Mr. REID. Will the Chair be kind enough to tell us what the business is today in the Senate?

RESERVATION OF LEADER TIME

The ACTING PRESIDENT pro tempore. Under the previous order, the leadership time is reserved.

ENSURING TAX EXEMPT ORGANIZATIONS THE RIGHT TO APPEAL ACT

The ACTING PRESIDENT pro tempore. Under the previous order, the Senate will resume consideration of H.R. 1314, which the clock will report.

The legislative clerk reads as follows:

A bill (H.R. 1314) to amend the Internal Revenue Code of 1986 to provide for a right to an administrative appeal relating to adverse determinations of tax-exempt status of certain organizations.

PENDING:

Hatch amendment No. 1221, in the nature of a substitute.

Hatch (for Flake) amendment No. 1243 (to amendment No. 1221), to strike the extension of the trade assistance program.

Hatch (for Inhofe/Coons) modified amendment No. 1312 (to amendment No. 1221), to amend the African Growth and Opportunity Act to require the development of a plan for each sub-Saharan African country for negotiating and entering into free trade agreements.

Hatch (for McCain) amendment No. 1226 (to amendment No. 1221), to repeal a duplicative inspection and grading program.

Stabenow (for Portman) amendment No. 1299 (to amendment No. 1221), to make it a principal negotiating objective of the United States to address currency manipulation in trade agreements.

Brown amendment No. 1251 (to amendment No. 1221), to require the approval of Congress before additional countries may join the Trans-Pacific Partnership Agreement.

Wyden amendment No. 1227 to amendment No. 1221, to make trade agreements work for American businesses.

Wyden (for Warren) amendment No. 1327 (to amendment No. 1221), to prohibit the application of the trade authorities procedures to an implementation agreement with respect to a trade agreement that includes investor-state dispute settlement.

Hatch modified amendment No. 1411 (to the language proposed to be stricken by amendment No. 1296), that the President pro tempore.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, I want to take some time today to talk about proposals to include a currency manipulation negotiation objective in trade negotiations and the impact this issue is having on the debate over renewing trade promotion authority, or TPA.

Currency manipulation has, for many, become the primary issue in the TPA debate. It has certainly gotten the focus of the media and other outside observers. Indeed, I suspect that everyone who has an interest in the outcome of the TPA debate—both for and against—is watching closely to see how the Senate will address this particular matter.

Let me begin by saying that I recognize the frustrations many have regarding exchange rate policies of some of our trading partners, and that we have committed to working with my colleagues to arrive at ways to improve currency surveillance and mechanisms
Case on their amendment, and I respect for responding to problems. However, I want to be as plain as I can on this issue. While currency manipulation is an important issue, it is inappropriate and counterproductive to try to solve this problem solely through free-trade agreements.

Nonetheless, I do not believe we should ignore currency manipulation, which is why, for the very first time, our TPA bill would elevate currency practices to a principal negotiation objective. Let me get that right: in the first time in any trade bill, we elevate currency practices to a principal negotiation objective. We thought that would solve the problem. It means that if the administration fails to make progress in achieving this or any other objectives laid out in the bill, then the relevant trade agreement is subject to a procedural disapproval resolution and other mechanisms that would remove procedural protections.

Of course, I understand that a number of my colleagues want to see more prescriptive language which would limit the range of tools available and require that trade sanctions be used to keep monetary policies in line.

Most notably, we have the Portman-Stabenow amendment, which would create a negotiating objective requiring enforceable currency standards among parties to a trade agreement. The amendment goes on to say that these standards must be subject to the same dispute settlement procedures and remedies as all other elements of the trade agreement. While this approach may sound reasonable on the surface, there are a number of very serious and complex policy issues to consider. I will address those specific concerns in some detail in just a few minutes, but first I think we need to step back and take a look at the big picture.

I think I can boil this very complicated issue down to a single point. The Portman-Stabenow amendment will kill TPA. I am not just saying that; it is at this point a verifiable fact.

Yesterday, I received a letter from Treasury Secretary Lew outlining the Obama administration’s opposition to this amendment. The letter addresses a number of issues, some of which I will discuss later, but most importantly, at the end of the letter, Secretary Lew states that he would recommend that the President veto a TPA bill that included this amendment. That is pretty clear. It doesn’t leave much room for interpretation or speculation. No TPA bill that contains the language of the Portman-Stabenow amendment stands a chance of becoming law.

I want to be clear. I have great respect for the authors of this amendment. They are my friends, and I believe they are well-intentioned. They have spent a lot of time making their case on their amendment, and I respect their points of view. But at this point, it is difficult—very difficult, in fact—for anyone in this Chamber to claim they support TPA and still vote in favor of the Portman-Stabenow amendment. The two, as of yesterday, have officially become mutually exclusive.

For me, this issue is pretty cut and dry. Here’s my position: I believe that perhaps not everyone will view these developments the same way I do. But regardless of what anyone may think of Secretary Lew’s letter, the Portman-Stabenow amendment raises enough substantive policy concerns to warrant opposition on its own.

Offhand, I can think of four separate consequences we would run into if the Senate were to adopt this amendment, and all of them would have a negative impact on U.S. economic interests.

First, the Portman-Stabenow negotiating objective would put the Trans-Pacific Partnership—or TPP—Agreement at grave risk, meaning that our negotiating partners, not to mention the workers they employ, would not get access to these important foreign markets, resulting in fewer good, high-paying jobs for American workers, and I should say higher paying jobs in this Chamber have made decrees that our own Fed—Federal Reserve—has manipulated our currency for trade advantage. We will also be hearing from other countries that Fed policy is causing instability in their financial markets and economies, and unless the Fed takes a different approach, we would argue for relief or justify their own exchange rate policies to gain some trade advantage for themselves.

While we may not agree with those allegations, the point is that under the version of the Portman-Stabenow formulation, judgments and verdicts on our policies will be taken out of our hands and, rather, can be rendered by international trade tribunals. I don’t know anybody who really wants that.

I well aware that in an attempt to address this concern, the latest version of the Portman-Stabenow amendment states that their enforceable rules do not apply to “the exercise of domestic monetary policy.” But for those of us living here in the United States, that clarification does not provide much comfort. After all, the U.S. dollar is the global currency—that is, currently the global currency. If we fail to pass this bill—we have already seen, and I would argue that we need to start having the yuan become the global currency. I will say again that the U.S. dollar is a global currency. In fact, it is the primary reserve currency in the world, and its value has an impact on markets everywhere. So for the United States, the question as to what is a domestic monetary policy and what is not is open to a lot of debate, and I don’t think any of us want those debates being resolved in some international trade tribunal, which is what is going to happen under these rules.

Moreover, contrary to what many of my colleagues seem to be arguing, no one in international trade—not the Treasury, not the IMF, not the G7, not the G20, not anyone in the world—has been looking for tools to help the Federal Reserve manipulate the value of the U.S. dollar to gain trade advantage. We will undoubtedly see formal actions to impose sanctions on U.S. trade under the guise that the Federal Reserve has manipulated our currency for trade advantage. We will also be hearing from other countries that Fed policy is causing instability in their financial markets and economies, and unless the Fed takes a different approach, we would argue for relief or justify their own exchange rate policies to gain some trade advantage for themselves.

We have already heard accusations from foreign finance ministers and central bankers that our own Fed—Federal Reserve, that is—has manipulated the value of the dollar to gain trade advantage. If the Portman-Stabenow amendment is adopted into TPA, this could become part of our trade agreements, how long do you think it will take for our trading partners to enter disputes and seek remedies against Federal Reserve quantitative easing policies? Not long, I would imagine.

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be unreliable is fraught with risks—risks we should not undertake.

For example, IMF models recently showed that in 2013, Japan’s currency was anywhere between around 15 percent undervalued and 15 percent overvalued. The range, which is an international trade tribunal to do if asked to set trade sanctions based on allegations of currency manipulation? Who in the heck knows. But if we insert these standards into our trade agreements, we would not only subject our trading partners to possible trade sanctions based on indefinite standards, the United States would face similar risks. This is a recipe for trade and currency wars—a situation I think we would all like to avoid.

Third, under this amendment—that is, the Portman-Stabenow amendment—the traditional role of the U.S. Treasury in setting U.S. exchange rate policies would be watered down and potentially overruled in international trade tribunals. Do we want that? Thus, adoption of the Portman-Stabenow negotiating objective cedes independence and full authority over not only monetary policy for the Federal Reserve but also exchange rate policy for the Treasury.

Fourth, the Portman-Stabenow amendment would create incentives for our trading partners to evade regular reporting and transparency of exchange rate policies. If currency standards become enforceable and administratively subject to sanctions under a trade agreement, the parties on that agreement would almost certainly start withholding full participation in reporting and monitoring mechanisms that would otherwise enable us to identify exchange rate interventions and work against them.

Put simply, we cannot enforce rules against unfair exchange rate practices. If we do not have information about them, we cannot enforce the rules. Under the Portman-Stabenow amendment, our trading partners are far more likely to engage in interventions in the shadows, hiding from detection out of fear that they could end up being subjected to trade sanctions. I don’t think anybody wants that, but that is what is going to happen.

For these reasons and others, the Portman-Stabenow amendment is the wrong approach. Still, I do recognize that currency manipulation is a legitimate concern and one we need to address in a serious, thoughtful way.

Toward that end, Senator WYDEN and I have filed an amendment that would expand on the currency negotiating objective that is already in the TPA bill to give our country a roadmap to address currency manipulation without the problems and risks that would come part and parcel with the Portman-Stabenow amendment.

The Portman-Stabenow amendment would provide a single tool to address currency manipulation: enforceable rules subject to sanctions. As I think I have demonstrated, this, for a variety of reasons, is a pretty blunt, unreliable, and imprecise instrument, given the realities of the global economy.

By contrast, the Hatch-Wyden amendment would put a number of tools at our disposal. Specifically, the amendment calls for enhanced transparency, measurement, and monitoring, cooperative mechanisms, as well as enforceable rules. Our amendment, which would provide maximum flexibility, is a better alternative for addressing currency manipulation for a number of reasons.

First, it would preserve the integrity of our current trade negotiations. Once again, if we insert an absolute requirement for enforceable currency rules and required sanctions into the ongoing TPP negotiations, many, if not all, of our negotiating partners will almost certainly walk away. The Hatch-Wyden amendment would pose no threat to the TPP negotiations or any other trade deals.

Second, our amendment would not threaten the independence of the Federal Reserve or subject our own monetary and exchange rate policies to possible sanctions based on indefinite standards. Unlike the Portman-Stabenow amendment, it does not give other countries a roadmap to accuse the United States of using its policies intended for domestic growth and stability as tools for currency manipulation.

Third, it would increase transparency and accountability of our trading partners’ currency practices. This is absolutely crucial. Put simply, we cannot counteract practices that we cannot readily observe. The Portman-Stabenow amendment would tell our trading partners that if you engage in full reporting and transparency, you run the risk of having an international tribunal detect your actions in ways that will generate trade sanctions. The incentive, then, is not to be transparent and instead to put their currency policies further in the shadows, hiding away information that could end up being used in trade disputes.

Our trade agreements should provide incentives for countries to go in the opposite direction: full disclosure and accountability of currency practices. The Hatch-Wyden amendment would provide a more effective incentive structure.

Finally, and in the current context, most importantly, the Hatch-Wyden amendment would not result in a veto of the TPA bill. It is, in fact, supported by the Obama administration, not to mention business and agriculture stakeholders across the country.

I suppose one could say we have come full circle. After what I hope has been an interesting discussion of important policy considerations, we are back at the same general discussion. If nothing else, I hope we are now more aware of the complexities of currency and monetary policy has resonated with my colleagues, this fact remains: A vote for the Portman-Stabenow amendment is a vote to kill TPA.

I am sure that sounds good to some of my colleagues who are fundamentally opposed to what we are trying to do here, but for those who support free trade, open markets, and high-paying American jobs, this truth is inescapable.

But, once again, this doesn’t mean we should stand by and do nothing about currency manipulation. The Hatch-Wyden amendment will provide an effective path to improve transparency, measurement, and monitoring of our trading partners’ currency practices, and effective and transparent ways to counteract anyone seeking to manipulate currencies for unfair trade advantage.

The Hatch-Wyden amendment will allow Congress to speak forcefully on the issue of currency manipulation without putting our trade agreements and domestic policies in limbo.

As Senator PORTMAN and I have previously said and other Senators who are sincerely concerned about currency manipulation—and I am one of those Senators—the Hatch-Wyden amendment would address these issues in a far more productive way.

So, at this point, the choice should be pretty clear. We have strong indications that the House cannot pass a TPA bill with the Portman-Stabenow language. Even if it could pass the House, Secretary Lew has made it very clear that that provision in our bill would compel President Obama to veto it.

The Hatch-Wyden amendment, on the other hand, would strengthen our hand by providing a workable set of tools to counteract currency manipulation in a way that would protect our interests and achieve real results and, most importantly, it would preserve our ability to enact TPA so we can negotiate strong trade agreements that will help grow our economy and create jobs.

That is the choice we face with these two amendments. I call on my colleagues who support TPA to oppose the Portman-Stabenow currency amendment and support the Hatch-Wyden alternative.

With that, I yield the floor.

The PRESIDING OFFICER (Mr. COTTON). The Senator from Oregon.

Mr. WYDEN. Mr. President, first of all, I wish for colleagues to know that I think Chairman HATCH has made some very important points with respect to the currency issue and for colleagues to know that the approach of the chairman and me is to make sure we can have tough, enforceable currency rules without doing damage to American monetary policy or the ability to fight big economic challenges in the days ahead that we think would come about with the amendment offered by the Senator from Ohio, Mr. PORTMAN.

By the way, I want colleagues to know that currency is going to be in the Customs conference. Chairman HATCH and I have discussed this point...
as well. We felt very strongly about making sure there is a Customs conference that goes right to the heart of the enforcement agenda. In that Customs conference—and the chairman and I have been able to secure a commitment from the President and from Chairman RYAN—that the Customs conference is going to take place right when we get back. The President of the United States indicated last night that he wants us to get this done in June. So we are going to have a chance to tackle currency in that conference. Senator BENNET worked closely with the chairman and I so we got something in the committee that we thought was a smart, practical step. The chairman and I are talking today about something that is also strong and enforceable that would not produce the downside I have outlined.

So I want colleagues to understand there is an opportunity, particularly on the currency issue, very quickly, to put in place practical rules that get us the upside in terms of protecting the American economy without some of the downsides I have outlined and that Chairman HATCH has described as well.

What I want to do particularly this morning is, given yesterday, talk about some of the very positive developments we saw yesterday. I wish to express my appreciation to Chairman HATCH again for working closely with me on these issues.

I will start by talking about Senator MENENDEZ. Senator MENENDEZ, as do many of us, feels very strongly about human trafficking, about compelled labor, about commercial sex. He has made it very clear he wants to stop trafficking and he wants us to come up with a fresh policy. So he offered an amendment in the Finance Committee and it passed. All over the press for the next few days—and Chairman HATCH reminded me accurately—that the pill is going to end the possibility of finding a way forward on the trade promotion act. The headlines were everywhere. The general view in the press was Western civilization was about to see the end of the pill.

So, yesterday, in consultation with Chairman HATCH and myself and others, the President put out a very strong statement explicitly stating what he wanted in that conference, and he wanted it in June. He talked again about Senator BROWN’s measures, 301, and the Trade Enforcement Act. This is something I developed back when I was chair of the trade subcommittee. We had put together a sting operation to catch scofflaws overseas who were trying to avoid our trade laws. In effect, what they were doing was merchandising laudering which would be found to be in violation of our dumping or our trade rules in one country and they would just move to another and try to move it through another nation, and we caught them on it. Many parties responded to the sting operation saying: We are in. We are anxious to stop this merchandise laundering. So I don’t take a backseat to anybody in terms of enforcing our trade laws.

So after Chairman HATCH and I got through the Finance Committee, the second step was we had a separate vote in the Senate on a very strong Customs and Enforcement package. That was step No. 2. But at that time, a number of observers said: Well, nothing is going to happen here in the Senate, but that bill is not going anywhere, not going to happen. That is the end of the topic.

Chairman HATCH and I, working together with Chairman RYAN, said: Of course we are going to have a conference. We feel very strongly about this. So we put out a statement earlier in this week saying: You bet there is going to be a conference in June, and we are committed to getting this done.

Chairman RYAN has indicated that he is going to take each of the trade bills—all four of them—up on the same day in the other body. He is going to pass them all, and then we will have a conference. After that happened, I was particularly pleased, well, that happened, but we are still not going to have much. Is the administration going to be for it?

So, yesterday, in consultation with Chairman HATCH and myself and others, the President put out a very strong statement explicitly stating what he wanted in that conference, and he wanted it in June. He talked again about Senator BROWN’s measures, 301, the level playing field, and the ENFORCE Act. I was very pleased he mentioned that bill later.

So a tough, strong enforcement package is going to happen. I am going to insist on it. Chairman HATCH has pledged to me he is going to insist on it. It is going to happen. All of that was essentially nailed down in the last 24 hours.

So two big issues, two very significant issues, which were both considered to be show-stoppers: The MENENDEZ amendment, fixed. All the headlines about poison pills, no longer valid. Senator MENENDEZ has fixed it.

Chairman HATCH, to his credit, has been willing to work with me and with the President. We are going to have a
strong enforcement package and we are going to have it in June and it is going to become law as part of the Customs conference.

The Senate spent a lot of time yesterday debating an important issue, which is called the Export-Import Bank. I want to thank my Pacific Northwest colleague and friend Senator CANTWELL for all of her leadership—all of her leadership over the years—in trying to renew the Export-Import Bank. She has been the one who has pointed out: If you have trade laws, which we are trying to promote with the trade promotion act, but you aren’t using the tools that you need to get the maximum value—wring the maximum value out of those new laws—you are missing opportunities that are important for our Nation. So I urge the majority leader to work closely with Senator CANTWELL to make that happen.

Finally, I have been pleased to see a robust debate on a number of issues, particularly issues that have been important to Senator WARREN and Senator BROWN. What I have said from the very beginning and what I am going to be here all day working on is this: There are Senators who feel strongly about the trade investment act; there are Senators who are opposed to it. I am obviously for the agreement, but every single day I am looking for opportunities for both sides to be heard and to be able to advance their ideas. It started long before we actually had votes in the Senate Finance Committee, and it is going to continue every single day that I have the opportunity to serve in the Senate.

These are important issues. I thought it was particularly important that Senator WARREN’s investor-state provision be able to get a vote early on in the proceeding—obviously an issue that there has been great debate on—and there are many more important amendments to the package.

So I want colleagues on both sides of the aisle to know I am going to be here throughout the day—throughout the day—looking for ways that all Senators, whether they are for the agreement or against the agreement, will have an opportunity to have their priorities considered on this trade legislation. I will just wrap up, colleagues, by way of saying that the reason this issue is so important to me is we still need to continue to think about how to get more high-wage jobs in our country. Continually we debate that because we want higher wages for our constituents. The evidence is that trade jobs pay better than do the nontrade jobs. We need more of them.

There was a report this morning that my State has a significant trade surplus, and we are very proud of that. There are other States that don’t. Let’s promote legislation that allows us to secure more exports, particularly in the developing world, where there are going to be a billion middle-class consumers in 2025. We want them to “Buy American,” because when they do, it creates the opportunity for us to have more of those export value-added, high-productivity jobs that pay our workers better wages and that strengthen our middle class.

It is going to be a busy day, and I look forward to working, again, with both sides so Senators, whether they are for the TPA or whether they are against it, feel they have a chance to raise their issues and be treated fairly. With that, I yield the floor.

The PRESIDING OFFICER. The Senator from Wyoming.

Mr. BARRASSO. Mr. President, I ask unanimous consent to speak as in morning business.

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

NATIONAL SECURITY

Mr. BARRASSO. Mr. President, today, President Obama is heading to Connecticut, where I understand he is going to congratulate graduates at the Coast Guard Academy. He plans to talk about threats to our national security.

I think many Americans would be astonished to learn the President’s national security strategy is going to center on climate change. After all, Americans understand there are much more immediate threats facing our Nation, such as the fall of Ramadi in Iraq and the brutal terrorist attacks by ISIS. These are clear examples of the real threats that must be addressed by President Obama.

I would encourage the President to spend this time today addressing America’s most pressing national security threats. The President and his national security team must deliver strong leadership and an effective strategy to fight the terrorists who want to attack our country and kill more Americans. This should be the focus of the President’s speech today. This should be our most pressing national security concern.

OBAMACARE

Mr. President, I would also like to talk about an important issue that is facing Americans and they will soon need to be seeing, which is that next month the Supreme Court is expected to announce a decision in the case of King v. Burwell. This is a case that has been brought on behalf of millions of Americans who have been harmed by the President’s unlawful expansion of his unpopular and unaffordable health care law.

Sometime before the end of June, the Court is going to announce if the law passed by Congress means what it says or if it means what the President wishes it had said. The law, written by Democrats in Congress, written behind closed doors, only authorized insurance subsidies for one group, and the President had the IRS pay subsidies to another group.

The President gave bureaucrats much more power to control the health care choices and decisions of people who never should have been caught under the law. The Supreme Court should strike down this alarming overreach by the President. If it does, that will give Congress an opportunity to address some of the devastating problems the health care law has caused.

I think many Americans would be astonished to learn that there is another headline about another damaging side effect of the President’s health care law. Here is one example from a story yesterday morning, the front page of Investor’s Business Daily: ObamaCare Rates Will Soar in 2016, Eagerly Sought.

It is going to be a billion middle-class consumers, particularly in Connecticut, who are facing rates going up by an average of 18.6 percent just next year alone. Early reports range from an alarming 36-percent hike sought by the dominant insurer in Tennessee to a hefty 23-percent hike sought by Oregon insurers.

People across the country saw these rates go up at the beginning of this year, and now they are facing it again. They are starting to learn that it was not just a 1-year deal.

There is another story that came out May 7 in the Connecticut Mirror. The article says that insurance companies selling health plans through the State’s health insurance exchange are seeing rate increases next year, with an average increase somewhere between 2 and nearly 14 percent.

You take a look; it is outrageous.

I know the Senator from Connecticut has come to the floor saying that he should be celebrating ObamaCare—[laughter]—even though it, he said, has not been coming true—[laughter]—is seeking rate changes that average 18.16 percent.

Mr. President, I would also like to address some of the devastating problems the health care law has caused. You take a look; it is outrageous. I know the Senator from Connecticut has come to the floor saying that he should be celebrating ObamaCare—[laughter]—even though it, he said, has not been coming true—[laughter]—is seeking rate changes that average 18.16 percent.

Insurance companies that sell plans in the ObamaCare exchange are starting to set their rates for next year. There are a series of articles that continue to come out. One says that the top ObamaCare exchange insurers in six different States where the 2016 rate requests have already been filed—and there will come—are seeking rate changes that average 18.6 percent just next year alone. Early reports range from an alarming 36-percent hike sought by the dominant insurer in Tennessee to a hefty 23-percent hike sought by Oregon insurers.

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You take a look; it is outrageous.

I know the Senator from Connecticut has come to the floor saying that he should be celebrating ObamaCare—[laughter]—even though it, he said, has not been coming true—[laughter]—is seeking rate changes that average 18.6 percent just next year alone. Early reports range from an alarming 36-percent hike sought by the dominant insurer in Tennessee to a hefty 23-percent hike sought by Oregon insurers.

People across the country saw these rates go up at the beginning of this year, and now they are facing it again. They are starting to learn that it was not just a 1-year deal.
smashing success or that an 18.6-percent average across the country is a smashing success?

We are going to see this same story about soaring insurance rates repeated all across America. And it is not just the deductibles that are causing problems for families. Here is a headline from the Washington Post on Friday: “Insured, but still not able to afford care.”

“Four in five who bought health coverage, some costs remained too high.” So they have insurance, but they are still not able to get care. People who have insurance have been avoiding going to see the doctor. That is according to a new study by the liberal advocacy group called Families USA. This was an advocacy group who was a huge supporter of the President’s health care law and a huge supporter of the President. Even this group has to admit that coverage does not equal care. There is a difference. The group’s executive director is quoted in this article in the Washington Post as saying, “The key culprit as to why people have been unable to afford medical care despite coverage is high deductibles.”

Well, many people’s deductibles are too high. The reason the deductibles have gotten so high and so out of hand all of a sudden is that the health care law included so many more mandates.

Democrats who voted for this said they knew better than the people at home what kind of insurance they need. That is what the President said. The President said: I know better than you do. I know what your family needs. You do not. That is why the deductibles are so high. Insurance had to raise their premiums to cover the cost of all these new Washington mandates. They had to raise deductibles as well. This year, the average deductible for an ObamaCare Silver Plan is almost $3,000 for a single person and more than $6,000 for a family.

People have Washington-mandated coverage, but they still cannot afford to go to the doctor. They are skipping tests. They are skipping followup care because of the high deductibles and copays. Why are people across the country having to put off getting care? Because they cannot afford it. Is that what Democrats mean when they say the law has been a smashing success, when the minority leader comes to the floor and says it is a smashing success? When the minority leader comes to the floor and says: I know what your family needs. That is what the President said.

Mr. MERKLEY. Mr. President, returning to the conversation about trade policy and its impact on American workers, President Kennedy once said, “The trade of a nation expresses, in a very concrete way, its aim and its aspirations.” Well, what are our aims and aspirations in crafting a new trade structure? The President says that his aim and aspiration is to be the writer of rules for trade in Asia. I have a different aspiration. My aspiration is that we create trade that creates living-wage jobs in America, that puts people to work making things in America. If we don’t make the things in America, we will not have a middle class in America.

So as we contemplate a massive new trade deal, the Trans-Pacific Partnership, and the bill before us to fast-track consideration of that Trans-Pacific Partnership, we should ask ourselves this question: Is this about our geostrategic goal of being the leader in writing the rules or is it about writing rules that actually work for working Americans? Because, you see, working Americans want to be part of this goal of geostrategic influence. Oh, yeah, we had NAFTA, the North American Free Trade Agreement. We had CAFTA, the Central American Free Trade Agreement. What was the result of that? We lost 5 million jobs in America. We lost 5 million jobs.

We lost 50,000 factories. If you go around Oregon, you can see those factory sites. I recently visited the Blue Heron site. Just a few years ago, there were hundreds of workers at the Blue Heron paper mill. Under the structure of one trade agreement—WTO—those jobs went to China. Paper manufacturing went to China. The equipment was pulled up out of that factory, leaving a big hole, and shipped overseas. That is what happened. We lost our factories. We lost our jobs.

There has been a lot of discussion that this is a new trade agreement, one that establishes enforceable standards for labor. Well, perhaps the single most important standard is minimum wage. Minimum wage is about resisting the full exploitation of workers, the full race to the bottom. So, of course, I am not writing the rules or is it about writing rules to end this destructive race to the bottom. Well, of course we have addressed that. That is central. That is the central ingredient, is to make sure that there is not a race to the bottom and that we address the fact that every nation that will be part of this agreement will have to have a minimum wage, a minimum wage that rises over time, a minimum wage that provides a basic standard of living so that we do not have conditions of full exploitation, miserable sweatshops, if you will, that are producing the goods that are here in America under this agreement.

So it may come as a shock to people across America that this most fundamental standard of minimum wage is not addressed in this agreement.

The President says it has done very poorly under this law. It did not work out the way they promised—and to start working with Republicans on reforms that will give people the care they need from a doctor they choose at lower costs.

I yield the floor to the Presiding Officer, Senator from Oregon.

Mr. MERKLEY. Mr. President, returning to the conversation about trade policy and its impact on American workers and businesses, President Kennedy once said, “The trade of a nation expresses, in a very concrete way, its aim and its aspirations.” Well, what are our aims and aspirations in crafting a new trade structure? The President says that his aim and aspiration is to be the writer of rules for trade in Asia. I have a different aspiration. My aspiration is that we create trade that creates living-wage jobs in America, that puts people to work making things in America. We will not have a middle class in America.

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What does this Trans-Pacific Partnership have a requirement that there be a minimum wage that will rise up workers and stop these sweatshops around the world and so that we are not buying products from sweatshops with miserable, slave-like conditions? It does not. It has no such provision. It has no minimum wage, which leads us to another fundamental observation. What this trade agreement does is set up a dynamic between these very low wage countries and countries that are developed and aspiring to create living-wage jobs here. But what happens when you have manufacturing in these high-wage countries? Well, it is obvious: The manufacturing migrates to the place that is the cheapest. That is the way the free enterprise works—it goes to where you can make the most profit.

So it is not some absurd, unexpected result that NAFTA resulted in the loss of 5 million good-paying jobs in America. It is not some unexpected result that we lost 50,000 factories.
When he was campaigning for President, Ross Perot said: If you adopt NAFTA, you will hear the sound of the jobs leaving America.

Well, that is exactly what happened—exactly what happened.

So is it true that this new-generation trade agreement actually address this core problem? Well, the answer is, it does not. It does not do anything to address this disparity between very low wages and prosperous countries. This is going to be, as Ross Perot put it, another situation with a giant sucking sound of jobs leaving America.

Proponents of this treaty say: Well, we have done something very significant. We have taken the labor and environmental side agreements and we have put them in the center of the agreement. This is pretty much like moving deck chairs on the Titanic. You move them from one location to another location. How does that change the outcome? Well, it doesn't. It just means that the same problem is in a different part of the text. That is not very good news, if you will, to workers across the United States of America who have been assured there is something fundamentally different about this agreement.

These labor standards and these environmental standards that are in the agreement—we have heard a lot about enforcement, and there is nothing new to enforce in these labor and environmental standards.

I want to take a little detour here because there are some important enforcement standards that my colleagues have put forward. My colleague from Oregon has put forward the ENFORCE Act. This is important for enforcing tariffs. This is important for enforcing the movement of goods illegally through third parties in order to bypass tariffs in the United States. That is a good step forward, but that does not address the core of this issue which is enforcement of the labor and environmental standards.

Now, we have the same basic standards in various trade agreements, and they are never enforced because there is no effective mechanism for enforcement. Let me expand a little bit on what has gone on and then point out that nothing has been done to fix it. You essentially have a set of standards and these standards are the International Labor Organization standards, ILO standards, and ILO standards address a series of things. These ILO standards are things such as child labor. That is a bad idea. It should stop. It addresses that union organizing should be allowed, and that is a good thing. So the standards themselves are solid and respectable.

But when a nation becomes part of the trade agreement, how do you have them enforce those standards? That is what is missing—no enforcement for these standards.

There is a government-to-government process for consultations when the United States is upset that some one is not enforcing. Ultimately, they can file a case. That case can take years and years and years to adjudicate, and it never gets done. The number of labor standard enforcement actions that have been completed is zero—zero. If so if we take a broken system from existing trade treaties and slip it into a new trade treaty, what is the expectation with respect of these standards? All the parties know that. They can put these laws on the books, but there is not going to be enforcement.

There is one case—one case alone—that we have sought to proceed to enforce and that is with Guatemala. With Guatemala, they have massive labor violations. They are not making the slightest attempt to follow the ILO. We have under that trade agreement in that nation, they come out and tell the government: What are you doing? The goal of the trade agreement was to create a stable environment for investments. You are destabilizing that by filing a lawsuit against our country, so don't do it. In the end, if you ever got to an enforcement action, well, that would hurt us because we put our factory there, and now we would be subject to tariffs.

So this combination means that structure is completely dysfunctional, and that structure is exactly what is in TPP. So this is why we are coming forward and saying now is the time to fix this. We need to address this problem so we can stop pontificating about strong labor and environmental standards, and actually have a structure that creates that within the 12 nations that are considered being part of TPP. So that is the point of that. That is unproductive. We say they are not meeting it. They say we are not meeting it.

Then, third, and very importantly, the companies that have invested in the United States. They have invested in this nation, they come out and tell the government: What are you doing? The goal of the trade agreement was to create a stable environment for investments. You are destabilizing that by filing a lawsuit against our country, so don't do it. In the end, if you ever got to an enforcement action, well, that would hurt us because we put our factory there, and now we would be subject to tariffs.

