



United States  
of America

# Congressional Record

PROCEEDINGS AND DEBATES OF THE 113<sup>th</sup> CONGRESS, SECOND SESSION

Vol. 160

WASHINGTON, TUESDAY, NOVEMBER 18, 2014

No. 141

## Senate

The Senate met at 10 a.m. and was called to order by the President pro tempore (Mr. LEAHY).

### PRAYER

The Chaplain, Dr. Barry C. Black, offered the following prayer:

Let us pray.

Shepherd of Love, our lives are open books to You, for You see our thoughts before they are formed and know our words before we utter a single sentence. Your powers astound us.

Today, guide our lawmakers on the path that leads to faith, inspiring them to cultivate a quiet spirit of confidence in Your providential love. Lord, teach them to wait with hope and to endure to the end, believing that in everything You are working for the good of those who love You and are called according to Your purposes.

God of Grace and Glory, we revel in Your goodness, rejoicing because of Your generous mercy.

We pray in Your holy Name. Amen.

### PLEDGE OF ALLEGIANCE

The President pro tempore led the Pledge of Allegiance, as follows:

I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all.

### RECOGNITION OF THE MAJORITY LEADER

The PRESIDENT pro tempore. The majority leader is recognized.

### SCHEDULE

Mr. REID. Mr. President, following my remarks and those of the Republican leader, the Senate will proceed to the consideration of S. 2280. There will be 6 hours of debate equally divided between the proponents and opponents of the bill. Senator BOXER will control the

opponents' time. Senator LANDRIEU will control 1 hour of the proponents' time, and Senator HOEVEN will control 2 hours.

The Senate will recess from 12:30 p.m. until 2:15 p.m. to allow for our weekly caucus meetings.

At about 6:15 p.m.—give or take a few minutes—this evening the Senate will vote on a bill to approve the Keystone Pipeline.

There will be three rollcall votes on confirmation of the Abrams, Cohen, and Ross nominations, followed by the confirmation of five Ambassadors, which are expected by voice vote.

There will be 30 minutes of debate prior to a cloture vote on the motion to proceed to the USA Freedom Act.

### USA FREEDOM ACT

Mr. REID. As I have indicated, this evening we will vote on the motion to proceed to the bipartisan USA FREEDOM Act, which reforms the U.S. Government's domestic surveillance authorities under the Foreign Intelligence Surveillance Act, or FISA, as we have come to call it.

In 2013 the American public first learned that the Federal Government collected telephone and Internet records of ordinary Americans—even when those Americans were not suspected of any wrongdoing. Earlier this year Senator LEAHY introduced the USA FREEDOM Act to end this bulk data collection. This bill has the support of the entire U.S. intelligence community, including the Director of National Intelligence, Gen. James Clapper. It enhances privacy and civil liberties protections, and it continues to give the U.S. intelligence community the ability to gather the information it needs to help keep America safe.

Two weeks ago the American people sent Congress a simple message: Let's work together. The USA FREEDOM Act is an excellent opportunity for Democrats and Republicans to work to-

gether to pass legislation that is good for this country.

The chairman of the Judiciary Committee, PAT LEAHY, has done tremendous work in crafting this bill. I hope we will invoke cloture today to allow us to proceed to this matter. Chairman LEAHY will manage the bill on the Senate floor in what I hope will be an open, bipartisan process.

In working to craft this bipartisan legislation, I expect Senators on both sides will want to offer amendments. Everyone should understand that there is not going to be any effort to stop this by the procedural avenue we call tree-filling. Instead, if we get on the legislation, the bill's managers will address amendments as they are offered. So I hope Democrats and Republicans will be able to come to agreements for votes on a number of amendments—hopefully a reasonable number or, of course, we will have no alternative than to try to terminate that by trying to get cloture on the bill itself. I am optimistic that we can work together—I hope so—to forge a compromise and pass this essential legislation.

### RECOGNITION OF THE MINORITY LEADER

The PRESIDING OFFICER (Mr. BOOKER). The Republican leader is recognized.

### FISA

Mr. MCCONNELL. Mr. President, the recent beheading of U.S. citizen Peter Kassig was the latest reminder of the brutal tactics employed by ISIL, a murderous terrorist organization and insurgency that slaughters the innocent and routinely employs suicide bombers and IEDs in its campaign of terror.

The Islamic State of Iraq and the Levant slaughtered Sunni tribe members in Anbar Province, executed prisoners, and captured key terrain in cities such as Mosul.

● This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.



Printed on recycled paper.

