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 want companies to obey the law in the future, doesn't it send a terrible message, doesn't it set a terrible precedent, to give them a ''get out of jail free'' card for allegedly ignoring the law in the past?

Last week, a key court decision on FISA undercut one of the most popular arguments in support of immunity; that is, that we need to let the companies off the hook because the State secrets privilege prevents them from defending themselves in court. A Federal Court has now held that the State secrets privilege does not apply to claims brought under FISA. Rather, more specific evidentiary rules in FISA govern in situations such as that. Shouldn't we at least let these cases proceed to see how they play out, rather than trying to solve a problem that may not even exist?

That is not all. This immunity provision doesn't just allow telephone companies off the hook; it will also make it that much harder to get at the core issue I have been raising since December 2005, which is that the President broke the law and should be held accountable. When these lawsuits are dismissed, we will be that much further away from an independent judicial review of this illegal program.

On top of all this, we are considering granting immunity when roughly 70 Members of the Senate still have not been briefed on the President's wiretapping program. The vast majority of this body still does not even know what we are being asked to grant immunity for. Frankly, I have a hard

time understanding how any Senator can vote against this amendment without this information.

I urge my colleagues to support the amendment to strike the immunity provision from the bill.

I yield the floor.

The ACTING PRESIDENT pro tempore. The Senator from Pennsylvania.

Mr. SPECTER. Mr. President, would the distinguished Senator from Wisconsin yield for a question?

Mr. FEINGOLD. I will.

Mr. SPECTER. As the Senator from Wisconsin doubtless knows, there was a very extensive analysis of these issues by Chief Judge Walker of the San Francisco District Court handed down last Wednesday, and I think it was no coincidence that the decision preceded just a few days—after everybody knew, including Chief Judge Walker—of the Senate taking up this question.

In that opinion, Chief Judge Walker finds the Terrorist Surveillance Program unconstitutional. He says, flatly, that the language of the Foreign Intelligence Surveillance Act of 1978 means what it says on the exclusive remedy for warrants, and that the President exceeded his article II powers as Commander in Chief.

As we all know, the Detroit District Court came to the same conclusion, was reversed by the Sixth Circuit in a 2-to-1 opinion on standing, and then the Supreme Court of the United States handily ducked the question by the noncert. That is the principal constitutional confrontation of our era, on article I powers by Congress and article II powers of the President as Commander in Chief. They denied cert. And on the standing issue, as disclosed by the Senate opinion in the Sixth Circuit, the Supreme Court could easily have taken the case to resolve this big issue.

But now Judge Walker has decided, and it is very significant, because Judge Walker has these more than 40 cases pending on the effort to grant retroactive immunity. The case he decided it on is the Oregon case where State secrets are involved, with the inadvertent disclosure by the Federal agents.

It is hard for me to see how you have a State secret which is no longer secret. And you have a document, just electronic surveillance, which was disclosed, so it is no longer a secret. That remains to be decided under the opinion of Chief Judge Walker, but he says there is a ''rich lode'' of material on the standing issue.

These questions involve extraordinarily complex matters. The Senator from Wisconsin knows that. He has been deeply involved in it. And the distinguished chairman knows that, because he has been deeply involved in these matters. My question to the Senator from Wisconsin is twofold:

One, what do you see as the immediate ramifications of Chief Judge Walker's opinion handed down a few days before we are to decide it?

And a related question: What do you think of the likelihood that Members of the Senate have had or could have an adequate opportunity to review that 59-page opinion with all of its detailed ramifications?

Mr. FEINGOLD. Mr. President, I thank the Senator for asking the question. Yes, I referred to this decision in my brief comments about this amendment. I think it is obviously a significant decision. As I indicated, it deals with the State secrets issue. It says that FISA is in fact the exclusive means and that the evidentiary rules regarding FISA should control, rather than State secrets. That is an important finding. But even more important is what the Senator from Pennsylvania is alluding to, which is the broader issue that the judge didn't decide, but clearly he indicated where he would head on the question of whether the President's TSP program was illegal—and I have long believed that it was illegal. In fact, the Senator and I were the first Members to comment on the revelation of this program in December of 2005 on the floor of the Senate.

I have examined it closely myself, as a member of the Intelligence Committee and the Judiciary Committee, and I feel even more strongly today than I did then that this program was illegal and there needs to be accountability for that illegality. That accountability can come in part from litigation of the kind that involved this district court decision, and it can come from other cases that are pending. But my concern, of course, is that if we jam this bill through, it may have an impact on the ability to pursue that underlying legal issue because of the effective granting of immunity to telephone companies. So this decision has significance, but I can't tell you that I know all the ramifications.