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to 1. It is not close to a level playing field. The American minimum wage is more than 10 times the Mexican minimum wage. It is a 10-to-1 disadvantage to American workers.

That is what we are talking about—the playing field level in this horse-riding into this trade agreement. So I am suggesting: OK. At a minimum, the negotiated process, where that playing field is gradually brought to a more level situation, where the disparity is decreased, shouldn't be that be a primary negotiating objective of the United States in these agreements? Aren't we right now talking about explaining to the administration what they should negotiate in this agreement?

My colleague from Utah spoke earlier about the provision regarding currency manipulation and explained why he thought it would be unproductive to have it here—while it is very important—unproductive to have the amendment that SHAHEEN and PORTMAN, my colleagues from New Hampshire, brought to the floor of the Senate.

But why would we give away U.S. judicial process, and thereby encourage foreign tribunals of three corporate lawyers—corporate lawyers for whom there is no accountability to the U.S. government, unless our local government, it can assess fines on our local governments, it can assess fines on the State or local or national level laws discussed. For example, we ended up with a 25 percent tariff on American products going to China and a 25 percent subsidy to Chinese products coming to the United States. Well, that is a huge tariff. Combine the two together—50 percent differential. That is not equitable in an international agreement that was supposed to reduce—the WTO—barriers. So. No. We know it is a problem. Why not fix it, why not address it, why not debate it, why not discuss it, and why not struggle to find a solution. That is what Senators SHAHEEN and PORTMAN are saying; that that is an important element related to this unbalanced situation that is going to remove jobs from the United States.

Now, I am pointing out another deficiency; that is, that there is no minimum wage, that we are starting out with a 10-to-1 differential with Mexico, approximately a 10-to-1 differential with Vietnam, that there should be a minimum wage so we can stop the race to the bottom, and it should be gradually raised to decrease the disparity.

That is an issue worthy of debate, but I can’t get that debate onto this floor because of the provisions. I don’t want to allow debate on these amendments. They just want to choose and pick the subjects that they want to allow to be debated rather than the ones the Senators want to allow to be debated. That is not a robust and open amendment process.

Now, there is another flaw in this TPA, which is it has negotiating objectives. An objective is simply a wish, a hope, it is a desire, it is an inclination, but an objective is not an actual provision.

So we can say all the beautiful things we want about what our objectives should be, but instead we should be asking, What are the standards? What are the actual standards that need to be in a treaty? Because in order to benefit from fast-track? What are the actual standards that should be in an agreement that is brought back to the Senate under fast-track—because fast-track gets special privileges on the floor of the Senate.

So setting an objective doesn’t do the work because it doesn’t define what will come back to this body under this special privilege. We should convert those objectives into actual requirements. That is what one of my amendments does.

Then we can turn to the situation where the TPA has another deep flaw that many have pointed out that hasn’t been addressed, and this deep flaw is it sets up an international tribunal, an international tribunal that can essentially assess fines on our local government, it can assess fines on our State government, it can assess fines on the U.S. Government, unless our local government, our State government or the Federal Government change their laws.

Establishing a judicial organization with no accountability to the U.S. judiciary, that is a grant of sovereignty. That is our courts’ sovereignty being shipped to a tribunal of three corporate lawyers who get to decide whether there are massive fines levied against our local, State, and national governments. Well, that is certainly something that should be deeply concerning to us.

Now, the goal of this was to have some sort of judicial process substitute in countries that have a dysfunctional judicial process, and thereby encourage international investment. So you could have a situation where Vietnam and Malaysia would say: We know our judicial organization is corrupt or dysfunctional, so we will opt in for this dispute resolution structure because we want investment to come to our country. But just imagine any U.S. judicial powers to an international tribunal of three corporate lawyers—corporate lawyers for whom there is no conflict of interest standard? They could be the advocates on one case and the judge on the next. That is really not in accordance with our norms of judicial conduct. So we aren’t even requiring our norms of judicial conduct to be applied to this international tribunal.

Furthermore, when we pass at the State or local or national level laws designed to protect the health and safety of our citizens, foreign investors are granted special privileges under this agreement because we can’t do it. We can’t say: Your laws for consumer protection or the health and welfare of your citizens or to take on significant environmental hazards have hurt our investment, and we want to be compensated. That is just wrong. Sure, if there was an unfair expropriation of someone’s assets, that is judicable under American law. It doesn’t require an international tribunal.

What about when something is done for the safety and wellness of our citizens? Take, for example, asbestos. We tried to regulate asbestos in 1991. It was the last time any toxic chemical was considered under the Toxic Chemicals Act. We have done nothing in the years since then to get over the hurdles that existed in 1991, and we have a new law, a new process, such as has been debated in the Committee on Environment and Public Works. That bill had bipartisan support. That is the American way of doing things, and we regulate asbestos, now the foreign investor says: Oh, we have an asbestos factory so you have to compensate us.

That is a privilege that the domestic—The United States; the red, white, and blue—investor would not have. Let’s say we regulate e-cigarettes, an effort by the tobacco company to addict our children to become lifetime users of nicotine and do so through fancy flavors—chocolate, strawberry, cotton candy, and every candy flavor on Earth. You name it, they have a flavor. You have an unfair expropriation of someone’s assets, that is judicable under American law. It doesn’t require an international tribunal.

So we can say all the beautiful things we want about what our objectives should be, but instead we should be asking, What are the standards? What are the actual standards that need to be in a treaty? Because in order to benefit from fast-track? What are the actual standards that should be in an agreement that is brought back to the Senate under fast-track—because fast-track gets special privileges on the floor of the Senate.

When I came into the Senate, China’s currency manipulation was calculated to be equal to a 25 percent tariff on American products going to China and a 25 percent subsidy to Chinese products coming to the United States. Well, that is a huge tariff. Combine the two together—50 percent differential. That is not equitable in an international agreement that was supposed to reduce—the WTO—barriers. So. No. We know it is a problem. Why not fix it, why not address it, why not debate it, why not discuss it, and why not struggle to find a solution. That is what Senators SHAHEEN and PORTMAN are saying; that that is an important element related to this unbalanced situation that is going to remove jobs from the United States.
those loans in the mortgage market. We don’t want a foreign investor saying: Well, our whole business was built on that; you owe us $1 billion. No, we are ending predatory wealth-stripping practices and replacing them with fairer, 30-year amortizing mortgages with full FHA insurance which were allowed under the previous law. They were called steering payments. We ended steering payments.

Or on this issue of e-cigarettes, we are doing all kinds of different things to protect our children, which is terrible for their health and certainly terrible for the cost of our health care system. It is a lose-lose. We should be regulating it. We passed a law to regulate it, but we just have never gotten the regulations done. The FDA has now completed those regulations. They have shipped them to OMB—Office of Management and Budget. We hope someday that regulation will be in place. When it is in place, a foreign investor should not have special privileges to be compensated because we are protecting our citizens.

Therefore, we should carve out and say that our laws related to the environment and public health and consumer laws cannot be the subject of ISDS—that is the name of the tribunal, ISDS—attacks.

Then let us look at basic consumer information, such as the labeling of products. A lot of manufacturers don’t like these labels because they are labeled. They consider that labeling might have information that might be prejudicial because consumers might prefer the content of one product, when honestly labeled, over the product of another.

We had a law in Oregon that took on growth hormones in milk. The basic compromise was that we printed on every package of milk. If it had growth hormones, it had to say it contained growth hormones; and then there was a little case saying it was not shown to have ill health effects. But consumers wanted to choose the milk that didn’t have the growth hormones in it. That was the value of labeling. It empowered choice by the consumer, by the individuals exercising their rights as to what they put into their body, their right as to what they feed their children.

We have a very similar situation with regard to meat. Americans often want to know whether their meat was made in America. So we passed a law called COOL—country-of-origin labeling. Well, COOL is very well received. People like to choose meat grown in America. Not everyone cares, but some do. That is their right. They know there are different standards for how animals are raised. The United States has different rules for what type of ingredients go into the feed in other nations. So wanting to support good practices, they might choose American meat. Wanting to support something healthy for our children, they might want to choose American meat.

And what just happened this week? Well, one of these tribunals, in a different trade agreement, struck down America’s country-of-origin labeling law. That is what I am talking about when I say we are giving the sovereignty of our judicial branch away to an international tribunal of corporate lawyers who can make decisions that affect our children. That is simply wrong. We must fix this.

So I have an amendment that I would like to hear debated on this floor. Others may disagree with me. We have been beaten by large corporations. That is simply wrong. We must fix this.

We are here to debate, so let us get these amendments up. Let us debate them, and let us quit stalling. Let us get on with this important work. Let us get on with trying to rush this through in a manner where these fundamental issues have not been addressed—fundamental issues such as the fact that there is no minimum wage in this agreement, and that the playing field is tilted deeply against manufacturing in America; fundamental issues such as that there are negotiating objectives that should be negotiating requirements for a bill to have the privilege of getting fast-track treatment here; fundamental issues such as that we should not have our environmental, public health, and consumer laws subject to an international tribunal; fundamental issues such as Americans having the right to label their products the way they decide, according to their statutes, and not have that overruled by an international group.

I would love to see this Senate function and to actually debate these issues instead of amendments. And any effort to shove this bill through without having those types of debates is certainly not the open and robust amendment process that was promised by the majority leader.

I yield the floor.

The PRESIDING OFFICER (Mr. SULLIVAN). The Senator from Iowa.

RENEWABLE FUEL STANDARD

Mr. GRASSLEY. Mr. President, while reading through the pages of the Wall Street Journal last week, I was overcome with a sense of déjà vu. As many of my colleagues have heard me speak on the Senate floor many times each year over the last several years about ethanol and about misconceptions about that, these misconceptions showed up in an op-ed piece in the Wall Street Journal last week.

Once again, in this case it happens to be chain restaurants and chicken producers teaming up to smear home-grown biofuel producers at the expense of our farmers and the farmer air. It seems as if every couple of years food producers and grocery manufacturers team up with Big Oil to try to undermine the extremely successful Renewable Fuel Standard Program.

Here is a little history for everyone. In 2008, it was the big food producers led by the Grocery Manufacturers Association, because, presumably, in our society, grocery manufacturers have more prestige than Big Oil. In 2010 and 2012, it was global integrated meat producers, led by Smithfield Foods and the American Meat Institute, presumably because they have more prestige than Big Oil.

The opinion piece I am referring to in the Wall Street Journal this time was written by the head of the National Chicken Council and the National Council of Chain Restaurants. And under these circumstances, compared to the other two instances I cited, there is really no difference. They have prestige that Big Oil doesn’t have.

This article makes many of the same points, claims we have heard dozens of times before, and I am going to take this opportunity to do a simple fact-check of some of the most egregious claims. First, these two authors claim that since 2005, when the renewable fuel standard was first adopted, costs of vital food commodities, including corn, grains, oilseeds, poultry, meat, eggs, and dairy have risen dramatically. This is pure myth. The fact is consumer food prices have increased by an annual rate of 2.68 percent since 2005. In contrast, food prices increased by an average of 3.47 percent in the 25 years leading up to passage of the renewable fuel standard in 2005.

Chicken breasts have been nearly flat over the past 7 years, averaging $3.43 per pound in 2007 and just 3 pennies more, to $3.46 per pound, in 2014. Corn prices are expected to average $3.50 per bushel this year, according to the Department of Agriculture. This would be the lowest price in nearly 10 years and 17 percent below the average price of $4.20 a bushel in 2007 when the renewable fuel standard was first adopted.

That is a fact. With ethanol production at record levels today, corn prices are lower now than they were in 2007. But I don’t know how many times over the last several years I have listened to this business about ethanol causing corn prices to go up and food prices would go up. And food prices went up. But when corn is $3.50, we don’t see food prices come down. It has been proven time and again by the EPA, by the USDA, and other consumer groups. There is no correlation between corn prices or ethanol production and retail food inflation or food prices. Once again, that is just a simple fact.

Second, these authors claim that as a result of the renewable fuel standard, corn is being “diverted” from livestock feed to ethanol. Again, this claim is pure falsehood. Corn used for ethanol has come from the significant increase in corn production since 2005. In 2005, American farmers produced 11.5 billion bushels of corn. In 2014, they produced 14.1 billion bushels of corn. Why? Because the market responds and the
farmers respond to the increased use of corn, and they will meet it whether it is for biofuels or anything else.

Here is something very significant: One-third of the corn used for ethanol production is returned to the market as an amount of corn coproducts available for feed use is larger today than at any time in history. So it hardly being diverted. But time after time, a prestigious newspaper as the Wall Street Journal continues to tell the people of this country that 40 percent of corn production goes to make ethanol. They are right—40 percent goes to the ethanol plant. But out of a 56-pound bushel of corn, only 18 pounds is left over for animal feed—and very efficient animal feed, let me say, badly in need and welcomed by farmers. In fact, some of it is even exported. But does the Wall Street Journal ever make that clear, that 14.33 billion gallons of ethanol were produced in the United States? And where would we rather get our energy from—voluntary parts of the Middle East or producers right here in the United States? And I say that not only for ethanol; I say that for oil, I say that for coal, I say that for gas, I say that in fact, I say that for all sources of alternative energy.

We should be proud of our Nation's farmers and biofuel producers. Efficiency gains have allowed farmers to produce ever-increasing yields, with greater environmental stewardship, including using less water and less fertilizer. Ethanol production has also seen efficiency gains. These are facts: In 1982, 1 bushel of corn produced about 2.5 gallons of ethanol. Today's ethanol plants are producing more than 2.8 billion gallons of ethanol. We have a plant in Ida County, IA, that can get almost 3 gallons of ethanol from 1 bushel of corn.

According to the U.S. Energy Information Administration, if ethanol yields per bushel had remained at the 1997 levels, it would have required 343 million bushels—or 7 percent more—of corn to produce the same amount of fuel last year. That corn would have required the use of 2.2 million additional acres—or approximately half the State of New Jersey—just to keep up when we had the more inefficient production of ethanol.

Homogeneous biofuels are extending our fuel supply and lowering prices at the pump for consumers. Biofuels account for 10 percent of our transportation fuel today. This economic activity supports America's farmers, rural communities, and small-business owners who work in local communities and help Americans put food on the table.

They have also all felt the failure of the federal corn-ethanol mandate, known as the Renewable Fuel Standard, Congress doesn't agree on much lately—but ending a policy that accomplished none of its objectives, hurts the environment and increases food prices should be a bipartisan priority.

Since the RFS was implemented in 2005, corn and other feed commodities, including corn, grains and oilseeds, poultry, meat, eggs and dairy, have risen dramatically. Here's one major reason: The federal government's corn-ethanol mandate requires that a percentage of the nation's corn crop be blended into gasoline each year as ethanol. Every year the percentage required increases, diverting more of the nation's corn supply into ethanol fuel. This harms the broader U.S. economy.

Mr. President, I ask unanimous consent to have printed in the RECORD the article from the Wall Street Journal. There being no objection, the material was ordered to be printed in the RECORD, as follows:

(Pay for Ethanol at the Pump and on the Plate) (By Mike Brown and Rob Green) What do a franchise owner of four chain restaurants in Virginia, a food service distributor in Ohio and a poultry farmer in Kentucky have in common? They are all small-business owners who work in local communities and help Americans put food on the table.

But they have also all felt the failure of the federal corn-ethanol mandate, known as the Renewable Fuel Standard, Congress doesn't agree on much lately—but ending a policy that accomplished none of its objectives, hurts the environment and increases food prices should be a bipartisan priority.

Since the RFS was implemented in 2005, corn and other feed commodities, including corn, grains and oilseeds, poultry, meat, eggs and dairy, have risen dramatically. Here's one major reason: The federal government's corn-ethanol mandate requires that a percentage of the nation's corn crop be blended into gasoline each year as ethanol. Every year the percentage required increases, diverting more of the nation's corn supply into ethanol fuel. This harms the broader U.S. economy.
Before it hit consumers so hard, the federal corn-ethanol mandate caused higher feed costs for poultry producers, cattle feeders, dairy farmers and others in the food chain. While corn prices have fluctuated due to unforeseeable factors like the weather, the demand artificially created by the RFS has resulted in a significant increase in volatility of feed prices.

Consider: Between 1973 and 2007, corn prices averaged $2.39 a bushel, according to the U.S. Agriculture Department. The average price per bushel jumped more than 100% between 2008 and 2014, to $5.04 a bushel. Even though corn prices have recently declined thanks to fabulous weather that produced two bumper crops, prices are still more than 50% higher than the historical average. Prices could surge even higher if the U.S. experiences anything less than ideal weather.

The resulting increases in feed costs have also affected the American production of beef, pork and chicken, which had increased consistently over the past 30 years but has now leveled off due to the higher cost of feed. As a result, a 2012 study by PricewaterhouseCoopers found that the RFS has caused feed costs to increase by $3.2 billion every year in increased food commodity costs.

Then there are restaurants. Wholesale food prices, which the consumers pay the index by more than a full percentage point since the implementation of the RFS. In many instances, especially in the restaurant sector, consumers are not able to pass on higher retail prices to consumers because of market competition—a concept that the corn-ethanol industry is unfamiliar with than what is often quoted.

As if this were not enough, ethanol production has contributed to global food scarcity and hunger. No country exports more corn than the United States. But 10% of the corn in gas tanks, not on the world market. So much corn has been blended into gasoline that the higher percentage levels routinely render boat engines, motorcycles, chain saws and older automobiles inoperable.

Fortunately, lawmakers in Congress see the chicken producer, the food service distributor, the restaurant owner and others in the food chain for what they are: major contributors to the U.S. economy. Legislation has been introduced in both the House and the Senate to repeal the RFS and the mandate, with broad bipartisan support. Congress should take up this legislation and send a strong signal to the President.

The food industry isn’t anti-ethanol. Repealing the fuel standard would simply require the ethanol industry to compete in the marketplace just like restaurants, food distributors and chicken farmers do every day—without a government mandate guaranteeing secure and growing sales.

I yield the floor.

The PRESIDING OFFICER. The majority leader.

THE PRESIDENT’S LEADERSHIP AND ISIL

Mr. CORNYN. Mr. President, I come to the floor today to talk about the latest example of President Obama’s failure to lead in the international arena, to the detriment of our national security and the security of our allies.

Over the weekend, the Iraqi city of Ramadi in Anbar Province—which is about 70 miles from Baghdad—fell to ISIL. Once a hotbed of Al Qaeda activity, Ramadi had been won back and pacified at great costs in 2006 and 2007. That accomplishment was made possible by the heroic efforts of some great Americans, such as Navy SEAL Chris Kyle, a Texan whom Al Qaeda called “the Devil of Ramadi” and whose service was chronicled in the book and the movie “American Sniper,” and LTG Sean McFarland, whose soldiers implemented a brilliant counterinsurgency strategy to win back the city and drive out Al Qaeda in the process.

By the way, we are proud to have General McFarland today serving as commanding general of III Corps at Fort Hood, TX.

ISIL’s latest raid and capture of Ramadi is a significant setback for all of us who seek a stable and prosperous Iraq, and it represents this terrorist army’s biggest military victory this year.

Reports of the ISIL takeover of Ramadi are staggering. Faced with the oncoming ISIL forces, hundreds of Ramadi police and security officials fled the city, leaving behind American-made military equipment, including as many as 50 tanks in the hands of our enemies. Those who managed to escape reported that many security officials, government workers, and even civilians were quickly killed execution-style.

In response, the Iraqi Government deployed its Shiite paramilitary troops to the province—a move that some experts believe could lead to even more sectarian strife. The Iraqis are looking for support almost anywhere they can get it. It is left to President Obama’s poor leadership and indecision, Iran is more than happy to fill that vacuum and take up the slack. It should come as no surprise that on Monday, the day after the fall of Ramadi, Iran’s Defense Minister arrived in Baghdad to hold consultations with the Iraqi Ministry of Defense.

Obviously, I am frustrated by the President’s lack of leadership and by the Obama administration’s failure to put together a strong and cohesive strategy to combat ISIL but it is more serious than that. It is about what we have squandered in Iraq, what we bought with the blood of Americans and the money that came out of the pockets of American citizens.

Since ISIL began taking large swaths of territory last summer, this administration has taken an approach of paralysis by analysis—in other words, doing nothing. When they do take action, it seems ad hoc and piecemeal and not driven by overall strategy. The main strategy and the focus we need in order to win. So I hope the President will reconsider after this latest dramatic setback in Ramadi. I hope President Obama will provide a strategy to degrade and ultimately destroy ISIL but not providing them with the strategy and the resources they need to do so, the President is essentially making them operate with one more hand tied behind their backs. We know we have the most capable military in the world, but we cannot win a fight with our hands tied behind our backs or with these constraints—politically correct constraints—the President wants to make and not support the resources and the strategy and the focus we need in order to win. So I hope the President will reconsider after this latest dramatic setback in Ramadi. I hope President Obama will provide a strategy to degrade and ultimately destroy ISIL.

In Ramadi—a major city and capital of Iraq’s largest province—we see much more than just a symbolic setback, and I bet Chairman Dempsey wishes he could take those words back—he called it merely symbolic.

We see a dangerous development and a great obstacle to a more stable Iraq
and thus a more stable Middle East. But this is what gets to me: We had more than 1,000 brave American troops die in Anbar Province during combat operations since 2003. I do not want to see their lives having been given in vain and squandered. So I hope that this will in some small way reassert administration and that they will provide the Congress and the American people and our troops a clear path forward to defeat ISIL and to rid the world of this terror army.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Washington.

Ms. CANTWELL. Mr. President, 4 years ago, I joined my Republican colleagues on the Senate Finance Committee and voted to give the President of the United States trade promotion authority—4 years ago. I have been a supporter of trade promotion authority for a long time, but I also realize that when it comes to trade, there are issues on which we have to work on togeth

We are at a juncture now where it is hard to move forward here in the Senate. I would say to my colleagues on the other side of the aisle that there are lots of the fortunes of America in a global economy—the American people want to be assured that there are going to be tools for them to compete.

So the fact that the Finance Committee and the negotiators of the trade promotion authority spent months and months on whether we were going to have TAA—which is a program that helps laid-off workers who are impacted by trade—because some House conservatives did not support trade adjustment authority—workers being retrained when they are affected by trade agreements—we spent months and months because some conservatives in the House do not believe in government and do not believe in this program that helps support laid-off workers.

Then we had to spend weeks and weeks out here because people on the other side of the aisle—again at the behest of conservatives in the House—did not want to support enforcement.

Now we are at this juncture because the same conservatives, because of an ideological belief by the Heritage Foundation—not something about business and labor, no, actually, business support export expansion, such as a credit agency that helps them sell their products. Again, this conservative group is holding up trade legislation because they do not think that it meets their political standards, as my colleague from South Carolina, Senator Graham, said, Senator Graham, that it is all about some private organization they are trying to politically atone to.

I say to my colleagues on the other side of the aisle that I have been a supporter of TPA for a long time, but I do not want to support a cloture motion and I do not plan to support moving ahead until we stop catering to this very minority group that does not support the basic tools the American people want to see when it comes to trade. They want to know that if they lose their jobs, they can get retrained. They want to know that if export markets are open, they will have some ability to sell their products to those developing countries. So if we have a bank there but can help get financial support from a bank in the United States with the help of a Federal export credit agency. And yes, we have to have some basic tools on enforcement. So if there is a way that we want to resolve these problems and move ahead on a trade agreement, they have to stop catering to the conservatives in the House—and probably some of them do not even support trade overall—and start working with the people who do support trade.

As I said 4 years ago in the Finance Committee when I supported TPA, these policies are important tools for the U.S. economy. I feel strongly that in the 21st century trade can be a great asset in helping stabilize regions. I do not want to hold down other growing middle classes around the globe. We do not want to lose jobs here in the United States because of it.

So let’s give the tools that go along with trade, and let’s get these bills passed. But if we are going to continue to cater to a group in the House who claims they do not want government, I do not see how, in this debate, we are going give the American people the tools that will give them security.

I give the floor.

The PRESIDING OFFICER. The Senator from North Dakota.

Ms. HEITKAMP. Mr. President, first, I would like to offer my great thank-you to the Senator from Washington for advancing this very important bipartisan bill.

We have worked long and hard in my office and with Senator Kain to try to do that addresses the vast majority of issues that so many people have or allege to have regarding the Export-Import Bank. At the same time we are stalling that critical piece of infrastructure in our trade apparatus. China and India are pouring billions of dollars into their similar institution to recruit and to invest in other countries to make sure their manufacturers and make sure the jobs in their country are safe. We are unilaterally disarming, and we are losing business, and for not moving forward on the Export-Import Bank. And I share my colleague’s comment: Who are we listening to?

This is one of those rare moments and one of those rare issues where we have the American business community, the chamber of commerce, American manufacturers—all the people on that side of the issue and American labor together. So what is the issue? The issue is scoring by conservative groups. The issue is that you might not get the checkmark behind your name if you actually support American workers, American jobs, and American manufacturing.

This is an issue we are passionate about, and I stand with Senator CANTWELL from Washington and support her. Until we know there is a path forward and that the charter for the Ex-Im Bank will not expire, that we will not play chicken with our economy and our exporters around the world, there is a path forward, how can we really say we are protrade? How can we really stand on the floor here as we are discussing trade and trade implications of TPA and TP and all of the initials—IP, ISDS, and all of the things. People might be listening to and saying: What are they talking about? These are important tools and an important apparatus and they represent a huge part of what we need to do when 95 percent of all consumers live outside this country, but we need to do it in a way that recognizes that American workers are part of this structure and that we have to have the tools other countries utilize in order to make sure we are moving forward.

I give my great public thanks to Senator CANTWELL for her brave fight and knowing that as the chief Democratic sponsor of the bill we are promoting, I stand with her. I stand with her today.

Mr. President, I also want to talk today about an issue that is important to North Dakota. I share with my colleague that we are talking about eliminating trade barriers and improving opportunities for access to markets when we have a self-imposed access-to-market problem, and that is the trade embargo on Cuba. It is a barrier our government puts on our own farmers and ranchers, and it holds back their ability to export and hurts their bottom line. I am talking about the U.S. embargo with Cuba, of course, specifically on private—private, private, private—business activities that could enhance the sale of our agricultural goods to Cuba.

My great friend from Arkansas Senator BOOZMAN and I filed an amendment which would free our exporters to provide private—private, private—credit with no risk to the government or taxpayers for exports of agricultural products to Cuba. We had a hearing on this in the agriculture committee, and I must say it was the single issue raised by all of the experts on how we could, in fact, open our markets to Cuba. If we would allow private-sponsored credit for these exports. This is a simple change to our regulation that will make our agricultural exporters more competitive against rice growers in Vietnam and corn growers in Brazil.

We know we are the highest quality producer of agricultural products, and many of those products are grown in my great State of North Dakota. Yet we don’t have access to that market because Cuban purchasers don’t have access to credit.

Unfortunately, under the current restrictions our government has erected a trade barrier. While we talk about TPA, trade promotion authority, and increasing export opportunities, we
need to look at what we can do to increase opportunities for our own producers here right now. It does not take a long, draw-out negotiation, costs no money, and just makes sense.

I urge my colleagues to join with me and support this important effort to remove our self-imposed trade barriers on our agricultural producers and to allow a private investment and sponsorship of the purchase of agricultural products in Cuba. With that, I yield the floor.

Mr. ENZI. Mr. President, this has been an interesting few days as we have set the way of deliberate, but it is probably designed to operate. It is not supposed to be the fastest legislative body in the world. It is supposed to be one that goes over issues slowly and gives those issues full consideration.

I am sure that it has been through the committee process. It has been years since we have seen bills go through that committee process. Virtually all of the bills are coming through the committee process this year, which means several hundred amendments have already been offered to this bill. A lot of them were considered in committee, some of them were considered duplicative, of course, but it brought this bill to the floor, which is very important for the economy of the United States.

I hope we can work through the process and get the bill finished. In fact, I am relatively certain we will. It is not the priority of the Senate. It does n't mean that way it gets done. It is being done for centuries in the United States.

A BALANCED BUDGET

Mr. President, what I really want to talk about today is the importance of a balanced budget. Over the past few weeks, we have seen America reacting to a Congress, and especially the Senate, which is back to work doing the people's business. The basic task of government is to authorize government programs and are charged with overseeing their efficiency and effectiveness. We also have committees that allocate the expected revenue in every year, but the Senate Budget Committee sets the spending goals. In other words, we set limits. This is why passing a budget is so important for our Nation. It lets the congressional policy. By putting the dollars to get to work immediately by following our spending limit. This year, we are giving them an early start, and Leader MCCONNELL is committed to allowing the Senate to do its job, and in history, if we can do that, we can help boost the economy and expand opportunity for each and every American.

The big question is, What happens if interest rates go to their normal historical level? A balanced budget and spending limits for our Nation.

A balanced budget will allow Americans to spend more time working hard to grow their businesses or advancing in their careers instead of about taxes and inefficient regulations. Most importantly, it means every American who wants to find a good-paying job and fulfilling career has the opportunity to do just that.

A balanced budget will also boost the Nation's economic output, but first we must get our overspending under control because Congress is already spending more tax revenue than at any point in history. If we can do that, we can help boost the economy and expand opportunity for each and every American.

A boost in economic growth means more real jobs from the private sector and small businesses across the Nation, not government "make work jobs." In fact, the Congressional Budget Office tells us that if we were to increase the gross domestic product, which is the private sector growth, by 1 percent, that would provide an average of nearly $300 billion in additional tax revenue every year.

How do we do that? One way is to reverse some of the many regulations that burden families and small businesses that provide little or no benefit. For many of these policies and regulations, we need to return to common sense, and that is not being done today.

When we continually overspend year after year, we have the opposite effect on private sector jobs and economic growth that can actually lead to more spending and more jobs. When the economy is the worst way to raise money for government services, not by raising more taxes.

Another important way to help the growth of our economy is to make sure that the same tough decisions hard-working taxpayers are making every day. This is Small Business Week, and I want to mention my appreciation for
Craig Kerrigan of the Oregon Trail Bank in Wyoming for writing a little article about the real issues for small business. Small business is the motor that drives this economy. He said:

If they can’t make a profit, no one benefits. This is the reality: They will tell you that the biggest threats and challenges they face in today’s economy are health care, taxes and excessive regulations.

A regulation affects a small business much more than it does a big business because they don’t have a lot of people to spread the work over.

Going back to Craig Kerrigan’s article:

They want to provide competitive salaries and benefits, and in most cases they do. But any cost that is forced upon them they either pass on to the consumer or they go out of business.

It is interesting to note that those who force these costs upon small business are not the ones paying for them, and it is always easier spending other people’s money.

Mr. President, I ask unanimous consent that the entire letter by Craig Kerrigan be printed in the RECORD at the conclusion of my remarks.

How more effective government? One of the first places Congress should start is by reviewing the 260 programs whose authorization—that is their right to spend more money—has expired. Some of these programs are more than 30 years old. Many of the years these programs have overstayed their welcome, the funds we allocated to them every year are more than what the law called for. In some cases, that means we are spending as much as four times what we should be. You have to take care of your own doorstep.

Yesterday, I had an oversight hearing for the Congressional Budget Office, which comes under the direction of the Budget Committee. It was the first oversight hearing in 33 years. Everybody needs to take a look at the programs they are in charge of and see if there are not some changes that ought to be made since the invention of the mobile phone, and, of course, that was a mobile phone about that big.

The 260 programs that have expired are over $2.9 trillion—more than $2.9 trillion—over 10 years. Eliminating these programs alone would almost balance the budget.

In business, programs are reviewed every year or sometimes every week to see if they still contribute to the business and its strategic plan, and if there is not some improvement that will make things work better, they often look for small savings to help strengthen the organization and contribute to its bottom line. But in Washington, programs are not reviewed, let alone questioned, let alone scrutinized. Not even big amounts are questioned.

Just think of how long it has been since we have taken a close examination of what we are spending money on. In 1983, “The Return of the Jedi” was the top movie and Americans were obsessed with the Rubik’s Cube.

