

We are hoping that out of those who voted against this provision the last time, some have gone home and heard from seniors, heard from the doctors, and believe Medicare is important.

What I have just described to you is the centerpiece of this debate. But there is another part to it which I have to mention. The way we pay for this reimbursement to Medicare physicians is to slightly—slightly—reduce the compensation given to private health insurance companies which are offering Medicare coverage. They are called Medicare Advantage companies. These companies were given this right to compete with Medicare a number of years back. Some of them have never been fans of Medicare. Some of them believe the private insurance companies can do a better job than the Government's Medicare Program, so they said: Let these private health insurance companies compete. Let them offer Medicare coverage.

They started offering it, and guess what happened. They started charging dramatically more for the same service that the Government Medicare Program was already providing. How much more? It was 13 to 17 percent more in cost.

Secondly, we found out they were not providing the basic health care they said they were going to provide to the Medicare people. And, third, they were using marketing practices that were unacceptable.

We reduced slightly the reimbursement to these companies so we can pay doctors under Medicare, and many of the Republicans objected saying they were more devoted to standing by these private health insurance companies than providing reimbursement for Medicare physicians.

The ACTING PRESIDENT pro tempore. The Senator's time has expired.

Mr. DURBIN. Mr. President, I ask for an additional 30 seconds.

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

Mr. DURBIN. That is the vote tomorrow. On the vote tomorrow, we need one more Republican Senator to join in this effort. We hope Senator MCCAIN will be back. I don't know Senator MCCAIN's position on this issue. I hope he is for Medicare. I hope he is against this physician Medicare cut. It is time for Senator MCCAIN to make his position clear and return to the Senate for this critically important vote, this historic vote. We want to make sure tomorrow that Medicare's future is bright. We have confidence that the doctors will be reimbursed and that seniors across America can receive their Medicare services without fear of having them cut off. We need JOHN MCCAIN on the Senate floor tomorrow. We need to make sure we have enough Republican votes tomorrow to make this bipartisan measure the same suc-

cess in the Senate as it was in the House.

Mr. President, I yield the floor.

The ACTING PRESIDENT pro tempore. The Senator from Maryland.

Mr. CARDIN. Mr. President, I understand there is no Republican who will claim the time remaining in morning business. I ask unanimous consent that I may have the time until 11:30 a.m.

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

#### FOREIGN INTELLIGENCE SURVEILLANCE AMENDMENTS ACT OF 2008

Mr. CARDIN. Mr. President, I rise today in opposition to final page of this legislation, H.R. 6304, the Foreign Intelligence Surveillance Act of 1978, FISA, Amendments Act of 2008, if it is not amended to change the retroactive immunity provisions.

The President must have the necessary authority to track terrorists, intercept their communications, and disrupt their plots. Our Nation still faces individuals and groups that are determined to do harm to Americans, as well as our interests throughout the world.

I have spent many hours at the National Security Agency, which is located in Fort Meade, MD. The men and women of our intelligence agencies are dedicated public servants who are doing a great job on behalf of their country. They are trying to do their jobs correctly, and comply with all applicable laws and regulations.

As a member of the Judiciary Committee, I have received classified briefings about the advice and requests that were given to the telecommunications companies by the U.S. Government. I have seen the opinions of counsel on this issue. I have attended numerous hearings on this issue.

Congress must indeed make needed changes to FISA to account for changes in technology and rulings from the FISA Court involving purely international communications that pass through telecommunications routes in the United States. While we have a solemn obligation to protect the American people, we must simultaneously uphold the Constitution and protect our civil liberties.

After learning about executive branch abuses in the 1960s and 1970s, Congress passed very specific laws which authorize electronic surveillance. Congress has regularly updated these measures over the years to provide the executive branch the tools it needs to investigate terrorists, while preserving essential oversight mechanisms for the courts and the Congress. FISA requires the Government to seek an order or warrant from the FISA Court before conducting electronic surveillance that may involve U.S. per-

sons. The act also provides for postsurveillance notice to the FISA Court by the Attorney General in an emergency.

I am very concerned that the FISA law was disregarded by the administration, and want to ensure that we put an end to this type of abuse. We are a nation of laws and no one is above the law, including the President and Attorney General. The President deliberately bypassed the FISA Court for years with his warrantless wiretapping program—long after any emergency period directly following the 9/11 terrorist attacks—and did not ask Congress to change the FISA statute. In fact, President Bush refused to fully brief Congress on the Terrorist Surveillance Program, TSP, the existence of which was only exposed through a New York Times story. After the story broke, the administration reluctantly agreed to place this program under the supervision of the FISA Court.