Obviously, Members of the Senate, to answer your question, should review the opinion and have a chance to find out more about the opinion. But there are 70 Members of the Senate who haven't even had the benefit of what you and I have had, which is the briefing on the actual TSP and what happened from 2001 to 2007 with regard to wiretapping.

I thank the Senator for making this important point about Senators being ready to grant this immunity without reviewing the litigation.

Mr. SPECTER. Mr. President, if the Senator from Wisconsin will yield for just one more question? And that is, in the context, is the Senator—I asked him to yield for one more question, and I will use a microphone so perhaps he can hear me, perhaps some people on C–SPAN2 will hear me, perhaps some Senators will hear me, because we need to be heard on this subject because of its complexity.

The question relates to what the Senator from Wisconsin has said. He puts it at some 70 Members of the Senate have not been briefed on the program. I have heard from House leadership that most of the Members of the House have not been briefed on the program. There has been no official determination. The language is picked up from the allegations of the complaint as to what is alleged.

The question is, How can the Congress intelligently decide—maybe that is too high a standard. But how can the Congress, especially the world's greatest deliberative body, the U.S. Senate—how can the decision be made on electronic surveillance, granting retroactive immunity, when we don't know what we are granting retroactive immunity to?

The second part is, How can we fly in the face of the decision by the judge who is ruling on these cases—we are sending them all to him—when he, speaking for the court: The law of the case is that the terrorist surveillance program is unconstitutional, that it exceeds the authority.

The Foreign Intelligence Surveillance Act also covers the pen register and related items, so—not specifying what is involved here—whatever is involved, sending it to the judge who has already said it is unconstitutional. How can we deal in an intelligent manner given those two critical factors?

Mr. FEINGOLD. Mr. President, I again thank the Senator from Pennsylvania for his comments and question. Really, the only appropriate answer is to say ''amen'' to everything he just said. Think about this: To vote on anything when 70 Members of the Senate haven't been briefed on it seems unbelievable, and then you add to it that it has to do with the most critical issue of our time: How can we best protect our country from those who attacked us while also observing the rule of law? That would be bad enough. But then you add to it, as the Senator from Pennsylvania has indicated, that this goes to the very core issue of the structure of the Constitution. Is it really true, as the administration puts forward in defense of the TSP program, that article II of the Constitution somehow allows the executive and Commander in Chief power to override an absolutely clear, exclusive authority adopted by Congress pursuant to Justice Jackson's third tier of the test set out in his Youngstown opinion?

All of these levels are implicated by this. The Senator could not be more correct. This is an amazingly inappropriate use of legislative interference, pushed by this administration, and Senators should take a very hard look at whether they want to be associated with such an attack on the rule of law in this country.

I yield the floor.

The ACTING PRESIDENT pro tempore. Who yields time? The Senator from West Virginia.

Mr. ROCKEFELLER. Mr. President, I am opposing the amendment. So I would be taking time from Senator BOND. I ask for approximately 20 minutes.

The ACTING PRESIDENT pro tempore. Duly noted.

Mr. ROCKEFELLER. Mr. President, my colleagues have submitted two amendments seeking to accomplish somewhat the same goal before, and in a sense now down to one. Senators DODD and FEINGOLD have an amendment to strike title II of the FISA bill. It is very plain and simple, and they are very clear about that. The amendments have the same effect—eliminating the title that provides a mechanism for a U.S. district court to decide whether pending suits against telecommunications companies should be dismissed.

Two other amendments with respect to title II, to be offered by Senator SPECTER and Senator BINGAMAN, will follow. While I address those amendments in separate statements, I would like to say now with respect to the amendments that I oppose each of them and I urge that the Senate pass H.R. 6304 without amendment so that the delicate compromise which serves as best it can to protect both national security and privacy and civil liberties can, in fact, become law.

Six and a half years ago, instead of consulting with Congress about changes that might be needed to FISA, the President made the very misguided decision to create a secret surveillance program that circumvented the judicial review process and authorization required by FISA and was kept from the full congressional oversight committees. That is calling it running around the end altogether. We are right to be angry about the President's actions, but our responsibility today is to look forward. That is what this bill is about, to make sure we have adequately dealt with the numerous issues that have arisen from the President's very poor decision, bad decision.

