive surveillance authorities, which brings me now to the part of the bill that in some ways concerns me even more than the immunity provision. Let me explain why I am so concerned about the new surveillance powers granted in this bill and why the modest improvements made to this part of the bill do not even come close to going far enough.

First, the FISA Amendments Act would authorize the Government to collect all—all—communications between the United States and the rest of the world. Now, that could mean millions upon millions of communications between innocent Americans and their friends, families, or business associates overseas could be legally collected. Parents calling their kids studying abroad, e-mails to friends serving in Iraq—all these communications could be collected, with absolutely no suspicion of any wrongdoing at all, under this legislation.

Second, like the earlier Senate version, this bill fails to effectively prohibit a practice known as reverse targeting; namely, wiretapping a person overseas when what the Government is really interested in doing is listening to an American here at home with whom the foreigner is communicating. This bill does have a provision that purports to address this issue. It prohibits intentionally targeting a person outside the United States without an individualized court order if "the purpose" is to target someone reasonably believed to be in the United States.

But this does not do the job. At best, this prevents the Government from targeting a person overseas as a complete pretext for getting information on someone in the United States. But this language would allow a lot more.

The language would permit intentional and possibly unconstitutional warrantless surveillance of an American so long as the Government has any interest—any interest at all—no matter how small, in the person overseas with whom the American is communicating. The bill does not include language that had the support of the House and the vast majority of the Senate's Democratic caucus that would have required the Government to obtain a court order whenever a significant purpose of the surveillance was to acquire the communications of an American in the United States. The administration's refusal to accept that reasonable restriction on its power is quite telling.

Third, the bill before us imposes no meaningful consequences if the Government initiates surveillance using procedures that have not been approved by the FISA Court, and the FISA Court later finds that those procedures were unlawful. Say, for example, the FISA Court determines that the procedures were not even reasonably designed to wiretap foreigners outside the United States rather than Americans at home. Under this bill, all that illegally obtained information on Americans can be retained and used. Once again, as seems to recur over and over again in this sordid tale, there are no consequences for illegal behavior by the Government of the United States. That is just wrong.

Unlike the Senate bill, this new bill does generally provide for FISA Court review of surveillance procedures before surveillance begins, and that is one of the changes that has been touted by supporters of the bill. But the bill also says if the Attorney General and the Director of National Intelligence certify they don't have time to get a court order, and that intelligence important to national security may be lost or not timely acquired, then they can go forward without traditional approval. This is a far cry from allowing an exception to FISA Court review in a true emergency because, arguably, all intelligence is important to national security and any delay at all might cause some intelligence to be lost. So I am concerned that this so-called "exigency" exception could very well swallow the rule and undermine any presumption at all of prior judicial approval. That could result in no prior court review. No prior judicial review. Let's just trust an administration—including this administration—rather than having the checks and balances that clearly the Founders of our country understood to be central in any situation such as this.

Fourth, this bill doesn't protect the privacy of Americans whose communications will be collected in vast new quantities. The administration's mantra has been: Don't worry, we have minimization procedures. But minimization procedures are nothing more

than unchecked executive branch decisions about what information on Americans constitutes “foreign intelligence.” That is why on the Senate floor I joined with Senator WEBB and Senator TESTER earlier this year to offer an amendment to provide real protections for the privacy of Americans, while also giving the Government the flexibility that it needs to wiretap terrorists overseas.

This bill relies solely on inadequate minimization procedures to protect innocent Americans, and they are simply not enough.

As I said at the outset, some supporters of this bill have pointed to improvements made since the Senate passed the bill earlier this year. I appreciate that some changes have been made, but those changes are either inadequate or they do not go to the core privacy issues raised by this bill. In fact, as the distinguished Senator from Missouri, the vice chairman of the Senate Intelligence Committee, said just yesterday, the bill before us is “basically the Senate bill all over again” with only “cosmetic fixes.” That is what the Republican vice chairman of the committee said. Any Democrat who suggests that this is somehow a big change, I don’t think they read the bill, because it doesn’t do the job.

For example, I am pleased the bill provides for FISA Court review of targeting minimization procedures, but as I mentioned, there is a potentially gaping loophole allowing the executive branch to go forward with surveillance without court review—an exception that could swallow the rule. The bill also now explicitly directs the FISA Court to consider whether the Government’s procedures comply with the fourth amendment, but that is an authority it should have had anyway.

The bill includes an inspector general review of the illegal program, which is a positive change, but that doesn’t make up for the lawsuits that are going to be dismissed as a result of this legislation. I strongly support the strengthened exclusivity language which, perhaps, may defer a future administration from engaging in lawless behavior, but let’s not lose sight of the fact that FISA, as originally enacted, clearly stated already that it and the criminal wiretap laws were the exclusive means for conducting electronic surveillance. This was confirmed in the strongest terms possible by a Federal district court just last week.

The idea that we would simply trust this administration, especially, to follow this exclusivity language when they have taken such a dismissive attitude with respect to the current exclusivity language is absurd. Only under the unprecedented legal theories of this administration could that clear language be ignored, requiring Congress to pass language that effectively says: No, we really mean it. If this bill is enacted, I am by no means reassured that this administration, which repeatedly broke the law and misled the public

over the past 7 years, will now respect the exclusivity of FISA.

Now, the bill does contain a key protection for Americans traveling overseas. It says if the Government wants to intentionally target Americans while they are outside of the country, it has to get an individualized FISA Court order based on probable cause. That is a great victory, and it is one we should be proud of, but it does not override the greatly expanded authorities in this bill to collect other types of communications involving Americans.

In sum, these improvements are obviously not enough. They are nowhere close. So I must strongly oppose this bill.

When you consider how we got here, this legislation is particularly discouraging. We discovered in late 2005 that the President had authorized an illegal program in blatant violation of a statute and that Congress and the public had been misled in a variety of ways leading up to this public revelation. Congress, to its credit, held hearings on the program, but was largely stonewalled by the administration for many months until the administration grudgingly agreed to brief the intelligence committees and, more recently, the judiciary committees. Nonetheless, the vast majority in the House and Senate have never been told what happened. In 2006, when the Republicans tried to push through legislation to grant massive new surveillance authority to the executive branch, we stopped it. But now, in a Democratic-controlled Congress not only did we pass the Protect America Act, but we are now about to extend for more than 4 years these expansive surveillance powers, and we are about to grant immunity to companies that are alleged to have participated in the administration’s lawlessness.

I sit on the Intelligence and Judiciary Committees. I am one of the few Members of this body who has been fully briefed on the warrantless wiretapping program. Based on what I know, I can promise that if more information is declassified about the program in the future, as is likely to happen either due to the inspectors general report, the election of a new President, or simply the passage of time, Members of this body will regret that we passed this legislation. I am also familiar with the collection activities that have been conducted under the Protect America Act and will continue under this bill. I invite any of my colleagues who wish to know more about these activities to come speak to me in a classified setting. Publicly, all I can say is that I have serious concerns about how those activities may have impacted the civil liberties of all Americans. If we grant these new powers to the Government and the effects become known to the American people, we will realize what a mistake it was. Of that, I am sure.

So I hope my colleagues will think long and hard about their votes on this

bill and consider how they and their constituents will feel about this vote 5, 10, or 20 years from now. I am confident that history will not judge this Senate kindly if it endorses this tragic retreat from the principles that have governed government conduct in this sensitive area for 30 years. I urge my colleagues to stand up for the rule of law and defeat this bill.

I reserve the remainder of my time.

The ACTING PRESIDENT pro tempore. The Senator from Vermont is recognized.

Mr. LEAHY. Mr. President, I applaud the Senator from Wisconsin for his statement. I concur with it.

The Senate has before it three amendments to bring accountability to this legislation: the Dodd-Feingold-Leahy amendment, the Specter amendment, and the Bingaman alternative. I intend to vote in favor of each of these three amendments.

As I noted at the outset of this debate and consistently throughout the course of Senate consideration of these matters, I oppose legislation that does not provide accountability for the 6 years of illegal, warrantless wiretapping initiated and approved by the Bush-Cheney administration. The bill, if it is adopted without amendments, seems intended to result in the dismissal of ongoing cases against the telecommunications carriers that participated in the warrantless wiretapping program without allowing a court ever to review whether the program itself was legal. None of us are out to punish the telecommunications carriers, but we worry if anybody is going to be held accountable. As it is now, the bill would have the effect of ensuring that this administration is never called to answer for its actions and never held accountable in a court of law. I do not support a result that says the President of the United States, whomever he or she is, is above the law and, therefore, I would not support the bill unless it is amended.

It is now almost 7 years since this President began efforts to circumvent the law. In violation of the provisions of the governing statute, the Foreign Intelligence Surveillance Act, this President and his administration engaged in a program of warrantless wiretapping. I believe that conduct was illegal. In running its program of warrantless surveillance, the administration relied on ends-oriented legal opinions prepared in secret and shown only to a tiny group of like-minded officials.

Basically, the administration said: This is what we want for legal advice, now give it to us. This is what we want to do to step outside the law; now you go tell us we can do that. As chairman of the Senate Judiciary Committee, of course I oppose that.

A former head of the Justice Department’s Office of Legal Counsel described this program as a “legal mess.” This administration wants to make sure that no court ever reviews that

legal mess. The bill before us seems to guarantee they get their wish.