I do believe that many of the telecommunications companies cooperated with the Government in good faith, and may be entitled to relief. But the FISA statute of 1978 already lays out procedures for the Government to seek a court order and present this order to the telecommunications companies and require their assistance. The 1978 FISA statute also provides certain immunities to telecommunications companies that provide this type of assistance to the Government.

The President chose to ignore the FISA statute. If the President did not want to use the FISA statute or wanted to change it, he had the responsibility to come to Congress and ask for that change. He cannot change the law by fiat, or by issuing a Presidential signing statement. Congress must change the law, and the courts must interpret the law. Congress and the courts have the power, and often the responsibility, to disagree with the President, and these co-equal branches have the constitutional checks to override his veto, disapprove of a request for a warrant, or strike down an action as unconstitutional.

I will vote against retroactive immunity for the telecommunications companies. The current bill only authorizes the district court to review whether the companies received written requests from the U.S. Government stating that the activity was authorized by the President and determined to be lawful by the executive branch. The Court would have to simply accept the executive branch's conclusion that the warrantless wiretapping outside of the FISA statute and without FISA Court approval was legal, which means the executive branch—not the judiciary—gets to decide whether the law was broken. I want the courts to be able to look at what the executive branch is

doing. I want the court to protect individual rights. Granting this type of immunity would violate the basic separation of powers. It would also create a dangerous precedent for future administrations and private actors to violate the law, and then seek relief in Congress or from the President through an after-the-fact amnesty or pardon.

There was a way to provide the telecommunications companies with appropriate relief. Senator FEINSTEIN's amendment would have allowed the courts to grant relief to the telecommunications companies if they acted reasonably under the reasonable assumption that the Government's requests were lawful. This amendment would have preserved the independent judgment of the judiciary, and preserved the necessary check and balance in our system of government. Unfortunately, the negotiators for this legislation rejected this compromise.

I also want to note the improvements made to title I of this legislation, compared to current law and the Senate-passed Intelligence Committee version. I thank the Members of the House and Senate who worked hard on improvements to this legislation, particularly House majority leader STENY HOYER.

Title I is not perfect, but it does bring the President's program under the FISA statute and FISA Court, and provides for oversight by Congress and the courts.

Title I contains a sunset of December 2012 for this legislation. I feel strongly that the next administration should be required to come back and justify these new authorities to Congress. As a member of the Judiciary Committee, I believe the only meaningful cooperation we received from the executive branch on this issue occurred when they were facing a sunset and a potential lapsing of their authorities and powers under the statute. Congress will then have time to evaluate how the new law has been implemented, and debate whether further changes are needed.

This legislation also requires the inspector general to review compliance with: (1) Targeting and minimization procedures; (2) reverse targeting guidelines; (3) guidelines for dissemination of U.S. person identities; and (4) guidelines for acquisition of targets who turned out to be in the United States. The inspector general review will be provided to the Attorney General, Director of National Intelligence, and the Judiciary and Intelligence Committees of the Senate and House. The public would also be given an unclassified version of these reviews, reports, and recommendations. These reviews will help Congress evaluate the new authorities under the FISA statute, and how the executive branch and the FISA Court are using these new authorities, before the legislation sunsets. Congress can then decide how best to reauthorize this program.

The bill strengthens the exclusivity language of FISA and the criminal wiretap laws. Congress is making very clear that these statutes are the exclusive means by which electronic surveillance can be legally conducted by the U.S. Government. The bill also removes a troubling attempt to unduly broaden the definition of "electronic surveillance."

Supreme Court Justice Anthony Kennedy, in his opinion in the recent *Boumediene* case on the Guantanamo detainees, stated: "The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law."

I believe title I should have been strengthened by more effective court review. However, absent the retroactive immunity provisions in title II, I would support the compromise legislation, because it is important for the intelligence community to have the tools it needs. However, I regret that if the retroactive immunity provision remains unchanged in the final legislation, I will vote against the legislation, because of the fundamental problem with that provision.

In conclusion Mr. President, shortly we will be considering the amendments to the Foreign Intelligence Surveillance Act, the FISA act. I must tell you, I think it is important that our intelligence community have the tools they need to obtain information from foreign sources. That is what this legislation is about. We need to modernize the FISA law. Communication methods have changed, and we need to give the tools to the intelligence community to meet their modern needs of communication.