S6027

Americans know ISIL is lethal, but it is also versatile. It has associates and sympathizers in countries across the West, some self-radicalized on the Internet, including not only in Europe and Canada but right here in the United States. The ISIL fighting force continues to grow more numerous—now numbering at least 20,000 strong—with its success on the battlefield having drawn more extremists to the fight from many of the same places, including, again, right here in America.

At its core, ISIL includes many seasoned veterans who once fought under the banner of Al Qaeda in Iraq and either survived the U.S. military detention or eluded our military altogether during the years of Operation Iraqi Freedom. Many of these fighters are familiar with America's intelligence capabilities, and many are savvy with communications. These are terrorists who know how to use encryption, and they know how to change devices frequently. That is part of the reason I am strongly opposed to legislation offered by the chairman of the Judiciary Committee that would end one of the Nation's critical capabilities to gather significant intelligence on terrorist threats. This is the worst possible time to be tying our hands behind our backs.

The threat from ISIL is real. It is different from what we faced before. If we are going to overcome it, if our aim is to degrade and destroy ISIL, as the President has said, then it is going to require smart policies and firm determination. At a minimum, we should not be doing anything to make the situation worse. Yet that is what this bill would do.

Most damagingly, it would hinder the ability of intelligence community analysts to query a database to determine links between potential terrorists. Instead, the Leahy bill would have this data be held by telephone companies. It would make it far harder for records to be gathered for a specific selection term. Under the Leahy bill, the telephone companies would face no statutory requirement to even hold the relevant data.

There is a legitimate debate to be had over the proper balance to strike in our democracy. We continue to have that debate, and we should. But the opponents of this collection program have not provided any examples—no examples of the National Security Agency intentionally spying on innocent civilians—no examples of that. In fact, the NSA, the courts, and the Congress have put in place detailed oversight procedures to protect both privacy and national security. Moreover, the only data captured under this program is the telephone number dialed—the telephone number dialed—the number from which the call was made, and the length of the call. Under section 215 of the PATRIOT Act, the content of the call is not captured. So I think the programs we have in place strike an appropriate balance between protecting our civil liberties and keeping

our Nation safe. I think the bill before us would upend that delicate balance completely.

What is more, legislation with such far-reaching effects should be given the closest possible scrutiny, but this bill was never even considered by the Judiciary Committee or the Intelligence Committee. So it is unclear why the majority leader is moving to it now rather than taking up a bipartisan measure such as the FISA Improvements Act that passed the Intelligence Committee on a strong bipartisan vote of 11 to 4.

With the current law not even expiring until next June, it is unclear why the majority leader wants to rush this untested bill through in this lameduck session rather than after a reasonable consideration by relevant committees and by the newly elected Members who will actually be responsible for overseeing the program's operation.

The point is that the authorities we enacted after September 11, 2001, which were crafted to ensure that we integrated intelligence gathered overseas and here in the United States, are acutely relevant right now. We live in a dangerous world. Threats such as ISIL only make it more so. At a moment when the United States is conducting a military campaign to disrupt, dismantle, and defeat ISIL, now is certainly not the time to be considering legislation that takes away the exact tools we need to combat ISIL.

Our intelligence community is working to track foreign fighters returning from fighting in Syria, to prevent others from traveling to the battlefield, and to keep those within Syria from radicalizing their friends and families back home. It makes little sense to pass legislation that hinders our intelligence community—legislation that has yet to receive any committee consideration.

On that note, today's Wall Street Journal features an excellent opinion piece offered by former Federal judge and Attorney General Michael Mukasey and Gen. Michael Hayden, the former Director of the CIA and the NSA. I recommend their column, "NSA Reform That Only ISIS Could Love." I ask unanimous consent that a copy be printed in the RECORD at this point.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

[From the Wall Street Journal, Nov. 7, 2014]

NSA REFORM THAT ONLY ISIS COULD LOVE

(By Michael V. Hayden and Michael B. Mukasey)

For those charged with gathering the information our government needs to keep us safe, the news has been grim. Following the leaks by Edward Snowden beginning in June last year of highly classified intelligence gathering techniques, the former head of the National Counterterrorism Center, Matthew Olsen, disclosed in September that terrorists tracked by U.S. intelligence services have started encrypting their communications in ways that defeat detection, and that the government has lost track of several.

Meanwhile, Islamic State terrorists continue to rampage across Syria and Iraq, even

as the group, also known as ISIS, uses sophisticated Internet communications to swell its ranks with recruits bearing U.S., Canadian or European passports who can easily slip back into their native countries and wreak havoc.

In that threat environment, one would think that the last thing on the "to do" list of the 113th Congress would be to add to the grim news. Yet Senate Majority Leader Harry Reid has announced that he will bring to the floor the extravagantly misnamed USA Freedom Act, a major new bill exquisitely crafted to hobble the gathering of electronic intelligence.