As Senator SPECTER and I have both confirmed during the course of this debate, the administration worked hard to ensure that Congress could not effectively review the legality of the program. Since the existence of this program became known through the press, the Judiciary Committee repeatedly tried to obtain access to the information its members needed to evaluate the administration's legal arguments. Indeed, Senator SPECTER, when he was chairman of the Judiciary Committee, prepared subpoenas for the telecommunications carriers to obtain information, simply because the administration would not tell us directly what it had done, but those subpoenas were never issued; Vice President CHENEY intervened to undercut Senator SPECTER and prevent the committee from voting on them.

There are public reports that at least one telecommunications carrier refused to comply with the administration's request to cooperate with the warrantless wiretapping. Surely that objection raised a red flag for all involved. It is clear that the administration did not want the Senate to evaluate the evidence and draw its own conclusions. Again, it sought to avoid accountability.

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, and allow for the administration to avoid accountability. 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. So 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.

So what if Americans' rights were violated. So what if laws were violated. This bill makes the Federal courts the handmaidens to a coverup. That is wrong.

Make no mistake. If title II becomes law, we would take away the only avenue for Americans to seek redress for harms to their privacy and their liberties, and there will likely be no judicial review of this administration's illegal actions. Those who claim that American citizens can still pursue their privacy claims against Government, they know that sovereign immunity is a roadblock. They know that cases against Government have been dismissed for lack of standing. They know about the Government's ability to assert the state secrets doctrine. They know the Michigan case that held the President's warrantless wiretapping program illegal was later vacated on appeal for lack of standing.

Indeed, for all of the talk about holding the Government accountable, they have chosen to do nothing to make any case against the Government more viable. This is a red herring if ever there was one. We are telling Americans we are closing the door. We are telling Americans—law-abiding, honest, good, hard-working Americans—that we are closing the courthouse door in their face because we have to protect the President and those around him who may have done something illegal.

Last week, a Federal judge in San Francisco ruled that FISA's provisions trump the state secrets privilege. But that same judge was constrained to hold that plaintiffs still must prove that they are "aggrieved" under FISA to maintain standing to sue the Government. It is not at all clear whether these plaintiffs, or any others, can make this showing. Absent congressional action to facilitate judgments on the merits, these cases against the Government are unlikely to survive.

The report of the Senate Committee on Intelligence in connection with its earlier version of the bill that also included retroactive immunity is telling. The committee 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 the merits. That is precisely what is lacking in this measure—an avenue to obtain meaningful judicial review and accountability.

Those who support retroactive immunity for the telecommunications carriers without providing an effective avenue to challenge the program or obtain judicial review of its legality, support unaccountability, pure and simple. I would have supported the efforts of the Government to indemnify the telecommunications carriers if we could substitute the Government to have accountability. I also support alternative efforts by Senator SPECTER and Senator WHITEHOUSE to substitute the Government in those cases so that the cases could proceed to a judgment on the merits. That would have allowed judicial review and provided for accountability.

The Senate is going to vote on a bill today which does not allow that. All the years I was growing up in Vermont we were told nobody is above the law. All my time in law school we were told nobody is above the law. We take an oath of office when we are sworn into this body where there are only 100 of us to represent 300 million Americans, but we are also told no one is above the law. We are about to vote on a bill that says, well, the President and those people around him are above the law.

Just as Vice President CHENEY is not supposed to control the Congress, the

administration is not supposed to control the Federal courts. In this democracy of coequal branches in which not even the President is above the law, judicial review is an important mechanism to correct the overreaching and excesses of the Executive. Since the landmark case of *Marbury v. Madison*, the principle of judicial review has been firmly established. Unfortunately, that principle is being sacrificed to this administration's claim that it, outside of all other administrations in this Nation's history—this administration, the Bush-Cheney administration—should be able to act with absolute impunity and act outside the law.

On the other hand, I believe a Federal court could well find that the limitations this bill, if enacted, would place on the courts' ability to rule on the legality of this program are themselves unconstitutional.

Under the strictest read of the language of the bill, the cases in question will most certainly be dismissed. Attorney General Mukasey must simply certify to the court that the "alleged" activity was the subject of a written request from the Attorney General, which indicated that the activity was authorized by the President and "determined to be lawful." This process gives me, and I would hope the Federal courts, pause.

If the judicial review provided by the bill is intended to be meaningful, the only way for that to happen is if the courts, in fact, review the legality of the warrantless wiretapping program. Surely, a court might find that it cannot dismiss an American's claim of a deprivation of rights based on the mere assertion by a party in interest that it told another party that what they were doing was "determined to be lawful." In this setting, in fact, the current Attorney General is not certifying or representing to the court that the warrantless wiretapping program was lawful. All the bill requires is that the Attorney General certify that the phone company acted at the behest of the administration and that the administration "indicat[ed]" that the activity was "determined to be lawful"—by somebody, at some time.

A court might reason that Congress could not have intended for the court to abdicate its judicial review role and become a mere rubber stamp. The court might nevertheless engage in "meaningful" judicial review. Wouldn't that be great.

How else, the court might reason, is it to assure itself that the Attorney General's certification is valid and worth affirming as a justification for closing the court house doors to Americans claiming deprivation of their constitutionally guaranteed rights? That is the only way to provide any real meaningful judicial review.

Indeed, the reasoning would go, any other reading would be an unconstitutional rule of decision. See *United States v. Klein*, 13 Wall. 128 (U.S. 1872). Congress simply does not have authority to tell the courts, a coequal branch,

how it must decide a case. So, in order not to reach that constitutional predicament, the court could interpret the statute to allow it to review the legality of the President's warrantless wiretapping program.

Another recent model for such meaningful review is that of the Court of Appeals for the District of Columbia in the *Parhat v. Gates* case. There, the appellate court invalidated a Combatant Status Review Tribunal's decision that petitioner Huzafa Parhat, a member of a Chinese Muslim minority group called Uighurs, was properly designated as an "enemy combatant."

Under the restrictive language of the Detainee Treatment Act, the court's review in the *Parhat* case was expressly limited to consideration whether the status determination of the CSRT was "consistent with the standards and procedures" specified by the Secretary of Defense for CSRTs, and whether "to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States."

The *Parhat* decision shows that in order to make its review meaningful, the court interpreted its role as reviewing the probity and reliability of the evidence in order to reach its conclusion on the validity of CSRT's designation of *Parhat* as an "enemy combatant." In so doing the court noted that to do otherwise would be "perilously close to suggesting that whatever the government says must be treated as true, thus rendering superfluous both the role of the Tribunal and the role that Congress assigned to this court." It noted that "[t]o do otherwise would require the courts to rubber-stamp the government's charges" rather than engage in meaningful judicial review.

I believe that independent judicial review would reject the administration's claims to authority from the Authorization for the Use of Military Force to engage in warrantless wiretapping of Americans in violation of 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, would not prevail over the express provisions of FISA.

Indeed, Chairman ROCKEFELLER seemed to concede as much yesterday 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 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 of its actions.

One Federal district judge in Detroit has already declared the President's warrantless wiretapping program to have been unconstitutional. Another in San Francisco just last week cast grave doubt on the legality of the President's warrantless wiretapping program, finding that the exclusivity provisions in FISA left no doubt that operating outside of the statute's framework was unlawful.

I urge the courts to exercise their rightful role to ensure justice is done.

As I have said, I recognize that this legislation also contains important surveillance authorities. I support this new authority, and have worked for years to craft legislation that provides that important authority along with appropriate protections for privacy and civil liberties. The Judiciary Committee reported such a bill last fall. I commend House Majority Leader HOYER and Senator ROCKEFELLER, who negotiated this legislation, for incorporating several additional protections that bring the bill the Senate previously passed closer to the Judiciary Committee's bill. While I would seek even greater civil liberties protections in Title I, there is no doubt that this bill provides stronger protections than the Senate bill I previously opposed.

I note, in particular, the requirement of an Inspector General review of the President's warrantless wiretapping program. It is a provision I offered and insisted upon when the Judiciary Committee reported its version of the FISA legislation. I had previously sought to add this provision to the Senate Intelligence Committee's bill. This review

will provide for a comprehensive examination of the facts of that program and should prove useful to the next President.

I believe still more protections for privacy and civil liberties are necessary, and if this bill becomes law, I will work with the next administration on additional protections.

I should emphasize that while the Inspector General provision serves important purposes, its inclusion in this bill is no substitute for a legal review of the President's warrantless wiretapping program. Federal judges and Inspectors General perform different functions. Inspector General reviews can be very useful for factual review of past actions, and I expect the inspectors general to undertake a probing and comprehensive review. But Inspectors General are not well-suited to determine whether the President's warrantless wiretapping program was legal. In fact, this bill prevents the Inspectors General from engaging in that kind of legal review.

Courts, on the other hand, are well-suited to make these kinds of legal determinations. They do it all the time. Federal judges make conclusions of law every day in this country based on facts found by a jury or, if the right to jury trial is waived, based on their own factual conclusions. But this administration doesn't want this kind of review. It has fought for years to avoid a determination by our courts of the legality—or more precisely the illegality—of the President's program. If the administration gets its wish through passage of this bill, there will likely be no conclusive judgment on the lawfulness of the President's program—ever—and no accountability.

I, therefore, cannot support this legislation without amendment. I do not believe Congress should seek to take away the only viable avenue for Americans to seek redress for harms to their privacy and liberties, and the only viable avenue of accountability for the administration's lawlessness. This administration violated FISA by conducting warrantless surveillance for more than five years. They got caught. The apparent purpose of this bill is to ensure that they will not be held to account. That is wrong. I will vote to support the amendments before us today to bring accountability to this legislation, but I will vote no in opposition to the effort to secure immunity for this administration's illegal activity.