Savings are usually found in the spending details, but Congress has not examined the details. It just has the big picture, which was painted long ago and has now expired. It is time for each committee to take a look at these programs, and if there are not some changes that ought to be made, then, if they are even worth funding anymore. After all, a project not worth doing at all would not be worth doing well or would not be worth continuing funding for it. But how would committees know if they have not looked at the program in years? How would they know if they don’t have a way to measure how well the programs are working?

When I first came to the Senate, Yellowstone Park was going broke and threatening to shut down. Every year they said they were running out of money in August, and that is the prime time for the season. I checked the spending bill covering the park, and I found out it only lists how many employees and the total millions of dollars to spend. It did not speak for the details. Both the spending committee and the Department of Interior told me that was as much detail as they had.

I asked for a printout of how the money was spent in the previous year. They said it’s not included in the bill. I was shocked about millions of dollars in delayed maintenance. I asked for a list of what that consisted of, and I was sent a list of new buildings they wanted to construct. That is not delayed maintenance.

In 1999, the Park Service was cited by the Wyoming Department of Environmental Quality for raw sewage that was flowing into the Madison River, which prompted a request to Congress for emergency repair funds. I asked why that wasn’t taken out of the National Park Service emergency budget. There was an emergency fund with plenty of money available immediately for the problem at that time. I didn’t get an answer, but I found out that they got more by asking for additional funding at a time of crisis. That is not how government spending is supposed to be done.

That is why we need to have a balanced budget. We need to have people scrutinizing the items that are under the jurisdiction of their committees.

A balanced budget amendment is what many of the States are working on. We better show taxpayers that Congress is committed to a balanced budget, to make it ever more effective, because we are running out of time. It is not just because of the increase in the interest rates that are possible here, but currently, lawmakers in 27 States have called for a constitutional Convention to approve a balanced budget amendment, and there are new applications in nine other States that are close behind. If just seven of those States approve moving forward on the balanced budget issue, it would bring the total number of States to 31 States. That would meet the two-thirds requirement under the Constitution for Congress to take action on a balanced budget amendment. If this happened, one of the most important functions of Congress—the power of the purse—would be drastically curtailed, because there would be a new constitutional limit on what Congress would be allowed to borrow.

Now, I mentioned before that I think we have been overspending. We are scheduled to overspend by $439 billion this year. How much do we get to actually make decisions on? That amount is $1.100 billion. If we were to balance the budget right now, we would have to do a 50-percent cut in everything we do, and that is not even talking about an additional increase in interest payments.

So, in conclusion, Americans are working harder than ever to make ends meet. Shouldn’t their elected officials be willing to work harder too? We need to pass a balanced budget as an important step, but that is just a first step and, unfortunately, that was the easy part. Congress has to get serious about tackling its addiction to overspending and once again become good fiscal stewards of the taxes paid by each and every hard-working American taxpayer.

Earlier this month, on the 70th anniversary of Victory in Europe Day—or V-E Day—our Nation—our National Mall, the rare privilege of seeing and hearing World War II airplanes, our Arsenal of Democracy, fly over the National Mall and the U.S. Capitol Building. This flight and these planes remind us that as a nation, we rise together or we fall together. Those planes also remind us that when we work together, we succeed together.

Let us commit to work together to end our overspending and balance our budget.

I yield the floor.

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

(From the Wyoming Tribune-Eagle, May 19, 2015)

FOCUS ON REAL ISSUES FOR SMALL BUSINESSES

(By Craig Kerrigan)

In recognition of Small Business Week, I thought it appropriate to share some thoughts about small businesses that are not discussed as much as I feel they should be.

It is frustrating how many articles are written about our economy and the effects it has had on small businesses since the Great Recession, but they always seem to take an approach based on surveys, statistics, theories, opinions, analysis and general assumptions; almost illusory.

Let me offer a suggestion. I am sure almost all of you have a family member, friend or acquaintance who owns a small business here in Cheyenne or Laramie County.

JUST ASK THEM

If you do, just ask them what is happening in their business and about the management
decisions they have had to make to navigate the issues they face every day as they relate to our economic and political environment.

No more theories as to what should be happening. It is what is really happening, simply put, where theory meets reality.

For the purpose of this article, I will use businesses that employ between one and 50 employees with gross receipts or sales up to $7.5 million, although the definition varies from industry to industry.

They are the true backbone and lifeline of our local and national economy as they create 70 percent of new jobs. They are what I call the forgotten person.

You can find someone in almost all business sectors: retail, construction, real estate, manufacturing, professional services and food service, to name a few.

Many of these small businesses are owned and operated by our friends and neighbors, people who go to work every day to provide a service that benefits our local economy.

They have no set hours, no guaranteed benefits, no stock options and no perks.

In almost all cases, they started their business with their hard-earned savings, conversion of retirement accounts from previous employment, gifts from family and credit from friends. They have pledged their homes, vehicles and other personal property just to find enough cash to start their business.

Many have second jobs and take no salary from their business so that it can be grow.

I have been blessed to have been a banker in Cheyenne for almost 40 years, and I have been given a unique perspective from both a banker and also an owner of a small business as many small community banks are privately and family-owned small businesses.

I have had the chance to be involved in helping to facilitate business startups, expansions, restructures and unfortunately liquidating some that have had to close.

Every business has unique characteristics with the type of product or service they sell, the experience of ownership and management and the demographics of employees. They are in business to make a profit, but more importantly, they have a passion for what they do.

They drive economic growth through innovation and entrepreneurship. They support not only themselves and their families, but they are responsible for the support of their employees and their families.

BIGGEST THREATS

If they can't make a profit, no one benefits. This is the reality: They will tell you that the biggest threats and challenges they face in today’s economy are health care, taxes and excessive regulations.

They want to provide competitive salaries and benefits, and in most cases they do. But any cost that is forced upon them will either pass on to the consumer or they go out of business.

It is interesting to note that those who force the costs upon small businesses are not the ones paying for them, and it is always easier spending other people’s money.

The new health-care law affects dealers they have had to make as to the number of employees they can have and the type of benefits they can offer. Many are limiting full-time employees to less than 50 to avoid the costs of mandated health coverage.

If they don’t know what the next surprise is going to be with our tax code, it is almost impossible to plan or budgets. And if they are forced to follow a new regulation, they have to hire non-income producing overhead just to make sure they don’t get fined worse.

Many regulations are needed; it is when they are inefficient, duplicative and applied based on a “one size fits all” approach that they become overwhelming and result in unintended consequences.

How do I know this? As a banker, you cannot analyze financial information and communicate with management throughout the year.

Numbers are interpreted differently, but they never lie, and they are not based on theories. You have to know the business of the business and make decisions to help them make decisions that make sense.

Sounds simple, but there are many different business structures—sole proprietorships, corporations, partnerships and limited liability companies. These are businesses that do not have the luxury to staff human resources, compliance, legal or accounting departments.

THANK THEM

The first thing you should do is thank them for everything they do to make our community a better place. Many of them are members of our Chamber of Commerce and unselfishly give of their time and money to support other small businesses.

Don’t be indifferent to our economic and political environment because the reality is you are paying for any increased costs to small businesses in the prices you pay.

So at the end of your visit, you will most likely hear “welcome to the real world.”

The PRESIDING OFFICER (Mrs. ERNST). The Senator from Hawaii.

Mr. SCHATZ. Madam President, I wish to join my colleagues in voicing my opposition to granting fast-track authority. I oppose the procedures contained in this bill, and I am serious about it.

I am concerned about using fast-track to pass trade agreements that don’t reflect the best interests of the American people and can undermine the prerogatives of the Congress.

Some who support fast-track would have us believe that opposing this bill and TPP means opposition to a free market, to trade, and to commerce; but that is not true. Commerce is essential, and we should be promoting it. But corporate interests should not be the driving force behind public policy decisions on public health, consumer safety, and the environment.

Just this week, a WTO ruling on our country-of-origin food labeling law provided a striking example of how what is called free trade can be used to erode consumer protection. The country-of-origin labeling law was passed by Congress, and it requires producers of meat and chicken to provide information to consumers on where the animal was raised and slaughtered. If we ask most businesses, they would want to know if their beef is from Texas or from Taiwan. And even if one isn’t particularly passionate about that issue, I think most people would agree that it is squarely within the prerogatives and the constitutional duties of the U.S. Congress to decide.

Consumers in the U.S. want to know where their food comes from. Through legitimate, democratic process, we passed a law to provide consumers with this information. But no matter how we have revised the rule pursuant to the law, it is apparently still not in our WTO commitments.

It seems that we will have to repeal the law to avoid trade sanctions.

While our WTO obligations are not the same as our commitments under a free-trade agreement, it doesn’t require too much imagination to see how other U.S. laws will buckle under future trade agreements. This is why the dealbreaker for me is the investor-state dispute settlement, or ISDS for short.

ISDS provides a special forum outside our law, but well can collide our system that is just for foreign investors. These investors are given the right to sue governments over laws and regulations that impact their businesses—a legal right not granted to anyone else. This forum is not available to anyone other than foreign investors. It is not open to domestic businesses. It is not open to labor unions, civil society groups or individuals that allege a violation of a treaty obligation. The arbitrators that preside over these cases are literally not accountable to anyone, and their decisions cannot be appealed.

To date, nearly 600 ISDS cases have been filed. Of the 274 cases that have been concluded, almost 60 percent have settled or have been decided in favor of the investor.

It is true that when a tribunal rules in favor of the investor, the arbitrators can’t force the government to change its laws, but they can order the government to pay the investor, which has the same effect. There is no limit to what compensation foreign investors can demand. The largest award to date was more than $2 billion.

For a developing country that must pay this award, sometimes it represents up to a third of their GDP. Most governments cannot risk such a settlement and end up avoiding this kind of conflict altogether. The government often agrees to change the law or regulation that is being challenged and still pays some compensation. The threat of a case can be enough to convince a government to back away from legitimate public health, safety or environmental policies.

ISDS cases cost millions of dollars to defend and take years to reach their final conclusion. The high profile cases filed by Philip Morris International and other tobacco companies can harden laws have had a chilling effect around the world. Several countries have been intimidated into holding on to their own laws to reduce smoking.

Every year of delay is a victory for tobacco. Every year of delay is a victory for tobacco.
May 20, 2015

I would hope that if we empower corporations to challenge democratically elected laws and regulations, that we would be doing so for an extremely compelling reason. But here is the thing: The rationale behind ISDS is extremely thin. Advocates claim that investor interests, such as ISDS draw foreign investment into a country, but no one has actually been able to demonstrate that this link exists. Studies have not even been able to show a significant correlation between investor protection and the level of foreign investment in that country. Instead of driving decisions to invest, ISDS provisions are being manipulated by multinational corporations.

Some companies seem to be setting up complex corporate structures explicitly for the purpose of taking advantage of existing ISDS provisions. This is what Australia is alleging that Philip Morris did to challenge Australia’s tobacco laws. The Philip Morris Hong Kong entity bought shares in Philip Morris’s Australian company just 10 months after Australia announced its cigarette plain packaging rules. It seems that Philip Morris did this for no other purpose than to gain access to the ISDS provision in the Hong Kong-Australia Bilateral Investment Treaty.

ISDS is just another arrow in the quiver of legal options available to multinational corporations and no other person, potentially consequence for public health, safety, and the environment far outweigh any real or imagined benefit of ISDS. For these reasons, I oppose fast-track and any trade agreement that contains an ISDS provision.

I yield the floor.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The senior assistant legislative clerk proceeded to do so.

Mr. WYDEN. Madam President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection.

Mr. WYDEN. Madam President, I spoke a little bit this morning about this whole issue—and a very serious issue it is—of currency manipulation. In effect, we are going to have two choices with respect to this issue, one offered by the chairman of the Finance Committee, Senator HATCH, and myself, and one offered by Senator PORTMAN and others.

AMENDMENT NO. 1296

I wish to take a few minutes to raise what are my biggest concerns with respect to the amendment offered by the Senator from Ohio, Mr. PORTMAN, and try to put this issue in context. What is particularly troubling to me is it seems to me that the Portman amendment would outsource the question of the Federal Reserve’s intent in decision-making to the whims of an international tribunal, and I think that is very troubling. That is why Chairman HATCH and I have thought to take a more flexible approach.

I am going to outline how I have reached that judgment so that colleagues, as we turn to this question of currency, have a bit more awareness of what has already happened. This morning, we will be discussing this particularly in the conference committee that is going to take place next month when the House and the Senate get together to talk about currency and other critically important enforcement issues.

I fully agree with my colleagues who have been saying this is a very important issue and our government must do more to target countries that harm our economy by artificially deflating their currency. What is at issue is making sure we proceed in a way that really redounds to the benefit of our country, our workers, and our business.

In the process of taking aim at foreign currencies, it is especially important to make sure that this Senate does not cause collateral damage to the Federal Reserve and our dollars. We all understand the Federal Reserve uses monetary policy as a tool to stabilize prices and boost employment. We also need to make sure that our country gets the upside of going after those who manipulate currency and avoids the downside of restricting the tools that Janet Yellen and those in charge of monetary policy may want.

The bipartisan trade promotion bill now before the Senate includes a first—many firsts but one in particular. For the first time currency will be a principal negotiating objective. What Chairman HATCH and I have sought to do is to strengthen that and to take yet another step. We direct the administration to hold our trading partners accountable when they manipulate currencies by using the most effective tools available: enforceable rules, transparency, recording, monitoring, and a variety of cooperative mechanisms. My view is that what Chairman HATCH and I are seeking to do here strikes the right balance. We get the upside of confronting unfair currency manipulation, and we don’t pick up the downside, tying our hands with respect to policy options that are completely legitimate and important.

One of those policy options that I feel especially strongly is ensuring that the Fed has the ability to use policies to strive towards full employment. So for me, this issue really comes down to making sure we have all the tools at the Fed and elsewhere for helping to create good jobs and economic stability—jobs that pay higher wages and help our communities prosper.

The Portman amendment is very different than what I and Chairman HATCH have been talking about. Under the Portman amendment, our country would be subject to dispute settlement in an international tribunal, which means that there would be trade sanctions. Now, Federal Reserve Chair Janet Yellen has expressed serious concern that this type of provision could “hamper”—these are Janet Yellen’s words—that this type of provision could “hamper or even hobble monetary policy.” The Chair’s concern—Janet Yellen’s concern—is that because monetary policy can impact currency valuation, we could end up tying our hands and, in effect, taking one of the Fed’s important tools out of their economic toolbox.

For example, a number of countries have argued that the Fed’s quantitative easing policy unfairly values our dollar. Now, I want it understood that I think those countries are dead wrong—dead wrong—in that argument. But we ought to realize that those countries that have sought to cry foul argue that what the Fed did to bring down the unemployment rate was in effect an unfair strategy for increasing our foreign trade, rather than our own. Therefore, we need to think about this currency issue, consider what could happen if the United States was subject to dispute settlement by an international tribunal on this issue.

That is why I am talking about the Portman amendment, as I have described, outsourcing the question of the Federal Reserve’s intent in decision-making to an international tribunal. I think that is a bad idea. I am skeptical of the idea that, in effect, we are going to have this international tribunal trying to divine essentially what the Federal Reserve’s intent was. I personally do not like the idea at all of entrusting this judgment to an international tribunal. I think it could have very detrimental consequences both to the cause of trade and to our economy.

Just yesterday, Treasury Secretary Lew said he would recommend a veto of the TPA package that included this type of amendment, because he, too, thought it would threat our Nation’s ability to respond to a financial crisis. So it is going to be important to get this right, to make sure that our trade agreements have the strongest in the fight against currency manipulation, but to make sure that we also avoid the downside of restricting our monetary policy tools.

I hope my colleagues will think about the unintended consequences of the Portman amendment. If we were to have another unfortunate financial crisis—and no one wants that—we all want to make sure that the Federal Reserve has the full array of economic tools to get our economy moving again and to keep workers on the job.

So we are going to be faced with this judgment, and I hope my colleagues will say that the approach Chairman HATCH and I have that will allow us to build on the first-ever negotiating objective for currency that is in the bill and accept our amendment and recognize that, as I stated earlier, we are going to have another bite at the apple when currency is certain to be an important part of a Customs conference between the House and the Senate in June.
With that, I see my colleagues are here, and I yield the floor.

The PRESIDING OFFICER. The Senator from Maryland.

Mr. CARDIN. Madam President, let me first say that I thank Senator WYDEN who is my good and close friend and colleague and Senator HATCH and the Senate Finance Committee. In reading this legislation—and I hope you all had a chance to do it—you are going to find that this really does take our delegation of authority and our expectations to a much higher level than we have ever done on areas that have not been traditionally as clear on Congress.

I will just mention a few of those. Our overall trading objective is very clear to deal with labor standards. In quoting from the bill that is before us, on the overall negotiating objectives: “to promote respect of worker rights and the rights of children consistent with core labor standards of the ILO (as set out in section 11(7))”—defined as the International Labour Organization—and an understanding of the relationship between trade and worker rights. To promote universal ratification and full compliance with ILO Convention No. 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor.

That is in our overall objective. I want to talk a moment about the principal negotiating objectives, because there is greater consequence to the principal negotiating objectives. There are provisions included in the principal negotiating objectives that are different from what we have done in any other TPA bill.

First, yes, it does deal with the core labor rights. The principal negotiating objectives are jobs must show us that they have done deals with the “adopts and maintains measures implementing internationally recognized core labor standards . . .” that is included there.

Included in our principal negotiating objectives is the requirement for environmental law: “its environmental laws in a manner that [cannot weaken] or reduces protections afforded in those laws in a manner affecting trade or in international investment in the United States and that party . . .”

So what we have done is that we also put in there: “does not fail to effectively enforce its environmental or labor laws, through a sustained or recurring course of action or inaction . . .”

I read that into the record because I want to make it clear that if you believe we should be negotiating trade agreements and you believe that it is our responsibility as an administration and can’t be done through Members of Congress individually negotiating a trade agreement, and you believe you need to be clear as to what we expect, the principal negotiating objective is where you include that language. And we have been very clear in the principal negotiating objectives in regards to core labor standards and environmental standards, because we know that to have a level playing field—currency issues are all dealt with in a separate bill that we passed earlier. I guess last week we passed the legislation on the Customs.

Let me just talk for a moment about trade and investment measures. We want to make sure we have a level playing field for American companies. I think that is our responsibility.

In the discussion of this bill, I want to acknowledge that we do have part of this—the tariff adjustment assistance. That is important to American workers. We have Customs legislation that I wish was in this bill, because I am concerned as to whether both will reach the finishing line. But it deals with strong enforcement, and “level the playing field” currency issues are all dealt with in the Customs.

I just mention a few of those. Our overall trading objective is very clear to deal with labor standards. In quoting from the bill that is before us, government officials or to secure any such improper advantage”—these are anticorruption provisions—“to ensure that such standards level the playing field for United States persons in international trade and investment.”

There are practices where companies that want to participate in government contracts have to deal with kickbacks or there is bribing that has to be dealt with.

Well, American companies cannot do that. We have laws that prohibit that, but there should not be anyone dealing with that. In the principal negotiating objectives, we instruct our negotiators to deal with these anticorruption issues. The administration must show we have made progress—not only progress, that we have enforceable standards against corruption that would disadvantage American companies doing business in those countries. That is in the administration. We have the effective operation of legal regimes, and the rule of law of trading partners. This is, again, a principal negotiating objective which says we have to strengthen good governance, transparency, the effective operation of legal regimes, and the rule of law of trading partners. This is, again, a principal negotiating objective which says we have to strengthen good governance, transparency, and respect for internationally recognized human rights.

That is a principal negotiating objective. We are talking about freedom of speech, freedom of assembly, association, religious freedom. We have instructed the administration—that they accept our bill and sign it into law—come back to us on how we have dealt with advancing good governance, transparency, and respect for internationally recognized human rights in the trade agreement that we brought forward.

This is the first time we have included anything similar to this in a trade promotion authority act. So this is a new level of expectation of what we expect the administration to do. If they really want to emphasize that because we have not been bashful in the past using trade to promote human rights. We usually do it when we have a specific opportunity. We did it well before our time in Congress when Jackson-Vanik was passed, dealing with Soviet Jewry being able to leave the former Soviet Union.

We also used trade as a hammer to bring down the apartheid government of South Africa. Most recently, we used trade as a hammer in regard to Russia in a WTO issue—where we attached the Magnitsky law...
to it—that I was proud to work on with Senator MCCAIN. I thank Senator MCCAIN for his strong leadership on the Magnitsky law.

We used that opportunity, a trade bill, to advance international human rights issues in holding Russia accountable to its own standards and what it did in regard to Sergei Magnitsky. So we should take advantage of the trade promotion authority act to advance basic human rights, particularly when we are dealing with countries that, quite frankly, are challenged in that regard.

I want to read one other provision that is in the current bill dealing with trade promotion authority and dealing with the principle negotiating objectives. It spells out very clearly that it is a principal negotiating objective. We have enforcement in it. It says:

To seek provisions that treat United States principal negotiating objectives equally with respect to the ability to resort to dispute settlement under the applicable agreement, the availability of equivalent settlement procedures, and the availability of equivalent remedies.

What does that mean? What that means is that this is not NAFTA agreement. In NAFTA, we did make advances on labor and environment, but we did not include it in the core agreement. It was not effective. We had no enforcement. We had these side bar agreements. We learned that was not the way to do it. Well, this TPA says that in regard to human rights and good governance, in regard to labor and the environment, that they are in the principal negotiating objectives and there will be trade sanctions in regard to violations—if there are violations. We hope there are not. We hope they will make the progress. But we have effective ways of dealing with our principal negotiating objectives that includes governance issues that I think are critically important.

I started my remarks by saying thank you to Senator WYDEN. I thank him very much because he has really done an incredible job in where we are today. He points out that we are not there yet. I agree. We need an open amendment process here. We need to take up more amendments on the floor of the Senate. I say that as one of those Members who have not been bashful about trying to change the rules of the Senate.

I am told by people who have been here longer than I that the rules of the Senate work. You just have to be a little patient. OK. We will be a little patient. But let’s figure out a way that we can have more votes on the floor of the Senate in regard to this bill.

We do not get a chance to take up trade bills very often. I have an amendment that I want to see acted upon. I do not think it is controversial, but it is extremely important. What that amendment would do is require the President, before commencing negotiations with potential trading partners, to take into account whether that potential trading partner has engaged in a consistent pattern of gross violations of internationally recognized human rights. This amendment appropriately puts gross violations of human rights on par with negotiating requirements of other principal negotiating objectives. So before we start picking countries with which we are going to do trade agreements, let’s make sure they are not gross violators of human rights.

Now, so everybody does not get nervous—because TPA is so far advanced—it would not be possible to have the free negotiating objectives certified by the President on TPA. I understand that. There is a blanket exemption in TPA in that regard, which applies also to the amendment I am offering. But I would hope our colleagues would agree that moving forward we would want the President to take that into consideration, to make sure we have a game plan, if we are dealing with a country that has failed to respect human rights, as to exactly how we are going correct that activity through the opening of trade.

Trade with our country is a benefit. It should be with countries that share our basic values. Lowering trade barriers should not come at the expense of commitments to our basic values, and that is what my amendment would do. I would urge my colleagues, at the appropriate time, to make sure this amendment is considered. I would ask their support on this amendment.

Let’s continue to work through the process. Let’s continue to improve the bill. Hopefully, we can reach a point where we can send to the President the appropriate legislation.

I yield the floor.

The PRESIDING OFFICER. The Senator from Oregon.

Mr. WYDEN. Madam President, no more than 2 minutes. Before my colleague leaves the floor, I just want to say that I appreciate the bipartisan leadership of Senator CARDIN has championed for decades the cause of labor rights, environmental rights, human rights. I so appreciate his leadership in this area.

For the first time, as a result of Senator CARDIN’s work, human rights will be a principle negotiating objective because Senator CARDIN has been spot-on in saying trade must be about human rights. So that is No. 1.

Point No. 2, my colleague was absolutely right in pointing out that we have more votes here. That is why I am going to be spending all day into the night trying to bring that about. I want my colleague to know I will also be very interested in working with him on this additional amendment he has to further build on what we have in the bill. I thank my colleagues for their patience.

I yield the floor.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. MCCAIN. Madam President, I ask unanimous consent to address the Senate as in morning business, and when the Senator from South Carolina arises, to engage in a colloquy with the Senator from South Carolina, Mr. GRAHAM.

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

FOREIGN POLICY AND ISIL

Mr. MCCAIN. Madam President, today, the black flag of ISIL fly over the city of Ramadi, the capital of Iraq’s Anbar Province. Anbar was once a symbol of Iraqis working together with brave young Americans in uniform to defeat Al Qaeda. Today, it appears to be a sad scene of administration’s indecisive air campaign in Iraq and Syria and a broader lack of strategy to achieve its stated objective of degrading and destroying ISIL.

Equally disturbing, reports indicate over 75,000 Iranian-backed Shiite militias are preparing to launch a counteroffensive in the larger Sunni province. Whatever the operational success Shiite militias may have in Anbar would be far exceeded by the strategic damage caused by sectarianism and the fear and suspicion it breeds among Iraqi Sunnis.

Moreover, the prominent role of these militias continues to feed the perception of a Baghdad government unwilling to protect Sunnis, which is devastating to the political reconciliation efforts that must be central to ensuring a united Iraq can rid itself of ISIL. Shiite militias and Iranian meddling will only foster the conditions that gave birth to ISIL in the first place.

Liberating Ramadi and defeating ISIL requires empowering Sunnis who want to rise and fight ISIL themselves, including by integrating them into Iraqi security forces, providing more robust American military assistance. Indeed, the Obama administration and its spokespersons have tried to save face for its failed policies by diminishing the importance of Ramadi to the campaign against ISIL. The future of Iraq, as ISIL forces captured and sacked Ramadi, the Pentagon’s news page ran a story with the headline, “Strategy to Defeat ISIL is Working.” Secretary of State John Kerry said Ramadi was a mere “target of opportunity.”

White House Press Secretary Josh Earnest said yesterday we should not “light our hair on fire at every time there is a setback in the campaign against ISIL. Meanwhile, Ramadi, Iraq, and the region are on fire. How could anyone—how could anyone say we should not light our hair on fire when news reports clearly indicate there are burning bodies in the streets of Ramadi, that ISIL is going from house to house, seeking out people and executing them. Tens of thousands of people are refugees. What does the President’s spokesman say? That we should not light our hair on fire everywhere there is a setback.”

The Secretary of State of the United States of America said Ramadi was a mere “target of opportunity.” Have we completely lost—have we completely...
lost our sense of any moral caring and concern about thousands and thousands of people who are murdered, who are made refugees, who are dying as we speak—and the President’s Press Secretary says we should not light our hair on fire.

What does the President have to say today? The President of the United States today says: Well, it is climate change that we have to worry about. I am worried about climate change.

Do we care about what is happening in the streets of Ramadi and the thousands of refugees and the people—innocent men, women, and children—who are dying and being executed and their bodies burned in the streets? A few weeks ago, as ISIL closed in on Ramadi, the Chairman of the Joint Chiefs of Staff said the city “is not symbolic in any way” and is “not central to the future of Iraq,” the capital of the Anbar Province, the place where we lost the lives of some 400 brave Americans and an estimated 1,000 in the first battle of Ramadi during the surge.

These are quotes from the media reports: Bodies, some burned, littered the streets as local officials reported the militants carried out mass killing of Iraqis and civilians.

Islamic state militants searched door-to-door for policemen and pro-government fighters and threw bodies in the Euphrates River in a bloody purge Monday after capturing the strategic city of Ramadi. . . . Some 500 civilians and soldiers died in the extremist killing spree . . . .

The U.S. militants were going door-to-door with lists of government sympathizers and were breaking into the homes of policeman and pro-government tribesmen.

So the Chairman of the Joint Chiefs of Staff said it is not symbolic in any way. It is not central to the future of Iraq. It was in response to those comments that Debbie Lee sent a letter to General Dempsey. Debbie’s son, Marc Alan Lee, was the first Navy SEAL killed in the Iraq war. For his bravery he was awarded the Silver Star and his comrades renamed their base in Ramadi “Camp Marc Alan Lee.”

“I am shaking and tears are flowing down my cheeks as I watch the news and listen to the insensitive, pain-inducing, comments made by you in regards to the fall of Ramadi” Debbie wrote General Dempsey.

She continues: My son and many others gave their future in Ramadi, Ramadi mattered to them. Many military analysts say that as goes Ramadi so goes Iraq.

Debbie Lee is right. Ramadi does matter. It matters to the families of the 187 brave Americans who gave their lives and another 150 who were wounded, some of them still residing at Walter Reed hospital, who were wounded fighting to rid Ramadi of Al Qaeda from August 2005 to March 2007.

And it matters to the hundreds of thousands of Iraqis, mostly Sunnis, who call Ramadi home, who were forced to flee their homes, and feel their government cannot protect them against ISIL’s terror.

Ramadi’s fall is a significant defeat, one that should lead our Nation’s leaders to reconsider an indecisive policy and a total lack of strategy that has done little to roll back ISIL and has strengthened the malignant sectarian influence of Iran. I wish to go back. Yesterday, as I mentioned, Press Secretary Josh Earnest said: “Are we going to light our hair on fire every time there is a setback?” It is one of the more incredible statements I have ever heard a public figure make. Well, General Dempsey’s comments are equally as absurd.


The only problem with that statement is there is no strategy to unravel. The Daily Beast: “ISIS Counterpunch Stuns U.S. and Iraq.” According to the Associated Press: “The United Nations says it is rushing aid to nearly 25,000 people fleeing for the second time in a month,” after the Islamic State group seized the key Iraqi city.

The U.N. reported 114,000 people fled Ramadi in April. The U.N. reports it has helped more than 130,000 people over the past alone.

Continuing: “Bodies, some burned, littered the streets as local officials reported the militants carried out mass killings of Iraq security forces and civilians. It goes on and on. Before I turn to my friend from South Carolina, I just want to point out, my friends, that this did not have to happen. This is the result of a failed, reckless policy that called for, against all reason, the total and complete withdrawal from Iraq after we had won with the enormous expenditure of American blood and treasure, including 187 of them in the battle of Ramadi.

In 2011, Senator LIEBERMAN, GRAHAM, and I argued that the complete pullout from Iraq would “needlessly put at risk all of the hard-won gains the United States has achieved there at enormous cost in blood and treasure,” and potentially be “a very serious foreign policy and national security mistake for our country.” We wrote a long article in the Washington Post. In October, 2011, on the day President Obama announced a total withdrawal of troops from Iraq, Senator McCain called the decision “a strategic victory for our enemies in the Middle East, especially the Iranian regime,” and warned that “I fear that all of the gains made possible by these brave Americans in Iraq, at such grave cost, are now at risk.” That was in 2011.

In December of 2011, Senators McCAIN and GRAHAM predicted that if Iraq slid back into sectarian violence due to U.S. pullout, “the consequences will be catastrophic for the Iraqi people and U.S. interests in the Middle East, and a clear victory for Al Qaeda and Iran.”

Now, my friends, before I turn to my friend from South Carolina, what was said at the same time that Senator GRAHAM, Senator Lieberman, and I were warning of this catastrophe? What was said at the same time?

February 2010, Vice President BIDEN: I am very optimistic about Iraq. I think it’s going to be one of the great achievements of this administration. You are going to see a stable government in Iraq that is actually moving toward a representative government.

In December 2011, at a Fort Bragg event marking the end of Iraq war, President Obama said: "But we are leaving behind a sovereign, stable and self-reliant Iraq. This is an extraordinary achievement, nearly 9 years in the making."

In March 2012—this is perhaps my favorite—Tony Blinken, then national security adviser to Vice President BIDEN, stated: “Iraq today is less violent, more democratic, and more prosperous than at any time in recent history.”

This is November of 2012, and President Obama on the Presidential campaign trail said: "The war in Iraq is over, the war in Afghanistan is winding down, al Qaeda has been decimated, Osama bin Laden is dead. The war in Iraq is over. The war in Afghanistan is winding down. Al Qaeda has been decimated. Osama bin Laden is dead."

So we have made real progress these last 4 years.

