FISA AMENDMENTS ACT OF 2007—Continued

Mr. WHITEHOUSE. Madam President, I ask that the pending amendment be set aside so I may call up amendment No. 3905.

The PRESIDING OFFICER. Is there objection?

Mr. BOND. I object.

The PRESIDING OFFICER. Objection is heard.

Mr. WHITEHOUSE. Madam President, I guess I would like to start by saying I appreciate very much the sentiments that were recently expressed by the Senator from Tennessee and the Senator from Texas, who is my friend who served with me as attorney general at the same time in our respective States, Texas and Rhode Island. I ask them to let me know when that new approach will begin because I am, frankly, not seeing much of it in the Foreign Intelligence Surveillance Act procedures we are going through on the floor. I confess, I am a new Member of this body, and I do not understand why.

We heard Senator DODD, the very distinguished Senator from Connecticut, who has served in this body for 27 years, describe how important this Chamber is and that it is the right of Senators to debate matters, not for the sake of ventilating themselves but toward actually getting a vote on a real amendment on a matter of real significance.

We had one vote on a committee amendment. Not one Senator has achieved getting a vote, and we are on a very short timeframe. I may be new, but I will tell you that in the 1 year I have served, I have presided a great deal. The Presiding Officer, the Senator from Minnesota, and I have both spent a lot of time in that chair. It is a wonderful place to sit, and you get a great view and a great education as to what goes on in the Chamber.

I can recall over and over hearing my colleagues on the Republican side of the aisle, as mad as they could be, complaining bitterly because the majority had offered them only 10 amendments on a bill or only 20 amendments on a bill. I cannot get one called up.

Let me first say, this is an important issue. On the one hand, we have to deal with perhaps the greatest danger our country faces at this moment, which is the threat that comes from international terrorism, and we have at the same time to deal with one of the basic principles of our Government—freedom, freedom from, among other things, Government surveillance, unless it is done properly and by the law.

This is not some new idea. It goes back to the Bill of Rights, where the very Founders of this country mandated that before the Government could intrude into the persons, places, houses, and effects of Americans, they had to get permission from a court.

The balance between freedom and security is an important one, a historic one. So this is no minor issue on which to avoid real debate, and the amendments are important ones. The amendments involve the immunity issue about which Senator DODD spoke so passionately. This is a very important issue.

As I see it, we have some cleaning up to do in this body as a result of a real mess the Bush administration left us. They could have gotten a court order, and we know perfectly well that if a court order had been obtained, there would be no issue of immunity for us to address. A company following a court order is protected. End of story. They couldn't be troubled to get a court order to protect these companies they are so concerned about now. But you do not necessarily need a court order. You can actually get a certification from the appropriate Government official using language this Congress has provided, and it will also provide protection to companies that cooperate in Government surveillance, as long as they have been notified properly through the certification process.

One would think the litigation would be over, if that certification process had been complied with. It would be a slam dunk. Which raises the logical conclusion that for some reason, the Government did not comply with the certification process. I don't know why they did that. I don't know if anybody else knows why they did that. It could be being obtuse and stubborn and insisting it had to be done under the President's unitary article II authority that they purposefully, deliberately failed to follow the certification process to prove that point they wanted to prove.

If that is the case, they have walked these phone companies into all this concern we now have to address for no purpose whatsoever. But now we do have to address the problem. No matter how they got into it, we have this problem to address, and it is not an easy problem.

One side says: Well, blanket immunity. Well, that is fine, but you are taking away rights and due process of people who are in court right now. A judge has looked at this case and he didn't throw it out. There is nothing to suggest that the litigation going on right now is not entirely legitimate. So if we do that, we are taking away real rights of real Americans that are currently in play right now before a court.

I don't know of a time the Congress has ever done that. As a former prosecutor, like the Presiding Officer, the very notion that it is the legislature's job to go into ongoing legitimate litigation and make decisions about who should win and who should lose seems to me a spectacular trespass over the doctrine of separation of powers. I hope my colleagues in this body who are in the Federalist Society would be concerned about this separation of powers.

On the other hand, we could strip the legislation of its immunity entirely and leave the companies in the litigation. That is not a great solution either. There is a problem with that solution. The problem with that solution is that the Bush administration has bound and gagged the company defendants—instructed them they may not defend themselves. So here you have legitimate American corporations in legitimate litigation being told by the Government that they may not speak, they may not answer, they may not defend themselves. That doesn't seem like a great outcome either.