The PRESIDING OFFICER (Mr. NELSON of Nebraska). The Senator has 30 seconds remaining.

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

The PRESIDING OFFICER. The Senator from Pennsylvania is recognized.

Mr. SPECTER. Mr. President, I have sought recognition to make the final argument in support of my amendment pending on a very vital issue facing this body.

We are asked today to do two things that I believe are unprecedented in the

history of the Senate. First, we are called upon to vote on legislation where most of the Members admittedly don't know what we are voting on; second, we are stripping the Federal court of jurisdiction on some 40 cases that have been pending for more than 3 years and are in the process of litigation.

On point 2, we are flying in the face of the most fundamental decision in the history of the United States on constitutional law, *Marbury v. Madison*, going back to 1803, 205 years, and Chief Justice Marshall saying that it is emphatically the province and duty of the judicial department to say what the law is.

But the Congress is now being asked by the administration to grant retroactive immunity to the telephone companies, where the judge who is presiding on the case, Chief Justice Vaughn Walker, in the Federal court in San Francisco, has declared that the terrorist surveillance program put into effect by the President violates the Constitution and exceeds his constitutional authority in directly violating the statutory provision that the exclusive way to wiretap is with court approval.

Here we have a situation where it is admitted that most Members of the House of Representatives, according to the House leadership, have not been briefed on the program. What we have are allegations in the legal papers as to having the telephone companies act at the request of the Government to invade privacy, without going through the customary judicial process of securing a warrant.

On the floor yesterday, after extended argument, it is plain that most Members of the Senate have not been briefed on this program. There is an old expression, "buying a pig in a poke." It means buying something and you don't know what it is you are buying. Well, that is what the Senate is being asked to do today—to grant retroactive immunity to a program where the Members don't know what the program is. How does that comport with our reputation that we in the Senate so pride ourselves on, being the world's greatest deliberative body?

I suggest that this may be a historical embarrassment, where we are voting on matters where everybody knows we don't know what we are voting on. The fact may be that we vote with some frequency on matters that we don't know what we are voting on, where we have voluminous reports that are impossible for any Senator to go through. But here we are caught red-handed. Everybody knows we don't know what this program is; yet we are granting retroactive immunity to the telephone companies.

I believe the telephone companies have been good citizens. There is a way to have the telephone companies protected without giving up the program. That would be by substituting the Government as a party defendant, so you

could both have the program and have the telephone companies protected.

Yesterday, in an extended discussion with the chairman of the Intelligence Committee and other Members on the floor, I pressed to see if anybody knew of any case that had been pending for more than 3 years, where Chief Judge Walker has handed down a lengthy opinion, running some 27 pages, on the issue of state secrets on this electronic surveillance. Just a week ago today, he handed down a 59-page opinion declaring that the Presidential power exceeded the constitutional authorization of article II. The first opinion is on appeal to the Court of Appeals for the Ninth Circuit. And here we are stripping the court of jurisdiction. I posed the question, Has that ever happened before? And it hasn't happened before.

I intend to support the amendment and cosponsor the amendment by Senator BINGAMAN, which would follow up on what the inspectors general do, to have it returned to Congress to see if the program is working. That is a good remedial step, but it doesn't go far enough. It has too many ifs, ands, and buts in it. I think it is a good fallback position, and I will support it. I urge my colleagues not to take Senator BINGAMAN's amendment as a substitute for my amendment because it doesn't go as far and it doesn't reach the constitutional issues.

We are dealing here with a matter that is of historic importance. I believe that years from now, historians will look back on this period from 9/11 to the present as the greatest expansion of Executive authority in history—unchecked expansion of authority. The President disregards the National Security Act of 1947 mandating notice to the Intelligence Committee; he doesn't do it. The President takes legislation that is presented by Congress and he signs it, and then he issues a signing statement disagreeing with key provisions. There is nothing Congress can do about it.

The Supreme Court of the United States has gone absent without leave on the issue, in my legal opinion. When the Detroit Federal judge found the terrorist surveillance program unconstitutional, it was affirmed by the Sixth Circuit on a 2-to-1 opinion on grounds of lack of standing. Then the Supreme Court refused to review the case. But the very formidable dissenting opinion laid out all of the grounds where there was ample basis to grant standing. Now we have Chief Judge Walker declaring the act unconstitutional.

The Congress ought to let the courts fulfill their constitutional function. 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 I voted for it even though my amendment to sub-

stitute the Government for the telephone companies was defeated in the Senate's February vote.

Similarly, with great reluctance, I am prepared to support it again as a last resort, even if it cannot be improved by providing for judicial review. However, since Congress has been so ineffective in providing a check and balance, I am fighting hard today again to secure passage of my amendment to keep the courts open.

When the stakes are high, as they inevitably are, when Congress addresses civil liberties and national security, Members frequently must choose between the lesser of two imperfect options. Unfortunately, we too often back ourselves into these corners by deferring legislation until there is a looming deadline. Perhaps this 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 don't believe it is too late to make this bill better. Perhaps the Fourth of July holiday will inspire the Senate to consider its independence from the executive branch now that we have returned to Washington.

These issues are extraordinarily complex. It is my hope that my colleagues will focus on these two unprecedented acts where we are called upon to vote for something we admittedly do not know what we are voting for because we don't know what this program is; secondly, to take the unprecedented step of intervening in the judicial process on a case pending for more than 3 years in the Federal courts.

I thank the Chair and yield the floor.
The PRESIDING OFFICER. Who yields time? The Senator from Vermont is recognized.

Mr. SANDERS. Senator LEAHY has yielded me his remaining time.

The PRESIDING OFFICER. Senator LEAHY only has 30 seconds.

Mr. SANDERS. Yes. Mr. President, international terrorism is a serious issue, and every Member of this body has pledged to protect the American people, and we will do that. But we will and must do it within the context of the Constitution of the United States and the law of the land. No individual, no President, is above the law. This President, perhaps more than any other in history, has abdicated the Constitution of the United States. The time is now to stand up and say: No more.

Let's defeat this legislation. Let's assure the American people that in fact we are a nation of laws, not individuals.

Thank you.

The PRESIDING OFFICER. Who yields time?

The Senator from New Mexico.

Mr. BINGAMAN. Mr. President, I ask that I be allowed to speak for up to 10

minutes. I don't expect to use all that time. And then my colleague from Connecticut, Senator DODD, be allowed to speak for up to 15 minutes.

The PRESIDING OFFICER. That is part of the previous order.

Mr. BINGAMAN. Mr. President, first, let me comment on the statement Senator SPECTER of Pennsylvania made about his own amendment. I support his amendment. I wish to make it very clear that the amendment I am offering is not intended as a substitute for his amendment. I favor his amendment. I favor the amendment I am offering as well. And, of course, I favor Senator DODD's amendment as well, which he is going to speak about in a few moments. I wished to make that clear.

Let me describe the amendment very briefly. I did that yesterday. This amendment is cosponsored by Senators CASEY, SPECTER, CLINTON, and NELSON of Florida. It is based on the simple proposition that we ought to conduct a thorough investigation before we grant any retroactive immunity to telecom companies.

In my view, the structure of this bill has it backward. As currently drafted, it would grant immunity first, and then after those companies are shielded for any potential liability for their past actions, the legislation requires a comprehensive investigation regarding the company's participation in the President's warrantless surveillance program.

The amendment I am offering would fix the problem by putting in place what I believe is a more logical process.

As I discussed yesterday, the amendment would do three things. First, it would stay all the civil cases against the telecom companies as soon as the legislation is signed into law. Second, it would allow time for the inspectors general to investigate the circumstances surrounding this warrantless surveillance program. And third, it would give Congress 90 days to review the findings of that investigation before the companies could ask a court to dismiss the cases pending against them.

I believe this is a very modest proposal. It would not change any of the substantive provisions in the immunity title. The amendment only modifies the timing of when these companies may seek immunity.

The amendment would not prejudice or harm the telecom companies while the investigation is being conducted. All the civil cases would be on hold and neither side would be incurring litigation expenses.

It would not create any risk whatsoever of sensitive information being leaked during the remainder of the litigation process. There would be no evidence submitted to the court during this period of stay. There would be no discovery. There would be no classified information being discussed. As I have stated, the cases would be stayed, would be on hold.

Lastly, the amendment would not hamper our Nation's ability to collect necessary intelligence. The amendment does not limit any of the authority being provided to the Government under this legislation to conduct foreign intelligence gathering. It would not discourage telecom companies from assisting the Government in the future. Under this legislation, companies would still be required to comply with lawful directives and would receive liability protection for any help they provide.

But the amendment does do something that I believe is very important. It would ensure that before these cases may be dismissed, Congress has an opportunity to know exactly what illegal acts, if any, it is forgiving. The Senator from Pennsylvania made a very strong case that Members of the Senate do not know what it is we are granting immunity for at this stage.

I believe the American people expect Congress to act in an informed manner. Quite frankly, other than select members of the Intelligence and Judiciary Committees, this Congress has not been fully informed about the circumstances surrounding this program. That is precisely why the investigation that is required under the legislation is so important and precisely why it is so important that we get the results of that investigation before we proceed.

We are talking about a program that was not conducted in accordance with the law and from what we do know may have violated the constitutional rights of many innocent Americans. I hope my colleagues will agree it is reasonable to keep these suits from being dismissed until at least we have a complete picture of what actions we are shielding from liability.

I yield the floor and yield back the remainder of my time.

The PRESIDING OFFICER. The Senator from Connecticut.