I serve on the Judiciary Committee. I was privy to many hearings we had, some of which were classified, to find out the information as to what we could do. We brought forward legislation that I think was the right legislation that would have given the necessary tools to the intelligence agencies to get information from foreign sources without being burdened by unnecessary court approval and protect the civil liberties of the people of this Nation. Unfortunately, that compromise was rejected.

We are in this situation today where we have had major disagreements on how to amend the FISA statutes because of the action of the Bush administration. It is absolutely clear to me that the President went beyond the legal or constitutional authority that he has in doing wiretaps without court approval. I want to make it clear, the men and women who work at our intelligence agencies, many of whom are in Maryland at NSA, are doing a great job. They are trying to do everything that is correct to protect our Nation

and do it in the correct manner. It was the Bush administration that went beyond the law. It was the Bush administration that went beyond the Constitution.

It is important for us to balance the needs of our community to get information to protect us but also protect the civil liberties with the proper checks and balances in our system.

That brings me to H.R. 6304, the legislation that will shortly be before us.

Title I is a much better bill than the bill that left the Senate earlier this year. I think this bill has been worked on in a very constructive environment. I compliment not only Senator ROCKEFELLER, who is on the Senate floor, for his hard work on this legislation, I also compliment my colleague from Maryland, Congressman HOYER, the majority leader of the House of Representatives, for the work he did in bringing us together on a bill that I think is a better bill than the bill that left the Senate.

This bill provides for a sunset in 2012. That is important because I find we do not get the attention from the administration on this issue unless they are faced with a deadline from Congress. This will force the next administration to take a look at this legislation and come back to the Congress with modifications or justifications for the continuation of the legislation. I think that is an important improvement.

The legislation provides for the inspector general to review the targeting and minimization provisions. The targeting is when a U.S. citizen, perhaps indirectly, is targeted. And the minimization procedures deal with when the intelligence community gets information about an American without court approval, to minimize the use of that information or to seek court approval. Both of those provisions will be reviewed by the inspector general and reports issued back to the Congress with unclassified versions available for public inspection.

The FISA Court is strengthened through the compromise that has been reached. Let me make it clear, I would have liked to have seen the Judiciary Committee's bill passed and enacted into law. I think we can still improve title I. But I believe in the legislative process, and I think there has been a fair compromise reached on title I.

If title I were before us as an individual action, I would support the compromise because I think it is time to move forward. But there is title II, and title II is the retroactive immunity. It gives retroactive immunity to our telecommunications companies, our telephone companies. They are entitled to some relief. They acted under the urgency of the attacks on our country on September 11 and with the request of the President of the United States. They are entitled for some relief. But this provision goes way too far.

It authorizes the executive branch to determine the legality of their actions. In other words, the agency, the President who asked for the information, will determine whether the telephone companies acted properly. It should be the courts. This takes too much away from the judicial branch. It, in my view, compromises the checks and balances that are so important in our constitutional system.

We didn't have to be here. I thought Senator FEINSTEIN offered a fair compromise, and I am surprised it was not taken by the negotiators. Senator FEINSTEIN said: Why don't we let the FISA Court make a decision as to whether the telephone companies acted legally? That is a compromise I could have supported. I think it would have been a fair compromise. Unfortunately, that was rejected. Title II is a fundamental flaw in the separation of powers, in the proper protection of civil liberties of the people of this Nation, and a dangerous precedent for future action by this Congress.

I will vote to remove or modify title II by the amendments that will be presented later today. I prefer to modify it. As I suggested, I think we have compromises that can work, but I will vote to remove it if there are no other options presented. If we do not modify title II, reluctantly I will not be able to support the compromise legislation that has been presented.

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

I yield the floor.

#### CONCLUSION OF MORNING BUSINESS

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

#### FISA AMENDMENTS ACT OF 2008

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

The legislative clerk read as follows:

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

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

The Senator from Wisconsin.

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

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

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

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

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

We already know, from the report of the Senate Intelligence Committee that was issued last fall, that the companies received exactly such a request or directive. This is already public information. So under the terms of this proposal, the court's decision would actually be predetermined.

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

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

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

the illegal warrantless wiretapping program it set up in secret.

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

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

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

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

Even worse, granting retroactive immunity under these circumstances will undermine any new laws we pass regarding Government surveillance. If we