Well, an amendment I wish to offer, the one I just tried to call up, proposes a potential solution. If the Government is going to tell them they can't defend themselves, then in all decency shouldn't the Government step in for them and say: OK, we are going to bind you and we are going to gag you in this ring of litigation combat, but we are going to step in for you and not leave you unable to defend yourself? Isn't that the most decent, basic thing you could expect the Government to do? That is what this amendment would do. It would substitute the Government for the defendant corporations that the Government has bound and gagged in this litigation—muzzled.

It would do another thing: It would make sure that a court decided that these companies had in fact acted in good faith before they were given that relief. They have told us they have acted in good faith, but we are a legislature. Good faith is a finding the courts make. We are not judges. We haven't heard from all sides. We haven't had hearings, such as a court would have to get to the bottom of this.

There is an easy way to do it. You let the FISA Court, which has the secrecy necessary to get to the bottom of this, make the determination, the fundamental determination: Did these companies, in fact, act in good faith? That is a basic point of entry. We have all assumed it to be true, but it is not our job as Members of Congress to decide on the good faith of an individual litigant in a matter that is before a court.

I think this is a very legitimate amendment. It may not be germane postcloture. It may never come up as a result of this. Maybe it is just the new Senator. Poor kid, all this work on these bills. Doesn't he know the merits don't matter around here? Maybe it is a situation related to me not knowing my way around here yet. But I don't think so. Because Senator FEINSTEIN, who has been here for a very long time, who is very distinguished, who is one of the most bipartisan Senators in this Chamber, if not the most bipartisan Senator in this Chamber, has a very similar piece of legislation. She has taken the good faith test in the Foreign Intelligence Surveillance Court

and picked it out as a separate, solitary piece of legislation, and she is pursuing that. That amendment can't be called up either.

You could say: Well, maybe it is because I am a Democrat; they are shutting down all the Democrats. But my amendment is cosponsored by ARLEN SPECTER, the very distinguished Senator from Pennsylvania, who has been the chairman of the Judiciary Committee. It is the Specter-Whitehouse amendment. I don't see how you could have a better credential, a better bipartisan credential than to have the Republican chairman of the Judiciary Committee as the cosponsor of the amendment. And yet we can't call it up, and because of the cloture motion that has been filed, it may never be called up.

I think we are doing serious work, and I think we should get votes on these amendments. I know some of my colleagues have said: Well, you should defer to the committee bill. The committee bill was so good, it was bipartisan, it passed 13 to 2. Well, I was in that committee. Yes, it passed 13 to 2, but an awful lot of us said in our remarks on that bill that we passed it out of that committee in order to work on it further in the Judiciary Committee and in order to move amendments on the floor. It did not pass with a 13-to-2 vote of Senators saying this is ready to go to the President; this is ready to clear the Senate. It passed on a 13-to-2 vote of Senators who knew that the bill was going to the Judiciary Committee and who knew that the bill was going to the floor and had reason to expect the ordinary courtesies of this body to be able to offer amendments would be honored.

In fact, the amendment I tried to offer yesterday that was objected to, that I can't call up, I raised in the Intelligence Committee. I was told by the executive branch officials there—and I should say that throughout this process I hope nobody would challenge how carefully my office has worked with the administration to get these things right, to get technical language worked through properly—I was told by the executive branch officials that the way I had written the amendment caused technical difficulties. So I didn't pursue it in the Intelligence Committee. I withdrew it, noting that we would work through the technical difficulties and then bring it up again later on.

Nobody said then, oh, Senator WHITEHOUSE, there is going to be no later on; the committee vote is all you will get. Nobody said that. Because that would violate the history and traditions of the Senate, because it would be wrong, and because it wasn't the program. It wasn't the plan at the time. I feel it has been represented to me that these amendments would be voted on, and I feel that representation has been dishonored by the procedure we are in right now.

I want to read something. I prepared remarks in the event that this amendment was going to go in. Of course, I thought it was going to go in. I had the Republican former chairman of the Judiciary Committee as a cosponsor and it addresses the biggest question in this legislation. It provides a potential resolution of the conflict between the two arguments. Why on Earth would it not be something that I would be able to exercise my traditional right to raise on the floor? So I planned ahead and I wrote remarks for that occasion. Here is what I wrote at the very end of the remarks.

Madam President, whether this amendment passes or fails, I would like to say that it is the product of a truly commendable process. Everybody here knows the old saw that the making of law is like the making of sausage. You might like the results, but you don't want to see what goes into making it. Not so here. This amendment and Senator Feinstein's are the results of many hours of thoughtful, bipartisan consideration, hard work by Senators and their staffs, reasoned and respectful committee debate, and what I am sure will be thorough debate on the floor.