Mr. DODD. Mr. President, let me first, as I did last evening, begin by commending our colleague from West Virginia, Senator ROCKEFELLER, who has the unenviable task of chairing the Intelligence Committee, a complex committee with very serious issues before it. Whatever differences we have should not in any way suggest a lack of appreciation for what he and his staff and others do to try and bring forth legislation to allow us to balance the needs of our security as well as our rights as citizens.

It is that very question which draws me to this amendment I offered which will be subject to a vote in a few minutes. This is a debate that has gone on for the last 7 months, beginning with the Judiciary Committee's reports of last fall, a debate last December and that continued into January and has been going all winter and spring and about to be culminated with the decisions we are about to make over the next hour or so, including the amendment being offered by Senator SPECTER and Senator BINGAMAN, both amendments I intend to support.

The amendment I have offered, along with Senator FEINGOLD and a number of our colleagues, simply strikes title II of this bill. Title II of this bill is the title that grants retroactive immunity to the telecommunications industry.

The facts are very clear. The telecommunications industry, based on some documents, possibly a letter or others, decided it was appropriate for them to gather virtually all the e-mails, telephone conversations, and the like, of millions and millions of Americans, over a period of 5 or 6 years in the wake of 9/11. As I said repeatedly, had this gone on a month or a year or so, I would not have raised objections, given the emotion surrounding the attack on our country. But this program, I suggest, would still be ongoing had it not been for a whistleblower who helped identify the program.

This is not an issue of whether we disagree at all with revising the Foreign Intelligence Surveillance Act to comply with the needs as our enemies gather more sophisticated means by which they can do us harm. It is the age-old question which has confronted this Republic of ours for 232 years. And that is: How do we balance security with simultaneously protecting the rights under our Constitution? Every generation who has preceded us has wrestled with this question.

The one issue we do not subscribe to is the notion that to be more secure, you have to give up rights. That is a fundamentally flawed idea. Every generation who has suggested and adopted it has regretted it in one case after another. Whether it was internment of Japanese Americans out of fear and other such cases, in every instance when we abandoned rights for security, we have come to regret it deeply.

I come, again, to offer this idea to allow the judiciary to do their job. That is what they exist for, that is why the Founders created three coequal branches of Government—the executive, legislative, and judicial branches.

We are not deciding the case. We are merely saying the courts ought to do that. Retroactive immunity for companies that may have broken the law may well soon become the law. That is the danger. As certain as it appears the outcome of the votes will be, equally certain, in my view, is that this matter will not end today regardless of what we do. This will end up in the courts, and there, not only the wisdom of granting retroactive immunity to these companies will be questioned but the constitutionality of that decision.

I have spoken at length about this legislation. It subjugates the role of the courts. But even as this body moves forward with this bill, opponents of retroactive immunity can take some solace in knowing it will still ultimately be the judiciary that decides the constitutionality of this action, as the Framers intended.

I can hardly see how it would have passed muster with our Founders. It was, after all, James Madison who said:

I believe there are more instances of the abridgment of the freedom of the people by gradual and silent encroachments of those in power than by violent and sudden usurpations.

He spoke those words at the Virginia Convention to ratify the U.S. Constitution.

I can hardly see how men who did not simply utter such sentiments, but rather sacrificed everything in the name of them, could have envisioned America ceding her hard-fought liberty in a moment of fear or weakness.

Is this bill constitutional? This is not for me or any one of us to decide. I am not a judge. None of us are. We are not a jury in this case. None of us are. We are Senators who treasure the document we have sworn to uphold. I have kept a copy with me every day, going back the 27 years I have served in this body.

What is for this body is to decide how we best safeguard our Nation's security. Greater security for our citizens is what, of course, all of us want from this bill. But if we have learned anything from this administration, it is that there is a right way to protect our Nation and a wrong way.

We learned that when even those of us in this body act with the best of intentions, we can still do lasting damage because we are not acting with foresight and prudence but with an impulsiveness and, in too many cases, out of fear.

No one doubts for a moment the gravity of the threats we face or continue to face. No one suggests we do not have an obligation to monitor terrorists' communications with the utmost of vigilance. I wish to make sure the Government has every tool it needs to do so. I have no interest whatsoever in denying our Government what it needs to make our country safe. I want our President to have the capabilities to stop terrorists before they act, before they inflict harm on our country, our communities, and our families. I think we can and must do that in a way that balances national security with our rights and liberties.

But for reasons I have described at length in previous debates, this so-called compromise strikes no balance at all, in my view.

Let us be very clear, the courts have continuously shown an ability to handle cases with sensitive security issues. Chief Judge Vaughn Walker, a Ronald Reagan appointee to the District Court to the Northern District of California, who has virtually overseen all the cases challenging the NSA's warrantless wiretapping program, demonstrated this once again.

In a case against the Government, Judge Walker recently ruled "FISA preempts the state secrets privilege in connection with electronic surveillance for intelligence purposes . . ." This ruling suggests that in suits against the telecommunications companies, they will be able to defend themselves and not be hamstrung by the state se-

crets privilege. At the very least, this decision highlights how premature it would be for Congress to grant retroactive immunity at this time.

The sum and substance of our argument is very simply this: Now is not the time to close the courthouse doors on this issue. I cannot say it enough. My trust remains in the courts in cases argued openly and judges presiding over them and juries of American citizens who decide them. Our courts should be a source of our pride, not our embarrassment. They deserve the chance to do the job the Framers intended them to do.

As complex, as diverse, as relentless as the assault on the rule of law has been, our answer to it is a simple one. Far more than any President's lawlessness, the American way of justice remains deeply rooted in our character as a people that no President can disturb. That is why, even on this day, I remain full of hope and faith that we can unite security and justice because we already have over the generations.

I harbor no illusions about what is about to happen with this legislation or its consequences. But even as this long fight draws to a close, it is worth pausing for a moment to recognize those who have joined us in writing its many chapters. They have not been written by any one hand alone.

Senator RUSS FEINGOLD of Wisconsin has fought this battle with me from the very beginning. His leadership has been articulate, his commitment unwavering and unyielding.

The Senator from Vermont, Mr. LEAHY, the chairman of the Judiciary Committee, fought valiantly to bring the Senate Judiciary Committee version of this bill that he crafted to the floor of this body. He has been a staunch opponent of retroactive immunity.

The majority leader, HARRY REID of Nevada, has stood with us on this fight. I thank him for it as well. It has not been easy to have been the majority leader taking the position he has and also managing this bill to move forward. Even as he fought and sought to balance his personal opposition to retroactive immunity with his responsibility to move this legislation as leader, he has given us every opportunity to speak out against this legislation. He has worked hard to make sure the world's foremost deliberative body, as it is often called, would, indeed, be given a chance to deliberate over a matter that goes to the very core of who we are as a republic. In Congresses past, I cannot say, with certainty, that my colleagues and I would have been afforded the opportunity the majority leader has given each and every one of us, and I thank him for it.

Lastly, I thank the thousands who joined with us in this fight around the country, those who took to the blogs, gathered signatures for online petitions, created a movement behind the issue, men and women, young and old, who stood up, spoke out, and gave us

the strength to carry on in this fight. Not one of them had to be involved, but they chose to be involved for one reason and one reason alone: their deep love for this country, the Constitution, and its liberties. They remind that the silent encroachment of those in power, as Madison spoke of, can, in fact, be heard if only we are willing to listen.

All of us, my colleagues and citizens around the country, share a fundamental belief in our Constitution. We believe our constitution isn't incidental to our security, rather it is its very foundation. This notion that it is the rule of law that keeps us safe should not be controversial. There should not be a partisan divide. I take no backseat, as no one does, when it comes to protecting America's safety and security. But if history has taught us anything, it simply doesn't require sacrificing our freedoms to do that.

I do not believe history will judge this President kindly for his contempt of the rule of law. But will history be any kinder to those of us who have served as these transgressions have occurred on our watch? I have two young daughters. Their generation is going to ask their parents and grandparents some very pointed questions:

Where were you when the President asked you to repudiate the Geneva Conventions and strip away the rights of habeas corpus? Where were you when stories of secret prisons and outsourced torture first began to surface and then became impossible to deny? And of today, they will ask: Where were you when Congress was persuaded to shield wealthy corporations that may well have knowingly acted outside of the law to spy on our fellow citizens? Where were we in that debate?

History will not forget. It will not forget our role in any of this. And just as surely as subsequent generations will ask all of us those questions, what will be clear is that we will have failed to ask ourselves one very fundamental question: Does America stand for the rule of law or for the rule of men? That question never goes away. It has been the same question asked for more than two centuries. It has been with us, of course, these past 7 years in very strong and poignant ways. It will haunt us long after this bill passes, long after this administration recedes into history, long after we all have passed into history ourselves. Indeed, generations of leaders and free societies have struggled to answer the question for thousands of years.

That is the question every generation must answer for themselves. It is a battle for the American soul, waged between our better angels and our worst fears. Our Founders answered the question correctly. I ask the question: Will we?

Mr. President, allow me to close with one of my favorite quotations, one I have recited many times on the floor of this Chamber. It is from Justice Robert Jackson's opening statement at the Nuremberg trials in the summer of July of 1945. He said . . .

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

The tribute that Power owes to Reason is as clear today as it was when those words were spoken more than half a century ago. That America stands for a transcendent idea; the idea that laws should rule, not men; the idea that the Constitution does not get suspended for vengeance; the idea that when this Nation begins to tailor its eternal principles to the conflict of the moment, it risks walking in the footsteps of the very enemies we despise. As Margaret Thatcher said: "When law ends, tyranny begins."