The bill in front of us today accomplishes three important goals with respect to the President's warrantless program.

First, the bill establishes a sure and realistic method of learning the truth about the President's program—I repeat, learning the truth about the President's program. It requires the relevant inspectors general—that is a term of art. What I mean by that is the inspectors general of the CIA, DOD, NSA, et cetera, people who oversee and know what is in this program altogether—to submit an unclassified report about the program to the Congress. This report will ensure that both Congress and, by the way, therefore, obviously, the public will have as complete a picture of the President's warrantless surveillance program as possible or as messy as it may be for them to ingest.

Second, the bill tightens the exclusivity of the FISA law, making it improbable for any future President to argue that acting outside of FISA is lawful. That is huge. That means the President can never again, ever use what he has used—his all-purpose powers—and say he can just walk right around the end of FISA. He has to have a statutory authority, it has to come from us, and he cannot bypass FISA as he did altogether.

Third, the bill addresses the problems the President's decision has caused for the telecommunications companies that were told their cooperation was both legal and necessary to prevent another terrorist attack. They were not told a lot, but they were certainly told that. The bill does not provide those companies with a free pass. It requires meaningful district court review of whether statutory standards for protection from liability have been met for the companies having relied on the Government's written representations of legality.

You remember there was a period when we were using the FISA Court to make these kinds of judgments, and we bent to the better wisdom of the House with respect to the district court, which is a more public court. So they have that responsibility.

All of these pieces fit together, and not just because they are part of a larger compromise on this bill. Private companies that cooperated with the Government in good faith, as the facts before the congressional intelligence committees demonstrate they did, should not be held accountable for the President's bad policy decisions. But if the court ultimately dismisses the litigation against those companies, it is important that there be a mechanism for public disclosure about the President's program, and it is precisely, therefore, in this bill that the inspectors general report, which has to be provided to us within a year, provide that public accountability.

Likewise, we can only put past actions behind us if we can be reassured that this will not happen again, and therefore the strength in the exclusivity language in the FISA bill addresses that concern. That it does.

Together, the three components of the bill provide accountability for the mistakes of the past as well as a way to move forward.

Although title II in the bill before us today differs in important ways from the title II we passed out of the Senate this past February, the two bills address the same underlying problems faced by the telecommunications companies.

Because the majority of the information in the cases is classified, there has been no substantial progress in the cases against the telecommunications companies—several of them have been going on for years. Classified information, they can't have it; state secrets, can't have it. The Government has not even allowed the telecommunications companies in the many pending lawsuits to disclose publicly whether they assisted the Government. These companies, therefore, have not been permitted to invoke the defense to which they are entitled. But sued they are. The companies cannot reveal, for example, whether they did not participate in the program. That would be a false accusation against some company, but they cannot say that they didn't participate or that they only participated pursuant to a court order—they can't talk about that—or participated in reliance on written Government representation of legality—cannot talk about that. The bill before us today allows these defenses to be presented to the district court, the public court—not the FISA Court, which is kind of a secret court, but to the district court, which is not a secret court. It is a public court.

The Attorney General is authorized to certify to the court that particular statutory requirements have been met without requiring public acknowledgment of whether particular providers assisted the Government.

The bill then requires the district court to determine whether the Attorney General's certification is supported by ''substantial evidence.'' That is a higher, tougher standard than the ''abuse of discretion'' test we had in the Senate bill. In making this assessment, the district court is specifically authorized to review the underlying documents on which the Attorney General's certification is based. The court can, therefore, ''review any court orders, statutory directives or certifications authorizing providers' cooperation.''

Importantly, the court may also review the highly classified documents provided to the companies indicating that the President had authorized the program and that it had been determined to be lawful. Explicitly allowing the court to base its decision on whether companies are entitled to liability protection on relevant underlying documents is an important improvement to the bill, and I am happy it is in it.

Because such documents would be classified, any review of those documents in the litigation prior to this bill would have been limited to a court assessment of whether the documents were privileged. The court could not have relied on what the Government's communications to the providers actually said in making its assessment about whether the cases should be dismissed. The court could not have relied on what those Government communications said—it is different.

This bill before the Senate, therefore, gives the district court both an important role in determining whether statutory requirements for liability protection have been met and the tools to make that assessment.

The FISA bill also provides a more explicit role for the parties to the litigation—this is new and better—to ensure that they will have their day in court open—sort of, and so to speak—but they will have their day in court.