In January 2014—I guess this is my favorite—President Obama on ISIS: "The analogy we use around here sometimes, and I think is accurate, is if a jayvee team puts on Lakers uniforms that doesn’t make them Kobe Bryant. He was talking about ISIS: The analogy we use around here sometimes, and I think is accurate, is if a jayvee team puts on Lakers uniforms that doesn’t make them Kobe Bryant."

We are seeing a dark chapter in American history, and it is the getting darker. In response to a slaughter in Ramadi, the answer seems to be: “Let’s not light our hair on fire (over this).” That was by the President’s Press Secretary, and that Ramadi isn’t important at all, from the Chairman of the Joint Chiefs of Staff. This is a “temporary setback.” This is, according to the Secretary of State, “a target of opportunity.”

Where is our morality? Where is our decency? Where is our concern about
these thousands of people who are being slaughtered and displaced and their lives destroyed? And we shouldn’t set our hair on fire? Outrageous.

I ask my friend, Senator Graham, what we should do next.

Mr. McCain, we should understand that the direct threat of the homeland is growing by the day.

If you want to be indifferent to what is going on in Iraq and say that people are dying all over the world and that is no reason for us to care or get involved, because we can’t be everywhere all the time doing everything for everybody, I would suggest to you that ISIL in Syria and Iraq represents a growing threat to our homeland. But you don’t have to believe me. Ask our intelligence community.

Over 10,000 foreign fighters have gone into Syria in support of ISIL over the last few months. Their goal is to hit the American homeland, so this JV team is becoming an existential threat, not just existential, maybe that is an overstatement—a real threat to the American homeland.

Ramadi is a big victory for them. It is a recruiting tool. They have been able to take on the Iraqi Army. They have been able to stand up to constant air assault by the American forces. They are surviving, and they are thriving.

So if you want to stop the flow of foreign fighters into the forms of ISIL, you have to deliver stinging defeats on the battlefield. Not only are they stronger today in Iraq and Syria than they have been in quite a while, but they are expanding their influence to Libya, Afghanistan, and throughout the region.

All I can tell you is their agenda includes three things—the purification of their religion, which means 3-year-old little girls are executed. Just hear what I said: They executed a 3-year-old little girl. They are enslaving women by their sex slaves under some twisted version of Islam. What they are doing to people we can’t really talk about on the floor, because I think it would be just beyond our ability to comprehend.

The second thing they want to do is to drive out all Western influence and create a caliphate where our allies have no place. The King of Jordan would be deposed. All the friends of the United States and people who live in peace and are being killed, they fall, and then their place becomes the most radical Islamic regime known in the history of the world, which will destroy Israel if they can—purify their religion, destroy Israel, and come after us.

President Obama, President Bush made mistakes. He adjusted, you have not. President Bush had a defining moment in his Presidency in 2006. The Iraq war was going very poorly. We had just gotten beaten on the Republican side, and the Iraq war was one of the reasons we lost the ballot box.

Mr. McCain. Could I interrupt my friend and point out that both of us, because of our perception that we were losing in Iraq, under our Republican President, called for the resignation of the Secretary of Defense and a new strategy. We saw with our own party in the White House that we were failing in Iraq and we could not succeed.

Mr. Graham. Yes. I remember very vividly going to the White House after multiple visits to Iraq and telling President Bush: When your people tell you this is just a few dead-enders, and this is the result of bad reporting by our media, they are wrong.

Mr. McCain. It was the first trip we took in Iraq after Baghdad fell. We were in three SUVs. We went downtown, shopping, and met with some leaders. And every time we went thereafter, it was always a bit worse, so I came back with the point that we were inside of a tank, virtually, to go outside the wire. It was clear to anybody who was paying attention at all in Iraq that it was not working. I remember talking to a sergeant at one of the mess halls and asking Sergeant, how is it going over here?

And his answer was: Well, not very well. We just drive around getting our ass shot off.

About 1 year later, maybe 2 years later, we went back to the same unit, to different sergeant, after the surge, and I asked another sergeant: How is it going?

Sir, we are kicking their ass.

So the bottom line is that I think Senator McCain and I have been more right than wrong. But we were willing to tell our own President it wasn’t working. He did make mistakes. We all have. It is not about the mistakes you make. It is how you correct your own mistakes.

This President—President Obama, you are at a defining moment in your Presidency. If you do not change your strategy regarding ISIL in Iraq and Syria—because it is one and the same—then this country is very likely to get attacked in another 9/11 fashion. You need to listen to the people in the intelligence community and those who have been in the military in Iraq for a very long time. You are about to make one of the biggest mistakes if you don’t change your strategy.

I know Americans are war weary, but let me just say this to the American people. The current strategy is going to fail, and one of the consequences of failure is the likelihood of our country or our allies getting hit and hit hard. We don’t have enough American forces in Iraq to change the tide of battle. We need American trainers, advisers, Special Forces units, and forward air controllers to make sure the Iraqi Army can eventually defeat ISIL.

If we keep the configuration we have today, it is just going to result in more losses over time.

Why do we need thousands of soldiers over there? To protect the millions of us here. And the only reason I would ever ask any soldier to go back overseas for any purpose is if I believed it was important to protect our homeland. And I do. This strategy that we have in place is an absolute failure inside of Syria, particularly, and it is not working inside of Iraq.

We are on borrowed time, Senator McCain.

President Obama, you need to listen to sound military advice. You need to build up the Iraqi military by having more of us on the ground to help them and turn the tide of battle before ISIL gets even stronger and they hit us here. If you don’t adjust, the price that we are going to pay as a nation is, I believe, another attack on the homeland.

So at the end of the day, you can blame Bush, you can blame Obama, you can blame me, and you can blame Senator McCain. We are where we are. We have a choice, convinced. If we had left a residual force behind in Iraq, we would not be here today.

President Bush, like every other leader in the world, had certain information—some of which proved to be false but is not our job to weigh the hair share of mistakes, he adjusted.

President Obama had good, sound advice in front of him to leave a residual force behind. He decided to go in a different direction. When they tell you at the White House that they didn’t want us to stay, that is a complete, absolute fabrication and a rewriting of history. President Obama, Vice President Biden got the answer they wanted. They made a campaign promise to end the war in Iraq. They fulfilled that promise, but what they have actually done is lost the war in Iraq. And the war in Iraq and what happens in Syria is directly tied to our own national security.

I hope the President will seize this opportunity to come up with a new strategy that will protect the homeland and reset order. Radical Islam is running wild in the Middle East, and as it runs wild over there, as they rape and murder, plunder and kill and crucify, to think those people will not eventually harm us I think is naive.

The only way we are going to stop ISIL and people like ISIL is to come up with a strategy that will allow us to win. This strategy that the President announced today will ensure the existence of ISIL as far as the eye can see, the fracturing of Iraq and Syria, and one day will inevitably lead to an attack on this country. All of this is preventable with a new strategy.

Mr. McCain. Madam President, on behalf of Senator Graham and me and many others, I have a message for Marc Alan Lee’s mother—the mother of the first Navy SEAL who was killed in the Iraq war and who, for bravery, was awarded the Silver Star—and 386 other mothers who lost their sons in the battle for Ramadi: I will never stop. I will never stop until we have
averaged their deaths. And we will bring freedom and democracy to Iraq.

But more importantly than that is the threat this radical Islam and the Iranians pose to our Nation and the young men and women who are serving in the military in much greater danger. My highest obligation is to do everything in my power to see that this situation is reversed and that they get the support and the equipment they need and most of all that they get a policy and a strategy that will succeed and defeat ISIS and Iran in their hegemonic ambitions.

Mr. President, I yield the floor.

The PRESIDING OFFICER (Mr. SULLIVAN). The Senator from Massachusetts.

Ms. WARREN. Mr. President, I come to the floor to support an amendment I filed with Senators MERKLEY, BALDWIN, and BLUMENTHAL. The amendment is simple. It says Congress shouldn’t make it easy to pass any trade deal that weakens our financial rules.

In light through the worst financial crisis in generations. Millions of families lost their homes. Millions of people lost their jobs. Millions lost their retirement savings. And they watched as the government spent hundreds of billions of their tax dollars to bail out the giant banks.

In response, Congress passed some commonsense financial reforms—the Dodd-Frank act. These new rules cracked down on the cheating and lying. They raised the financial marketplace. They required the big banks to raise more capital so they wouldn’t need a bailout if they started to stumble. They gave our regulators new tools to oversee the biggest banks to make sure the rules were followed.

It is no surprise the giant banks don’t like the new rules, so for 5 years now they have been on the attack. They have sent their armies of lobbyists and lawyers and their Republican friends in Congress to try to roll back the rules and let the giants of Wall Street run free again. Democrats stood strong to fight off these attacks because we knew that thoughtful rules can help stop the next financial crisis and protect our working families from another great recession. But now, if this fast-track bill passes, Democrats will be handing Republicans a powerful tool they can use to weaken our financial rules.

Here is how it works: This fast-track bill applies to any trade deal presented to Congress in the next 6 years, which is through the end of the Obama Presidency, through the entirety of the next Presidency, and into the Presidency after that. Fast-track prevents anyone in Congress from offering any amendments to the bill. And in the Senate, with fast-track, a trade bill can pass with just 51 votes, not the 60 typically required for major bills.

What if we have a Republican President in 2016 or 2020? Look, I hope that will not be the case, but this is a democracy and it is not up to me. Most Republicans—including ones currently running for President—are committed to rolling back financial reform. With fast-track, they could weaken our financial rules in a trade deal and then ram it through Congress with just 51 votes in the Senate. That is a lot easier than the 60 votes needed for a head-on attack on the financial rules through the normal process.

This is a real risk. We are already deep into negotiations with the European Union over a massive trade agreement. The European negotiators are pressing hard to include financial reforms as part of that trade deal. And lobbyists from the United States have recognized that the European trade deal is a great opportunity to weaken America’s financial reforms.

Here is what a member of the European Parliament said just a few months ago: “I have been approached by lobbyists that have clearly argued they want to have a weak European regulation, much weaker than Dodd-Frank, in order to use that afterwards as a lever to undermine Dodd-Frank in the transatlantic negotiations.”

The big banks on both sides of the Atlantic are pushing for changes, too. A letter from some of the largest financial institutions in Europe and the United States called for an “ambitious chapter” on financial regulations in the European trade deal. I don’t think they are looking to make our regulations stronger...

Michael Barr, a former senior Obama official at the Treasury Department and one of the architects of Dodd-Frank, said that the risk to Dodd-Frank in a European trade deal is “real and meaningful and worth worrying about,” that European officials are “barnstorming the U.S., looking for support to include financial services as part of the talks on the proposed Transatlantic Trade and Investment Partnership,” while the financial industry looks to use talks to “over turn the pesky—and highly effective—rules being implemented in the U.S. under the Dodd-Frank act.”

The Obama administration, to their credit, has stood strong against such an amendment. Jack Lew noted in testimony before the House Financial Services Committee that there is “pressure to lower standards” on things such as financial regulations in trade deals but that the administration believes that is “not acceptable.” Our lead negotiator, U.S. Trade Representative Michael Froman, has said that the United States is “not open to creating any process designed to reopen, weaken, or undermine implementation” of Dodd-Frank. And the administration says our trade deals should not include regulation of financial services. I agree. But this President won’t be President in 18 months, and there is nothing this President can do to stop the next President from reversing direction in the European negotiations.

Senator MCCONNELL certainly knows this. That is why he is telling Republicans that “if we want the next Republican President to have a chance to do trade agreements with the rest of the world, this bill is about that President as well as this one.”

That is why I am proposing this amendment—to make sure no future President can fast-track a trade agreement that weakens our financial regulations. All of my colleagues who believe in holding the big banks accountable and keeping our financial system safe should support this amendment. I yield the floor.

The PRESIDING OFFICER. The Senator from Ohio.

Mr. PORTMAN. Mr. President, I have come to the floor a number of times this week to talk about the trade issue, and we are now debating that legislation. I have put up this sign because it is being used by folks on our side of the aisle to talk about the importance of this agreement. It talks about a free and fair trade agreement for a healthy economy. I agree that it needs to be fair, and I agree we need to expand exports.

I support for the first time in 7 years giving the U.S. Government the ability to knock down barriers, free up our workers, and our service providers so we can get a fair shake, but we have to be sure it is fair. And so to my colleagues who have put up this sign and then have opposed the amendment I am about to talk about, I hope they will focus on the fair part as well as the expansion of trade to make sure it does indeed give our farmers and workers a fair shake.

There has been a lot of debate about a particular amendment dealing with currency manipulation. It turns out everybody is against currency manipulation. Maybe that has been an evolution, but everybody is now saying the same thing. The question is whether it should be enforceable.

AMENDMENT NO. 129

There has been a lot of discussion on the floor here today about the amendment I am offering with Senator STABENOW, and frankly there has been some misinformation out there that I would like to clarify.

First, I want to talk about what these two amendments do. They are very similar, with one exception. The amendment being offered by Senator HATCH and Senator WYDEN does not include currency manipulation. It turns out this is terrible, that we ought not to have currency manipulation, but the amendment does not have the courage of its convictions. It doesn’t say we should do anything about it.

Here is the language. First, both have basically the same definition—targeting protracted and large-scale intervention in the exchange markets by a party to a trade agreement to gain
Mr. PAUL. Mr. President, there comes a time in the history of nations when fear and complacency allow power to accumulate and liberty and privacy to suffer. That time is now. And I will not let the PATRIOT Act— the most unpatriotic of acts—go unchallenged.

Mr. President, there is a time when the very least, we should debate. We should debate whether we are going to relinquish our rights or whether we are going to have a full and able debate

that but at the same time ensure that we have a more level playing field.

People have said it is a poison pill because some of our partners in TPP don’t want to have to live up to their obligations under the International Monetary Fund. To my colleagues I would just say that they should think again.

The last thing we want to do is to complete an agreement called the Trans-Pacific Partnership and then find out after the fact that all these tariffs we reduced for those Tariff Barrier that got knocked down didn’t matter much because these same countries decided they were going to manipulate their currency, which undoes so much of the benefit of a trade agreement.

Paul Volcker, former Fed Chair, has said it well: “In five minutes, exchange rates can wipe out what it took trade negotiators ten years to accomplish.”

So it should concern us if our trading partners aren’t interested.

Finally, there has been a lot of discussion about poison pills. I have joked that this is more like a vitamin pill than a poison pill because this would actually help strengthen this underlying agreement and help us get more support for trade.

The polling data on this, by the way, is overwhelming. Nine out of ten Americans agree that we have to deal with currency manipulation. Why? Because they think it is wrong.

So I have heard it is a poison pill, first because it might hurt us here in the Senate. Just the opposite is true. There are Senators who have told me they would like to support trade promotion authority, but they don’t know what it is. There are people who have in ours said theirs has to be consistent with existing principles and agreements, meaning that the other countries have to live up to their agreements also.

I am not quite sure why they don’t think other countries should have to live up to their obligations. When you sign up with the Fund, you are required not to manipulate your currency. Yet, people do it because there is no enforcement. Their amendment doesn’t deal with this issue directly. Ours does—have it be consistent with the obligations these countries have already undertaken.

Finally and, of course, the most important part is the enforceability. There were 60 Senators who in 2013 signed a letter—and the letter went to the Secretary of the Treasury yesterday. Well, it was a recommendation; it wasn’t a Statement of Administration Policy.

I would just reference the President’s own statements on this. I know how he feels about it; he is against currency manipulation. In fact, he said that he wanted to be sure to work with colleagues, “that any trade agreement brought before the Congress is measured not against administration commitments but instead against the rights of Americans to protection from unfair trade practices, including currency manipulation.” He said he couldn’t vote for a trade agreement without enforceable practices on currency manipulation—enforceable so that the rights of Americans would be protected. I hope the President stood on it, and I hope he will remember that this is about expanding trade. And that is good. We need to do
over whether we can live within the Constitution or whether we have to go around the Constitution.

The bulk collection of all Americans' phone records all of the time is a direct violation of the Fourth Amendment. The Second Appeals Court has ruled it is illegal.

The President began this program by Executive order. He should immediately end it through Executive order. For over a year now, he has said the program is illegal. Yet, he does nothing. He says: Well, Congress can get rid of the PATRIOT Act; Congress can get of the bulk collection. Yet, he has the power to do it at his fingertips. He began this illegal program. The court has informed him that the program is illegal. He has every power to stop it. Yet, the President does nothing.

Justice Brandeis wrote that the right to be left alone is the most cherished of rights possessed by civilized men. The Fourth Amendment incorporates this right to privacy. The Fourth Amendment incorporates this right to be left alone.

When we think about the bulk collection of records, we might ask, well, maybe I am willing to give up my freedom for security. Maybe if I just give up a little freedom, I will be more safe.

Most of the information that comes on what is safe comes from the people who have secret information you are not allowed to look at. So you have to trust the people—you have to trust those in our intelligence community that they are being honest with you. And if you believe them, tell you how important these programs are and that you must give up your freedom, you must give up part of the Fourth Amendment—when they tell you this, you have to trust them.

They are telling us we are having a great deal of difficulty trusting these people. When James Clapper, the head of the intelligence agency, the Director of National Intelligence, was asked point blank, are you collecting the phone records of Americans in bulk, he said no. It turns out that was dishonest. Yet, President Obama still has him in place.

So when they say how important these programs are and how they are keeping us safe from terrorists, we are having to trust someone who lied to a congressional committee. It is a felony to lie to a congressional committee, and nothing has been done about this. Above, we began having this debate because a whistleblower came forward and said: Here is a warrant for all of the phone records from Verizon.

You say: Well, maybe they have evidence that people at Verizon were doing something wrong.

There is no evidence. This is that they want everyone's phone records.

I don't have a problem with going after terrorists and getting their records, but you should call a judge and you should say the name of the terrorist, and then you get their records as much as you want.

If I am the judge and they ask me for the Tsarnaev boy's records—the Boston Bomber—the Russians had investigated him. He had gone back to Chechnya. Yet, nobody asked for a warrant to look at his stuff. We didn't even know he went back to Chechnya. And then they had the disaster at the Boston Marathon.

I would make the argument that we spend so much time making the haystack bigger and bigger that we can't find the needle. The haystack is too darned big. We keep making it bigger and bigger, and we are taking resources away from the human analysts who should be looking and seeing when Tsarnaev travels outside of our country.

We recently had another terrorist travel from Phoenix to Texas. We had arrested him previously. My guess is there was sufficient cause—probable cause—for a real warrant to look at his activities, and we should. But I don't think we are looking very closely at every American's records.

In fact, when this came up, the government said: Well, we have captured 52 terrorists because of this. But then when the President's own privacy commissioner testified, he said there was a debate about whether one had been aided but not found by these records and would have been found by other records.

We have to decide as a country whether we value our Bill of Rights, whether we value our privacy, or whether we are willing to give that up to feel safer, because I am not even sure you really can argue that we are safer, but people will argue that they feel safer. But think about it. Is the standard to be that if you have nothing to hide, you have nothing to fear but that everything should be exposed to the government, that all of your records can be collected?

Some will say that these are just boring old business records. Why would you care if they could find out who you called and how long you spoke on the phone? Well, two Stanford students did a study on this. They got an app and they put the app on the phone—voluntarily—of 500 people. These people then made phone calls. All they looked at was how long they spoke—metadata—and whom they spoke to, the phone number to which they were connected. What they found was that any other information, 85 percent of the time they could tell what their religion was; more than 70 percent of the time they could tell who their doctor was; they could tell what medications they took; they could tell what diseases they had. The government shouldn't have the ability to get that information unless they have suspicion, unless they have probable cause that you committed a crime.

When they look at this, the appeals court was flabbergasted that the government would make the argument that this was somehow relevant to an investigation—because that is what the standard is. Under the Constitution, the standard is probable cause, which means there is some evidence or suspicion that you have done something illegal. But the standard now is relevance, which means, is it relevant to an investigation? But the court said that enough that lesser standard of relevance completely destroys any meaning of any words if we are going to say every American's phone record in the whole country is somehow relevant to an investigation.

But it gets worse. They don't even have to prove it. The government says to the court that they think it is relevant, but there is no challenge and there is no debate. It is just taken at face value, or at least until this court ruling was appealed. So we now have the second appeals court that said this bulk collection of phone records is illegal.

There are many different programs going on. This is the only one we know about. There is just the bulk collection. There is the bulk collection; that there is an enormous amount of data being collected on people through this other program.

One question is, if there is no Fourth Amendment protection to your records, are they collecting your credit card bills? I don't know the truth of that. I would sure like to know. I don't know whether to trust their answer if I asked them, if they will be honest with us and say are they collecting our credit card records.

People might say: Well, your credit card records are just boring old business records. Why would you care?

But think about it. If the government has your Visa bill, they can tell whether you drink, whether you smoke, what restaurants you go to, what your reading material is, what magazines or books you read, what doctors you see, what medicines you buy? Do you buy medicine? Do you go online? Any one of these things can be determined.

Not only can they determine stuff directly from your phone bill and directly from your Visa bill, they now have the ability to merge all of this information. Apparently, they have the ability to collect your contact lists, and sometimes they are collecting this in a way that is somewhat nefarious.

We are supposed to be spying on foreigners—foreigners who might attack us. I am all for that. But what happens is there is a lot of data that goes in and out of the country. In fact, sometimes an e-mail from New Jersey to Colorado
might go through a server in Brazil. Once it gets to a server in Brazil, they can not only look at your metadata—how long and whom you talked to—the content is now available. It all gets scooped up. It is all being analyzed. They have a social network of who your friends are. Some have said this could potentially have a chilling effect on the First Amendment.

There was a time in our country not too long ago, in the lifetime of most of us, when it was called the NAACP. You might not want your neighbors to know or if you were a member of the NAACP, you might not want your neighbors to know or if you were calling the ACLU or a member of the ACLU, you might not want your neighbors to know. It can have a chilling effects on your expression of your speech, whom you associate with, and whether you are fearful to have association with people because you are fearful that someone might be known by the government.

People say: Well, certainly that would never happen. During the civil rights era, many of the civil rights leaders were spied upon illegally by the government through illegal wiretaps.

Many Vietnam war protesters were also spied upon illegally by the government. They have the Fourth Amendment is to have checks and balances. Everything that is great about our country is checks and balances.

Let's say we have a rapist or a murderer in Washington, DC today. Let's say it is the morning and the police come to the house. They think the rapist or murderer is inside. They do not just break the door down. If there is no commotion, no noise, no imminent danger, they stand outside and get on their cell phone and call a judge. Almost always the judge grants a warrant. Then the police go in.

But why do you want that to happen? Sometimes people come up to me and they say, "You're a policeman. You work for the FBI." Many of my friends are policemen and work for the FBI, and they say "Don't you trust us?" It is not about the individual. Laws are not about whether we trust one person or your brother is a policeman and your brother would never do anything wrong. It is not about your brother. It is about the potential for there to be a rotten apple, someone who would take that power and abuse it. We have seen this for not for most of us. It is for the exception. It is for something out of the ordinary. But it is also to prevent systemic bias from entering into the situation. For example, there was a time in the civil rights era, that you might have been that a White person from the government might have decided they were going into the home of a Black person just because of racial bias. You get rid of bias by having checks and balances, by always saying you have to ask somebody else for permission.

When we were leading up to the war for our independence in about 1761, I believe, James Otis was arguing against the courts. He was arguing against something called the writs of assistance. A writ of assistance was a type of warrant, but it was a generalized warrant. No one’s name was on it; it just said, You are welcome to search anybody’s house, as long as they are paying the stamp tax.

Do you wonder why the Colonists hated the stamp tax? It was not just the tax; it was the fact that the government could break the door down, come in and rifled the papers. Writs of assistance were something called a general warrant.

This same battle had gone on in common law in England and developed as one of our precious rights that we actually kept from the English tradition. John Adams wrote about James Otis fighting against these general warrants, and he said it was the spark that led to the American Revolution. That is how important this is.

The Fourth Amendment was a big deal to our Founders. The right to privacy, as Justice Brandeis said, the most cherished of rights, is a big deal. We should not be so fearful that we are willing to relinquish our rights without a spirited discussion on simultaneously over here with James Otis. It was a big deal.

So often my party does such a great job talking about the Second Amendment and the right to bear arms. I am a hunter and a 2nd Amendment supporter. I am not about to take this lying down, so John Wilkes was not about to take this lying down, so John Wilkes actually then decided that he would sue the King. I tried doing the same thing. I tried suing the President, and it has not gone so well. But the thing is that everybody ought to think that they have the ability and the equality to sue even their leaders.

I will give an example. A lot of people think we will be safer if we collect gun records. A few years ago, they collected all the gun records and they had them in Westchester County, near New York City. A newspaper in Westchester County, near New York City. A newspaper decided they would publish them. They really did not think this through. But you can see the danger of what happens when the government has records and then releases them to everybody.

Imagine a woman who has been abused or beaten by her husband and has left him. She lives in fear of him finding her. Now the registration comes out and says where she lives and that she has a gun or, worse yet, where she travels to work. The security meets them in the parking lot. They do not work, but they worry. We have had sheriffs and we have had prosecutors killed in Kentucky because the criminals were angry that they were locked up.

Think about prosecutors and our judges. I know many of them who put bad people away, and many of them have concealed carry. Many of them travel to work. The security meets them in the parking lot. They do not work, but they worry. We have had sheriffs and we have had prosecutors killed in Kentucky because the criminals were angry that they were locked up.

We do not want all of our records by the government to be put out there in public for everybody to know where we live and whether we have a gun.
You can see the issue of privacy is not a small issue. It is a big issue. It was incredibly important to our Founding Fathers.

Some have said it is too late to even get this back. There have been articles written in the last few weeks that say that whether or not the PATRIOT Act expires, the government will just keep on doing what they are doing. In fact, there is a provision in the PATRIOT Act that says any investigation already begun before the deadline can go on in perpetuity.

The other thing is that there are people now writing—John Napier Tyre, who was the Internet watchdog for this program, wrote that he believes that Executive Order 12333 is really allowing all this bulk collection under what the President says are Article II authorities.

Article II gives the President and the executive branch different powers, but these are not unlimited powers. Some think they are. I say the President has the absolute power when it comes to war. Article II actually comes after Article I. In Article I, section 8, the President was told he does not get to initiate war. The most basic of powers with regard to war were not given to the President; they were given to Congress.

What is said about this, what is going on now is that Congress has not shown sufficient interest in what the executive branch does on a host of things, whether it be regulation, whether it be the enormous bureaucracy, but really so much power has shifted and gone from Congress and wound up in the executive.

It is the same way with intelligence. We have intelligence committees, but the question is, Are they asking sufficient questions? There are some. Senator Wyden and I have a series of questions. There are some. Senator Wyden and I have a series of questions. Senator Wyden and I have a series of questions.

As we look at what happened at that time, I think we now have the ability to look backward and say: Is there another way? When we start with the doctrine that a man's house or a woman's house is their castle, it was a very old notion, maybe even dating back to the times of Magna Carta. Our castle and our papers are a little bit different now, and the Supreme Court has not quite caught up to where we are technologically. They are getting there, but this really needs to be debated and discussed at the Supreme Court level because the thing is we don't keep our papers in our house anymore. In fact, it has gone to an electronic format, a paperless society that 90 percent of your paper—or if you are under 30 years old, 100 percent of your paper—is held somewhere else.

The question we have to ask is: Do you retain a privacy interest in your records? When the phone company holds your records, do they have an obligation to keep them private? Do you retain a privacy interest? If the government wants the records from the phone company, should they be allowed to write the name Verizon and get all your telephone records from the phone company and think that if John Smith has his phone service with Verizon and he is a terrorist, the warrant should say John
Smith and go to Verizon, but it is an individualized warrant. I don’t think we should have generalized warrants.

There are some who want to replace the bulk collection of records with a different system where the government doesn’t get the records, but they fear phone companies hold the records. I am also concerned about this for one big reason: The recent court case has now said the PATRIOT Act does not justify the collection of records, that it is actually illegal. That is what the court is now saying section 215 doesn’t allow a bulk collection, that in trying to reform this, what is called the USA FREEDOM Act, we will actually be granting new power to section 215 that the court says is not there. The court is saying that it stands logic on its head to say relevance means nothing, that everybody’s records in the whole country could be relevant.

We have even changed, over time, the investigations and whether there is a full-blow investigation at the beginning of an investigation. Who gets to decide or define what an investigation is? The bottom line is that we look at this, and as we move forward, we have to decide whether our fear is going to get the best of us.

Once upon a time, we had a standard in our country that was innocent until proven guilty. We have given up on so much. Now people are talking about a standard that is: If you have nothing to hide, you have nothing to fear. Think about it. Is that the standard we are willing to live under? Think about whether you believe you still have a privacy interest in the records that are held by the credit card companies, your bank or the phone company.

In the PATRIOT Act, they did something to make it easier to collect records and to override your privacy agreement. If you read the nitty-gritty of any of these agreements that you have with a search engine when you are on the Internet, you do voluntarily say that your information will be shared in an anonymous way, but they promise they will not give your name to somebody.

The phone company has the same sort of privacy agreement, but what has happened through the PATRIOT Act is that we have given them liability protection. At first blush, you might say we have too many damn law suits. But that was the way we used to deal with the doctor, the lawyer, the dentist, the student, the pharmacist, the store or the bank. We have way too many law suits. I am for cutting back on law suits. But at the same time, if you give the phone, Internet or credit card company immunity to ignore your privacy agreement, they will.

Instead of the government storing billions and billions of records in Utah, the new system is still going to store billions and billions of records in the phone company, but still the question is: Who will access them in a general way? It is always going to look at a specific person, but if you look at the way “person” is defined, a person could be a corporation. I don’t think you should have a warrant that says Verizon and gets all the records for all of their customers.

The other thing that has been going on that they have not been completely honest with, and we may have some doubt about data, is going inside of the software. They are asking companies such as Facebook or demanding that companies such as Facebook give them access through sources that the companies get, that they can get, that they can go after. They are fighting them, and I think more companies are now standing up and trying to fight against this. But in a nefarious way, the government is going into the code of Facebook and then inserting malware into other people’s Facebook and spreading it throughout the Internet.

The government is also looking at communications between two nodes. Let’s say you communicate with Google and it is encrypted, but then when you talk to another data center which is non-encrypted, the government just hooks up to a cable and siphons off records. There is a danger that you will have no privacy left at the end of this. It is very specific. The Fourth Amendment says you have to individualize a warrant and put a name on the warrant. You have to say specifically what records you want, you have to say where they are located, and then you have to ask a judge for permission.

The sneak-and-peek warrant I was talking about before in section 213. It is now permanent law. We don’t even get a chance to talk about it. We could repeal it, and I will have an amendment to repeal it. This is where the government goes in secretly and says: Well, we need this lower standard because terrorists will get us if we don’t. Well, we have now had it on the books for a year and a half, and who are we fighting? Drug people—people who are buying, selling or using drugs. That is a domestic problem, which also leads me to something else about the PATRIOT Act that really bothers me.

When we first started talking about the standards of the PATRIOT Act and going from probable cause, which is what the Constitution has, to articulable suspicion, down to relevance, we said: Well, we are going to lower the standard because we are going after foreigners. They are not Americans and they are not here. We are going to lower the standard, and really there could be some debate in favor of that.

When we first did it, we said we could not use that information for a domestic crime. I will give an example. I asked one of the intelligence folks at one time to answer a question and was dissatisfied with the response. Let’s say the government comes in through a sneak-and-peek warrant. They don’t tell you that they are in your house. Guess what. They find you out you are not a terrorist, but you have paint in your house which you bought through your office business expense, and you are painting your house, which is a tax violation. It is a domestic crime, but they got into your house through false pretenses. They said you were a terrorist, but they were wrong. However, they found paint you used to paint your house, and that is exactly what you are doing with your taxes. They have gotten in through a lower standard.

Ultimately, if we let them collect all of your records and we let a domestic crime be prosecuted by this, we could have someone sitting through your phone records because they say the Fourth Amendment does not protect records, including your phone records—not the content, just all of this data. After they put it together and mesh it, they decide, by looking at your digital footprint, that maybe you are somebody who runs traffic lights.