Today, let us pay the tribute that Power owes to Reason today—in this moment, with these votes. I implore my colleagues to vote against retroactive immunity, against cloture, and above all, for the rule of law.

Mr. President, I yield the floor.

Mr. ROCKEFELLER. Mr. President, yesterday, we heard some discussion of last week's decision in the district court in California. In that case, the court ruled that FISA limits the power of the executive branch to conduct foreign intelligence surveillance activities and limits the executive branch's authority to assert the state secrets privilege. That opinion, however, is only minimally relevant to the debate before us today for three reasons.

First, the decision was in a case against the U.S. Government. In contrast, title II applies only to cases against telecommunications companies, not to suits brought against the Government. The case will therefore be unaffected by title II.

Furthermore, because a provider could be entitled to protection from suit under existing law even if the Government acted unconstitutionally, this decision does not resolve the question of whether telecommunications companies acted lawfully or should be entitled to immunity.

Second, the decision in the case is only one step in a lawsuit that may continue in the district court and which will likely be appealed. This decision, which is a long way from being final, does not affect the need for the Congress to act on this legislation.

Third, the court found that the civil liability provisions of FISA trump the state secrets privilege only to the extent that those civil liability provisions apply. This is not a broad exemption to the state secrets privilege. The opinion does not change the fact that the companies are and, unless we pass title II, will continue to be unable to assert their statutory defenses because of the Government's assertion of the state secrets privilege.

The one thing that the decision shows us is that the court can consider the issue of constitutionality in those suits being brought against the Government. Congress therefore does not

need to require the courts to consider that issue in suits against private companies.

The PRESIDING OFFICER (Mr. CASEY). The Senator from West Virginia.

Mr. ROCKEFELLER. Mr. President, is there a time set for the beginning of the votes?

The PRESIDING OFFICER. There is not. There is approximately 30 minutes of debate remaining.

Mr. ROCKEFELLER. This Senator wanted to be clear about that because Senator BOND will be coming. I will speak shortly, and then he will come down to speak also.

Mr. President, we are at quite a remarkable period now, because we are actually closing the debate on something which we have been discussing in this Chamber, in committees, around the Congress, in the press, in general, for quite a long time. It has been an amazing debate, and today we close debate on the Foreign Intelligence Surveillance Act Amendments of 2008.

I wish to thank all of my colleagues for engaging in this critically important debate, both on and off the Senate floor, whether for or against whatever amendments we will be voting on today. People have expressed their principles, they have been articulate, they have spoken with restraint and dignity and eloquence, and I respect that very much. I think that is the essence of senatorial behavior. We have vigorously debated the appropriate controls for electronic surveillance to collect foreign intelligence information since the disclosure was made 2½ years ago about the President's wireless surveillance program, which is a travesty—a travesty from 2001 to 2007. An absolute travesty. And because of the contributions not only of those who have supported earlier versions of this legislation but also of those who have opposed various provisions to deal with those issues, we have moved forward to craft, in this Senator's judgment, a strong bipartisan, bicameral compromise that is supported not just by the Senate but also by the House, which was unwilling to support it before at all, but also by the Attorney General and the Director of National Intelligence, both of whom are entirely relevant to what is in this bill and what is to be said about what is in this bill.

This final product is critical to the Nation's security. I am aware of both our rights and our security. In my job as chairman of the Intelligence Committee, I have to look at both. I was brought up in a tradition, in a family which worried about rights, and I have fallen into a position where I am in a position to see what goes on in this world. In a post-9/11 situation, it is very different. It is like comparing fighting wars against the Soviets as opposed to against al-Qaida, the Taliban, or whatever it is. It is a very different world. You can't tell who anybody else is, you can't tell what their intentions

are, you can't tell what is in a suitcase which might be lying anywhere in this building or anywhere else.

When you walk around this Capitol, you see levels of security which you have never seen before. We frequently evacuate this building and our offices, all because of what happened on 9/11, and what had been planned well before that. So it is serious. And not that it makes any difference—it makes us no more important than any other citizen in the United States—but we do know that United Airlines 93 was headed for this building and for this complex. So there is an instinct to understand that those who oppose us and who would have us change our way of life and punish us for what they see as our sins are very serious in their work, patient in their work, and willing to wait to continue their work.

The final product is, therefore, critical to the Nation's security, and it sets forth a legal framework to reflect the enormous changes in telecommunications technology over the last 30 years. The bill couples this improvement in foreign intelligence collection against foreign targets overseas with important protections for civil liberties, including the review by the Foreign Intelligence Surveillance Court of the targeting and minimization procedures governing these collection activities.

In addition, the bill ensures that when Americans overseas are the target, that a FISA Court judge, rather than the Attorney General—in a very important change—decide that there is clear authority and probable cause for intelligence agencies to target such an individual.

The bill also requires the Attorney General to develop guidelines to prevent prohibited activities, such as reverse targeting. That was put before us by Senator FEINGOLD, who is in opposition to this bill but who made that contribution to this bill, along with others, to ensure individual FISA Court orders are obtained, when required.

You can't do anything these days without a FISA Court review if you are in the Government. You can't do anything. That is only title I of the bill, not title II.

There are new oversight and reporting requirements to Congress in the agreement and a sunset date that means these issues will be addressed during the next administration. And I think that is very important, because some people said: Well, let this law be permanent and forever.

There were those of us who didn't want that to happen. We said: We are in new territory here. It is a post-9/11 world. It is very different. So we need to put down into law what we believe, but we also need to go back and review that, to make sure we have done it correctly. So in a period of 4½ years, during the administration of the next President, he will be able to review, along with us, what we have done and

decide if we need to make any changes. I like that. I think that is fair. I think that is democratic.

Certainly the most controversial aspect of this legislation has been those provisions that set standards and procedures that allow the courts to find limited immunity protection for electronic communication service providers alleged to have assisted the Government in the President's warrantless surveillance program. Under this agreement, however, these provisions are not the blanket immunity that the administration first proposed, nor are they a statement by the Congress either pro or con on the legality of the program.

We have debated these liability protection provisions in great depth over the past 2 days—over the past 2 years, really. As I have said in opposition to the amendments that were offered to strike or amend the limited liability provisions, I am convinced the bill takes the right approach. We did have efforts to have substitution rather than immunity, and they were defeated. They were defeated in the Judiciary Committee, they were defeated on the floor of the Senate, and it was thought if they would be brought up again, they would have been defeated again. So we have been through this. The Senate has worked its judgment on that approach.

I believe the requirement in the bill for the inspectors general to complete a comprehensive review of the President's program is much more likely to provide the American people a complete set of facts about the program on a timely basis, to the extent that classification permits, than would continuation of the pending litigation. In other words, we have improved it.

And to be quite honest, we passed this 13 to 2 in committee, and then with 68, 69 votes, whatever it was in the Senate, we passed the Senate bill that came out of the Senate Intelligence Committee, but the House had not. They were not happy. They had their reasons. And so we went to them, the vice chairman, CHRISTOPHER BOND, and myself and our staff, and we worked with them endlessly. We worked with the White House, to some extent; with the DNI, the Director of National Intelligence, the Attorney General's office, extensively working through individual ways of compromising to make sure that we could protect companies that provide the intercept and the collection of communications we need to get, but to do so in a way which made it clear that the Government was the issue, not them. And we have done that.

Finally, with this agreement, we settle the issue of whether past or future congressional authorizations for the use of military force that do not include a reference to surveillance may be used to justify the conduct of warrantless electronic surveillance. This was an extraordinarily important thing to do, and Senator FEINSTEIN de-

serves a lot of credit for that—the exclusivity amendment. We have said you cannot conduct any of this collection outside of FISA. You have to have a warrant. You cannot go outside. You cannot use what the President likes to refer to as inherent powers to do anything he wants. You can't do that. You have to have authorization from the Congress in order to do that. That is clear—for the first time in this bill. That is huge. That restricts some of the comments we have been hearing earlier.

FISA remains the exclusive means by which electronic surveillance or interception will be conducted from this point forward unless the Congress sees some reason to make it either stronger or whatever. With enactment of this bill, there will be no question that Congress intends that only an express statutory authorization for electronic surveillance or interception may constitute an additional exclusive means for that surveillance or interception. In other words, you cannot do anything more without congressional authorization. That is oversight. That is what we ought to be doing. It is what we should have done but we didn't do. The world changed. We didn't change quickly enough. But we have changed enormously in this bill.

This is buttressed further with the clarification that criminal and civil penalties can be imposed for any electronic surveillance that is not conducted in accordance with FISA or specifically listed provisions of title 18.

In closing, I would like to address my colleagues who would have preferred a different result than the agreement before us today. I urge them not so much now—there being not much time—but I urge them in the coming days, weeks, and months to look at this legislation in its entirety; not to think about a single point here or a single point there but to look at the whole texture of it. This is what we are doing. That is why we have a sunset date, so we will again be looking at it, looking at the larger picture, seeing what the balance really is and are we keeping it properly as between safety and civil rights, individual rights. That is very important.

This is a bill which provides a framework and stability within the Foreign Intelligence Surveillance Act for a collection system that will work well for national security. That is very important to this Nation. That is very important to this body and to every single American. This bill is vastly better than the Protect America Act, obviously, enacted last August, and much preferred to any additional short-term extension of that flawed statute—which was one approach. This is a bill which contains important safeguards for civil liberties and effective mechanisms for oversight.

