to issue orders for domestic surveillance on particular targets.

Congress specifically left foreign surveillance activities to the executive branch and to the intelligence community. The FISA Court, they are article III judges who are called in from time to time to make the judgments of probable cause for issuing warrants. They have expertise in issuing warrants for surveillance on a domestic basis.

The bill before us gives them that responsibility, as did the other FISA, the old FISA, for issuing those orders for people or facilities in the United States. The old one said ''facilities in the United States.''

Well, that court is not set up to deal with foreign intelligence surveillance. As I quoted yesterday, the court's own words said—and this is the December 11, In re: Motion for Court Records. The court stated that: The FISA Court judges are not expected to or desire to become experts in foreign intelligence activities and do not make substantive judgments on the propriety or need for a particular surveillance. Even if a typical FISA judge has more expertise in national security matters than a typical district court judge, that expertise would still not equal that of the executive branch which is constitutionally entrusted with protecting national security.

So I expect we will get to the point where we will be debating the distinguished Senator's assessing compliance amendment. But he has brought today the substitution amendment.

I have already explained why we could not get through signals collection immediately after 9/11 if we had gone to the old FISA. How many months would it have taken? Well, the leaders who apparently spoke with the intelligence community and the White House said they did not want to highlight the fact that we were going to be listening in and they did not think it would work quickly.

The intelligence committee has carefully assessed the orders which were given to the telecommunications carriers which may or may not have participated in the Terrorist Surveillance Program. And they were based, yes, they were based largely on article II.

The FISC has already indicated nothing Congress can do can extinguish the President's authority under article II, but Congress also passed the authorization for use of military force, which was a counterbalance in the weighing of the constitutional arguments of article II with the provisions of the FISA law.

I have reviewed the Attorney General's findings, the Department of Justice findings. I have read the authorizations and the directives. It is clear to me, and clear to others, most of the others who have reviewed it, they were clearly acting under the color of law.

I happen to think they were right. You can make an argument that maybe they were not right. But the carriers that may have participated were not in a position to challenge those. They got a lawful order from the head of the intelligence community, based on authorization from the President, in a manner cleared by the Department of Justice. Under those circumstances, I believe it would not only have been unpatriotic, but it would have been willful for the carriers to refuse to participate. Yet they are being sued.

I think the suits are designed to cripple our intelligence community. There are not going to be significant judgments awarded no matter what they say because anybody who was intercepted would have to come in to court and say they were intercepted and prove harm. I really question whether they can do that. But under the substitution argument, the disaster to our intelligence operations is clear, as is the damage to the reputation and the business of any carriers which may have participated.

Back in 2006, right after the disclosure of this and the terrorist finance tracking measure, when the newspapers carried it, television carried it, terrorist leaders—very bright people—abroad learned of it, communicated about it on their own communications, and those communications, I was told in the field, went down significantly.

So I asked General Hayden, at his confirmation hearing to be head of CIA, how badly these disclosures hurt us. And he said at the time that we are applying the Darwinian theory to terrorists; we are only capturing dummies. The more we disclose about the workings of our intelligence intercept capabilities, the more those whom we would target know how to avoid them. And they are taking steps; they know too much about it. Any further disclosures would further complicate and damage the collection capabilities of our intelligence community.

Moreover, the damage to the reputation of the carriers would be significant. The damage would occur likely in exposing the carriers—their employees and their facilities—to terrorist activities or vigilante activities. It would destroy their business reputation, cause untold harm in the United States, and probably effectively curtail their ability to operate overseas. If they are put out of operation or if they are limited in their operations, then the intelligence community loses a substantial means of acquiring the intelligence we need.

So when this bill comes up—I expect it will come up, but I believe it must come up under a 60-vote rule or we are going to go through the normal process of getting to 60 votes, and we will never get anywhere. I think both sides of the aisle should recognize that. I will be happy to make these arguments.

I know my colleague from Rhode Island is a very skilled lawyer, a very effective debater. He will present his arguments, I will present my arguments, and there will be others who will join with us. So while I would love to get on with the debate and votes, we are not going to go there until we resolve the question of whether there is a 60-vote margin.

So I thank the Chair, and I thank my colleague from Rhode Island.

I yield the floor.

The PRESIDING OFFICER. The Senator from Rhode Island is recognized.

Mr. WHITEHOUSE. Madam President, I appreciate very much the arguments made by the very distinguished Senator from Missouri, who is also the vice chairman of the Intelligence Committee and possesses great experience in this area. My point, though, is that all these arguments are for naught if the simple courtesy of a Senator being allowed to vote on his amendment is not honored.

This particular amendment being nongermane postcloture means it may very well be squeezed out by the procedural devices the Republican leader has applied. So my simple question is, if I may ask it through the Chair to the distinguished Senator from Missouri, the Republican manager of this bill, can we assure Senator SPECTER and myself that this amendment will, at the appropriate time in this legislation, receive a vote?

Mr. BOND. Madam President, I am happy to respond as soon as we go back to the normal means of proceeding on FISA matters, establishing a 60-vote threshold, which is the standard I had to meet to bring the Protect America Act to the floor. I would certainly expect that his amendment would be brought up, fully discussed, and debated. This is one of the major issues we have to decide. But we have to decide it on a 60-vote point of order.

MORNING BUSINESS

Mr. BOND. Madam President, I ask unanimous consent that the Senate proceed to a period of morning business with Senators permitted to speak for up to 10 minutes each.

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

The Senator from North Dakota.

FISA

Mr. DORGAN. Madam President, we are talking about FISA we use a lot of acronyms in Washington, DC, unfortunately—the Foreign Intelligence Surveillance Act. It is a complicated subject, and one, if people have been watching the debate, that is also controversial. There is a lot of passion about this subject. We have people standing up and saying: None of this should be disclosed. We should not be talking about this. This is about the ability to protect our country against terrorists. Of course, we have to listen into communications and intercept communications. It is the only way to find out if there are terrorist acts being plotted by terrorist groups, and so on. There is that kind of thing.

There are concerns on the other side by people who say: Wait a second.