For starters, the bill ends the National Security Agency's bulk collection of what is called telephone metadata. This includes the date, time, duration and telephone numbers for all calls, but not their content or the identity of the caller or called, and is information already held by telephone companies. The bill would substitute a cumbersome and untried process that would require the NSA, when it seeks to check on which telephone numbers have called or been called by a number reasonably associated with terrorist activity, to obtain a warrant from the Foreign Intelligence Surveillance Court, or FISA court, and then scurry to each of the nation's telephone-service providers to comb through the information that remains in their hands rather than in the NSA's.

Nothing in the bill requires the telephone companies to preserve the metadata for any prescribed period. Current Federal Communications Commission regulations impose an 18-month retention requirement, but administrative regulations are subject to change. It isn't hard to envision companies that wish to offer subscribers the attraction of rapid destruction of these records, or a complainant bureaucracy that lets them do it.

The bill's imposition of the warrant requirement on the NSA would be more burdensome than what any assistant U.S. attorney must do to get metadata in a routine criminal case, which is simply to aver that the information is needed in connection with a criminal investigation—period.

Proponents say this change is necessary to allay fears that the NSA could use telephone metadata to construct an electronic portrait of an American citizen's communications, and determine whether that person has, say, consulted a psychiatrist, or called someone else's spouse. However, only 22 people at the NSA are permitted access to metadata, and only upon a showing of relevance to a national-security investigation, and they are barred from any data-mining whatsoever even in connection with such an investigation. They are overseen by a Madisonian trifecta of the FISA court, the executive and committees of Congress. Those people and everyone else at the NSA live in constant dread of failing to detect a terrorist attack. Nonetheless, the sponsors of the USA Freedom Act prefer the counsel of hypothetical fears to the logic of concrete realities.

This sensitivity to abstract concerns doesn't stop at the water's edge. Under the bill, if the FISA court directs any change, however technical, in the gathering of information from foreigners abroad, no information gathered before the change is implemented could be used before any official body in this country—agency, grand jury, court, whatever.

Back in the bad old days, as during World War II and the Cold War, intelligence of all sorts directed at protecting national security was gathered by the executive without supervision by judges who, after all, know nothing about the subject and cannot be held to account for adverse outcomes. After the Watergate scandal and the resignation of

President Nixon, the FISA court was established in 1978 to provide oversight for intelligence gathering, in addition to that already provided by the executive and by Congress. Now, there are those who complain that the FISA court accedes too often to requests for government access to information, and does not appear to resemble a true court in that there is no public advocate opposing the government position.

But the nearly uniform success of the government before the FISA court is due both to the government's careful restraint in presenting applications, and to pushback from the court itself—which results in the amendment of applications. Even when the government applies for wiretaps or search warrants in ordinary criminal cases there is no advocate opposing the application.

Nonetheless, this new bill would establish a permanent advocate appointed by the court to oppose the government's applications before the FISA court. This provision has elicited an extraordinary written objection from a former presiding judge of the FISA court. U.S. District Judge John D. Bates points out that the presence of such an advocate, who cannot conceivably be aware of all the facts, would simply add to the burdens of the court and could wind up sacrificing both national security and privacy.

This bill redefines the FISA court, which was never meant to be an adversary tribunal and was imposed simply as an added safeguard in the 1970s, without regard to its history or its purpose. Worse, it is a three-headed constitutional monster: It is a violation of both the separation of powers principle and the Constitution's appointments clause by having judges rather than the president appoint the public advocate, and then it has the advocate litigate against the Justice Department when both executive offices are supposed to be controlled by the president.

The bill is not an unrelieved disaster. It rightly allows for the expansion of metadata gathering to include more calls made by cellphones.

Not surprisingly, the bill has received the endorsement of President Obama's attorney general, Eric Holder, and his director of national intelligence, James Clapper, who in a Sept. 2 letter to the Senate Judiciary Committee said they were "comfortable" with the bill's provisions—even as they conceded that the bill may have "additional impacts that we will be able to identify only after we start to implement the new law."

If that calls to mind the Affordable Care Act and the suggestion that we should wait and find out what is in the bill until after it passes, bear in mind that "additional impacts" here may include holes in the ground where buildings used to stand and empty chairs where people used to sit.

There is no immediate or emergency need for this piece of legislation. Current surveillance authorities do not expire at the end of this year, which is fortunate given the current threats we face at home and abroad. The USA Freedom Act should await the attention of the Congress that will actually oversee it. A change to national-security procedures is not something to be rushed through in a lame-duck session.