Now we are taking something that was intended to capture foreigners and we will capture people domestically at a lower standard. For domestic crimes, the specific thing they promised us they would never do. So things morph and get bigger and bigger.

We could have a valid debate about whether we have gone too far, but we at least have a debate. Shouldn’t we get together and say: Let’s have a debate. Let’s devote all week to this.

For a while, I have asked to have a full day and have five or six amendments that Senator Wyden and I could put forward and have a full-fledged debate over whether the bulk collection of our records is something we should continue to do.

I think if you look at this and say: Where are the American people on this, well, there has been poll after poll. Well over half the people—maybe well over 60 percent of the people—think the government has gone too far. But if you want an example of why the Senate and the House says we still need bulk collection. This is where the government has gone too far. But if you want an example of why the Senate and the House says we still need bulk collection, it is because the people very well or why we are maybe a decade behind. I would bet that 20 percent of the people here would vote to just stop this—to truly just stop it—at the most; whereas, 60 to 70 percent of the public would stop these things.

You are not well represented. What has happened is that I think the Congress is maybe a decade behind the people. I think this is an argument for why we should limit terms. I think it is an argument why we should have more turnover in office because we get up here and stay too long and get separated from the people. The people don’t want the bulk collection of their records, and if we were listening, we would hear that.

The vote in the House, while I don’t think the bill is perfect, and I think it may well continue bulk collection, was over 300 votes to end this program and to say we are no longer going to have bulk collection. Yet it looks like the majority in this body says we still need bulk collection. In fact, the biggest complaint from the majority of this body is that we are not collecting
enough records and that we need to collect more records.

Can we have security and liberty at the same time?

I had breakfast with a high-ranking official from our intelligence community a few months ago, and he said: How much information do you get from metadata and how much do you end up getting from a warrant? He said, without question, you get more from a warrant. People talk about whether we can go one hop or two hops. That means if you are suspected of terrorism and they called 100 people—if we look at your records, that is one hop. If we look at the next 100 records, that is a second hop. As you go in, this pyramid gets bigger and bigger until you are talking about tens of thousands of people.

As you get further and further away from the suspect, I see no reason you couldn’t keep getting warrants. If they say they are slow, they are slow and furious and there is not a judge, put more judges on the court. If they say they need them at 3 in the morning, put the judges on 24-hour alert and you can call them at 3 in the morning. We call judges for a warrant in the middle of the night all across America. There is no reason why you can’t have security and the Constitution at the same time.

The President instituted the Privacy and Civil Rights Board. They went through a lot of this and some of the things they came up with, I think, were truly astounding. The amount of information, I think, is mindboggling—of what is being sucked up in this. There is something called section 702 of FISA, and this has allowed them to collect information on Americans who might have been communicating with a foreigner. You say: Well, that American is probably suspicious. Well, it goes out in ripples and it becomes this enormous amount of cache of information.

When they looked at some of this recently—the Washington Post looked at this—they found that 9 of 10 intercepted conversations were not the intended target. So I think there was one estimate that in the last year we had 89,000 targets. If you multiply that and say it is only one-tenth of what we actually take, you are now looking at 900,000 records of people who had nothing to do with terrorism. They didn’t even talk to the person. They incidentally talked to a person who talked to the person. It could be the terrorist called Papa John’s and you called Papa John’s, so now you are in the same phone tree network. That can ripple out in waves. That information should not be collected, it should not be put in a database, and it should not be stored. Ultimately, we are collecting so much information that it is all of your information.

One thing that should concern us about what is going on from a system where the government collects all of these records and stores them in Utah to one where the phone company does it—actually some people in the NSA are acquiescing and saying it is not so bad. That concerns me that the NSA is saying “not so bad.” It concerns me that we are still going to have bulk collection.

The debate we really need to have is whether, if someone else is holding your records, if you still have any kind of privacy interest in your records. I personally think your phone records are still partially yours, in a way, or that you have some interest in them. This is going to become very important because your records ultimately—there probably will not even be any records in your house, they will be on your phone, and then your phone records are connected to the company. Who owns them? Do you have a right to privacy in those records? I think you can have security and freedom at the same time, but I think if we are not real, this is going to get away from us.

When they found out that 9 out of 10 intercepts were actually not the intended target, just ancillary information they picked up, they also found that 50 percent contained email addresses that were U.S. citizens. So let’s say you collect a million pieces of information and you are just gathering this up and you are intending to go after foreign targets who might be terrorists, but over half of this information, much of it incidentally gained, is actually U.S. citizens. So this is sort of an end run—they call it backdoor searches—but it is sort of an end run that has gotten out of control. It went around the Fourth Amendment, to collect information that we have actually said should be illegal to be collected that way, but we are doing it because we have done an end run around. It is an end run that has gone around the Constitution, gone around the Fourth Amendment, to collect information that we have actually said should be illegal to be collected that way, but we are doing it because we have done an end run around. It is an end run that has gone around the Constitution, gone around the Fourth Amendment, to collect information that we have actually said should be illegal to be collected that way, but we are doing it because we have done an end run around. It is an end run that has gone around the Constitution, gone around the Fourth Amendment, to collect information that we have actually said should be illegal to be collected that way, but we are doing it because we have done an end run around. It is an end run that has gone around the Constitution, gone around the Fourth Amendment, to collect information that we have actually said should be illegal to be collected that way, but we are doing it because we have done an end run around.

In the Upstream Program, a similar thing happened, but this is when the data is collected as it moves across U.S. junctions. The problem is not so much going after foreign communications but going after incidental and unexpected communications that involve American citizens.

John Napier Tye was a section chief for Internet freedom in the State Department’s Bureau of Democracy. He was going to give a speech, but he thought this was very telling. This is reported in the Washington Post. He had written out his speech and he sent it for review. In his speech, he said: If U.S. citizens disagree with congressional and executive determinations about the proper scope of intelligence activities, they have the opportunity to change policy through democratic process.

And we think, Who could object to that? What would his censors say? How could his executives or the President say they have the right through democratic process to change policies? They had him strike “through intelligence processes” because I guess they apparently think we don’t have the democratic ability to change things. It may be true because a lot of this is being done by Executive order.

Executive Order No. 12333 has no congressional oversight. In fact, the question was asked recently of one of the Senate leaders, Will you investigate this? Now, there may well be a secret investigation going on, but there was some indication it was really outside of our purview.

I don’t think anything the executive branch does should be outside of our purview. The whole idea of having co-equal branches was to have checks and balances. One of the biggest problems I find in Washington is that sometimes the administration, the President, if he is from a Democratic President and a Republican Congress, you will get a little bit of adversity and a little bit of pitting ambition against ambition and check and balance. But the party that is the same party as the President doesn’t tend to push back, probably for partisan reasons. Now, it is not just the other party; it happens when Republicans are in power also. What happens is the political party that is the same power as the President tends to sort of be open to letting things move on, just letting the President accumulate more power. But I think this should be telling that when he said we could change things through democratic action, President Obama’s administration counsel told him that, no, that wasn’t true. He was instructed to amend the line and make a general reference to our laws and policies but to leave out intelligence policies as if we don’t really get a say in what they do to what information they collect on us.

John Napier Tye goes on to warn us.

He says: Unlike section 215, Executive Order No. 12333 authorizes collection of both phone and Internet communications, not just metadata, even for U.S. citizens.

So quite often we are told—we were told for years—don’t worry, they are
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not collecting your data; they are just collecting the data of foreigners. It turns out that wasn’t true.

Now, the big thing they tell us is, Well, we are not collecting the content, we are only collecting the numbers. But when we read John Napier Tye, he says the Executive order authorizes collection of the content of the communications also, not just metadata, and also for U.S. persons.

So the question is, If we get rid of bulk collection, will the Executive continue to do it anyway?

The other question is, Why doesn’t the President think? It was started by Executive action and can be ended by Executive action at any time. Where is the Executive? How come the press gives him a free pass just to say Congress needs to fix this? Sure, I messed it up, I broke it; I am doing something that the second appeals court said is illegal, and I am going to keep on doing it until Congress does something. Why don’t we see any questions from the press? Why don’t we see anybody from the media saying, Mr. President, it is illegal. You started it. You were performing a program that is collecting all of the phone records from all Americans without a warrant, and has been declared illegal from the second highest court in the land. Why don’t you stop? I have not ever heard the question asked of him.

With the Executive order, apparently because this, they say, is article II, and then article II to them means they can do whatever they want without any oversight by Congress, the conclusion by John Tye is that there is nothing to prevent the NSA from collecting and storing all communications. This concerns me.

The President instituted or brought together a group called the Review Group on Intelligence and Communications Technologies. In it, they came forward with some recommendations. Recommendation No. 12 was that all of this information incidentally collected data is becoming part of these databases that is collected under these authorities—the Executive order—should be immediately purged unless there is a foreign intelligence component to it. The Review Group further recommended that a U.S. person’s incidentally collected data should never be used in a criminal proceeding against that person.

So now we are back to what I was talking about earlier. If you are going to go away from the Constitution, if you are going to say to catch bad guys we can’t really have the Constitution, we are going to have to have a bar that is a lot easier to cross that allows us to do kind of what we want, wouldn’t you want to exclude American citizens from being convicted or put in jail for a crime under lower standard? It is kind of like this: The question is, If the government can come in without a valid search warrant, without announcing they are in your house, collect all of your data, would you want them to have hours and hours in your house without any probable cause and then start arresting you for this?

There are rumors we are doing this. There are rumors that intelligence warrants, which are nonconstitutional, which are a lower standard, are being used to get regular criminals. What they do is collect information through the data, many of which, they get enough to be convinced that you are a drug dealer, and then they arrest you by getting a traditional warrant, but they are using information they got illegally to get to you. Section 213, this whole sneak-and-peak, where they go in without announcing that they have been in your house, 99.5 percent of the people arrested are who committed a domestic crime. They are not terrorists. So we are told you have to have a PATRIOT Act to get terrorists. Yet what we really find is that they are using it in a way that is not honest. They are using a lower standard—a standard less than the Constitution—and they are using that standard then to arrest people for basic domestic crime.

The President’s Review Commission in recommendation No. 12 recommended that this incidentally collected data not be used criminally against anybody. They gave their recommendation to the White House. The White House stated that the adoption of these recommendations they requested would require significant changes and indicated it had no plans to make any changes. So the President’s own commission says there is great danger in using a lower, less-than-constitutional standard to collect great amounts of information that can be searched. There is great danger to privacy. There is also great danger to using information collected outside of the Constitution. There is great danger in then using that for domestic prosecution, and the President said he has no intention of any changes.

When I think of this President, it is probably what disappoints me most. There were fleeting times when this President was in the U.S. Senate that he stood up. In fact, there is a quote from the President when he was running for office—there are many quotes—but there was one quote saying that the warrants that are issued by police—national security—should be signed by a judge. The very amendment that I will call the Bill of Rights. Some of them worry about this. Our Founding Fathers worried about this. Our Founding Fathers came to this country and they did things that we would just do the Constitution without the Bill of Rights. Some of them worried. They said: If we do the Bill of...
Rights, people will think that is all we have. If we list ten different amendments, they will think that is all of our rights. So they finally convinced everybody to go along with it by saying: We will put in the 9th and 10th amendment, with the 10th Amendment limiting how the powers enumerated are given to the Federal Government and everything else is left to the States and the people, respectively. But the Ninth Amendment, which is in many ways sort of the stepchild of our amendments, hasn’t been as adequately, I think, adhered to or recognized. It says that those rights not listed are not to be disparaged.

Sometimes we have this discussion because some people say it has to be enumerated. I agree completely if we are talking that the powers given to government should be enumerated. They are few—few and limited, the powers given to the government. But it is the opposite with your rights. Your rights are many and infinite. Your rights are enumerated, and you do have a right to privacy. So while the word “privacy” is not in the Constitution, in the Fourth Amendment, though, they do talk a lot about your privacy. It is about your home, that your home is your castle.

The exact words of the Fourth Amendment are:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons and things to be seized.

The reason why we should worry about whether a warrant is individualized is we have had some tragic times in our history. During World War II we didn’t individualize the arrests of Japanese Americans. We didn’t say: That is so-and-so who lives in California, and we think they are communicating with Japan and telling our secrets. We indiscriminately rounded up all of the Japanese and incarcerated them. There have been times in our history when we haven’t acted in an individualized manner. It happened throughout the South in the old Jim Crow South. We told people that we were going to relegate them to a certain status based on a general category. We were talking about individuals warrants, we are talking about trying to prevent bias from occurring. Now, bias can occur for a lot of different reasons. I tell people that you can be a minority because of the color of your skin or the shade of your ideology. You can be a minority because of your religion. You can be a minority because you are home-schooled. But the thing is, if you are a minority, if you are a dissenter, if you dissent from the majority, you need to be very, very aware of our constitutional rights. Be very, very aware of the Bill of Rights.

The Bill of Rights isn’t so much for the prom queen. The Bill of Rights isn’t so much for the high school quarterback. Many people in life always seem to be treated fairly. The Bill of Rights is for those who are less fortunate, for those who might be a minority of thought, deed or race. We have to be concerned about the individualization of data. In the danger and the danger of people being treated in categories.

Right now we are treating every American in one category. There is a general veil of suspicion that is placed on every American now. Every American is somehow said to be under suspicion, because we are collecting the records of every American. We talk about metadata and whether or how much it means or what the government thinks it can determine from metadata. There are some people who say: Don’t worry. It is just your phone logs. It is no big deal. It is just boring old business records. We should be a little bit concerned by the words of one former government official who said that “we kill people based on metadata.” He wasn’t referring to Americans. He was talking about terrorists. But we should be concerned that they are so confident of metadata that they would kill someone.

Instead of our believing that metadata is no big deal and it just should be public information and anybody can have it, realize that your government is so certain of metadata that they would kill an individual over it. That seems to me to make the point that metadata is incredibly important, if we would make a decision to kill someone based on their metadata.

The Electronic Frontier Foundation has done a lot of work for privacy and deserves a lot of credit. Mark Jaycox writes in an issue from last year that “it is likely that the NSA conducts much more of its spying power under the President’s claimed ‘inherent’ powers and only governed by a document originally approved by Executive Order.”

So while we are superficially having a debate over the bulk collection of records that some claim are authorized under the PATRIOT Act, section 215, there is a whole other section that some privacy advocates are worried about that is even bigger.

I had a meeting recently with one of the founders of one of the huge social commerce companies and he told me that he thinks we are missing some of the debate here, because he says everybody is talking about bulk collection of your phone records. He is convinced that there is ever so much more being collected through backdoor channels. These backdoor channels can occur in two ways. They can occur one way by going and looking at foreigners’ information and then coming through the backdoor back into our country and looking at Americans’ information. Information has tentacles and spreads and it becomes this enormous grouping of incidental information. In fact, some have said 9 out of 10 pieces of data pulled in aren’t about terrorists; they are just incidental stuff.

What the President’s review commission says is we should delete that once we find it is not relevant to an investigation. The amazing thing is that even the authors of the PATRIOT Act and I don’t; I think the PATRIOT Act lowers the constitutional standards and risks all freedom and our liberty. But even for those who think the PATRIOT Act is fine, they say that the PATRIOT Act never was intended to do this.

So if you want to ask yourself is the government overstepping, even the authors of the PATRIOT Act are now telling us that the overstepping is to such a degree that they think the PATRIOT Act doesn’t justify it.

In fact, that is really what the court ruled recently. I had hoped the court would rule that the bulk collection—the grabbing up of all your records—was not sanctioned by the Constitution and actually simply ruled that the PATRIOT Act does not sanction it. The PATRIOT Act does not give authority to the government to do this. It is a pretty amazing sort of set of circumstances—that the government has taken something that was intended in one way, completely transformed it, and then when they are rebuked by the court, they are not chastened at all.

I wonder why no one has had the guts or the wherewithal to ask the President why he doesn’t stop this now. The President could today listen to this speech on the floor of the Senate, and he could change his mind. He could, this afternoon, with his pen—he says he has his pen and his cell phone—he can immediately stop the bulk collection of data. In fact, all of the alternatives he could continue and he could probably do now. He could also say he is going to collect the data with a warrant. He has all of the different Internet companies. There are a couple of things that are occurring because of this. If you live in Europe, if you are Angela Merkel or if you are anybody in Europe, you might not want American stuff anymore.

There are already rumors in discussion that billions of dollars—there has been some estimating of over $100 billion—have been lost. There have been a dynamic leader in software, in hardware, in the Internet. People don’t want our stuff because they don’t trust us anymore.
One of the reasons they don’t trust us is this. We have a group called the Tailored Access Operations that targets system administrators and installs malware while masquerading as Facebook servers. That is a little scary—what if you go on Facebook, somebody is getting into your computer and then searching and allowing them to know everything you are doing on your computer. If you have a warrant, to my mind you can do a host of these things, but do it to some suspicion of.

I think we have made the haystack so big that no one is ever getting through the haystack to find the needle. What we really need to do is isolate the haystack into a group of suspicious people and spend enormous resources looking at suspicious people—people for whom we have probable cause. If you think of almost every instance—I mean, go back to 9/11. You will have people come forward with a ridiculous assertion that if we had the PATRIOT Act, we wouldn’t have had 9/11. We would have caught those two terrorists in San Diego. And I am like, you mean the two terrorists that were living with a confidential informant for a few years?

We know who these people were. These people were talking to each other. It wasn’t a lack of gathering information. All of these incidents and all of this grabbing up of bulk records isn’t what we need. We needed the CIA to call the FBI. We needed further that FBI call Washington and for somebody to listen to them.

The 20th hijacker, a guy named Moussaoui, was captured a month in advance. We got him in Minnesota. We got his computer. He was captured because people said—he was from a foreign country, and he was attempting to learn to take off planes but not land them. The FBI agent there ought to be given the Medal of Honor. Instead of giving the Medal of Honor to the head of the FBI, we should have fired the head of the FBI and this FBI agent should have been made the head of the FBI. He wrote 70 letters to his superiors. He caught the 20th hijacker. He should be a well-known name to every American and a hero. He caught the 20th hijacker. He saved lives. But his superior got 70 letters and did squat. I have no idea what happened to his superior, but nobody was fired for 9/11. Instead of firing the person who did not do a good job, we gave them medals. The guy who did a good job, I don’t know what happened to him.

(Mr. SCOTT assumed the Chair.)

What did we do is we decided we should just keep everybody’s information, that we would sort of scrap the Bill of Rights.

I have met a lot of our wounded soldiers. I have met young men who have lost two, three arms, two, three limbs, sometimes four limbs. I have met people who are paralyzed. And to a person, when I ask them “What were you fighting for?” they tell me “The Constitution.” They tell me “Our way of life” or “Our Bill of Rights.” Don’t you think they would be disappointed to find out that they went over there and they risked life and limb and gave up part of their bodies and they came home, and while they were gone we gutted our Bill of Rights?

Not only did we get it—we can have a difference of opinion on this, but not only did we gut it, we don’t have time to debate it. We just willy-nilly say: That is fine. We are not even going to tell people that if you have been known for 3 years that this debate was coming up. Yet, we squashed a bunch of bills in the last week, and we have no time for debate, no time for amendments, no time to discuss whether we are willing to trade our liberty for security.

Franklin said that those who trade their liberty for security may wind up with neither.

This is a very important debate that we need to have in the public, in the government. I am of the view that just in discussion of bulk records, we may not get to other programs the government just simply will not tell us about. A lot of them are written about, though.

In another edition of the Electronic Frontier Foundation’s newsletter, they talk about a program called Muscular. Muscular is a program that is siphoning off the data between different data centers. Yahoo and Google sometimes have—at least did have communication between them that was not encrypted. Your information was encrypted going to the data center, but then between data centers, it was not encrypted, and the government simply siphoned all of this off through Executive order. I do not whether it is foreign. I do not know whether there is incidental American. I do not know what is being collected. We have no oversight, no ability to vote on whether we continue this program or discontinue it. The companies are sometimes not notified of the warrants or if they are notified of the warrants or if they are notified of the warrants are told they cannot talk about them; they are gagged. This is the kind of stuff we need to have in the open.

Some of the information people are talking about that the NSA collects on Americans is contacts from your address book, buddy lists, calling records, phone records, emails, and then they put it all into a program they think is private called SNAC. They put it all into this data program, and they develop a network of who you are and who your friends are through all of the interconnection of all of your contacts and friends.

If you ask them “Is any of this protected by the Fourth Amendment?” the answer you will get is “The Fourth Amendment does not protect third-party records.” So, really, we are going to have this go to the Supreme Court. I remember earlier that in the Olmstead case in 1928, Justice Brandeis was in the dissent. The vote was 6 to 3, I believe. The Court ruled that phone conversations have no protection. So we started out with a bad history. The phone was just coming around and becoming commonplace. The Supreme Court said: Your conversations do not have any protection.

It was not until the late 1960s—I think 1968—and the Katz case. Then they say there is an expectation of privacy. So that was a big blow for those of us who believe in privacy, that we finally decided your phone conversations are private. It is an expectation of privacy and that it should take a warrant with your name on it, individualized, with probable cause.

But we go another dozen years, 10, 12 years, and we get another court case called Maryland v. Smith. Here, though, the Court ruled that your conversation are protected from the government, that the government has to have a valid warrant, but they end up saying that your records don’t and that the government can go into your records and pick up and accumulate records about your phone calls without a warrant. I think that was a big mistake.

The case in Maryland v. Smith, though, is one sort of petty criminal for a few records at a time. We had a period. The question that I would like to see before the Supreme Court would be, is that equivalent to all Americans’ phone records all the time? There was at least some kind of investigation going on of this person, they did not do it the right way. I think they should have gotten a warrant.

But in this case, what the government is arguing is that every one of you is somehow relevant to an investigation for terrorism. That is absurd.

Finally, we get to the appellate court last week, and the appellate court says that. They say that, frankly, it is absurd to say that everybody in America is relevant to an investigation. Not only is it absurd, not only is it trifling with your privacy and your right to be left alone, but it takes our eye off the prize.

Why do you think it is that there are not enough human analysts to know that Tsarnaev, the Boston Bomber, was plotting to bomb the Boston Marathon? Why did we not know he got on a plane to go to Chechnya? One of the things that we were told at least in the newspaper was that he had an alternate name of his name, we have been 15 years and we cannot figure out that sometimes these names are spelled a little differently and we did not know he flew back and was radicalized in another country.

I am for spending more money and more time on analysts to investigate and look at the data connected to people of suspicion. But I do not want to spend a penny on collecting all of the information from all of the innocent Americans and giving up who we are in the process. We have to fight against terrorism. We have to protect ourselves. But if we give up who we are in the process, has it been worth it? Are
you really willing to give up your liberty for security? What if the security you are getting is not even real? They said the 52 people who were caught through the bulk collection program—the President’s own privacy group investigated and said not one person was captured. Nobody of one, but they already had information on him from some other source.

Under the Executive order, we are still not talking about the PATRIOT Act, but are talking about something that nobody knows much about at all. No common Member has been, to my knowledge, informed of what is going on in this program; none of those not on the Intelligence Committee.

But they have something with this information called the special procedures governing communications metadata analysis. This is allowing the NSA to use your metadata—phone records, et cetera, who you call, how long you talk, what you say, who they talk to, and so forth. But they already had information on him from some other source.

There is something called something, and we are talking about dozens of programs. We are talking about one program; we would just boggle your mind. We are seeing collection of data—I mean, it goes against the Constitution. Information is something that goes against the Constitution.

Not too long ago, there was a Korean husband and wife. They owned a grocery store. They dealt with a lot of cash and were very successful. Three times a day, they deposited over $9,000, $8 to $10,000. They tried to stay under $10,000 because there were all kinds of extra paperwork if you were over $10,000. So what the government said is, you are structuring your deposits to evade people. You must be guilty of something.

The government then can accuse people of a crime and take their stuff. There is something called civil asset forfeiture. It does not require that you be convicted. You require that you be accused of something.

There was a story not too long ago in Philadelphia—Christos Sourvelis. The teenager was selling drugs out of the back of the parents’ house. So they caught the kid and they were punishing him, but they decided they would punish the parents, too. They confiscated the parents’ house and evicted the family. So the teenager makes a mistake by selling drugs, and what does he not do? They take the parents’ house. So you think that is going to help the kid or help anything get better in this situation by taking the house? But here is the rub: the kid did not even have to be convicted of anything. The kid did not own the house; he was just their kid. If we allow all kinds of data to be out there to catch people and then we are not even going to require that you are convicted of a crime before we take it, the danger of allowing so much data to be collected. But we are currently convicting and taking people’s stuff or their money simply based on what they are using it for.

The Washington Post did a series of articles on this. Turns out that most people having their stuff taken are poor, often African American, often Hispanic, but for the most part poor. One guy was here in Washington and had $100,000 of home equipment, such as a refrigerator or a commercial oven or something, for his restaurant. They just stopped him and took his money. It took him years to get it back. He only got it back because the Institute for Justice defended him in getting it back. It turns out that the government is not always considered to be guilty until he could prove himself innocent.

I think about if I want to know about their lives, if I collect the data from their phones, not the content of their messages, but the data on their phones—that I can know virtually everything about them. Do we want to live in a world where the government knows everything about us? Do we want to live in a world where the government has us under constant surveillance?

They will say: We are not looking at it; we are just keeping it in case we want to look at it. The danger is too great to let the government collect your information.

I think there is a valid question as to whether simply the collecting of your information is something that goes against the Constitution.

One of the other areas where we are seeing collection of data—I mean, it would just boggle your mind. We are not just talking about one program; we are talking about dozens of programs the government has instituted to look at your stuff.

There is another group called EPIC, the Electronic Privacy Information Center. They talk about suspicious activity reports. Those are reports your bank has to file whenever you deal in cash at the bank. There are certain dollar limits. They think, well, gosh, someone is probably a bad person if they are putting $5,500 in cash in the bank. Well, first of all, lots of honest, law-abiding people do that.

The burden should always be on the government to prove you are guilty of something. You should never be convicted and you should never be punished without there first being a trial, without there first being evidence, without there first being a trial with a lawyer, and a verdict.

So some of this has gone into the war on drugs. The war on drugs has a lot of problems. But part of it has been the abuse of our civil liberties. Also, part of the war on drugs is that there has been a disparate racial outcome. What do I mean by that? There have been statistics, three out of four people in prison are Black or Brown and are there for nonviolent drug use. But if you look at the surveys and you ask yourselves: Are White kids using drugs the same as Black kids? The White kids are 80 percent of the public. How do we get the reverse for 80 percent of the population in jail is Black and Brown? It is a problem. If we can’t figure it out, you are going to have to continue to realize why people are unhappy.

If you want to know why there is unhappiness in some of our cities, you should read The New Yorker. About 3 or 4 months ago they did a story about Kalief Browder. Kalief Browder was a 16-year-old Black kid from the Bronx. He lives in a poor situation. His family had no money, and he had been in trouble before.

He was arrested, and he was sent to Rikers Island—16 years old, arrested, sent to Rikers Island. His bail was $3,000. His family couldn’t come up with $3,000. He was kept for 3 years without a trial. At least some of it was in solitary confinement. He tried to commit suicide. Can you imagine how he must feel? Can you imagine how his parents must feel? Can you imagine how his friends feel, the kids who went to high school with. Do you think they think justice is occurring in our country?

We have to be careful we don’t let slip away what we are in the process of all of this fight against terrorism, all of this fight against drugs, because what happens is people take things that are bad. Terrorism is bad, drugs are bad. But we take this fight about something that is bad, we forget about the process of law, we forget about the rule of law, and we forget who we are in the process.

But if you want to know why people are unhappy in some of our big cities, you want to see that unhappiness in the streets, it is because some people don’t think they are getting justice. I, frankly, agree with them. I think there isn’t justice in our country when this occurs.
Originally, we had the Constitution. Then after 9/11 we got the PATRIOT Act. The biggest change between the Constitution, which provided protection for us from people, bad people, for 200 years or more—the biggest difference is we changed the standard on how we go after people or how we would give out warrants. I remember having this debate about 3 years ago when we talked about the PATRIOT Act. I was walking along talking to another Senator, and he was alarmed. I said, ‘The PATRIOT Act would expire at midnight. What would we do?’ And I was like: Couldn’t we, for just a couple of hours, you know, live under the Constitution? I mean we did for 200 years, for goodness’ sake. We have all kinds of tools. There is almost no judge in the land that is going to turn down a warrant. The FISA warrants, the ones they give for security, 99.9 percent of them are approved.

‘Could we give out warrants? They said it takes too long. Computers work in the blink of an eye. In the blink of an eye, if John Smith is thought to be a terrorist and he called 100 people, in the blink of an eye, I can look at the 100 calls. I can say: What is the evidence that some on the list look suspicious or any of them from a foreign country or any of them on another list from somebody calling from a foreign country?

There are ways to look at this where we would simply then get a warrant for the next hop and the next hop and the next hop. There is no reason we can’t catch terrorists the same way we catch other bad people in society by using the Constitution.

Initially, the government had to show evidence that you were an agent of a foreign power, but this is no longer true. Now all you have to do is make a broad assertion that the arrest is related to an ongoing terrorism investigation.

The problem in the FISA Court is that when they take you to this court, it is secret. You don’t get your own lawyer, and basically the government says to the FISA Court judge: ‘Oh, yes, it is related to an investigation—but I don’t believe they are forced to show that it is relating to an investigation. In some ways, I think we have gone too far because what you end up having is you have people who are saying it is related, but the question is, Is there any evidence that there is a relation to it and how could there be a relationship of everybody in America to an investigation?

We also often have given gag orders, and this is one of the big complaints of the Internet companies. They get order after order after order, a national security letter. They get all of these suspicionless warrants, and then they are told they can’t talk about it or they go to jail. There are some people who got gag warrants who were librarians and for a decade or more were not allowed to talk to anybody to say that they had received this warrant.

The American Civil Liberties Union has written that the PATRIOT Act ‘violates the Fourth Amendment,’ which says the government cannot conduct searches without obtaining a warrant and showing probable cause to believe that a person has committed or will commit a crime.

The ACLU goes on to say that it ‘violates the First Amendment’s guarantee of free speech by prohibiting the recipients of search orders from telling others [these are the gag orders] about those orders, even where there is no real need for secrecy.’

These are the gag orders. They also say that it ‘violates the First Amendment by effectively authorizing the FBI to launch investigations of American citizens in part for exercising their freedom of speech.’ Now, they went back in and they wrote the rules and said: Oh, you are not supposed to talk about these because it is free speech. But the bottom line is that the opening we have given to the intelligence community is so wide that there are, for all practical purposes, no limitations on the gathering of your information.

In the Maryland v. Smith case, we kind of got to the point where we have said that telephone conversations are protected, but we have said trace-and-trap and pen register, where they collect your phone calls, is not. The problem is—and this is a problem that needs to be corrected by the courts—at this point they are essentially nonexistent. There are no protections in the court for any kind of warrant that has to be gotten for any kind of metadata.

The FBI need not show probable cause or even reasonable suspicion of criminal activity. It must only certify to a judge, without having to prove it, that such data would be relevant to an ongoing investigation.

Also, typically in the past, when we gave warrants for wiretaps, they were sorted to entities. You kind of had to name the entities. But now we are giving the regist, trace-and-trap data on your phone calls nationwide. This is a severe departure from what we had had in the past because typically warrants were given under a judge’s jurisdiction, so within a region. But now we have a blanket order that says, we can collect any of your phone records, anywhere, anytime, across the whole country. This goes against the history of the way we have had jurisdiction.

We talk a lot about phone data but your emails are an issue too. Interestingly, your emails, after 6 months, have no protection at all. So any email you have on your computer, after 6 months, has no protection at all.

Up to 6 months, there is a little bit of protection, but the government is allowed to look at—without a probable cause warrant—is able to look at whom you are communicating with and the header on the subject line. The government is also able to look at, through metadata, the Web sites you visit.

You can see how various groups would say that might be an infringement of their First Amendment because it’s a part of the government that now knows I go to Electronic Frontier Foundation or I go to EPIC or I go to ACLU. I am concerned with civil liberties. Am I a potential problem to the government? I am concerned and I am cause because the government now knows what the government now knows what Web sites I go to and that I am concerned with this?