But they will have their day in court. They are provided the opportunity to brief the legal and constitutional issues before the court and may submit documents to the court for review. Whatever it is they want to submit, they can submit.

A few of my colleagues have argued that including any sort of mechanism that would allow the district court to resolve these cases will prevent the public from hearing the details about the President's program. But even if the litigation were to continue indefinitely, it would never tell the full story.

Lawsuits have now been pending for, as I indicated, over 2 years. The fight during all that time, and the likely fight in the future, has been about whether the plaintiffs will have access to any classified information about the program. The plaintiffs in the litigation, they have never been and will never be provided with wide-ranging information about the President's classified program that would enable them to put together a comprehensive picture of what happened.

This capability is reserved for those who have complete access to information about the program. And that again is why I come back to the importance of the inspectors general aspect of this oversight. You can say: inspectors general, them and their reports. Well, inspectors general can take apart their agencies, and they are sort of in there to do that.

That is why we have asked the inspectors general of these relevant intelligence agencies, including the DOD, who do, in fact, have complete access to information about the program, to conduct a comprehensive review of that same program, the whole thing.

The FISA bill requires a report of the review be submitted to the Congress in a year and requires that the report, apart from any classified annex, be submitted in an unclassified form that can be made available to the public.

That is not a dodge, that is simply a fact. You cannot release classified information to the public. So this is an appropriate way to obtain answers to questions about the President's program and ensure the public's accountability.

Critics have also claimed that granting immunity will suggest to the telecommunications companies that that compliance with the law is optional or that Congress believes that the President's program was legal. An examination of the bill that is before us in the Senate would make it impossible for anyone to come to either conclusion.

The administration made very strained arguments to circumvent existing laws in carrying out the President's warrantless surveillance program: a claim, for example, that the 2001 authorization for use of military force was a statutory authorization for electronic surveillance outside FISA, even though that authorization did not mention electronic surveillance.

What role did we expect telecommunications companies to play in those assessments of legality? To answer that question, we must consider the legal regime under which these companies were operating. Numerous statutes over the years have stressed the importance of cooperation between the telephone companies and the Federal Government, particularly in times of emergency. This has a fairly long history.

FISA itself allows the Attorney General to authorize electronic surveillance for short periods of time in emergencies prior to the submission of an application for an order. The law, as it existed in 2001 and as it exists today, grants immunity to telecommunications companies, based solely on a certification from the Attorney General that no warrant or court order is required by law, that the statutory requirements have been met, and that the specified assistance is required.

Given the need for speedy cooperation in times of emergency, Congress has never asked companies to question the Government's legal analysis that their cooperation is legal and necessary. Thus, although the telecommunications companies have always been and will always be expected to comply with the law, Congress has told them, prior to 2001, that they were entitled to rely on representations from the highest levels of Government as to what conduct was legal.

That is the way it worked. In the case of the President's surveillance program, representations of legality were made to providers from the very highest levels of Government. The FISA bill before the Senate, therefore, eliminates any possible loopholes in existing law, ensuring that neither the telecommunications companies nor any future Presidents have any doubt about what is required to comply with the law.

It strengthens the exclusivity language of FISA—I have mentioned that, I do again—making it absolutely clear that the Congress does not intend general statutes to be an exception to FISA's exclusivity requirements. In other words, no future President can therefore claim that an authorization for use of military force allows the Government to circumvent FISA.

Even more importantly for the telecommunications companies, the bill before us makes it a criminal offense to conduct electronic surveillance outside of specifically listed statutes. Unlike existing criminal and civil penalties which exempt electronic surveillance that is authorized by statute, the bill puts telecommunications companies on notice that any electronic surveillance outside FISA or specifically listed criminal intercept provisions, in the future, is a criminal offense that is subject to civil penalties for claims brought by individuals who are free to do so.

This clear language provides no room for any future President or Attorney General to argue that criminal and civil penalties should not attach for any circumvention of FISA.

Now, the improvements to this bill address many of the concerns raised with the possibility that the court might dismiss the lawsuits against the telecommunications companies. The bill before us makes clear that Congress expects compliance with the laws, and it assures that public accountability is on the Government, where it belongs, and not on the companies that acted in good faith in cooperating with the Government.

It is important to say that whatever the inspectors general come up with in their analysis of this, and believe me, they will be under the gun to do it right, that they have to report that, both unclassified and classified, to the Intelligence Committees and the Judiciary Committees in both Houses. So the oversight factor again comes in.