Those are the remarks I wrote. And I have to say right now, those words taste like ashes in my mouth. I hope the spirit that Senator ALEXANDER and Senator CORNYN brought to the floor a moment ago will begin to animate the FISA debate, and that legitimate—and I believe my Republican colleagues will concede these are legitimate—and sincere—and I believe my Republican colleagues will concede these are sincere—and important amendments have a chance to be raised and debated and voted on here on the floor of the Senate.

Madam President, I yield the floor.

The PRESIDING OFFICER. The Senator from Missouri is recognized.

Mr. BOND. Madam President, first, I express my admiration for the Senator from Rhode Island. The hard work he has put in on the Senate Intelligence Committee and the experience he brings to that committee is very important. We have worked with him on many issues that we were able to accomplish in the committee. I agree with his assertion that we need to balance freedom and security. That is one of the heavy responsibilities we have in the Senate Intelligence Committee.

He talks about an amendment he has presented on a bipartisan basis, and he and his Republican cosponsor feel very strongly about it. I would be happy at the appropriate time to have debate and a vote on this very important measure. But I also happen to agree with the Senate majority leader, who said back in December that the issues before us on this FISA bill are so important that we must ensure they have a 60-vote margin for passage, the same vote that would have to occur if we were to overcome a filibuster. That will ensure that there will be no filibuster of the bill.

We filed cloture to make sure we could go forward with the bill. We are waiting to see how that works out. But the measures, as I have stated earlier—and the proponent of this amendment had the distinct misfortune to be in the chair when I addressed this earlier today—but for my colleagues, I would say that we have before us a very carefully crafted bipartisan compromise to improve the FISA, Foreign Intelligence Surveillance Act, significantly and to ensure that it can work to keep our country safe.

Passing these measures on a 60-vote margin is nothing new. When I brought the Protect America Act to the floor on August 3, I brought it on an agreement that we had to have 60 votes to pass it, because it is a very important bill. And I assume that this bill, which I hope will pass, will have to pass with 60 votes.

I think it is a reasonable proposition to say that a 60-vote threshold must be achieved to ensure there is bipartisan agreement on something that is this important to our security and our freedom.

Now, my colleague raised the question about why the immediate interception of foreign intelligence did not go forward right after 9/11, when the President determined there must be interception of telephone and other electronic transmissions coming from foreign terrorists abroad into the United States.

I am told the administration met with the Gang of 8, leaders of the House and Senate and the House and Senate Intelligence Committees. They were faced with the problems that arose when the court order occurred in the spring of last year, saying the existing FISA law did not permit interception of communications coming through the way—coming the way by which they now come, through cable and wire.

Previously, collections occurred routinely against foreign sources by radio wave. And there were minimization procedures. But the FISA Court was not involved. Because of the change in technology, as the order of the court indicated last spring, FISA applied to collection of most of the foreign terrorist communications, whether they were coming into the United States or into other areas.

We were advised by the commanding general, Special Operations Command General McCrystal, that the limitations of FISA in April and May and June and July prevented our intelligence authorities from collecting vital signals information on communications among terrorists in the battlefield, putting our troops at risk.

He begged and pleaded to get it done. Well, despite the begging and pleading to get it done, you have seen how long it takes us to get FISA changed. As I understand the conversations held in

the aftermath of 9/11, when we knew there were other attacks being planned and we needed to get control of them, there was general agreement among the parties, legislative and executive, that we could not afford to try to take the time to try to change FISA, to make it work with the new electronic signals means of communication in time to stop further terrorist attacks.

How long has it taken to get FISA passed? Well, the Director of National Intelligence sent up a bill in April pointing out that the old FISA law did not permit collection of foreign signals intelligence from known terrorist targets abroad. He sent it up in April. He testified before our committee in May. He came to the Senate and had a hearing in our classified room telling leaders of both parties how important and how sensitive it was.

Another month passed. Nothing happened. He came back with a short-term extension that had to have a 6-month sunset on it. We passed that. We passed that with a 60-vote margin. That has become standard for any controversial and important legislation coming before this body, which is applied not only in FISA but many other circumstances.

So we got a 6-month extension. Now, we are still debating whether to have a slightly longer extension of the FISA bill. We reported the bill on a bipartisan 13-to-2 majority in October. It sat for 2 months. The majority leader tried to bring it up, but he was filibustered from bringing it up.