Now, if the government would hear—they would say: No, that is not what we are doing.

But the other part of the question is maybe not yet, maybe not now, but you can also squelch and severely restrict First Amendment practices if just the legal of the government looking at it might change my behavior. There is all the evidence, there have been surveys, saying that 20, 25 percent of people doing things online are changing their behavior because they are afraid of the government.

The government argues that the list of Web sites and Web site addresses is simply transactional data, but I think there is much more you can garner from this data.

The PATRIOT Act that is due to expire is just three sections. Interestingly, the complaints that I have are a lot over section 215, which the government claims is their justification for collecting all of your phone records. Now, the courts have said otherwise. The appeals court said last week that the business records do not give them the authority to collect your records. In fact, the courts have been very specific that it is illegal.

The President is currently ignoring the court, and the President continues to collect your phone data, all of your phone data, all of the time, as much as they can get. They have changed all of their behavior, that I know of, since it was declared to be illegal.

Some of the changes—I would repeal the whole thing. I would repeal the whole PATRIOT Act. But some of the changes that I would favor, if we were allowed to change it, if we could get a consensus in this body that would mirror the consensus that I think is in America—once you get outside the beltway of Washington and you go back into America, 99 percent of people are for this, the vast majority of people think the government shouldn’t collect all of their phone records all of the time.

But there are some changes we could make. I think the first thing we ought to do is not replace this system but basically say we are not going to collect data in bulk, that we are not going to collect your phone records, your credit card information, your emails, and where you go on the Web. We are not going to collect that in bulk.

I think we could change the PATRIOT Act to say we are only going to
collect data that has to do with some- 
one who is suspicious, that we have presented some suspicion to a judge, and 
that the judge said: This is prob- 
able. The standard is not that hard. It is 
hard to, in fact, a judge saying no. Judges always say yes. If at 
3 in the morning there is a murder 
somewhere inside a house in DC, what 
do you think the odds are that when 
the police call for the warrant that the 
judge will say no? Odds are most of us 
want the judge to give permission. But 
it is the checks and balances that we 
want so we don’t have police who oper- 
ate on bias or bigotry or religious dis- 
?rmination. We want the people to be 
bound by the rule of law. 
It is kind of interesting, because you 
will hear Republicans sometimes give 
lip service to the rule of law. But in 
giving lip service to the rule of law, 
what happens is they seem to forget 
the whole idea of privacy. They are for 
it in small doses, but not so much with regard to personal liberty. 
The New York Times has written and 
talked about some of the economic ef- ects of this. In an article by Scott 
Shane a couple of years ago, he talks about the content business, 
many of whom rely on American com- 
panies for email Internet services, are 
concerned about their privacy. 
Now you can say you don’t care 
about foreigners, and they don’t care 
about the American business, yet, so 
you can understand maybe there is going to be 
a lower standard. But realize, if we 
are going to say the standard is quite a 
bit different and that there is no pro- 	ection for anybody’s data on the Internet, realize that standard is going 
to scare people in other countries away 
from our stuff. It is going to scare peo- 
ples away from our email companies. It 
 is going to scare people away from 
our search engines. 
I think if you would talk to any of 
these companies out there—and some 
of these companies are some of the 
greatest success stories in our coun- 
try—if you think of the Internet revo- 
lution and you think of how America has really led, America has been the 
leader. We have created hundreds of 
thousands of jobs, billions of dollars of 
profit. In our zealously to grab up 
every bit of information and in our 
zealously to ignore, basically, the 
Consent Clause, grabbing as much stuff we are scaring people to death. There has already been billions of 
dollars lost to North American com- 
panies because of this, because Euro- 
pian, Asians, they don’t want our stuff anymore. They don’t want things 
with our hardware. They don’t want to 
deal with our services because they are 
fearful the U.S. Government is looking at all of their transactions. 
The government is pretty clueless 
over this. Recently, one of the mem- 
bers of President Obama’s administra- 
tion came out—in fact, several mem- 
ers—complaining about encryption. 
They are like: Well, you know, we are 
going to maybe have some laws to pre- 
vent these companies from encrypting 
thing. It is like: Don’t you get it? 
Don’t you get why companies—the 
encryption is a response to govern- 
ment. The encryption is a response to a 
government that has run amok pri- 
cipally collection wise, gathering, 
collecting all of our information. So if you 
are an American Internet company, if 
you are an American search engine or an 
American email company, what do 
you think you are saying? You are say- 
ing: We don’t want the Europeans back, the only way I getting 
Asians back is to say I am going to 
protect them from my government. 
Isn’t that a sad state of affairs? 
There is a danger that we will destroy 
the great American companies by forcing 
them to terrorists if everything is encrypted? 
Edward Snowden was using an 
encrypted email server, and the 
company that was housing him—that was 
specifically the genre of their business. 
They had to sell the service encrypted because some people want to 
be private for a lot of different reasons, 
many of them legitimate—business, 
legal, personal reasons. But, anyway, 
when they came to get Edward Snowden’s email, they don’t just 
to get his email; they said they wanted 
the encryption keys for the entire busi- 
ness. 
See, this is the problem. You have to 
realize—there are zealots who don’t 
seem too concerned with your privacy 
rights. Imagine what they are going to 
do if they say to Apple: We don’t want 
just the encryption for you to let us in 
to one time to see John Smith, who we 
think is a terrorist; we want you to let 
us in all of your products. If they force 
a company like Apple to do that, 
who in the world would want anything 
from Apple anywhere in the world? 
There is a danger that we will destroy 
American by forcing this surveillance into 
their products. 
(Mr. TOOMEY assumed the Chair.) 
Senator WYDEN has also made a good 
point. If the government is going to 
mandate backdoor access to the code 
source and the government is going to 
say that Facebook or Google has to let 
them in a backdoor, that is a window, 
that is a breach of the wall, it is a 
breach of protection. 
Senator WYDEN and others have made 
a good point. He said: If you do that, 
you will be actually weakening these 
companies to attacks of cyber security 
because if somebody can get in, some- 
body else who is smart can get in as 
well. 
So there is a danger to letting the 
government in. 
There are dozens and dozens of these 
programs. The NSA has something 
called the Dishfire database. It stores 
years and years of text messages from 
around the world. That might be fine 
except for it ends up trapping people 
who are also American citizens as well. 
It ends up tracking and trapping purely 
internal American communications that are retransmitted 
outside the country. 
They have a program called Tracfin 
that collects and accumulates 
gigabytes of credit card purchases. I 
don’t know—for some reason, I am 
more appalled by the credit card pur- 
chases than I am the phone because I 
think of all the stuff you can buy with 
your credit card and what it indicates about you. 
With phones—you can find out a lot with people’s phone records. When the 
Stanford students looked at phone 
records, they found that 85 percent of 
the time they could tell your religion. 
The majority of the time, they could 
tell what your partner’s name was. 
The majority of the time, they could tell what 
disease you had. The vast majority of 
the time, the government can then also 
connect you through social networking 
and tell an extraordinary amount 
about you. 
With a credit card, it is even more 
explicit than that. They can tell if you 
drink, if you smoke, and how much, what 
magazines you buy, what books you read, what medicines you take. All 
these companies, some of the great American companies, are 
more and more and more that type of society. We are 
less and less a society of cash and 
more and more a society where every- 
thing is on paper. That should worry 
us. It should worry us that the govern- 
ment can look at your credit card records 
all of the time. It should concern us 
that the government also says, when 
you ask them—and this is an impor- 
ant point—that your records, when 
held by a third party, are not protected 
ad they are debating that. What is 
true. I think it needs to be looked at 
again by the court, and I think there 
are those who will, in the court, say 
your third-party records are. The 
Maryland decision was 6 to 3. 
Justice Marshall felt your third- 
party records should be protected. He 
specifically mentioned that there was a 
potential stifling effect for association, 
there was a potential stifling effect for speech, and he was quite concerned 
that the government really should have a warrant to look at your records. 
My hope is that someday the Mary- 
land v. Smith case will be relegated to 
the dustbin of history, into the same 
dustbin in which we put Olmstead. In 
Olmstead, they said you couldn’t have any protection for your phone records. 
It went on for 40 years. I think we still 
live with some of that because we have 
trained and taught the phone compa- 
?ies not to be great advocates for our 
privacy, and there has to be 
seen a great deal of fighting on the 
part of the phone companies in adva- 
crating for us. Some of the Internet 
companies have begun to step up. But I 
would like to see both phone companies 
and Internet companies stand up and 
say: We are not going to give you access to us, 
and you will have to take all the way to the 
Supreme Court. 
If they did, if there was unified re- 
?istance among the consumer and 
the companies to say: We are not going to let you have our data 
without a fight, and you are going to have 
to prove suspicion, and that you
are going to have to get a specific warrant," I think then we might be able to get back to a more constitutional scenario.

Within the NSA, there has also been evidence of installing filters in the facilities of Internet and telecommunication companies, generally obtaining them with court orders, and building backdoors into their software and acquiring keys to break their encryption. If this becomes the norm, you can see how people will flee American products, and people are not going to believe in American things. There is an enormous, beyond-imagination economic punishment to our country that is occurring now and going to continue and worsen if we don’t wise up and send a signal.

So for those in this body who say: We need to collect more information. We are not getting enough information. Warrants be damned. I don’t care what they do. Take all my information, get as much as you want. And then they will have to explain why they are destroying an American industry and why people around the world are going to say: We are alarmed at that, and we want some protection. If we are going to use American products, if we are going to use American email, we want to know there is not going to be indiscriminate collection of our information.

Bill Binney was probably or is probably one of the highest ranking whistleblowers from the NSA. The thing he has to say should disturb us because he probably knows more about this than any of us will ever know. Bill Binney said that without new leadership—this is in our intelligence agencies—new laws and top-to-bottom reform, the NSA will represent a threat of turnkey totalitarianism. The capability to turn its awesome power—now directed mainly against other countries—will now be turned on the American public.

Originally, all of these intelligence forays were to get foreigners. We lowered the standard, saying: Well, they do not live here. These are potentially terrorists, and so we are going to have a lower standard.

They started out as foreign searches. In fact, the NSA was originally intended to search for foreigners and to search the information of foreigners. And I am not opposed to that. In fact, I was on one of the Sunday morning programs—last night. I was asked: Well, are you for eliminating the NSA? I said: Of course not. I am for the NSA. I want the NSA to do surveillance that will help to protect us from attack.

Not only am I for surveillance, I am for looking as deep as it takes. But I want some suspicion. I want suspicion that this person—that there is some evidence against this John Doe. You don’t need to prove they are guilty; you just have to have something that points toward them being suspicious. You then go to the judge, and the judge says: Here is a warrant. And if there is evidence the people he called is suspicious, go back to the judge and get another warrant. Go deeper and deeper. There is no reason why this couldn’t be done nearly instantaneously. There is no reason why it couldn’t be done 24 hours a day. And there is no reason why we can’t have security and the constitution as well.

This battle has not been just about records; it has also been about another key part of the Bill of Rights, which is the right to a trial by jury, the right to due process, but people outside of battle, particularly American citizens, should. In some of these cases, we are talking about American citizens accused of a crime—perhaps terrorism—everybody said. Yet, we are going to say: Well, they do not really deserve trials. They do not deserve lawyers.

In fact, and I find this really hard to believe, one Senator said recently: Well, we do not need a lawyer for a judge, just drone them. Ha-ha.

The same guy said: Well, when they ask you for a lawyer, you just tell them to shut up.

About 10 years ago, Richard Jewell was thought to be the Olympic Bomber. Everybody said he did it. The TV convicted him within minutes. Everybody said he was the Olympic Bomber. He fit the profile: He wore glasses, he was an introvert, he had a backpack, and he was nice. Somehow, that was the profile. Everybody said he did it. The only problem is, he didn’t do it.

So here he was accused of being a terrorist, of exploding something, doing something terrible and killing innocent people. And I think to myself, if he had been a Black man in the South in 1920, what would have happened to him? Or if he had been any American in this century if the people who believe in no jurisprudence were really in charge. We should be afraid of ever letting these people get in charge of our government, because the thing is that Richard Jewell was innocent.

People say: Well, these aren’t just American citizens, they are enemy combatants, and we don’t give any kind of jurisprudence—no judges or lawyers for these people. They are enemy combatants. Well, it kind of begs the question, doesn’t it? Who gets to decide who is an enemy combatant and who is an American citizen? Are we really so frightened and so easily frightened that we would give up a thousand-year history, the Magna Carta, even before we had juries—even in the Greek and Roman times, we had juries. Are we really willing to give that up and give people a classification that the government assesses them that cannot be challenged, where people don’t get a lawyer, they do not get to a judge and told why they are being held, and we would hold them forever?

This was the debate over indefinite detention. The response I got during the debate was: Well, yeah, we would hold them in Guantanamo. An American citizen? Sure, if they are dangerous.

Kind of begs the question, doesn’t it? Who gets to decide who is dangerous and who is not?

When this finally made it to the Supreme Court, though, whether you could hold an American citizen, the Supreme Court rejected the administration’s claim that “enemy combatants” were not entitled to judicial review. It took years and years to finally have the Supreme Court tell people that the Bill of Rights was still in effect, that if you are an American citizen accused of a crime in our country, they do not have a right to a trial by jury, you do have the right of habeas corpus, you do have all of the rights of an American citizen. And no one can arbitrarily take those away from you. And no one can say: You don’t think that is potentially a problem, think of the South in the 1920s. Think of what would have happened if Richard Jewell were a Black man in the 1920s. He might not have lived the day. Think if Richard Jewell had been a Japanese American during World War II, when we decided that the right of habeas corpus didn’t apply to you if your parents were from Japan or if your grandparents were from Japan. There was an experiment I remember, I think in college—a psychology experiment. They put a person in a room, and they said: This person has information, and we are going to shock them just a little bit. Here is the dial. You get to decide. They wanted to ask how high people would turn up the dial. It was pretty scary—a good amount of people you would imagine are normal, respectable people—how high would they turn the dial to shock somebody to torture somebody. So we think that wouldn’t happen, but it does.

Any time we make an analogy to horrific people in history—to Mussolini or Hitler—people say: You are exaggerating; it is a hyperbole. Maybe it is. Particularly to accuse anybody of that is a horrific analogy, and I am not doing that.

But what I would say is that if you are not concerned that democracy could produce bad people, I don’t think you are really thinking through too much. And if you are not concerned about procedural protections—procedural protections are how evidence is
gathered, how evidence is taken from your house, what rules the police have to obey. People don’t quite get this. We don’t have a mature discussion on this. Any time we try to say that this should stop and that someone could be a bad policeman, the media dumb it down and say that we are saying policemen are bad. No, it is the opposite. Some 98 or 99 percent of the police are good. In fact, in the general public it is pretty close to that.

The thing is that we have the rules in place for the exception to the rule. We have these procedures in place because maybe it isn’t tomorrow that we decide that we are going to round up all the Japanese Americans again and put them in internment camps, but maybe next time it is Arab Americans. So we have to be concerned with this because we don’t know who the next group is that is unpopular.

The Bill of Rights isn’t for the queen. The Queen of England isn’t for the high school quarterback. The Bill of Rights is for the least among us. The Bill of Rights is for minorities. The Bill of Rights is for those who have minority opinions. The Bill of Rights is for those who are oddballs, those who aren’t accepted, those who have unconventional thinking.

If we are so frightened that we are going to throw all the rules out and we are just going to say that here is my liberty, take it, and here are my records; if you collect all of Americans’ records, we are not going to get very far. We are not going to get very far, and if we think we are going to get very far, that is when we are going to lose it.

There have been good folks within the National Security Agency who have talked about and have pointed out that we have gone too far. Bill Binney was one of those. He was a high-ranking NSA official who decided that they had gone too far.

There was an interview—it has probably been 1 year or 2 years ago—with Bill Binney that was in “Frontline.”

One of the first questions was:

What a lot of people in government will say is that you don’t understand; we’re still at war. We have lost 3,000 people in 9/11. This is a very important program.

They talk about the warrantless collection of all records:

It has saved thousands of lives, as Cheney said at one point. There are multiple plots that have been stopped because of this program. You’ve got to be very careful about what you wish for, because if you do, you might have another attack, and you might have blood on your hands.

Fear:

What is your reaction to this question about the effectiveness of what all this has been?

Binney replied:

First of all, they like to jump it in as one program and say you can’t cancel the program.

In fact, Binney was famous because he had been working on a program that did investigate terrorists but protected American information and American information from incidental collection.

So he said:

That’s false to begin with. It’s multiple programs. The one program that dealt with domestic speech was called Stellar Wind.

Stellar Wind was one that was also created by Executive order and was done without the permission of Congress before the PATRIOT Act.

They had the other foreign ones; you mentioned the names. There were other names that were listed in the PRISM program that was dealing with foreign intelligence. There were a whole bunch of those programs, not just one.

So the point is you stop the intelligence, the domestic intelligence program, period.

So Binney’s opinion was—this is the guy who wrote a lot of the original programs. Bill Binney said he would continue gathering information on foreigners. This is a guy who worked for 30 years for the NSA. He is not some dove who doesn’t want to do anything about terrorists. Bill Binney worked for 30 years to develop the programs to help us catch terrorists, but he felt it wasn’t proper or constitutional to collect Americans’ records without a warrant. He said if we get incidental records, destroy them; don’t collect them.

He says:

Eliminate them. (The records of Americans are) irrelevant to anything that—

The incidental collection—

is going on. All the terrorists would have been caught by the process that we put in place for ThinThread—

ThinThread was a program they had before they went to the unconstitutional program—

which was looking and focusing in on the international information and the other simple rules like anybody that was looking at jihad advocating sites. . . .

Et cetera.

That would get them all, and you didn’t have to do the collection of all other data that requires all that storage, transport of information to the storage, maintenance of it, interrogation programs, all of that added expense that they are incurring as a part of it over the last 10 years. You wouldn’t have any of that.

Frontline then asks:

This problem of haystacks, how big a problem is that? Is that what we’ve done, is we’ve created a situation where the haystacks are bigger, and it’s almost impossible to find?

This was Frontline’s question. It is a question I have been asking, also. If you collect all of Americans’ records all of the time, if we collect all of your phone records, can we possibly look at them?

Now, computers are getting better, but still there has to be a human involved. I think we are overwhelmed with data. At one time about a year ago, I remember an article where I think they collected millions and millions of audio hours. They had just been collecting. They were vacuuming up everything. And I think they had only been able to listen to about 25 percent of it.

So the thing is that there is information that we need to get and we should get.

When the Tsarnaev boy—the Boston Bomber—went to Chechnya, we needed to know that. We needed to continue to see if there was evidence that we could take to a judge to continue to investigate him. So we do need surveillance. But what we don’t need is discriminate surveillance, and we don’t need the haystack to get so big that we can never find the terrorist in the stack.

Binney responds:

Well, what it simply means is if you use the traditional argument they say we’re trying to find a needle in a haystack, it doesn’t help to make the haystack orders of magnitude larger, because it makes it orders of magnitude more difficult to find that needle in the haystack.

Frontline:

And is that what they’ve done?

Have we made that haystack so large that we are actually having trouble catching terrorists because we’re scooping up and sifting up all of America’s data?

Binney:

That’s what they’ve done. And now they’re looking at things like game playing and things like people doing that. I mean, this is ridiculous. How relevant is that to anything?

Frontline:

But they say there’re computers, and in Utah they’re going to be able to take all this stored data, and they’re going to be able to go through all of it, and they’re going to be able to connect the dots. Connect the dots—that’s what everybody wanted them to do after 9/11.

Bill Binney, former senior NSA:

See, that’s always been possible. Before 9/11 we were doing that. That was already happening with ThinThread. That wasn’t an issue at all. That’s why we should have picked this out from the beginning. We should have implemented it, the ThinThread program that we had. We had the haystacks. (We couldn’t—by the) connect-the-dots program on everything in the world, but we didn’t. That’s why we failed. It wasn’t a matter of not having the program; it was a matter of not implementing the program we had.

When 9/11 came, we gave medals to the heads of our intelligence agencies. No one was ever fired. Yet the 20th hijacker was caught a month in advance.

Bill Binney was caught in Minnesota trying to take off in planes but not land them. The FBI agent there wrote 70 letters to his superior trying to get a warrant. It wasn’t that we had to dumb down and take away the procedural protections of warrants. The warrant wasn’t denied. They would have a much stronger argument if they could say: We tried to catch the terrorists, but the judges kept saying no to warrants.

That is absolutely not true. They didn’t ask the judge for warrants. So the 70 requests in Washington sat at FBI Headquarters and weren’t requested.
We also had another hijacker in Arizona training to take planes off. Once again, the FBI agent there was doing a great job in sending the information to Washington, and but people were not talking to each other. It had nothing to do with saying the Constitution is too scarce to try to say the Constitution or we will never catch terrorists. It had nothing to do with that. But that is precisely the argument we have.

In the aftermath of 9/11, the PATRIOT Act was rushed to the floor—several hundred pages—and nobody read it. It didn't come out of there was one out of the committee. They didn't use that. They rushed a substitute to the floor, and no one had time to read it. But people voted because they were fearful, and people said there could be another attack and Americans will blame me if I don't vote on this.

But we are now at a stage where we should be asking ourselves are we willing to give up our liberty for security?

Can you not have both? Can you not have the Constitution and your security? I think you can.

Several agents—other than Bill Binney, at that—said—several national security officials—that the powers granted the NSA go far beyond the expanded counterterrorism powers granted by Congress under the PATRIOT Act.

The court now agrees with that. Any time someone tries to tell you that metadata is meaningless, don't worry. It is just whom you call. It is just your phone records. It is not a big deal. Realize that we kill people based on metadata. So they must be pretty darned certain that they think they know something based on metadata.

So these are ostensibly or presumably terrorists that are being killed. But what I would say is that if they are killing based on metadata, I would think you would want your own metadata pretty well protected.

To give you an example of how Representatives are sometimes getting it right, in the House of Representatives, they have been and responded to the people. THOMAS MASSIE and Representative LOFGREN introduced an amendment to the Defense appropriation bill last year. This amendment would have defunded the warrantless backdoor search that is included in the FISA Act. This is where we say we are investigating a foreigner, but the foreigner talks to an American who talks to other Americans, and it ripples out into enormous amounts of incidental information. The information from 702, when you analyze it—9 out of 10 bits of information that are collected—is not about the person we have targeted. They are incidentally collected about other individuals.

But when Representative MASSIE and Representative LOFGREN introduced their amendment to defund the backdoor searches and to tell the CIA and NSA that they cannot mandate that companies give a backdoor entry into their product, the amendment passed 293 to 123.

But just to show you that no good deed goes unpunished and just to show you the ignorance of the body—the vast majority of people do not want their phone records collected without warrant—what did they do when this passed 293 to 123? They stripped it out in secret in conference committee and it was gone. The only way we can stop it like everything else around here. You wonder why your government is completely broken. We lurched from deadline to deadline, and it is on purpose really. We do deadline to deadline because we have to go. It is spring break. We are going to be late for spring break. We have to go, so we have to finish this up before we go.

It is how the budget is done. No one ever votes on whether we are going to spend $X or $Y. We throw the whole bucket of $X into 2,000 pages. Nobody reads it. It is placed on our desk that day. Nobody has any idea what is in it. None of your concerns about your Government are ever addressed. We just pass, boom, the whole thing and it is done. The door. It is the same with these kinds of things. Because there is a deadline—and this amendment was passed 293 to 123, saying that we shouldn't fund these illegal searches and that we should stop the bulk collection records—it is passed overwhelmingly. Yet, in secret, somehow it is taken back out of the bill and never becomes law.

Now, while I don't agree completely or really at all with the reform that has come forward out of the House, it is at least evident they are listening. They have a bill that would end the bulk collection of records to replace it with, I think, another form of bulk collection, but it still passed overwhelmingly to try to fix it—the first thing I hear over here from people is, Well, we are not collecting enough of your phone records. They are disappointed that the government isn't getting—they have access and they claim they can get it, they gain access to everything, but the Government really is not collecting all of it, so people are very disappointed; they want to collect more.

The American people say: Enough is enough. We want our privacy protected. We want the Government to take less of our records. Congress recognizes that—the House of Representatives. Then it comes over to the Senate, and the Senate says: Oh, my goodness. We want to collect more of your records. We do not think we are getting enough into your privacy. We do not think we have completely trashed the Bill of Rights enough; let's try to gain more of your records.

One of the other things the Massie-Loftgren amendment did—that did pass over there—was to get rid of and say that no funds would go to mandate or request that a person alter his product to permit electronic surveillance. This is what is going on. What is pretty nefarious and antithetical to freedom is that our Government is telling companies like Facebook and Google and these other companies—they are forcing them to let the government have access into their products.

Everybody knows this is going on. It is no secret, and it is killing these companies in their work because non-Americans don't want to use their email. They are afraid the government has forced their way into all their transmissions.

There is currently another bill in the House of Representatives by Representative POCAN, Representative MASSIE, Representative GRAYSON, and Representative McGOVERN that would repeal the entire thing. It repeals the PATRIOT Act and FISA amendments of 2008, permits the courts to re-examine the warrants the courts have to have appeal. It basically tries to make our intelligence courts more like an American court or American jurisprudence.

EPIC is the Electronic Privacy Information Center. They talk some about these national security letters I mentioned earlier. There are now hundreds of thousands of national security letters. These are letters that are warrants. They are not signed by judges. They are signed by law enforcement and the police. This goes against the fundamental precept of our jurisprudence. The fundamental aspect was that we divided police from the judiciary. It is supposed to be a check and balance. In case the local policemen had some sort of bias, they always had to call somebody else. It is not perfect, but it is a lot better than not having a check and balance.

When we got to NSL—this comes out of the PATRIOT Act—they start out with your name on it, and the House has said if they grow overwhelmingly to try to fix it—the first thing I hear over here from people is, Well, we are not collecting enough of your phone records. They are disappointed that the government isn't getting—they have access and they claim they can get it, they gain access to everything, but the Government really is not collecting all of it, so people are very disappointed; they want to collect more.

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said that it had to be specific to an individual. That is one of the real problems with the bulk collection of records. They are not really based on suspicion of an individual because basically it is just collecting all of your records, indiscriminately.

The government is not even obeying the loose restrictions they put in place. The Constitution says you have to have probable cause. You have to present standard, not just a judge. You don’t have to prove that they are guilty, but you have to have enough evidence that the judge says it looks like that person could be guilty of a crime.

So with the PATRIOT Act we lowered that standard and then lowered it again. For collecting information under the PATRIOT Act, all you have to do is say that the information you want is relevant to an investigation. Where the court, the court basically said this is absurd. So 2 weeks ago, the court just below the Supreme Court said it is absurd to say that every American’s phone record is somehow related to an investigation. They said it takes the meaning of the word ‘relevant’ and basically destroys any concept that the word has meaning at all.

The PATRIOT Act went to a much lower standard, not just probable cause but just that it might be relevant to an investigation. And even with that lower standard, the court said that is absurd.

How does the President respond? The President responds by doing nothing. The President could end this program tomorrow. Every one of your phone records is being collected without suspicion, without relevance. In contradiction to even what the PATRIOT Act says, your records are being collected. The second highest court in the land has said this is illegal, and the President does nothing. The President said to Congress, Oh, yes; I will do it if Congress will do it.

It is not a continuous. We did not start the program. The authors of the PATRIOT Act had no idea this was going on. The PATRIOT Act, according to the court, does not even justify this. We are looking at telephone records. We are looking at email records. EPIC, the Electronic Privacy Information Center, has another big complaint about this; that people were put forward and then told that they could not even show a fact that they had been given a warrant. They were threatened with 5 years in prison for even mentioning that they had been served a warrant.

This, I think, is a obvious contradiction to the Fourth Amendment. We have legislation that contradicts the Fourth and the First Amendments.

The national security letters in 3 years, from 2003 to 2006—these are the warrants that are not written by FBI agents, not written by a judge—there were 143,000 warrants given out in our country to Americans with a warrant written by the police.

The New York Times has talked about this, and Charlie Savage in a report last year reported that the Justice Department had to apologize to a Federal appeals court for providing inaccurate information about a central case challenging the unconstitutionality.

Now, what is truth and what isn’t truth. When you go to a court, it is like when your kids fight; there are two sides to everything. One child has one argument, and the other argument is listening to both sides and trying to figure out what the truth is. The court is no different. But in these courts, you are only hearing one side and only the government represents their case.

The government says that we want all the phone records because they are relevant. No one stands up on the other side and says: I object. That is one of the reforms Senator Wyden and I have talked about, having somebody represent a indem to stand up and say maybe all the phone records in the country are not relevant, maybe they are not relevant to an investigation. It would be absurd to say every American’s records would be relevant.

Probably the one in America knows more about this subject than Senator Wyden, who I see has come to the floor. Senator Wyden knows more about this because he has been on the Intelligence Committee for several years.

There are two tiers within Congress. There is a great deal of information that I have never been told. Even though I was elected to represent Kentucky, I am not allowed to know a lot of things that happen in the Intelligence Committee. The downside for Senator Wyden is he is allowed to know more but then he is not allowed to talk about it, which makes it a problem. It is hard to have dissent in our country. If I am not given information, how can I question it? And if the Senator from Oregon is given information, he is not allowed to complain about it.

These are the things we struggle with in trying to find truth.

Mr. WYDEN. Mr. WYDEN. Will the Senator from Kentucky yield for a question, without losing his right to the floor?

Mr. PAUL. Yes.

Mr. WYDEN. I thank my colleague. It is good to be back on the floor with him once again on this topic. As we have indicated, this will not be the last time we are back on the floor. My colleague has made a number of very important points already. I was especially pleased to hear my colleague brought to light something that is little known: that the Attorney General of the United States is interested in excuse me—the FBI Director is interested in requiring companies to build weaknesses into their products. In other words, the companies in interested in encryption, as my colleague mentioned. What happened as a result of that encryption, they had a chance to start getting back the confidence of consumers, both in the United States and worldwide—and then the FBI Director has been interested in, in effect, allowing companies to build a backdoor into their systems. This, once again, kind of defies common sense because the keys will not just be out there for the good guys. They will also be available to the bad guys.

I am very pleased that my colleague from Kentucky has brought a particularly new development in this debate, and I have sought as a member of the Intelligence Committee for some time to come up with an approach that once again demonstrates that security and liberty are not mutually exclusive. But we are certainly not going to have both, as my colleague touched on in his statement, if the policy of the FBI Director is to require companies to build a backdoor into their products—build systems.

Now, the Senator from Kentucky is very much aware that my staff and a number of Senators are currently working through a number of issues and amendments related to questions that we’ve been asked about the Patriot Act and get more family wage jobs for our people through exports. A number of us, myself specifically, have been concerned that the majority leader and other supporters of business as usual on bulk collection of all of these phone records would somehow try to take advantage of our current discussions and try to, in effect, sneak through a motion to extend section 215 of the USA PATRIOT Act. As long as the Senator from Kentucky has the floor, that cannot happen. My hope is that once our colleagues have agreed on a path to go forward with job-creating, export-oriented trade legislation, it will be possible to resume our work on that very important bill.

In the meantime, my question for my colleague pertains to an issue that he noted I have been at for some time. As my colleague knows, I have been trying to end the bulk collection program since 2006, and the reason I have is because this bulk phone record collection program is a Federal human relations database.

When the Federal Government knows whom you have called, when you have called, and often where you have called from, which is certainly the case if somebody calls from a land line and someone has a phonebook, the government knows a whole lot about who your friends are. It knows a whole lot about what most Americans would consider to be very private.