I think it is time to pass this bill and move forward. I urge my colleagues to oppose the Dodd-Feingold amendment.

Mr. SPECTER. Mr. President, would the Senator yield for a question; two questions, very briefly?

Mr. ROCKEFELLER. Of course.

Mr. SPECTER. The first question relates to the fact, as represented, that some 70 Members of the Senate will not have been briefed on the program.

I have been advised by the leadership in the House that most of the Members of the House have not been briefed on the program. The chairman, in detail, went over what the telephone companies cannot do because they cannot make any public disclosures.

And my question is: How can we intelligently grant retroactive immunity on a program that most Members of Congress do not know what we are granting retroactive immunity on?

Mr. ROCKEFELLER. First of all, I should point out to the distinguished Senator from Pennsylvania that there was a period when members of the Intelligence Committee, members of the Judiciary Committee, were not even able to go to the Executive Office Building to look at any of the orders that came down, President to Attorney General to National Security Advisor, then a letter to the companies. We were not allowed to do that.

The chairman and the vice chairman were allowed to do that. Nobody else was. That changed. And it changed because this Senator and a number of others put tremendous pressure, because it was such a ridiculous situation that I could not even talk to my committee members about it. And so they expanded that to include not only committee members but also some staff from both the Intelligence and Judiciary Committees.

So I would say to the good Senator that intelligence is difficult, and it is difficult to legislate it on the floor of the Senate. Let me phrase it this way. There is a common view held by many that members of the Intelligence Committee and then, to some extent, the Judiciary Committee, in fact, have the intelligence, they control the intelligence, it is all theirs.

I wish to debunk that right now. We control no intelligence. It is entirely controlled, meted out or not, by the executive branch. This executive branch

has been extremely cautious, stingy, I would say undemocratic, in doing this.

The good Senator from Missouri who is coming in now, the vice chairman of the Intelligence Committee and I have fought like bears to expand the number of people who can have access to these programs. But I cannot argue that the Senator—his point is worthy of thought.

I think then one has to consider, are the people on the Judiciary Committee and the people on the Intelligence Committee representative of good faith, people of reasonable intellect, people who know their business, and people who exercise fair judgment? I have been handed a note to say something I have already said, that the public reporting accompanying the Senate Intelligence Committee bill, detailed, with a great deal of specificity, what the companies received from the Federal Government.

That still does not allow me to argue the Senator's point. It is a peculiar and difficult nature of legislating intelligence legislation on the floor of the Senate. But it is not weakened by so doing because of what I have indicated, because of what the inspectors general, granted, not in time for this, will come up with, and, secondly, what I would call the very high standard of people who serve on both the Republican and the Democratic side of the Senate and House Judiciary Committee and Intelligence Committee.

Mr. SPECTER. Mr. President, my second question is, very briefly——

Mr. BOND. Mr. President, I would like to reclaim my time.

The ACTING PRESIDENT pro tempore. There are 34 minutes remaining in opposition. The Senator from West Virginia has the floor.

Mr. SPECTER. Mr. President, very briefly on the second question, and I will be very brief—the chairman has gone over the ineffectiveness of Congress in dealing with the statutory requirement for notice to the Intelligence Committees which wasn't followed. We have gone over the ineffectiveness of the courts in dealing with enforcing the Foreign Intelligence Surveillance Act, where the Supreme Court, as I detailed earlier, had ducked the question. So given the ineffectiveness of Congress—and I know, I chaired the Intelligence Committee in the 104th Congress and could find out hardly anything; I found the Director of the CIA knew so little about what was going on—and then the signing statements, the only recourse we have now is to the courts and to Chief Judge Walker.

So my question to you is, if we are to maintain separation of powers and determination of constitutionality, article I versus article II powers, how in the world can we act to divest Chief Judge Walker of his jurisdiction in the case, especially in light of the opinion he handed down last Wednesday?

Mr. ROCKEFELLER. I respond to the Senator from Pennsylvania by saying he indicated that Judge Walker said this was not a constitutional effort between 2001 and 2007, and it was not constitutional. But when the Senator offers his own amendment this afternoon, I will make the point I make now, that even if it is determined that the program is unconstitutional—and that, for reasons I will explain after lunch when we do the amendment, will not be possible—the immunity fact is not compromised. It is not changed. You are talking about the constitutionality of the White House's action. This bill talks about title I and then title II and a couple of other titles which referred to protecting basic rights, reverse targeting, all kinds of things such as that, which, in fact, came from Senator FEINGOLD, and it is not involved in the constitutionality. It is not involved in that. Even if the judge ruled it unconstitutional, it would make no difference whatsoever on title II.