I do not think any of the committees that deal with these measures will ever be the same again, nor have they been in the last year and a half with respect to oversight. The vigor, the passion

with which we sought, leveraged, coerced in some cases, the administration to make more people read into the program, to make more people a part of the discussion, make more people a part of the knowledge which they held so closely to themselves—I remember at one point I was one of 4 out of 535 people who were briefed on the program, and they kept saying on television: The Congress is briefed. And this was a joke, this was a farce. I will not go into it further but, believe me, it was. They did not do that, they did not want to do that. That is their nature. Now it is different. Now we are all over them. And we have a lot more to do before this Congress gets out with respect to the oversight factor of Congress, which is so important to us and to the Nation.

Support for the agreement says to the intelligence professionals who will implement the new authority that Congress takes seriously its oversight responsibilities. Some of them do not like that fact. They do not want us to. They want to be able to do what they have always done because they could do what they always wanted to do—before the world changed. Now they cannot. Yes, we have had intelligence committees for a long time, and, yes, they have done work for a long time, but there has never been a greater need for tough oversight.

Sometimes when the Director of the CIA calls me—and I don't think I am saying anything privileged here—and he wants to tell me about something good that has happened—it is a secure conversation on a secure phone—I say: Look, when I hear from you, I want to hear what you want to tell me that is good, and I also want to hear from you about something that is not working right.

That is the pattern which is developing. They are a little more timid about coming up to us. We have to negotiate more to have them come before us, but we do it because we need them and they need our oversight. They are not free to do entirely what they want to do, but we have to give them the full right to keep us safe, yet balance, as I believe we do in this bill, civil liberty protections.

I simply close by congratulating all people involved. I think for a subject which was meant to be understood by so few in this body, many people have expressed views on the floor and to many of us in private. It has been the subject of caucus discussions.

It is a major piece of legislation, and I urge my colleagues to oppose the three remaining amendments, and I urge my colleagues to vote yes on final passage. They will serve their Nation well.

I yield the floor.

The PRESIDING OFFICER. The Senator from Florida.

Mr. NELSON of Florida. Mr. President, is there an order established here under unanimous consent?

The PRESIDING OFFICER. There is 3 minutes remaining for the Senator

from Wisconsin, Mr. FEINGOLD, and 9 minutes for the Senator from Missouri, Mr. BOND.

Mr. NELSON of Florida. Will the Senator allow me to have a couple of moments?

Mr. BOND. Off Senator FEINGOLD's time.

Mr. NELSON of Florida. What is the procedure? Since Senator FEINGOLD is not here, is that locked in as such for him?

Mr. ROCKEFELLER. Mr. President, might I inquire whether that was entirely necessary—or, rather, of the Parliamentarian—is that entirely necessary? The Senator does wish to speak. We are not starting votes quite yet. There does not seem to be a total limit on that, a time set for that, and the Senator has been wanting to speak for a number of days. I would be happy if he would be able to do that.

The PRESIDING OFFICER. There is only 3 minutes on the majority side for Senator FEINGOLD. It would require unanimous consent.

Mr. ROCKEFELLER. What about leader time?

The PRESIDING OFFICER. Only the leader has leader time.

Mr. ROCKEFELLER. And that is correct.

The PRESIDING OFFICER. The Senator from Washington is recognized.

Ms. CANTWELL. Mr. President, I rise today to express my strong disappointment with the FISA Amendments Act of 2008, H.R. 6304. While proponents of this bill have claimed this bill was designed to monitor foreign-to-foreign communications that pass through the U.S. without a warrant, the bill actually goes much further—providing a broad expansion of authority to conduct domestic surveillance.

We all want to protect our country's national security interests and protect Americans from those who would do us harm, but to do so without accountability or without adequate checks and balances is contrary to the vision of our Founding Fathers.

I recognize that some changes have been made to this bill over the past 6 months but those cosmetic changes have failed to adequately protect the privacy rights of innocent Americans.

This bill permits the Government to collect all Americans' international communications, even communications of innocent Americans with no connection to terrorism or other national security concerns. This bulk collection of innocent Americans' private communications is unacceptable and contrary to American values and fundamental Constitutional protections.

While this administration has ignored the congressional mandate that the Foreign Intelligence Surveillance Act is the exclusive means for conducting wiretapping activities on American citizens, Congress can not ignore the weighty constitutional issues being decided here today.

I am also very troubled that telecom companies will not be held accountable

for participation in the Bush administration's warrantless surveillance program. Congress should not be providing blanket immunity for telecommunications companies that cooperated with the administration's warrantless wiretapping programs. We don't know precisely what those companies did or the full extent of what they did.

This bill effectively grants retroactive immunity to companies that aided the Bush administration's warrantless wiretapping over the last 7 years. It would effectively dismiss 40 cases pending against the telecommunications companies that are undergoing judicial review. Judicial review is a critical component of our Government to check potential overreaching by the executive branch.

This administration wants to ensure that no court has the opportunity to review potential illegal activity, effectively slamming the door shut before the judicial system can determine whether American citizens' rights were violated.

This is why I voted in support of Senator DODD's amendment to strike the immunity provision today, and I am disappointed that it was not adopted. Congress should respect judicial review and not take away the only opportunity for redress available to American citizens for potential overreaching by this administration.

According to public documents and media reports, a telecom company allegedly split off a copy of the Internet traffic transported over fiber-optic cable running through its San Francisco office and diverted it to another room under the supervision of a Federal Government agency, where the copy was transported to equipment that could review and select out the contents and data mine call patterns of communications.

The reason I say allegedly is because all the details are classified, sources and methods, and those who do not know can at best only make educated guesses while those who do know can not or will not say.

Now the Electronic Frontier Foundation believes that the telecom company has deployed similar facilities in 15 to 20 different locations around the country, implying a significant fraction of the communications to and from the telecom firm's domestic customers could have been examined illegally. And it is critical that we get to the bottom of this.

Congress would be acting even though only last week Judge Walker issued a key ruling holding that held that the government could not prevent plaintiffs from submitting unclassified evidence to support their claims against telecommunications companies. Congress should respect the judiciary's role and allow it to move forward with these cases.

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

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

The PRESIDING OFFICER. Nine minutes.

Mr. BOND. I yield a minute and a half to my distinguished colleague from Florida.

Mr. NELSON of Florida. I am grateful to the vice chairman. I wish to say—and I will do it in a minute and a half—how much I appreciate the chairman and vice chairman being able to come up with a product that we need so we get some certainty about the court review of this process so we can balance this interest of going after the terrorists but at the same time protecting the civil liberties of American citizens and American persons who are here legally in the country. I think the bill does that. We have struggled with it for a year and a half in our committee. I am certainly going to support the final product.

There are obviously some matters we have had in the Intelligence Committee that we are not able to discuss here. I am sure the people listening understand that. I just want to say on the controversial issue of immunity that I do not believe in blanket immunity for the phone companies, and that is why, when this issue was in front of our Intelligence Committee, I offered language to deny them immunity. But it failed, my amendment, and it failed miserably. So when it came to the floor, I offered a compromise to the full Senate, along with Senator FEINSTEIN, that would have required a special court to review the phone companies' action, but that failed as well.

Now I am backing an amendment by Senator BINGAMAN that would at least delay immunity until the inspectors general of the U.S. Government complete their investigation of the President's warrantless wiretapping program. Upon completion of the report, the Senate will have 90 days to act before immunity is granted to the telecommunications companies. This will allow us time to change some minds if real wrongdoing is found.

Overall, I believe this legislation significantly improves civil liberties protections for Americans while enabling our intelligence community to listen in on terrorists. This is an important step forward and I will support this legislation.

Mr. BOND. Mr. President, I thank the distinguished Senator from Florida, who has been a hard-working member of the Intelligence Committee and has been a great contributor. I am sorry he does not agree with the compromise we reached with the House to have the district courts make a review. I think that is important. That satisfies our needs.

Several points made on the floor today and previously need to be answered. It has been said that the new surveillance powers allow the Government to collect all communications between the United States and the rest of the world, millions and millions of communications between innocent Americans, parents calling children

abroad, people serving in Iraq. There is no prohibition on reverse targeting.

A plain reading of the bill shows us that this statement is simply inaccurate. As the Senator from Utah said earlier today: Unless you have al-Qaida on your speed dial, you are not going to be collected against. There are safeguards in place to ensure that any conversations that do not have foreign intelligence information will not be kept or shared, they will be minimized or suppressed.

Americans either inside or outside the United States may not be targeted without court order. That "outside of the U.S." protection was something we added on a bipartisan basis in the Senate Intelligence Committee.

In addition to approving any collection against Americans, anybody in the United States, an American overseas, the FISA Court will review all procedures used to target foreign communications and make sure that communications with innocent Americans are minimized or suppressed.

As far as reverse targeting goes, I refer my colleagues to section 702(B) of the bill which says:

An acquisition authorized under subsection 8 may not intentionally target a person reasonably believed to be located outside the United States if the purpose of such acquisition is to target a particular known person reasonably believed to be in the United States.

I can assure you that I and other members of the Intelligence Committee have reviewed the procedures, have seen the operations, know the supervision, and know the very tight constraints under which these professionals operate. They are overseen by supervisors, by higher level authorities, by inspectors general, by lawyers, their own lawyers, and lawyers from the Department of Justice. Somebody made an error and collected some criminal information a year or so ago and that was dealt with appropriately. There is no ability for somebody, even a rogue who happens to get in, to get away with targeting innocent American communications.

There has been a lot of debate also about the Senators having access to all of the information. As I pointed out earlier, we set up the Senate Select Committee on Intelligence to provide the most highly classified information to members of the committee. I have worked hard with the chairman, and we have opened to the full Intelligence Committee far more information than we ever got before, because I believe the Intelligence Committee has a heavy responsibility to make sure that what is being done stays within the law, stays within the guidelines, and protects the rights of American citizens.