This has been an important issue. My colleague from Kentucky has been an invaluable ally on this particular cause since he arrived in the Senate, and I just want to give a little bit more background and then get my colleague’s reaction to this question.
I have seen several of my colleagues come to the floor of the Senate and talk about why we ought to keep a bulk phone record collection, and the statement has somehow been that this is absolutely key for strong counterterrorism. That is a baffling assertion. I say that because—the Senate Finance Committee—I had a relatively short tenure there—in 2014—we held a workshop in Silicon Valley. The problem stems from the fact that with the NSA overreach taking a huge toll on our companies and the confidence that consumers, both here and around the world, had in the privacy of their products, these companies said we have to figure out a way to make sure consumers here and around the world understand that we are going to protect their privacy. So they decided to put in products that had strong encryption. They felt that was important to be able to assure their consumers that when they sold something, their privacy rights were protected. In doing so, of course, they also made it clear, as has always been the case, that when the government believes an individual could put our Nation at risk, you get an individual court order, you use emergency circumstances, and you could still get access to information.

The response by our government, which contributed mightily to the problem by the NSA’s overreach in the first place, was our government saying: Nope. You are not going to be able to use that encryption to bring back the confidence that Americans and people around the world have in your products. There were projections that these companies were already losing billions and billions of dollars in terms of the consequences of loss of privacy.

The response of the government was to say: We are looking at requiring you to build weaknesses into your products and, in effect, create a backdoor so we can get easy entry.

I am also interested in hearing the Senator from Oregon talk about an op-ed he wrote which appeared in the Los Angeles Times in December. Senator Wyden wrote that building a backdoor into every cell phone, tablet or laptop means directly creating weaknesses that hackers and foreign governments can exploit.

I would be interested in entertaining a question concerning that.

Mr. Wyden. Mr. President, I apologize that I collect phone numbers, but that my colleague restates his question.

Mr. Paul. This is an op-ed that was written by the Senator from Oregon and appeared in the LA Times in December. The op-ed says that building a backdoor into every cell phone, tablet or laptop means deliberately creating weaknesses that hackers and foreign governments can exploit.

I think expanding on that in the form of a question would help us to understand exactly what the Senator means by that.

Mr. Wyden. What the Senator is asking about is a statement made by the FBI Director, Mr. Comey. This is not some kind of hidden article. It was on the front pages of all of our papers around the world. Mr. Wyden is suggesting, some consideration.

In fact, one of the last things I did as chairman of the Senate Finance Committee—I had a relatively short tenure there—in 2014—we held a workshop in Silicon Valley. The problem stems from the fact that with the NSA overreach taking a huge toll on our companies and the confidence that consumers, both here and around the world, had in the privacy of their products, these companies said we have to figure out a way to make sure consumers here and around the world understand that we are going to protect their privacy. So they decided to put in products that had strong encryption. They felt that was important to be able to assure their consumers that when they sold something, their privacy rights were protected. In doing so, of course, they also made it clear, as has always been the case, that when the government believes an individual could put our Nation at risk, you get an individual court order, you use emergency circumstances, and you could still get access to information.

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The response of the government was to say: We are looking at requiring you to build weaknesses into your products and, in effect, create a backdoor so we can get easy entry.
I know at townhall meetings at home in Oregon, I have talked about the concept of our government requiring companies to build weaknesses into their products. People just slap their foreheads. They say: That is what is all about. It is our job to make sure we have policies that both assure security and keep us safe. It is not your job to tell companies to build weaknesses into their products.

In effect, you have to just throw up your hands when they say: We can't do it, so we ought to build weaknesses into the products.

As my colleague said, I pointed out that once you do that, it will not just be the good guys who have the keys. It will be bad guys who have the keys at a time when we are so concerned about cyber security.

I wish to ask my colleague one other question on one other topic he and I have spoken about at great length. Is the Senator from Kentucky troubled by the belief of his government's intelligence officials that the intelligence community at the highest levels. What is the reaction of the Senator from Oregon that the vast majority of law enforcement and the intelligence community are good people. They are patriotic. They want to stop terrorism, as we all do. But what we are arguing about is the process and the law and the Constitution and trying to do it within the confines of the Constitution.

Mr. WYDEN. I appreciate my colleagues' questions on that issue. He knows that it was very troubling that in 2012 and in 2013, we just weren't able to get straight answers to this question of collecting data on millions or hundreds of millions of Americans. As my colleagues have pointed out that the former NSA Director said that—he had been to a conference—and that he was not involved in collecting "dossiers" on millions of Americans. Having been on the committee at that point for over a dozen years, I said: Gee, I am not exactly sure what a "dossier" means in that context.

So we began to ask questions, both public ones, to the extent we could, and private ones, about exactly what that answer means. And when we asked those questions, we just couldn't get answers.

The Intelligence Committee traditionally doesn't have many open hearings. By my calculus, we probably get to ask questions in an open hearing for maybe 20 minutes, maximum, a year. So after months and months of trying to find out exactly what was meant, we felt it was important to ask the Director of National Intelligence exactly what "dossiers" and government collecting data and the like. So at our open hearing, I said: I am going to have to ask the Director of National Intelligence about this. And because I have long felt that it was important not to try to trick people or ambush them or anything of the sort, we sent the question in advance to the head of national intelligence. We sent the exact question: Does the government collect any type of data at all on millions of Americans? We asked it so that we would have time to work through it and reflect on it. We waited to see if the Director would get back to us and say: Please don't ask it. There has always been a kind of informal tradition in the Intelligence Committee of being respectful of that. We didn't get that request, so I asked it. When I asked: Does the government collect any type of data at all on millions of Americans, the Director said no. I knew that statement was not forthright, straightforward, truthful answer, so we asked for a correction. We couldn't get a correction.

I would say to my colleague that since that time, the Senator and his representatives have given five different reasons why they responded as they did, further raising questions in my mind, not with respect to the rank-and-file in the intelligence community—the thousands and thousands of hard-working members of the intelligence community my colleague and I feel so strongly about and respect so greatly.

I wish to ask just one other question with respect to where we are at this point in time. As the Senator from Kentucky holds the floor, no one will be able to offer a motion to consider an extension of the USA PATRIOT Act. But at some point in the near future, whether it is this weekend or next month, my analysis is the proponents of phone record collection are going to seek a vote in the Senate to continue what I consider to be this invasion of privacy of millions and millions of law-abiding Americans. When that happens, I intend to use every procedural tool available to me to block that extension. And if at least 41 Senators stand together, we can block that extension and block it indefinitely. If 41 Senators stick together, there isn't going to be any short-term extension, and finally, after something like 8 years of working on this issue, finally we will be saying no to bulk phone record collection.

I am certain I know the answer to this question, but I think it behooves us to be on the Record on this matter. When that vote comes, the Senator is going to be one of the 41 Senators who are going to block that extension. I have appreciated his leadership. I would just like his reaction to our efforts to go forward once again when we have to do it with proponents of mass surveillance seeking an actual vote to continue business as usual with respect to dragnet surveillance.

I think the American people are with us. I think the American people don't like the idea of bulk collection. I think the American people are horrified. I think it will go down in history as one of the most important questions we have asked in a generation when the Senator from Oregon asked the Director of National Intelligence: Are you gathering in bulk the phone records of Americans? And when he didn't tell the truth and then when the President knew about that, then how that led to this great debate we are having now—I think the American people are with us.
I don’t think those inside Washington are listening very well, so I think those inside Washington have not come to the conclusion yet. But I think the Senator from Oregon is right. There may be enough of us now to say: Hey, wait a minute, you are not going to steam roll through this or something that isn’t even doing what you said it is going to do.

No one said at the time of the PATRIOT Act that it meant we could collect all records of all Americans all the time. The Acting Director of the FBI, one of the cosponsors of the bill, JAMES SENSENBRENNER, knew all about the PATRIOT Act. He was a proponent of the PATRIOT Act, and he said never in his wildest dreams did he think that what he voted for would say we could gather all the records all the time.

But I am interested in another question, and that would be whether the Senator from Oregon has a question that will help us to better understand, if we were to eliminate bulk collection tomorrow, if we were to eliminate what is called section 215 of the PATRIOT Act, if we were to do that, is there still concern and worry about what is called Executive Order 12333?

I am not aware of whether the Senator or can’t talk about this or what is public. From what I have read in public and from one of the insightful articles from John Napier Tye, the section chief for Internet freedom in the State Department, he has written that his concern is that this Executive order may well allow a lot of bulk collection that is not justified and not given sanction under the PATRIOT Act.

Does the Senator from Oregon have a question that might help the American public to understand that?

Mr. WYDEN. I would just say to my colleague that we always have to be vigilant about secret law. And we have, in effect, found our way into this ominous cul-de-sac that the Senator from Kentucky and I have been describing here this afternoon really because of secret law.

As I wrap up with this question and hearing the concern of my colleague—because I think that is what is at the heart of his question, that “secret law” is what the interpretation is in the intelligence community of the laws written by the Congress. Very often those secret interpretations are very different from what an American can read or in this case, the Senate from Kentucky and I have been describing here this afternoon really because of secret law.

I don’t think very many people in Kentucky or Oregon took out their laptop, read the PATRIOT Act, and said: Oh, that authorizes collecting all the phone records on millions of law-abiding Americans.

There is nothing that even suggests something like that, but that was a secret interpretation.

So I am very glad the Senator from Kentucky has chosen to have us wrap up at least this part of our discussion with the questions that we have directed to each other on this question of secret law because, as my colleague from Kentucky and I have talked about, we both feel that operations of the intelligence community—what are called sources and methods—they absolutely have to be secret and classified because if they were not, Americans could die. Patriotic Americans who work in the intelligence community could suffer grievous harm if sources and methods and the actual operations were in some way leaked to the public. But the law should never be secret. The American people should always know what the law means. And yet, with respect to bulk collection and why that court decision was so important, what happened was that a program that had been kept secret that had been prop up by secret law, was declared illegal by an important court.

So I will just wrap up by way of saying that the Senator from Kentucky and I have always done a little kidding with each other about the Ben Franklin caucus. Ben Franklin was always talking about anything who gave up their liberty to have security really deserves neither.

I just want to tell my colleague that I am very appreciative of his involvement in this. From the time my colleague came to the Senate, he has been a very valuable ally in this effort. My colleague recognized this was not about balance. This is a program that doesn’t make us safer but compromises our liberty. It is not about balance. And at page 104, you can read that the President’s own advisers say that.

So I am very pleased that the informal Ben Franklin caucus is back in action this afternoon. I look forward to working closely with my colleagues on this. As I indicated by my question, I expect we will be back on the floor of this wonderful body before long having to once again tackle this question of whether the government can do business as usual and a re-up of a flawed law. My colleague and I aren’t going to accept that.

I thank him for his work today. These discussions and being on your feet hour after hour are not for the faint hearted. I appreciate my colleague’s leadership, and I once again yield the floor back to him.

Mr. PAUL. Mr. President, I would like to thank the Senator from Oregon, and I would like to thank the American people, to people who are always crying out and saying “Why can’t you work together? Why can’t you work with the other side?” that I think we have a false understanding sometimes of compromise. The Senator from Oregon is from the opposite party. We are in two opposite parties, and we don’t agree on every issue. But when it comes to privacy and the Bill of Rights and what we need to do to protect the Fourth Amendment, we are not splitting the difference to try to find a middle ground between us. We both believe in the Fourth Amendment. We both believe in protecting the Fourth Amendment and protecting your right to privacy.

So bipartisanship can be about two people believing in the same thing but just being in different parties. It means we may not agree on 100 percent of issues, but on a few, we are exactly together, and we don’t split the difference. It isn’t always about splitting the difference.

You can have true, healthy bipartisanship. Republican Independent coming together on a constitutional principle, coming together on something that is important.

I didn’t come to the floor today because I want to get some money for one individual project for one person. I came because I want something for everybody. I want freedom for everybody, and I want protection for the individual. I want protection against the government’s invasion of your privacy. I obey the Senate. It is like, we didn’t for his insightful questions.

One of the things we talked a little bit about as Senator Wyden and I were going through a series of questions was sense of the difference that has been put in place by the President and have come out and said that the program—the Executive order—the President put in place two panels, a review panel and another one called the Privacy and Civil Liberties Oversight Board, and, interestingly, both panels told him the same thing: that what he was doing was illegal and wrong and it ought to stop. Then the President came out and said “That is great,” but then he keeps doing it.

I don’t quite understand because I like the President and I take him at his word, and he says: Well, yes, I am balancing this and that, and they told me this, and if Congress stops it, I will order the executive. So I will just wrap up by way of saying that that is like the President and I take him at his word, and he says: Well, yes, I am balancing this and that, and they told me this, and if Congress stops it, I will order the executive.
courts, to the experts, or to the Constitution. The Privacy and Civil Liberties Oversight Board, though, I think really had some insightful comments. They give a description, first of all, of collecting all of your phone call records, and I like the way they put it. They said that an order was given so that the NSA is "to collect nearly all call detail records generated by certain telephone companies in the United States." Sometimes a sentence or a phrase, and I like the way they put it. They said that an order was given so that the NSA is "to collect nearly all call detail records generated by certain telephone companies in the United States."

Sometime later in the sentence, I like the way they put it. "Nearly all." So we are not talking about 1,000 records. We are not talking about 1 million records. We are talking about nearly all of the records in the entire United States. There are probably over 100 million phones, I am thinking, in the United States, so over 100 million records. Every record has thousands of pieces of information in it, so we are talking about billions of bits of information that the government is collecting.

I don’t have a problem if they want to collect the phone data of terrorists. In fact, I want them to. I don’t have a problem if they will go 100 hops into the data if they have a warrant. If John Doe is called, we look at John Doe’s phone records. Ask a judge to put his name on the warrant and look at all of his records. If there are 100 people he called and they are people you are suspicious of, call them, too. Go to the next hop, and go to the next hop, and go to the next hop. There is no limit. But just do it appropriately. Do it appropriately with a warrant with somebody’s name on it. I see no reason why we can’t do this with the Constitution.

We are now collecting the records of hundreds of millions of people without a warrant, and I think it needs to stop. The President’s own commission says to stop. Here is what the commission says: "From 2001 through early 2006 the NSA collected nearly all call detail records generated by certain telephone companies in the United States, and with no legal justification, the PATRIOT Act justifies this. But for 5 years they were collecting all the phone records with just a Presidential order. Now we do it under the PATRIOT Act."

But the rule of law is about checks and balances. It is about balancing the executive branch and the legislative branch and the judiciary branch. It is about balancing the police in the judiciary. We talked about warrants and the police in the judiciary.

I see on the floor one of the Nation’s leading experts in the Fourth Amendment and the Constitution, who has recently written a book on this, and I told him recently I have been stealing his answers about some giving him credit for it. But I talked earlier on the floor about the story of John Wilkes, and if the Senator from Utah is interested in telling us a little bit of the story, I would like to hear a little bit from his angle or in the form of a question or any other question he has.

Mr. LEE. I would like to be clear at the outset that while the Senator from Kentucky and I come to different conclusions with regard to the specific question as to whether we should allow section 215 of the PATRIOT Act to expire, I absolutely stand with the junior Senator from Kentucky and, more importantly, I stand with the American people.

With regard to the need for a transparent, open amendment process and for an open, honest debate in front of the American people on the important issues facing our Nation, including this one—and I certainly agree with the Senator from Kentucky that the American people deserve better than what they are getting, and, quite frankly, it is time that they expect more from the Senate.

On issues as important as this one, on issues as important as the right to privacy of our citizens and our national security, this is not a time for more cliffs, more secrecy, and more eleven-hour backroom deals that are designed to mix conflict, mix crisis in a preciously arranged time crunch in which the American people are presented with something where they don’t really have any real options. It is time for the kind of bipartisan, bicameral consensus that I believe is embodied in the USA FREEDOM Act. While I often criticize Congress for our economic deficits, our financial deficits, the core of this current challenge we face is centered around the Congress’s deficit of trust—in this particular circumstance, the Senate’s deficit of trust. Members of our body routinely tell the American people to just trust us. Trust us, we will get it right. Just trust us, we will appropriately balance all the competing concerns.

I think it is time that we trust the American people by having an honest discussion with them emanating from right here on the floor of the Senate. It is time to discuss and debate and to amend the House-passed USA FREEDOM Act.

I am confident that Senator PAUL and others among my colleagues who have different ideas from mine will be happy to offer and debate amendments to improve it and make it something perhaps that they could even support. In fact, as far as I am aware, Senator PAUL and others have amendments that they are eager and anxious and willing and ready to present and to work on. That is the purpose behind the vote that I voted on right here on the floor of the Senate.

But first I am calling on my Republican and Democratic colleagues to help repair the dysfunctional legislative process that led to repealing the PATRIOT Act. While I applaud the bipartisan effort in legislation that led to repealing the PATRIOT Act and simply use the Constitution, I think it is time that we trust the American people by having an honest discussion with them emanating from right here on the floor of the Senate. It is time to discuss and debate and to amend the House-passed USA FREEDOM Act.

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abuses that have created today's status quo—the very same status quo that Republicans have been elected to correct.

What too few in Washington appreciate and what this new Republican majority in Congress must appreciate if we are to restore the American people's distrust of their public institutions is totally justified. There is no misunderstanding here. Americans are fed up with Washington, and they have every right to be. The exploited status quo in Washington has shattered America's economy and their government, and its entrenched defenders, powerful and sometimes rich in the process. This situation was created by both parties, but repairing it is now going to fail to those of us in this body right now. It is our job to win back the public's trust. That cannot be done simply by passing bills or even better bills. The only way to gain trust is to be trustworthy. I think that means that we have to invite the people back into the discussion, give them the bills we do pass the moral legitimacy that Congress alone no longer confers.

In order to restore this trust, Members will have to expose themselves to inconvenient amendment votes, inconveniences, and scrutiny of legislation we are considering. The result of some votes in the face of certain bills may, indeed, prove unpredictable, but the costs of an open source, transparent process are worth it for the benefits of greater inclusion and more diverse voices and views and for the opportunity such a process would offer to rebuild the internal and the external trust needed to govern with legitimacy.

My friend and colleague, the junior Senator from Kentucky, has referred to a story of which I have become quite fond, a story that I have written about and talked about in various venues throughout my State and throughout America. As a lawmaker, a lawmaker who served several hundred years ago, a lawmaker named John Wilkes—not to be confused with John Wilkes Booth, Lincoln's assassin. This John Wilkes served in the English Parliament in the late 1700s.

In 1763, John Wilkes found himself at the receiving end of anger and resentment by the administration of King George III. King George III and his ministers were angry with John Wilkes.

At the time, there were these weekly news circulars, weekly news magazines that went out and would often just extol the virtues of King George III and his ministers. One of them was called the Briton. The Briton was written, produced, and published by those who were loyal to the King, and they would say only glowing things about the King. They would write things about the King saying: Oh, the King is fantastic. The King can do no wrong. Had sliced bread been invented as of 1763, I am sure the Briton would have reported that the King was the greatest thing since sliced bread. All they could say were nice things about the King because they were written by the King's people.

Well, John Wilkes decided to buck that trend. He started his own weekly circular called the North Briton. The idea behind this program is to give the bills we do pass the moral legitimacy that Congress alone no longer confers.

In time, the number 45 to be raised in connection with cries for the cause of liberty. So the number 45, the name John Wilkes, and the cause of liberty all became wrapped up into one. It was against this backdrop that the United States was becoming its own Nation. When it did become its own Nation, when we adopted a Constitution, and when we decided shortly thereafter to adopt a Bill of Rights, one of the very first amendments we adopted was the Fourth Amendment. The Fourth Amendment responded to this particular call for freedom by guaranteeing that in the United States we would not have general warrants. The Fourth Amendment makes that clear. It contains a particularity requirement that any person or thing to be searched and seized, this warrant simply identified an offense and said: Go after anyone and everyone who might in some way be involved in it. It gave unfettered, unlimited discretion on the part of those who might be executing that warrant as to how and where and with respect to whom this warrant might be executed.

So they went through his house even though he was not named in the warrant, even though his home, his address, was not identified in the warrant. They searched through everything. John Wilkes was, understandably, outraged by this, as were people throughout the city of London when they became aware of it. John Wilkes, while in jail, decided he was going to fight back. He fought in open court the terms and the conditions of his arrest. He ended up fighting against this general warrant. He eventually won his freedom.

Over time, he was recalled repeatedly to Parliament. In time, he also brought a civil suit against King George III's ministers who were involved in the execution of this general warrant, and he won. He was awarded 4,000 pounds, which was a very substantial sum of money at the time. The other people who were subjected to the same type of search under the same general warrant were also awarded a recovery under this same theory, to the point that, in present-day terms, there were many millions of dollars that had to be paid out by King George III and his ministers to the plaintiffs who sued under this theory that they were unlawfully subjected to a search under a general warrant.

In time, the number 45, in connection with the North Briton No. 45—the publication that had sparked this whole inquiry—the number 45 became synonymous with the name John Wilkes, and then John Wilkes in turn became synonymous with the cause of liberty. People throughout Britain and throughout America would celebrate freedom by celebrating the number 45. It was not uncommon for people to buy drinks for their 45 closest friends. It was not uncommon to write the number 45 on the side of buildings, taverns, saloons. It was not uncommon for the number 45 to be raised in connection with cries for the cause of liberty. So the number 45, the name John Wilkes, and the cause of liberty all became wrapped up into one.

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be used or could easily be abused in such a way that would allow the govern-
ment to paint a painfully clear portrait, a silhouette of every American. Some researchers have suggested, for example, that through metadata alone, it could be discerned whether an individual is, or is not, a terrorist. The question becomes: What are your political views, your religious affiliation, what activities you engage in, the condition of your health, and all other kinds of personal information.

One could reasonably infer—this is distressing, that, unlike a program that would involve listening to the content of your telephone calls—which, of course, is not at issue with respect to this program—all of this can be done with a high degree of automation, such that those intent on abuses could do so with relative ease, with the type of ease that they would not have access to absent this type of automation.

Sometimes people are inclined to ask me: Where is the evidence that this particular program is being used for nefarious political purposes or for some other illegitimate purpose not connected with protecting American national security? I have not been able to point to that suggests anyone has used this for a nefarious political purpose or for some other illegitimate purpose not connected with protecting American national security.

What can you point to that suggests anyone has used this for a nefarious political purpose or for some other illegitimate purpose not connected with protecting American national security? I cannot think of a single instance where the NSA has yielded information that would lead one to conclude simply because we have taken an oath to uphold, protect, and defend it as Members of this body. The Constitution is an end unto itself. It is important that we follow it regardless of whether we can point to some particular respect in which this particular program has been abused.

Secondly, even if we assume, even if we stipulate for purposes of this discussion that no one within the NSA is currently implementing any type of program for nefarious political purposes or otherwise, even if we assume no one within the NSA is currently even capable of abusing or has any inclination to abuse this program at any point in the future, I would ask the question: Can we say we are certain that will always be the case? Who is to say what might happen 1 year from now, 2 years from now, 5 years, 10 years or 15 years from now? We know how these things happen. We know how they happen. We know how they happened in the 1970s when the Nixon administration used that technology that was still only a few decades old back in the 1970s when this occurred—the Church Committee concluded, among other things, that every Presidential administration from FDR through Johnson had abused our Nation’s investigative and counter-intelligence agencies for partisan, political purposes to engage in political espionage. Every single one of those administrations from FDR to Nixon had done that.

In that sense, we have seen this movie before. We know how it ends. We know that even though the people at the NSA may not yet have the technology, they have only the noblest of intentions, over time these kinds of programs can be abused, and we know a lot of people in America understand the potential for this abuse.

Thirdly, I have to point out that the NSA currently is collecting metadata only with respect to phone calls. But under the same reading of section 215 of the PATRIOT Act that the NSA has used to collect this metadata—a reading with which I disagree and a reading with which the U.S. Court of Appeals for the Second Circuit disagreed in its thoughtful, well-written opinion just about 2 weeks ago—even though the NSA currently is collecting only telephone call metadata right now, there is no reason why the NSA reads metadata on section 215 of the PATRIOT Act—which is incorrect, by the way, an incorrect reading—but there is nothing about that reading that would limit the NSA to collecting only metadata related to telephone calls.

So who is to say the NSA might decide tomorrow or next year or a couple of years from now—if we reauthorize this—or at some point down the road during a period of reauthorization, that they will decide at some point in the future to begin collecting other types of metadata, not just telephone call metadata but perhaps credit card usage, metadata regarding people who reserve hotels online, and regarding online transactions that occur. Those are all different types of metadata.

Now, again, I disagree with the NSA’s legal interpretation of section 215 of the PATRIOT Act. I think they are abusing it. I think they are misusing it. I think they have dangerously misconstrued it, just as the U.S. Court of Appeals for the Second Circuit concluded a few weeks ago. But this is their reinterpretation. And if we reau-
thorize this, are we not reauthorizing, in some respects, or at least enabling them to continue this? I don’t think we are validating or ratifying what they are doing.

Their interpretation is it still wrong, but we are enabling them to engage in a continued ongoing practice of abuse of the plain language of section 215, which requires that anything they collect be relevant to an investigation.

Well, their interpretation of “relevant to the investigation” is we might at some point in the future deem this material relevant to what we might at some point in the future be inves-
tigating. That cannot plausibly, under any interpretation of the word “rele-
vance,” be acceptable. And it was on that basis that the Second Circuit re-
jected the NSA’s interpretation.
Mr. PAUL. Mr. President, the Senator from Utah makes a very good point and also asks some very good questions.

In saying that we tend to work against headlines here, I often say we lurch from deadline to deadline, and the American people wonder what the heck we are doing in between the deadlines.

The PATRIOT Act has been due to expire for 3 years. It is on a sunset of 3 years. We knew 3 years ago that this debate was coming. There should be plenty of time and, I think, adequate time to deal with issues that affect the Fourth Amendment and, most importantly, I would ask my friend from Kentucky if privacy isn’t, in fact, part of our security rather than being in conflict with it.

I would be interested in any thoughts my friend from Kentucky might have on that issue.

Mr. PAUL. Mr. President, the Senator from Utah makes a very good point and also asks some very good questions.

In saying that we tend to work against headlines here, I often say we lurch from deadline to deadline, and the American people wonder what the heck we are doing in between the deadlines.

The PATRIOT Act has been due to expire for 3 years. It is on a sunset of 3 years. We knew 3 years ago that this debate was coming. There should be plenty of time and, I think, adequate time to deal with issues that affect the Bill of Rights, that affect rights that were encoded into our Constitution from the very beginning.

So I think without question the issue is of great importance and then we should debate it; but too often budgetary measures—or maybe this measure—get so crowded up against deadlines that people are like: Oh, we don’t have time for amendments. The problem is, if you don’t have amendments, you are not really having a debate.

I think the Senator characterized very well that we both agree the bulk collection of data is wrong. We think that goes against the spirit and the letter of the Constitution.

However, at least half of us that we would encounter in this body don’t even agree with that supposition. They believe, as many of them have pointed out, we are not collecting enough, and they don’t care how we collect it, let’s just collect more.

So we are on different sides of opinion, two groups here. And then some of us aren’t exactly on the same page as to the solution, but we agree on the problem. I think you could work through that problem if the Senate would agree it is a problem and that the American people think we have gone too far.

I think that is what the purpose of some of this debate today is, hopefully to draw in the American public and have them call their legislators and say: Enough is enough. You shouldn’t be collecting my data unless you suspect me of a crime, unless my name is on the warrant. Unless you had a judge sign the warrant for me, you shouldn’t be collecting the data of all American citizens all the time.

I think part of our problem is the deadlines, and part of the reason I am here today is that I have been working on five or six amendments for a year now with Senator Wyden, so we have bipartisan support for a series of amendments. These are what we think would be best to fix this problem. Certainly, when we have had 3 years to look at this, we should have enough time to vote on five or six amendments.

So that is really, I think, what we are asking of the leadership of both sides—is permission. Because, really, in this instance, you have to agree to let you vote on something or no votes happen.

We have done a better job this year. We are voting on more amendments, but this is still one of those occasions where we are butting up against a deadline. My fear is that without extraordinary measures—which I am hopefully trying to do today—that we may not get a vote on amendments and we may not get adequate time to debate it, but this is still one of those occasions where we are butting up against a deadline.

The problem is that the government should collect all of. So the practice of collecting all of the time without putting your name on a warrant, without telling a judge that they have suspicion that you have committed a crime. We think that collecting everyone’s phone records all the time without suspicion is sort of like a general warrant. It is like a writ of assistance, it is like what James Otis fought against, it is like what John Adams said was the spark that led to the American Revolution.

So we think the American people also believe this, that the American people believe their records shouldn’t be collected in bulk, that there should not be this enormous gathering of our records.

What we need to do is get to a consensus where everybody agrees that is a problem. But the body is still divided. About half of the Senate believes we should collect more records, that we are not invading your privacy enough, that privacy doesn’t matter—that, by golly, let the government collect all of your records to be safe.

Well, when the privacy commission looked at this, when Senator Wyden looked at this, and when other people who have the intimate knowledge looked at this, their conclusion was that the bulk collection of our records, this invasion of privacy, isn’t even working, that we aren’t capturing terrorists we wouldn’t have caught otherwise by this invasion of privacy. There is a practical argument that says we will give up our privacy to keep us safe, even that argument is not a valid argument.

But we have been looking at some of the possible solutions—and I see the Senator from Kentucky and I would be pleased to entertain a question if he has a question.

(Mr. LEE assumed the Chair.)

Mr. HEINRICH. Yes. I thank my friend from Kentucky and ask him if he would yield for a question without losing his right to the floor.

I want to start out by prefacing this for a few minutes, from my limited experience just a phone call or little over 2 years, and I am on the Intelligence Committee now—by saying there is simply no question that our Nation’s intelligence professionals are incredibly dedicated, patriotic men and women who make us to keep our country safe and free and, in that, they should be able to do their job, secure in the knowledge that their agencies have the confidence of the American people. And Congress—those of us here—needs to preserve the ability of those agencies to collect information that is truly necessary to guard against real threats to our national security.

The Framers of the Constitution, as my colleague from Kentucky knows, specifically said that government officials had no power—to no power—to seize the records of individual Americans without evidence of wrongdoing. And it was so important that they literally enshrined and embedded this principle in the Fourth Amendment to the Constitution.

In my view, the bulk collection of Americans’ private telephone records by the NSA in this program clearly violates the spirit—if not the letter—of the intentions of the Framers here.

Just 6 months after my first Senate intelligence briefing, former National Security Agency contractor Edward Snowden leaked documents that exposed the NSA’s massive collection of Americans’ cell phone and Internet data. And as my friend from Kentucky said, not just a few Americans but literally millions of innocent Americans were caught up in what is effectively a dragnet program. It was made clear to the public that the government had convinced the FISA Court to accept a sweeping reinterpretation of section 215 of the PATRIOT Act, which ignited, in my view, a very necessary and long overdue public conversation about the trade-offs made by our government between protecting our Nation and respecting our constitutional liberties.

I think well-intentioned leaders had, during the previous decade, come down on the side of national security with a willingness to sacrifice privacy protections in the process. And what became obvious was that because of our continued lack of knowledge of Al Qaeda and other terrorist organizations, some within our government believed we still needed to collect every scrap of information available in order to ensure that, should we ever need it, we could query this information and track down U.S.-based threats. In doing so, the government ended up collecting billions and billions and billions of phone records, linked in case after case after case not to terrorists but to innocent Americans.
Wisconsin Republican Congressman Jim Sensenbrenner, who I served with in the House of Representatives, who was one of the authors of the original underlying legislation—the PATRIOT Act itself—said a couple of years ago: "The PATRIOT Act never would have passed if there had been any inclination at all that it would have authorized bulk collections."

As this debate increasingly moved to the public sphere, I joined my colleagues on the Select Committee on Intelligence—Senator Wyden, who was just here on the floor a few minutes ago, and former Senator Mark Udall—in pressing the NSA and the Director of National Intelligence for some clear examples in which the bulk information collected under this metadata program, under section 215, was uniquely responsible for the capture of a terrorist or the thwarting of a terrorist plot. They could not provide any—not a single solitary example—nor could they explain why the government had to hold the data itself and why for so long.

Thankfully, a review panel set up by President Obama agreed with us and recommended that the government end its bulk collection of telephone metadata.

I will admit, however—and my friend from Kentucky has brought this up on several occasions already—that I am incredibly disappointed that the President has not simply used his existing authority to unilaterally roll back some of the unnecessary blanket metadata collection. Some have claimed this inaction is evidence that the President secretly supports maintaining the current program as is.