Mr. SPECTER. I respect Senator BOND's time, and I will pursue this with the chairman when my amendment is called up later today.

I thank my colleagues.

Mrs. BOXER. I have a parliamentary inquiry.

The ACTING PRESIDENT pro tempore. The Senator will state it.

Mrs. BOXER. Senator DODD has yielded me 10 minutes of his time to speak in favor of his amendment to strike the immunity clause. I am wondering how I may get recognition here and how much time does Senator DODD have left in this debate?

The ACTING PRESIDENT pro tempore. There is 43 minutes remaining for the Senator from Connecticut.

Mrs. BOXER. I wonder if Senator BOND would allow me to take 10 minutes of the 43 minutes Senator DODD has remaining?

Mr. BOND. Mr. President, I am happy to accommodate the Senator from California. With respect to the comments by the Senator from Pennsylvania, I had asked that those be reserved for the arguments in favor of the amendment. How much time remains on the chairman and my side of the aisle?

The ACTING PRESIDENT pro tempore. There is 30 minutes.

Mr. BOND. We will reserve that and accommodate the Senator from California. I thank the Chair and my colleagues.

The ACTING PRESIDENT pro tempore. Without objection, the Senator from California is recognized for 10 minutes.

Mrs. BOXER. Mr. President, I rise today to speak in strong support of the amendment offered by Senator DODD to strike the provision from the bill providing immunity to the telecom companies who assisted President Bush with his warrantless surveillance program; in essence, breaking the law they were supposed to live by. I also note that not every telecom company went along with this. There was at least one, Qwest, that refused to go along because they said it would break the law if they did so. I thank Senators DODD, FEINGOLD, LEAHY, and others for their leadership. I know these are difficult debates to have because people could say: My goodness, they are offering an amendment to the intelligence bill and, ipso facto, that must be a bad thing because they are slowing things down.

I have to say, when you are standing up to fight for liberty and justice and the truth, you should never be afraid to slow something down. As a matter of fact, it is our job to do so. I do thank my colleagues for their leadership.

I am proud to be a cosponsor of this amendment. In my support of this amendment to strike the immunity to the telecom companies who went along with the President's secret and, I believe, illegal program, I wish to say I am not seeking punishment for them. As a matter of fact, I have stated a long time ago that I support indemnification for the telecom companies. I believe Senator WHITEHOUSE took the lead on that. Senator SPECTER, at one point, I think, was involved in that and others. I thank them for their leadership on that issue.

I understand the predicament of a company that is facing the White House and the White House is saying: You need to spy on your customers because we are asking you to do it for the safety of the people. I understand their predicament. But I do believe, at this point in time, to give retroactive immunity kind of makes a mockery of the fact that we are supposed to be a government of laws, not people. We are a government of laws. Do we then come back and say: By the way, there are three laws over here we don't like so we are going to say to the people who broke them, it is OK, because we have looked at it and we think it is OK? This is America. We are a country of laws. So this issue is so important. I can't overstate how deeply I feel about it.

We cannot place the interests of the companies and, frankly, of this administration, that doesn't want the truth to come out, ahead of the constitutional rights of our citizens who seek justice in our courts. This administration is so desperate to have this immunity because they have no interest in the American people finding out the truth.

In another subject area, I had a press conference today with a wonderful man who stood up and quit the Environmental Protection Agency because they were thwarting him every step of the way as he tried to tell the truth about the real dangers, as a matter of fact, the endangerment posed by global warming. He sent the White House an e-mail, and it was entitled ''Endangerment Finding.'' The White House called and said: Take it back. We don't want to open it. And he said: It is too late. So that e-mail is floating around in cyberspace because the

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

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

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

Listen to what Judge Walker wrote:

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

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

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

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

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

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

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

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

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

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

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

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

I thank the Chair.

The ACTING PRESIDENT pro tempore. The Senator from Missouri.

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

The ACTING PRESIDENT pro tempore. That is correct.

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

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

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

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

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

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

RECESS

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

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

FOREIGN INTELLIGENCE SURVEILLANCE AMENDMENTS ACT OF 2008—Continued

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

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

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

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

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