We are now at the end of January, when the Protect America Act expires on February 1. We need to move forward to get this bill passed. We need to move forward as promptly as we can. But we need to move forward on the same ground rules by which other major legislation and which the Protect America Act came to the floor; that is, a 60-vote margin to ensure there is bipartisan agreement on something as important as the freedom and security framed by the FISA debate.

Let me add a word or two about the FISA Court. I had thought the distinguished Senator from Rhode Island was going to offer an amendment on assessing compliance and toss that to the FISA Court. Well, the FISA Court, or FISC as we call it, was created in 1978 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. There is something called a Constitution in this country. There is a right to privacy, a right to expect that the Government will not be spying on American citizens without cause.

This is a very controversial and difficult subject. Frankly, nearly everyone, with the possible exception of the chairman and ranking member or maybe one or two others on the Intelligence Committee, knows very little about that which we are discussing.

Let me put up a photograph of a door. This is a door in San Francisco, CA, a rather unremarkable photograph of a door. This is a door that is in AT&T's central offices in San Francisco. A courageous employee of AT&T named Mark Klein, who had been with the company for 22 years, blew the whistle on what was happening behind this door. According to Mark Klein, the National Security Agency had connected fiber optic cables to AT&T's circuits through which the National Security Agency could essentially monitor all of the data crossing the Internet. Here is what Mr. Klein had to say went on behind this door:

> It appears the [National Security Agency] is capable of conducting what amounts to vacuum-cleaner surveillance of all the data crossing the Internet—whether that be people's e-mail, web surfing, or any other data.

The description of what was happening at this one telephone company in this one location in San Francisco was this: the intercepting of communications at the AT&T Folsom Street facility, millions, perhaps billions of communications from ordinary Americans coming into and through the facility, which would normally have been the case for a telephone company, and a splitter being used, according to the discussion by Mark Klein, splitting off all of this conversation into an NSA-controlled room, to be eventually evaluated with sophisticated programming, and then going back out in order to complete the communication. So you have effectively a copy of everything that is happening going through with a splitter to a secret room.

When this became public, when a whistleblower working for the company said, here is what is happening, there was an unbelievable outcry on both sides. Some people said: What on Earth is happening? We have secret rooms in which the National Security Agency is running all this data and all this information through and spying on American citizens? Others said: What is going on? Who on Earth would have decided they should disclose this publicly? They are going to alert the terrorists to what we are doing. We had both sides aghast that this was disclosed. It is important to say that, initially, almost no one in an official capacity was willing to admit to this. Finally, it was admitted, yes, there was a program. The President said: Yes, there is a program—speaking, apparently, of just this program; we don't know of other programs that exist or may exist, but this program existed without our knowledge. The President indicated this program existed because we are going after the bad guys, and we have a right to do that. And we did this program because the process that had been set up because of abuses with respect to eavesdropping and spying on American citizens decades ago, that process was way too cumbersome, took far too much time, and we needed to streamline that. That is a paraphrase. But there was an admission that this program existed and no additional legal authority needed to empower the President to do it.

So that is where we are. Most of us don't know the full extent of this program at all. In fact, my understanding is that rooms like this exist in other parts of the country with other telephone companies where splitters are used to move data to separate rooms and data is evaluated.

This whole process comes from several decades ago when something called the FISA Court was set up, a court to evaluate the questions about when it is legal and appropriate and when the Government is able to intercept communications. The FISA Court was established for the very purpose of trying to make the judgment about when it is appropriate to go after the bad guys and how to protect our civil liberties at the same time.

The FISA Court was an outgrowth of concern by the Congress when we discovered that there was a time in this country when we had the National Security Agency running secret projects called Shamrock and Minaret to gather both international communications and also domestic communications. Project Shamrock actually started during the Second World War when major communications companies of the day gave the Federal Government access to all of their international traffic. One can imagine, in the fight against the Nazis and the Japanese Imperial Army, the desire for international communications to evaluate things that might threaten this country's security. But the Shamrock program then, as we know, changed over time.

At first the goal was to intercept international telegrams relating to foreign targets. Then, soon the Government began to intercept telegrams of U.S. citizens. By the time there were hearings held in the Congress, the National Security Agency was intercepting and analyzing about 150,000 messages per month.

Data from Project Shamrock was then used for another project code named Project Minaret, which we now know spied on perceived political opponents of the then-administration of Richard Nixon. Under this program the NSA added Vietnam war protesters to its watch list. After there was a march on the Pentagon, the Army requested that they add antiwar protesters. The list included people such as folk singer Joan Baez and civil rights leader Dr.