#### KEYSTONE XL PIPELINE

Mr. MCCONNELL. On an entirely different matter, later today the Senate will vote on whether to send Congressman CASSIDY's Keystone jobs bill to the President. It is a vote that is long overdue but certainly welcome. Keystone XL is just common sense. It is a shovel-ready jobs project that would

help thousands of Americans find work. It would increase our supply of North American energy. It would do all of that with minimal net climate impact. That is why the American people support it. That is why Republicans support it. That is why so many rank-and-file Democrats support it too.

I wish the Senate would have followed the lead of Congressman CASSIDY and his House colleagues in approving Keystone years ago. It is just common sense. Those who took a serious look at the science and the potential benefits reached that conclusion long ago. They understand that the whole drama over Keystone has been as protracted as it has been unnecessary. We hope to turn the page on all of that today.

The reason we are able to have this vote is because the American people sent a strong message earlier this month. They told us they just want Washington to get on with approving serious policies such as Keystone and then move on. That is why after years of delay and so many thwarted attempts to bring Keystone up for a vote, the Democratic leadership is finally, after 6 years, allowing us to vote on passage of the Cassidy Keystone bill. That is a good thing. It is a step forward. Now it will be up to our friends on the other side to vote with us and actually pass the Cassidy Keystone bill through Congress.

The President's remarks opposing this bipartisan legislation are certainly not helpful. Republicans are committed to getting Keystone approved. We want to see those jobs created as soon as possible. That is what the people want. The House already acted long ago, and Congressman CASSIDY and his colleagues, such as Senator HOEVEN, who is here on the floor, deserve recognition for their years of hard work on this issue.

So I would urge a "yes" vote on the legislation to send Congressman CASSIDY's Keystone bill to the President and create more American jobs. If not, then a new majority, after the beginning of the year, will be taking this matter up and sending it down to the President.

I also wish to take a moment to thank the Senator from North Dakota for his persistence on this issue for literally years.

Without his leadership I don't know where we would be. I just want to extend my gratitude to him for his great work on this matter.

I yield the floor.

Mr. LEAHY. Would the Republican leader yield for a question?

The minority leader will not yield for a question, but I would note, based on his concerns about the bipartisan piece of legislation regarding the NSA and others and his concern about ISIL—which we all share—that the NSA and all of our intelligence community had every single tool the Republican leader advocates for, while ISIL built up its strength, while ISIL had Iraq's army flee from them while they went for-

ward. With every single one of those elements the Republican leader advocates for, there was not one single alarm bell that rang. So let's deal with the facts and not hypotheses.

#### RESERVATION OF LEADER TIME

The PRESIDING OFFICER. Under the previous order, the leadership time is reserved.

#### TO APPROVE THE KEYSTONE XL PIPELINE

The PRESIDING OFFICER. Under the previous order, the Senate will proceed to the consideration of S. 2280, which the clerk will report.

The legislative clerk read as follows:

A bill (S. 2280) to approve the Keystone XL Pipeline.

The PRESIDING OFFICER. Under the previous order, there are 6½ hours of debate equally divided between proponents and opponents of this measure.

The Senator from California.

Mrs. BOXER. I have a parliamentary inquiry. I am confused because Senator MCCONNELL called the bill the Cassidy Keystone bill, and I thought we were debating the Hoeven-Landrieu bill. Could you tell me which bill it is, because that is very important.

The PRESIDING OFFICER. The Senate is considering S. 2280.

Mrs. BOXER. So we are considering the Hoeven-Landrieu bill. I just wanted that to be clear.

The PRESIDING OFFICER. Yes. The Senator from North Dakota.

Mr. HOEVEN. Today we vote on S. 2280, introduced by myself and Senator LANDRIEU. There are actually 54 sponsors on the legislation with us. So we have a total of 56 sponsors of this bipartisan bill. That is the same bill that has been passed in the House of Representatives. That was passed on Friday—the same version. The prime sponsor in the House was Representative CASSIDY.

The bill we vote on today, S. 2280, is approval of the Keystone XL Pipeline. We have actually passed legislation on the Keystone XL Pipeline before. This is not the first bill. In 2012, we passed legislation that required the President to make a decision on the Keystone XL Pipeline. We attached it to the payroll tax holiday. At that time the President turned down the pipeline project.

So today we have submitted a number of different pieces of legislation, but this legislation actually has Congress approving the Keystone XL Pipeline.

When the President turned down the project, what we did was we went back and we did the research.

Under the commerce clause of the Constitution, Congress has the authority to oversee commerce with foreign powers, with other countries.

So in this situation, Congress has the authority to approve the Keystone XL Pipeline crossing the border from Canada into the United States, and that is