But if you say that every intelligence matter should be briefed to the entire Congress, where does that stop? Should we then brief the New York Times directly so they can publish a story and decide whether the intelligence activ-

ity is acceptable? I think not. I think we have seen the problems that occur when leaks have compromised our intelligence. They have done it too often.

Some people still want to debate the legality of the TSP, saying it is blatantly illegal. Well, they persist in their belief that the President lacks the constitutional authority to conduct warrantless foreign intelligence surveillance, even though article II has not changed in over 200 years.

The FISA Court itself, en banc, In re: Sealed Case, has noted the President has that authority, and if the Congress tried to pass a law saying the President does not have that authority, it would be found to be unlawful.

The intelligence community has been overseen by the Intelligence Committee, and we have found clearly that the companies acted in good faith. Regardless, however, of the legality of the President's TSP, it is a matter of fundamental fairness. These providers should not be punished by forcing them to litigate frivolous claims or by delaying this much needed relief.

Without these companies, without their active participation on this and many other matters, the intelligence community is fearful and has lost cooperation in the past. They are taking risks by being good patriotic Americans, and there are some who want to punish them. They want to kick them to get at the administration. Well, this bill does not prohibit lawsuits against the Government or Government officials.

I believe the time has come for us to pass a bill after 15 months. We now know that we have before us the ability to give clear authority, direction, and guidelines to the intelligence community to operate to keep us safe. We have added new protections, and if the President had not followed the advice of the "gang of eight" and had tried to reform the FISA rather than using article II, we would not only be debating September 11, there would be many others.

I urge my colleagues to vote down all these amendments and pass this badly needed modernization of intelligence collection, electronic surveillance, and the provisions of the additional privacy rights and protections for American citizens.

I yield the floor.

AMENDMENT NO. 5064

The PRESIDING OFFICER. There will now be 2 minutes of debate equally divided prior to a vote on the amendment offered by the Senator from Connecticut, Mr. DODD.

Mr. ROCKEFELLER. All time has been yielded. I ask unanimous consent, en bloc, that the vice chairman and I ask for the yeas and the nays on all of the upcoming votes.

The PRESIDING OFFICER. Without objection, the yeas and nays may be requested on all three amendments.

Is there a sufficient second?

There appears to be a sufficient second.

The yeas and nays are ordered.

The Senator from Connecticut.

Mr. DODD. There is 2 minutes equally divided?

The PRESIDING OFFICER. The Senator is correct.

Mr. DODD. Mr. President, this has been a long debate. It started last fall. Again, let me commend the two members here, the chair and ranking member of the committee. I respect their efforts. But my friend from Missouri has made my case. This is a matter for the courts to decide, not for the legislative branch to decide. It is why we have three coequal branches of Government.

It is not our business as a juror and judge to determine the legality of what occurred here. This much we do know through published reports: Since 1978, 18,748 requests for warrants from the FISA Court have been granted; 5 have been rejected.

Why did this administration not proceed with the normal course of events here and seek justification and legal authority for the vacuuming up of private information of American citizens? All of us here want our agencies to do everything they can to protect our security. But all of us equally care about the liberties of our country.

The false dichotomy that is being suggested by what is in this bill, that in order to be more secure we have to give up rights, is a dangerous dichotomy. It is a false choice.

Previous generations have made it. We should not. Let's strike this title, allow the courts to determine whether what occurred was legal and then proceed.

Some of the companies did not do what others did because they felt it was not legal, what they were being asked to perform. Clearly there was some doubt in the minds of people as to justification. So I happen to believe the best way to proceed, as did Judge Walker, appointed by Ronald Reagan to the district court which has handled most of these NSA cases in the past, that the secret privilege will be protected, the court can do its job and determine the legality here. It is not the place for the Senate to act as the judicial branch of Government. That is why the Founders created three coequal branches of Government. That is what the issue is, the rule of law or the rule of men. That is what this amendment does by striking this title and allowing these matters to go before the court. I urge the adoption of the amendment.

The PRESIDING OFFICER. The Senator from Missouri.

Mr. BOND. Permit me to relieve the Senator from Connecticut, a good friend and a good legislator, of some of his concerns. No. 1: During the President's terrorist surveillance program, even though it was operating under article II, he went to the FISA Court to get warrants for listening in on American communications, the same procedure we have outlined in this bill

today. But what he was able to do was to listen in on terrorists reasonably believed to be abroad, which is now included in our bill.

Article II is clear that he has that right. Article II was used by President Bill Clinton for a physical search, a physical search of Aldridge Ames' home; and the Congress responded by giving him more power.

Secondly, it is said that the article II should be challenged. I point out that there is no ban, no ban on lawsuits such as a lawsuit before Judge Walker, on lawsuits going forward against the Government or Government officials.

The Intelligence Committee conducted a comprehensive review of the TSP. We determined, on a strong bipartisan basis, that the providers acted in good faith pursuant to representations from the highest level of the Government that the TSP was lawful. It is not right to punish patriotic Americans who step forward and help their Government by subjecting them to harassment of lawsuits.

I urge the defeat of the amendment. The PRESIDING OFFICER. The question is on agreeing to the amendment.

The yeas and nays have been ordered. The clerk will call the roll.

The bill clerk called the roll.

Mr. DURBIN. I announce that the Senator from Massachusetts (Mr. KENNEDY) is necessarily absent.

Mr. KYL. The following Senator is necessarily absent: the Senator from Arizona (Mr. MCCAIN).

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

The result was announced—yeas 32, nays 66, as follows:

[Rollcall Vote No. 164 Leg.]

YEAS—32

Akaka	Dodd	Murray
Baucus	Dorgan	Obama
Biden	Durbin	Reed
Bingaman	Feingold	Reid
Boxer	Harkin	Sanders
Brown	Kerry	Schumer
Byrd	Klobuchar	Stabenow
Cantwell	Lautenberg	Tester
Cardin	Leahy	Whitehouse
Casey	Levin	Wyden
Clinton	Menendez	

NAYS—66

Alexander	Domenici	McConnell
Allard	Ensign	Mikulski
Barrasso	Enzi	Murkowski
Bayh	Feinstein	Nelson (FL)
Bennett	Graham	Nelson (NE)
Bond	Grassley	Pryor
Brownback	Gregg	Roberts
Bunning	Hagel	Rockefeller
Burr	Hatch	Salazar
Carper	Hutchison	Sessions
Chambliss	Inhofe	Shelby
Coburn	Inouye	Smith
Cochran	Isakson	Snowe
Coleman	Johnson	Specter
Collins	Kohl	Stevens
Conrad	Kyl	Sununu
Corker	Landrieu	Thune
Cornyn	Lieberman	Vitter
Craig	Lincoln	Voivovich
Crapo	Lugar	Warner
DeMint	Martinez	Webb
Dole	McCaskill	Wicker

NOT VOTING—2

Kennedy	McCain
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The amendment (No. 5064) was rejected.

AMENDMENT NO. 5059

The PRESIDING OFFICER. There will now be a period of 2 minutes of debate, equally divided, prior to a vote on the amendment offered by the Senator from Pennsylvania, Mr. SPECTER.

The Senator from Pennsylvania.

Mr. SPECTER. Mr. President, the Senate is not in order.

The PRESIDING OFFICER. The Senate is not in order. Please take your conversations out of the Senate.

The Senator from Pennsylvania.

Mr. SPECTER. Mr. President, I urge my colleagues to vote for the pending amendment to avoid two unprecedented actions. One is that the Senate is being called upon to vote on retroactive immunity for a program that most of the Members do not know and have not been briefed on. We frequently vote on matters that we do not know about but not when it is so blatant, when it is on the record that we do not know about it, we are caught red-handed. We ought not to be giving retroactive immunity to a program where most of the Members have not been briefed.

The second unprecedented act would be to intervene in a court decision which has been pending for 3 years, where a judge has found the terrorist surveillance program unconstitutional, where it is on appeal to the Ninth Circuit. And Marbury v. Madison, which is the cornerstone of this democracy, says the courts have to interpret the Constitution.

Mr. BYRD. Right.

Mr. SPECTER. Vote for this amendment.

I thank the Chair, especially for securing order. It is unprecedented. There is another unprecedented act today.

The PRESIDING OFFICER. The Senator from West Virginia.

Mr. ROCKEFELLER. Mr. President, I oppose this amendment, which would require the district court to assess the constitutionality of the President's program—which is not what this is about—before it could dismiss cases against any telecommunications companies which participated in it.

The amendment unnecessarily puts the burden of constitutionality—a burden that lies squarely on the shoulders of the Government—on the shoulders of telecommunications companies that cooperated with the Government in good faith. This is unfair.

Because the Government requires prompted cooperation from telecommunications companies, we do not ask those companies to make detailed legal assessments prior to cooperating with the Government. Their protection from suit should not be limited based upon constitutional questions they had no obligation to assess.

The significant constitutional question of whether the President's program was constitutional or lawful is properly addressed in cases against Government officials who are not immune. These cases can and should con-

tinue, without regard to this legislation.

I ask that people oppose this amendment.

The PRESIDING OFFICER. The question is on agreeing to the amendment.

The yeas and nays have been ordered.

The clerk will call the roll.

The legislative clerk called the roll.

Mr. DURBIN. I announce that the Senator from Massachusetts (Mr. KENNEDY) is necessarily absent.

Mr. KYL. The following Senator is necessarily absent: the Senator from Arizona (Mr. MCCAIN).

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

The result was announced—yeas 37, nays 61, as follows:

[Rollcall Vote No. 165 Leg.]

YEAS—37

Akaka	Dorgan	Obama
Baucus	Durbin	Reed
Biden	Feingold	Reid
Bingaman	Harkin	Sanders
Boxer	Kerry	Schumer
Brown	Klobuchar	Specter
Byrd	Kohl	Stabenow
Cantwell	Lautenberg	Tester
Cardin	Leahy	Webb
Casey	Levin	Whitehouse
Clinton	McCaskill	Wyden
Conrad	Menendez	
Dodd	Murray	

NAYS—61

Alexander	Domenici	Mikulski
Allard	Ensign	Murkowski
Barrasso	Enzi	Nelson (FL)
Bayh	Feinstein	Nelson (NE)
Bennett	Graham	Pryor
Bond	Grassley	Roberts
Brownback	Gregg	Rockefeller
Bunning	Hagel	Salazar
Burr	Hatch	Sessions
Carper	Hutchison	Shelby
Chambliss	Inhofe	Smith
Coburn	Inouye	Snowe
Cochran	Isakson	Stevens
Coleman	Johnson	Sununu
Collins	Kyl	Thune
Corker	Landrieu	Vitter
Cornyn	Lieberman	Voivovich
Craig	Lincoln	Warner
Crapo	Lugar	Wicker
DeMint	Martinez	
Dole	McConnell	

NOT VOTING—2

Kennedy	McCain
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The PRESIDING OFFICER. Under the previous order requiring 60 votes for the adoption of this amendment, the amendment is withdrawn.

AMENDMENT NO. 5066

The PRESIDING OFFICER. There will now be 2 minutes of debate equally divided prior to a vote on the amendment offered by the Senator from New Mexico, Mr. BINGAMAN.

The Senator from New Mexico.

Mr. BINGAMAN. Mr. President, first, I ask unanimous consent that Senator FEINSTEIN be added as a cosponsor.

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

Mr. BINGAMAN. Mr. President, the bill that is pending before us has the sequence of events in the wrong order. It provides that once the bill is enacted, companies can go into court and get the lawsuits dismissed. After that, there is an investigation provided for

by the inspectors general to determine what was going on in this program and what, in fact, we are providing immunity for. That is the wrong sequence.

What we ought to do is to stay the cases, stay any proceedings on these cases, keep them in court, have the investigation done—a 1-year investigation, which is provided for in the bill, and then have 90 days in which Congress can review that investigation and the results of it. Only after that would the companies be able to go into court and seek immunity. That is a much more realistic way to proceed. I am glad we have cosponsors of this amendment who support the final bill, we have cosponsors who oppose the final bill.

I hope all Senators will look at this and see this as something they can support. It would improve the legislation.

Mr. President, I yield the floor.

The PRESIDING OFFICER. Who yields time? The Senator from Missouri.

Mr. BOND. Mr. President, the simple fact is, the IGs have already reviewed this bill. I agreed to a limited inspectors general overall review, even though the Senate Intelligence Committee has reviewed the program on a bipartisan basis. At a time when we are urging more congressional oversight, why would we again turn over the question of the executive branch's actions to an executive branch agency when the committee has clearly said there is no reason to deny retroactive liability protection to these areas?

Now, there are some who don't like the program at all. There are some who don't like the administration. They want to kick the administration by penalizing the companies, by dragging the companies through a continuing stretch of frivolous lawsuits. The Senator from Pennsylvania admitted that there is going to be no recovery. The lawsuits are designed to kill it. This amendment would get a veto, and we would have to start all over. Please vote no.

The PRESIDING OFFICER. The majority leader is recognized.

Mr. REID. Mr. President, for Members here, we are going to do this vote now, and then the Republican caucus—because of Senator Helm's funeral—is going to be today. So when the Republican caucus is completed, at 2, 2:15, we will have the final two votes before a 4 o'clock vote today on Medicare. So we will have two votes this afternoon starting at about 2 or 2:15.

The PRESIDING OFFICER. The question is on agreeing to the amendment.

The yeas and nays have been ordered. The clerk will call the roll.

Mr. DURBIN. I announce that the Senator from Massachusetts (Mr. KENNEDY) is necessarily absent.

Mr. KYL. The following Senator is necessarily absent: the Senator from Arizona (Mr. MCCAIN).

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

The result was announced—yeas 42, nays 56, as follows:

[Rollcall Vote No. 166 Leg.]

YEAS—42

Akaka	Feingold	Murray
Baucus	Feinstein	Nelson (FL)
Biden	Harkin	Obama
Bingaman	Johnson	Reed
Boxer	Kerry	Reid
Brown	Klobuchar	Salazar
Byrd	Kohl	Sanders
Cantwell	Lautenberg	Schumer
Cardin	Leahy	Specter
Casey	Levin	Stabenow
Clinton	Lincoln	Tester
Dodd	McCaskill	Webb
Dorgan	Menendez	Whitehouse
Durbin	Mikulski	Wyden

NAYS—56

Alexander	Crapo	Martinez
Allard	DeMint	McConnell
Barrasso	Dole	Murkowski
Bayh	Domenici	Nelson (NE)
Bennett	Ensign	Pryor
Bond	Enzi	Roberts
Brownback	Graham	Rockefeller
Bunning	Grassley	Sessions
Burr	Gregg	Shelby
Carper	Hagel	Smith
Chambliss	Hatch	Snowe
Coburn	Hutchison	Stevens
Cochran	Inhofe	Sununu
Coleman	Inouye	Thune
Collins	Isakson	Vitter
Conrad	Kyl	Voinovich
Corker	Landrieu	Warner
Cornyn	Lieberman	Wicker
Craig	Lugar	

NOT VOTING—2

Kennedy

McCain

The PRESIDING OFFICER. Under the previous order requiring 60 votes for the adoption of this amendment, the amendment is withdrawn.

RECESS

The PRESIDING OFFICER. Under the previous order, the Senate stands in recess until 2:15 p.m.

Thereupon, the Senate, at 12:54 p.m., recessed until 2:15 p.m. and reassembled when called to order by the Acting President pro tempore.

FISA AMENDMENTS ACT OF 2008— Continued

CLOTURE MOTION

The ACTING PRESIDENT pro tempore. Under the previous order, pursuant to rule XXII, the Chair lays before the Senate the pending cloture motion, which the clerk will report.

The assistant legislative clerk read as follows:

CLOTURE MOTION

We, the undersigned Senators, in accordance with the provisions of rule XXII of the Standing Rules of the Senate, hereby move to bring to a close debate on H.R. 6304, the FISA Amendments Act of 2008.

E. Benjamin Nelson, John D. Rockefeller IV, Thomas R. Carper, Mark L. Pryor, Bill Nelson, Dianne Feinstein, Robert P. Casey, Jr., Barbara A. Mikulski, Claire McCaskill, Kent Conrad, Daniel K. Inouye, Mary L. Landrieu, Joseph I. Lieberman, Sheldon Whitehouse, Evan Bayh, Ken Salazar.

The ACTING PRESIDENT pro tempore. By unanimous consent, the mandatory quorum call is waived.

There is 2 minutes of debate evenly divided. Who yields time?

Mr. BOND. I yield myself 1 minute in support of cloture.

The ACTING PRESIDENT pro tempore. The Senator from Missouri.

Mr. BOND. Mr. President, some opponents of this legislation claim that Congress is usurping the authority of the courts and that their trust lies in single, lifetime appointed judges in the judicial branch. I strongly disagree.

The Constitution set up three co-equal branches of Government. Our Constitution gives Congress the ability to determine the jurisdiction of Federal courts. This power is particularly important and necessary today in sensitive matters of national security.

Further, the courts, including the FISA Court, have recognized the executive branch's expertise in matters of national security. They have stated that national security matters are not within their purview. It is entirely appropriate for this Congress to end this litigation and not entrust this matter any further to the courts with respect to the liability of particular participants in the program in the private sector. They can still sue the Government. We think a matter of fairness requires we protect those who assisted.

The ACTING PRESIDENT pro tempore. Does anyone seek time in opposition? If not, all time is yielded back.

The question is, Is it the sense of the Senate that the debate on H.R. 6304, the FISA Amendments Act of 2008, shall be brought to a close?

The yeas and nays are mandatory under the rule.

The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. DURBIN. I announce that the Senator from Massachusetts (Mr. KENNEDY) is necessarily absent.

Mr. KYL. The following Senator is necessarily absent: the Senator from Arizona (Mr. MCCAIN).

The ACTING PRESIDENT pro tempore. Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 72, nays 26, as follows:

[Rollcall Vote No. 167 Leg.]

YEAS—72

Alexander	Dole	McConnell
Allard	Domenici	Mikulski
Barrasso	Dorgan	Murkowski
Baucus	Ensign	Nelson (FL)
Bayh	Enzi	Nelson (NE)
Bennett	Feinstein	Obama
Biden	Graham	Pryor
Bond	Grassley	Roberts
Brownback	Gregg	Rockefeller
Bunning	Hagel	Salazar
Burr	Hatch	Sessions
Carper	Hutchison	Shelby
Casey	Inhofe	Smith
Chambliss	Inouye	Snowe
Coburn	Isakson	Specter
Cochran	Johnson	Stevens
Coleman	Kohl	Sununu
Collins	Kyl	Thune
Conrad	Landrieu	Vitter
Corker	Lieberman	Voinovich
Cornyn	Lincoln	Warner
Craig	Lugar	Webb
Crapo	Martinez	Whitehouse
DeMint	McCaskill	Wicker