That, however, is nonsense.

The President has asked Congress to give him additional authorities so that he can carry out the program in an effective manner, and the USA Freedom Act says to do just that.

The Republican-led House of Representatives last week passed that bill—the USA Freedom Act—by a vote of 338 to 88, with large majorities from both parties. At a time when everyone believes we agree on nothing, large majorities of Republicans and Democrats supported that piece of legislation.

Further, the Second Circuit Court of Appeals ruling that the NSA is violating the law by collecting millions of Americans' phone records is evidence that the court has found to be illegal. The court held that the government's bulk collection of phone records of law-abiding American citizens?

I think there is no way we can square this bulk collection with the Fourth Amendment. I think part of the problem, though, is that we, over a long period of time, diminished the protections of records held by third parties. And I think one of the debates we need to get hopefully to the Supreme Court sometime soon is whether you give up your privacy interest in records that are held by third parties.

I think there will come a time that your phone is in your house, but there are no papers in your house. There may not be paper. But there is still the concept of records. Records were traditionally on paper, and they were traditionally in your house. But now your most private papers are held digitally by your phone, and then by the people who are in charge of the different organizations such as phone, email, et cetera.

I think there has to be Fourth Amendment protection of these. Those who look at the court cases, and go back to probably the last important case, the Maryland v. Smith case, often say there is no Fourth Amendment protection at all for these records. In fact, the government will tell you they can do whatever they want with email, with text, and with all of these things. And I am not convinced they are not using other programs, such as this Executive order program, to actually collect many other kinds of metadata other than phone.

So I am very worried about it. I think we need help from the courts. But we need help from the legislative body to represent the will of the people. And I think the will of the people is very clear that the majority of people think we have gone too far and that we need to stop this indiscriminate vacuuming up of all Americans' phone records regardless of whether there is suspicion.

Mr. HEINRICH. Mr. President, I would ask the Senator from Kentucky an additional question. I found it very helpful before I came to the floor today—and I want to thank my colleague again for raising these critical issues—to go back and read the Fourth Amendment, and I thought it would be worthwhile just to briefly read that once again here on the floor because I think it really puts you in the mind of some of the greatest Americans who ever lived.

Our Framers wrote a constitution that has survived for well over 200 years now. It has survived Republicans. It has survived Democrats. It has survived political parties that came and went, and it has survived great conflicts time and again.

The Fourth Amendment says: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

I would ask my friend from Kentucky his views on the resilience of this constitutional document and how he can possibly read the actual text of this Fourth Amendment without realizing that those Framers really meant for this to apply into the future to things that we hadn't foreseen yet but using the broadest terminology available, such as words like effects and papers?

I yield the floor and thank the Senator from Kentucky once again. This is one of those issues that unite people on the left and the right, Republicans and Democrats, who care deeply about our constitutional liberties. I think the time to fix this is upon us. And without shining a light on this, we certainly are not going to be able to make the progress we need. We have an opportunity here, and we should seize it.

I yield the floor to the Senator from Kentucky.

Mr. PAUL. Mr. President, I thank the Senator from New Mexico for coming down and for being a great supporter of the Fourth Amendment.

One of the things I think is interesting is that in our current culture we seem to devalue the Fourth Amendment. You go to mall—

One of our Founding Fathers was George Mason. He was considered to be
an anti-Federalist. He was a guy who really stood on principle, but also he was a guy who had the audacity to actually not sign the Constitution, even though he was asked and he was there and could have.

On December 17, 1787, he refused to sign the Constitution and returned to his native State as an outspoken opponent of the ratification contest. His objection to the proposed Constitution was that it lacked a declaration of rights. Mason felt that a declaration of rights was necessary, and we call a Bill of Rights—a necessity in order to curb Federal overreach.

Mason, though, was also famous for being an author of the Virginia Declaration of Rights, which was written a decade or so before our Constitution and upon which many things were based. He wrote in the first paragraph of the U.S. Declaration of Independence something similar to what we hear in the Declaration of Independence:

That nature equally free and independent, and have certain inherent rights of which, when they enter into a state of society, they cannot by any compact deprive or take away, such as the right of enjoying life and liberty, of acquiring and possessing property, and pursuing and obtaining happiness and safety.

In the Declaration of Rights, which comes from 1776, for Virginia, he also was instrumental in including article IX. Article IX is basically the precursor to the Fourth Amendment. In it, he wrote:

That general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.

So from the very beginning, the Fourth Amendment was a big deal. It was a deal that Mason felt that it wasn’t included caused George Mason to say he couldn’t sign the Constitution. It was a big enough deal that this debate went on for a while, and finally the resolution of getting the Constitution included that there would ultimately be a Bill of Rights. Thomas Jefferson wrote about the Bill of Rights. He said:

A bill of rights is what the people are entitled to against every government on earth, forever, or particular, and what no just government should refuse, or rest on inferences.

I like the way he put it: A Bill of Rights is what the people are entitled to against every government. It is a protection.

Jefferson also described the Constitution as the chains of the Constitution. The chains were to bind government and to prevent government from abusing its authority.

When we have adhered to this, when we paid strict attention to it, we have maximized our freedom. When we have let our guard down, when we have allowed our guard to stray away, when we have allowed the government to usurp authority to gain and grab and take more power, it has been at the expense of freedom.

I think we can be safe and have our freedom as well. I think we can obey the Constitution and catch terrorists at the same time. If you think, in fact, frankly—strictly from a practical point of view—I think we gain more information by using the Constitution. By having less indiscriminate collection of data and by collection of discriminating data—data that is based on suspicion, data that is based on tips, data that is based on human intelligence, data that we can focus all of our human energy on—I think we actually will capture more terrorists. I think there has been instance after instance after instance where we did have information on terrorists and we failed to act, perhaps because we are spending so much time and so much energy on the indiscriminate collection of data.

William Brennan had one of our famous Justices, and he said of the Framers:

The Framers of the Bill of Rights did not purport to "create" rights. Rather, they designed the Bill of Rights in government from infringing rights and liberties presumed to be preexisting.

We didn’t create the rights. Government didn’t create your rights. Your rights come naturally to you. For those who believe in a Creator, they come from our Creator. But they are important to protect. They should be protected against all forms of even majority. It is why some of us think it very important to say that we are a Republic, we are a democracy, that no majority should be able to take away our rights. That is why this is important. I think these questions ultimately get to the Supreme Court. Because no matter what the majority says here, no matter what the majority of the legislature says, the Bill of Rights lists and codifies rights that cannot and should not be taken away by a majority: the rights that we have to be secure in our person, the rights Brandeis said, the most cherished of rights, the right to be left alone. But this debate is a long and ongoing debate. For nearly 100 years, from the Olmstead case in 1928 to the present, we have had a discussion and a struggle and a controversy over what parts of our conversations are to be protected and what parts are not to be protected.

I think a lot of our problems really originated with going the wrong way in 1928 with the decision that because we went for a long period of time—we went for two generations thinking that your phone calls were not private and that your phone calls were not protected by the Fourth Amendment. Then, really in the 1960s, and we reversed that and we said your conversations are to be protected. But within a decade we made the wrong decision again and said that your records are not to be protected. I think that your Fourth Amendment, your records once held by the phone company, aren’t to be protected. I think that was a mistake.

I think it is also a mistake to think we are literally talking about paper in your house because there is quickly coming a time in which technology will be such that there will be no papers. Papers will be another word for "records," but your records will not be kept in your house.

They already aren’t. There was a discussion of this in whether we can search a person’s individual phone, and the Court did rule I think in an accurate way. The Court Justices said that, basically, the information found on your phone is more personal and more extensive than probably any papers that were ever in any home in a time before electronics. So we are going to have to catch up to electronics; we are going to have to catch up to the digital age, and we are going to have to decide does the individual maintain a privacy interest and/or a property interest.

I, frankly, think that when the phone company holds your records, that they are partly mine; that there is a property interest and a privacy interest I haven’t relinquished. Unless I have given explicit permission, I don’t think I have given up my privacy. In fact, my times it is this privacy that when they don’t, they are actually fearful of being sued. And so all of this craziness, all of this overreach, all of this loss of our privacy comes with a little additional caveat that is written into all the laws and everybody is clamoring for and it is what they want now—liability protection. They want to be able to violate their privacy agreement. So we give them liability protection. They don’t like it, but they realize they are violating and could be accused of violating our privacy agreement.

So as much as I hate and despise frivolous lawsuits, the threat of suing somebody causes them to obey their contract. If they don’t have the threat—if you say: Well, we are going to have contracts, but we are not going to enforce them with the threat of a lawsuit, then contracts become meaningless. So it is really important that as we move forward, we find a way to people the privacy agreement you signed is a real document, it is a real contract, and it should be protected.

When referring to the Bill of Rights, Gen. Smedley Butler, who was a two-time Medal of Honor winner and a Brevet Medal of Honor winner, said:

There are only two things we should fight for. One is the defense of our homes and the other is the Bill of Rights.

When I have spoken to the young men and women who have fought bravely for our country—young men and women who have lost limbs, families of those who have lost lives—that is what
I hear from every one of them. I hear from them that they were fighting to defend the Bill of Rights. They were fighting to defend our Constitution.

What saddens me is that while they were fighting for our Constitution, while they were fighting for the Bill of Rights, their legislators weren't fighting for the Bill of Rights. Their legislators were turning the other way. Their legislators were so fearful of attack that they gave up on the Bill of Rights and said: "Give me my liberty, just so I can be secure." This is a longstanding debate. Franklin had it right—those who are willing to give up their liberty may end up with neither.

Now, some would ask: Why am I here today? What do I propose to get out of this? Is there an end point when I will go home and be quiet and quit talking about the Bill of Rights? I think there could be. I think if the leadership of both parties in the Senate would agree to have amendments and have votes—and I will give some examples of some things that we think—most of these will ultimately be introduced in all likelihood by Senator Wyden and I. I will start with the first one. This is based upon an amendment that he and I have worked on together. This amendment would prohibit mandates on companies that alter their products to enable government surveillance. So this amendment prohibits any mandates from government agencies requiring private companies to alter their security features—source code—to allow the government to get into their stuff and into your lives. This amendment would apply to computer services, hardware, software, and electronic devices made available to the general public.

Currently, the government is requiring and sometimes telling companies they can even tell you this. They are requiring access to certain products. There have been stories of them inserting malware on Facebook, giving you access to Facebook, and then getting into your Facebook account through the Facebook code source. I know Facebook has objected to this and fought them on this, but our amendment would say that the government just can't do this. The government cannot force different social networking sites on the Internet, software cannot force them to give the government access indiscriminately.

The question would be: Can the government require things specifically? Absolutely, yes. Present evidence to get a warrant, and realize that when they want to make you so afraid that you give up all your records, realize that warrants aren't hard to get. The FISA warrants are almost without question agreed to, maybe to a fault. Ninety-nine percent-plus of all the warrants are granted. I think it is not too much of a step to say we should ask and request warrants.

The second amendment we would consider putting forward, if we were allowed to and allowed to have votes on, would replace the PATRIOT Act extension with comprehensive surveillance reform. We would replace the extension of expiring authorities with substantial reforms proposed by Senators Wyden and Paul and others in the Intelligence Oversight and Surveillance Act of 2013.

This amendment would end bulk collection. We would close the section 702 backdoor search loophole, which allows the government to say they are searching foreigners' records but in reality gather up 90 percent of the records being American records and called incidental. We would close this backdoor loophole where actually American records are being collected, not foreign records. We would create a constitutional advocate to argue before the FISA Court, before the intelligence court.

The reason I think this is necessary is that the court has somehow become a rubber stamp for the government, and we aren't allowing any kind of opposing arguments and we really aren't having any argument. For example, we have loosened the standard from the constitutional standard, which is probable cause, and we have said it is relevant. So we get to relevance. But when you come before the court, I don't think they are being asked to prove whether it is relevant. Certainly they must not because they are somehow approving the collection of everybody's records in the United States—which I don't know of anybody who believes the word "relevant" can include everybody.

So if we had an advocate or we had someone to say this is the other side—I think it is really important. I am not a lawyer, but I understand they argue with each other all the time and you are supposed to figure out the truth. You argue and advocate for your side, and then somehow you apply the truth or people arbitrate what they think the truth is from this discussion. If only the government argues, you can't get even any sense or form of what truth is.

So what we would argue in our second amendment is that you actually have an advocate that argues on that side. I would go further, though, and say that not only do you have an advocate, you should have an avenue for appeal.

I am with Senator Wyden. I want to protect all the people doing this. I don't want any names revealed. I don't want any agents revealed. I don't want to endanger the people who are risking their lives for our country to gain intelligence. But I do think the law in general can be debated. Senator Wyden talked about how the law doesn't need to be secret; the operations need to be secret.

So we can protect all of that. But I think the law should be debated. For example, the question now whether you have any privacy interest in your third-party-held records—which the Fourth Amendment protects these at all, that is our constitutional question. That should not be decided in secret, and you really can't have justice decisions in secret.

The other part of our amendment would give Americans spied on by the government standing to sue in court and end the practice of reverse targeting, under which the government targets the communication of an American without a warrant by targeting the non-U.S. person they speak to. By some reports, it is even worse than that. I mentioned earlier that an enormous amount of what the PATRIOT Act does—which is supposed to go after foreigners—is actually being used domestically for drug crimes.

There have been reports that the information is being gathered through an intelligence warrant, and then they go back on the traditional warrant after they have gotten information through a lower standard—through a nontraditional, nonconstitutional investigation. Then they go back, and they get the warrant after using this information. I think in the normal course of justice, you do not get the information you need. Then they do not tell the judges they got the information through the intelligence angle.

Another amendment that we would like to ask the leadership of both sides if they would let us introduce it and if we were allowed to debate this and have an open amendment process would be that the warrantless crime could not be used against Americans in nonterror criminal cases.

This was originally the way it was. This is why you have to worry about the slippery slope. Back in the 1970s, they said: OK, we are going to have a different standard to get foreign targets. If we, who are good citizens, can accept a little bit of that—a slightly lower standard for people who do not live here and are not American citizens and are not part of our country. It has its dangers, but even I might be able to accept that. But what I cannot accept is that you lower the constitutional standard. You are going to use a terrorist warrant that has a lower procedural hurdle, and then you are going to use it for domestic crimes.

This is exactly what is going on now. We should be appalled that they destroyed the Fourth Amendment for certain crimes and we did not do anything about it.

Section 215 of the PATRIOT Act is called sneak-and-peek. The government can go into your house and never tell you they were there. They can look through all of your records. They can steal stuff. They can replace it. They can do all kinds of things and place listening devices—all without ever telling you.

This is in contradiction to what most people have accepted the Fourth
Amendment to be. But if you look at who is being convicted with section 213, 99.5 percent of the people are for drugs, for domestic crime. What we have done is that we have taken a domestic crime and we say the Constitution no longer applies. We are talking about the Fourth Amendment for these crimes.

For about 11,000 people a year, the Constitution no longer applies to them. We are using a lower standard. If you want to make this even worse, think about the cases where the victim would attack us. But the question is: Can you catch more or less, or do you get the same results? We would stop it. We would say no more spying against Americans and no more warrantless spying against Americans. The government has said we are no longer going to do the bulk collection. Most of these things are talked about without the memory of those who died on 9/11 and the check and balance so it does not happen. I do not know of any judge in their right mind who would attack us. But the question is: Can you catch more or less, or do you get the same results? We would stop it. We would say no more spying against Americans and no more warrantless spying against Americans.

We have another amendment that goes to the heart of what I think should be decided by the Supreme Court. We call this the amendment that will protect the privacy of Americans’ records held by third parties. This amendment will establish a clear principle consistent with the Fourth Amendment. As it relates to government’s collection of an individual’s records, if given to a third party for a specific business purpose, are as equally secure in their possession as those that remain in their possession, unless the third party informs the individual that it intends to share the information. This amendment affirms that the government cannot circumvent warrant requirements by talking Americans’ records from third parties, and it protects the constitutional rights during engagement and regular communication and commerce.

I think we had a vote on this a while back. I do not think we were that successful. I think we got four people to vote—to say that your records should be protected by the Fourth Amendment. Most people do not realize this. Most people have no idea that the government’s position, and currently, maybe the Supreme Court’s position, is that you do not have any right—Fourth Amendment right—in your records unless you have them in your house.

I think this is something about which the more people understand and the more people are drawn to this issue, maybe people will demand that we have some justice here. We live in an era where ultimately no one is going to have paper records in their house. All of your records are going to be electronic. Because they are held and they are managed somehow by a third party, can we claim we have given up our rights? The thing is that the government might say if your cell phone is in your house, then they do. But the cell phone is connected to somewhere outside your house. Your email is being served on some server somewhere. I see no way that it could be construed that you have given up your right to privacy because someone else is holding the records for you because that is the way in the digital age we have come to hold records.

We talked a little bit earlier about trust. I think trust is incredibly important. I do not discount that the vast majority of people who work in our intelligence community are honest, trustworthy, and patriotic. I think we all want the same thing. We want to protect our country. We want to protect our loved ones. We want to honor the memory of those who died on 9/11 by capturing and stopping the people who would attack us. But the question is: Can you catch more or less, or are we more or less effective, in catching terrorists if we use the Constitution, if we use traditional warrants?

I think, without question, if you talk to people, they will tell you that they get a great deal more information and more specific information by using warrants.

Let’s say tomorrow we elected a President who eliminated the bulk collection of data. Let’s just say it happened. What do you think would happen? People say: Oh, the sky would fall. We would be overrun with jihadists. Maybe we could rule on the Constitution, maybe we could rule on that. The security information is out there. There are warrants. If you make the warrants specific, there is no limit to what you cannot get through a warrant. The warrants are given the vast majority of the time.

People complain and say it would take too long; it would be inconvenient. Make it better then. Put your judges on 24 hours a day. Appoint 24 putty judges. And then, on a particular day, and let’s do this. There is no reason why you cannot have security and liberty at the same time.

Another amendment we have—should the leadership agree to allow us to have amendments—to have a vote and to have a debate on this—is an amendment that would require the court to approve national security letters. In a 3-year period between 2003 and 2006, 140,000 national security letters were given out. National security letters are warrants that are below the constitutional bar. They do not meet the constitutional bar because they are not being signed by a judge. They are being signed by the police. You got rid of one of the great protections we had, which was the check and balance that the police would always go to the judiciary. It was a different branch.

The judge is sitting at home, hopelessly reading it in one fashion. The judge is not in hot pursuit. The judge is not letting their emotions—the judge was not just punched by one of the convicts. The judge is sitting at home in a reasoned fashion trying to make a reasoned decision. But still, the vast majority of the time, warrants are given.

If there is a policeman outside the house of an alleged rapist, and they want to go in, they call on a cell phone. The judge almost always says yes. It is the same for murder.

Does anybody imagine that there would be a judge in our country and that you call and say: John Doe—we have evidence that he is a terrorist. We have evidence that he lived in Yemen last year. We have evidence that he talked to Joe Smith, and we have evidence that he is a terrorist, and we want a warrant to tap his phone.

Look, I am the biggest privacy advocate in the world. I will sign the warrant immediately. I do not know of anybody that will not sign warrants to allow searches to occur. But you have the check and balance. It does not get out of control. What happened and what is happening now is let us down our guard. We have no checks and balances. So what does the government do?
when you are not watching? If you look away, the government will abuse their power. Lord Acton said: ‘‘Power corrupts, and absolute power corrupts absolutely.’’ The corollary to that would be: When you are not watching, power grows and the corruption increases.

They will do whatever they can get away with. They will do it in the name of patriotism. Actually, I do not even question their motives. They believe themselves to be patriotic, but they think we have to do anything it takes to perform their work. It travesnes the Constitution or travesnes the Bill of Rights. The people who do this—their motives are good, but they are confused in a sense, and they do not fully comprehend what we are giving up in the process.

This amendment would require judges to sign national security letters. It would make them more like warrants. In practice, national security letters have become warrants written by people without court review and approval, granting them almost unfettered access to individual email and phone communication data, as well as consumer information such as bank and credit records.

The least the national security letters must also obey a gag order. Not only does the Government come to you with a less than constitutional permit or a less than constitutional warrant, but they then tell you that you cannot say anything. You may go to jail for 5 years if you tell somebody you had a warrant served on you.

This amendment would require that a government obtain approvals from a court prior to issuing an NSL to a private entity, thus forcing them to dem- onstrate a clear need for information as part of an investigation.

Amendment 6 would create a new channel for legal appeals for those sub- jected to government surveillance or- ders. The amendment would empower individuals or companies, ordered by the government to hand over information about users or customers, to make constitutional challenges that would be in order in the U.S. court of appeals. My understanding right now is that it is very difficult to appeal a FISA order. They are secret. You are not allowed to be in the court, so you are not allowed to participate in the process. I think, also, you can get outside of FISA by appealing, but I think you have to do something called a writ of certiorari. It is a spe- cial condition, and it is not so automatic. My understanding is that the court will grant these things, but they do not occur very often. They are an extraordinary thing.

We would like to make it a little bit more of a facility of getting to a normal appeal—the way a normal appeal would occur. We have been pushing to allow that there would be more of an automatic sort of appeal here.

One of the other amendments would say there is no liability immunity for companies that break their agreements with users. Like I said, while I am not in favor of lawsuits and I do not like the idea of frivolous lawsuits, I think if you do not protect the contract and if you have a privacy agreement that says they are not going to share your information with anybody, the only way they will protect it is if there is the threat that they could be sued for not protecting it. I think the contracts become not worth the paper or the click ‘‘I agree to this’’ and become meaningless. Companies you do not know are told they can go around it. The companies have all specifically re- questsed this because I think they fear that every day the government is re- questing them to breach the privacy contract. So in order to enable the pri- vacy contract, I think we have to get to a point where people can sue if their privacy is violated.

I think there can be a mixture of opinions on what Snowden did. I think one thing that has to be laws against revealing secrets, so I can’t say we should have everybody revealing secrets. At the same time, I think the law says that those who are reporting to Congress should tell the truth.

So we have the intelligence director lying to us and saying the program doesn’t exist, and then we have some- thing that is going on. When you commit civil disobedience, it isn’t that we change the law and say it is OK. What we do is say: You broke the law, and maybe you did it for a higher purpose, but it doesn’t mean we will get rid of punishment for things like this. I think there is one way we can modify it.

Snowden was a contractor, and we don’t have very good rules for whistle- blowers who are contractors. I would extend the whistleblower statute to people who want to come in and want to tell an authority, an investigator general or somebody, if they want to reveal that they think something is being done illegally.

For example, if Snowden knew that Clapper was lying, a felony has been committed. I would think that some- body who has evidence of a felony and tells the investigator general, ‘‘Look, I have seen this, and I have seen that they are collecting all the records of every American,’’ and he says they are not, then he has committed perjury and a felony, and there ought to be some sort of whistleblower statute for that. That is one of our amend- ments is to allow whistleblowers to be contractors as well.

One of the things that has been going on—even predating the PATRIOT Act and goes back to probably the 1980s and 1990s—but suspicious activity reports. These are now being done. I believe, by the millions. At one point I looked at it, and 5 million of these had been filed. Every year, hun- dreds of thousands of these are being filed, and if the banks don’t file them, the banks could have their licenses taken from them or there could be $100,000 fines issued to banks.

What we would like to do is make a suspicious activity report based on suspicion, not just based on a trans- action. It would make it more like a warrant where a judge would actually review it and see if there is suspicion of a crime or reporting this activity instead of just reporting a activity based on the way people do their transactions.

The problem has been that we now have the IRS confiscating your money, your bank account, based on the way you do your transactions. It is not based on a conviction; it is based on, I guess, the presumption that you are guilty until you can prove yourself inno- cent. This is also going on with civil asset forfeiture. It is intertwined to with civil asset forfeiture. It is intertwined with the IRS and with the government to collect our records in an un- constitutional manner, we have to be very careful that those records are then those records are then those records are then those records are then being used with the presum- pulation of guilt, not innocence.

Our concern is that we need to look more at the Executive order. I think it is being done in secret, but once again, an evaluation as to whether a law is constitutional or whether a law over- states its purpose should be done in the open.

I spoke with one of the founders of one of America’s larger Internet companies recently, and he told me that not only is he worried about bulk collection, but he is worried that bulk collection might be smaller—the collection of all the phone data might be smaller than the backdoor collection through, 702 and the backdoor collect- tion through the government forcing companies to allow them into their software.

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Our concern is that we need to look more at the Executive order. I think it is being done in secret, but once again, an evaluation as to whether a law is constitutional or whether a law over- states its purpose should be done in the open.
Well, 2 years later, we are here again, and the threats to America’s civil liberties and constitutional freedoms remain ever present.

As my colleague from Kentucky is well aware, I spent more than 12 years in the technology sector before being elected to Congress. I know firsthand the power that Big Data holds. I also know the great risks that arise when that power is abused.

There is a clear and direct threat to Americans’ civil liberties that comes from our collection of our personal information in our phone records. I, like so many Montanans, am deeply concerned about the NSA’s bulk metadata collection program and its impact on our constitutional rights. In fact, just last night, I hosted a telephone townhall meeting with thousands of Montanans, and one of the issues I heard most about was the NSA’s bulk data collection program and when is Congress finally going to put a stop to it. In fact, this is one of the issues I hear most about from my fellow Montanans.

I brought down just a few of the thousands of letters I received from Montanans on the NSA’s dangerous bulk metadata program. For example, I have a letter from Adam, who lives in Missoula. Adam writes:

I’m writing to ask you to allow Section 215 of the PATRIOT Act to expire on June 1st of this year. While it is only one provision of the law, it would at least begin to curtail the surveillance of Americans.

As Americans we should be free to communicate without the threat of the government monitoring those communications. Wanting to keep your life private does not mean you have something to hide—only that your life isn’t any of the government’s business as long as you are not infringing on the liberty of others.

At the end of the day, giving up our liberties because of the threat of terrorism truly is a threat of terrorism winning. To be free inherently means a person also inures risks.

Even though he was speaking about taxes, I believe in maintaining privacy: “Those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety.”

Jes from my hometown of Bozeman, MT, wrote:

I am writing to you as your constituent.

NSA spying needs a comprehensive overhaul. But in the meantime, I urge you to show that you care about the Constitution by voting against the reauthorization of Section 215 of the USA PATRIOT Act. Section 215 has been used to invade the privacy of millions of people.

Although I come in Congress and the NSA have argued that collecting call detail records (“metadata”) is not privacy invasion, the information collected by the government is nothing, it paints an intimate portrait of the lives of millions of Americans.

What’s more, the collection of call detail records is not even necessary to keep us safe.

The President, the Privacy and Civil Liberties Oversight Board and the President’s Review Group have all admitted that collection of phone records is not necessary to keep us safe.

PCLOB (Privacy and Civil Liberties Oversight Board) went so far as to note that it could not identify the single time in which bulk collection under Section 215 made a concrete difference in the outcome of a counterterrorism investigation.

That’s why I strongly support reform by committing to a no vote on reauthorization of Section 215.

A vote against reauthorization is a vote for the Constitution. Thank you for opposing unconstitutional surveillance and for supporting a free and secure Internet.

Montanans are right to be concerned. This program is a direct threat to our constitutional rights. It has jeopardized our civil liberties with little proven effectiveness, and I am the son of a U.S. marine.

Several weeks ago, I was with Leader McConnell and other Senators. When we went to Israel, we met with Prime Minister Netanyahu. When we went to Jordan, we met with King Abdullah. When we went to Iraq, we met with Prime Minister al-Abadi. When we were both in Baghdad, we went up to Erbil and met with the leaders of the Kurds, including Mr. Barzani. We then went to Afghanistan. We were in Kabul, and we were in Jalalabad. We met with President Ghani. We heard directly from the leaders in the Middle East, we heard directly from our U.S. military, and we heard directly from intelligence about what is going on in the Middle East.

As the father of four and someone who strongly believes in a strong national defense and the importance of protecting our homeland, I weigh these issues very deeply. These are heavy issues we must look at as we want to ensure we protect the homeland and, just as important, protect the Constitution and the constitutional rights of the American people.

As my colleague is likely aware, a 2014 report from the Privacy and Civil Liberties Oversight Board, which is a nonpartisan, independent privacy board, found that the NSA’s bulk data collection program said that it “contribute[d] only minimal value when combating terrorism beyond what the government already achieves through ... other alternative means.”

Like the New York-based Second Circuit U.S. Court of Appeals recently unanimously confirmed, this oversight board found that section 215 of the PATRIOT Act does not provide authority for the NSA’s bulk metadata collection program. In fact, the report states:

Under the First and Fourth Amendment, the telephone records collection program, the NSA acquires a massive number of calling records from telephone companies each day, potentially including the records of every call made across the nation. Yet Section 215 does not authorize the NSA to acquire anything at all.

It is illegal, it is an overreach of power, and it is a direct threat to our First and Fourth Amendment rights.

In fact, the report goes on to conclude:

The program lacks a viable legal foundation under Section 215, implicates constitutional concerns, and is not necessary to protect national security. The Fourth Amendment, raises serious threats to privacy and civil liberties as a policy matter, and has shown only limited value. For these reasons, the government should end the program.

I stand here today with the people of Montana. I stand here today with my colleagues from Kentucky, I stand here today with five Members of the U.S. House who are seated in the back of the Senate Chamber: Congressman DUNCAN of South Carolina, Congressman BLUM of Iowa, Congressman GAINES of Kentucky, Congressman LABRADOR of Idaho, and Congressman AMASH of Michigan.

I think it is important that the Senate recognize what the people’s House did last week when last week passed the USA FREEDOM Act. That vote was 338 to 88. To suggest that this is just a small minority of Congress men and women who support the USA FREEDOM Act—this is the chairman of the Intelligence Committee, the chairman of the Armed Services Committee, and the chairman of the Homeland Security and Governmental Affairs Committee, amongst many others, who I strongly believe will make sure we strike the right balance between protecting the homeland and protecting our civil liberties.

The people of Montana, my colleague from Kentucky, the five Members from Congress who are here at this moment, and millions of Americans know I strongly agree with their view on the USA FREEDOM Act.

Like all Americans, I understand the great risks that face our national security and law enforcement agencies have the threats from ISIS, the threats from North Korea, and the threats from Iran grow stronger each and every day. We must be prepared. We must ensure our intelligence and law enforcement agencies have the tools they need to protect and defend our Nation. But these objectives—national security and protection of our civil liberties—are not mutually exclusive. We can and we must achieve both.

We must maintain a balance between protecting our Nation’s security while also maintaining our civil liberties and our constitutional rights.

All of us standing here today took an oath to protect and defend the Constitution. I took that oath just a few steps away from where I am speaking here today, between myself and the Presiding Officer’s chair, occupied at the moment by the Senator from Utah, Mr. Lee.

As all of us here today know, the right to protect our Constitution and America’s civil liberties is far from over. We must remain vigilant and we must also ensure that we have robust and transparent debate about these programs and what reforms must be implemented to protect our civil liberties. That is why I support the USA FREEDOM Act, which would end the NSA’s bulk metadata collection program and why I strongly believe that Congress must engage in an open amendment process so American people must have their voices heard, and an open amendment process will help ensure that happens.
In light of all we have learned about the NSA’s unlawful bulk data collection program, it is clear that reforms must happen. It is critical that Americans’ rights are protected against the overreach of their own government.

So I thank the Senator from Kentucky, who would agree that the indiscriminate government collection of Americans’ phone records violates the Constitution and, according to two independent commissions, has not proven critical to our national security?

(Mr. PAUL. I wish to thank the Senator from Montana for that excellent synopsis of the issues as well as for the great question. I think the reports by the review committee and the privacy committee, both commissioned by the President, both nonpartisan, are incredibly powerful because not only did they look at the constitutional issue of whether this is a bulk or a general warrant versus an individual warrant, they also looked practically that it wasn’t working, it wasn’t adding anything to our intelligence. So I think we have sort of a dual reason now to say this is a big problem.

One or are constitutional questions, which I think are very clear, but then the second practical question is that when we examine the evidence—and the privacy commission actually looked at classified evidence; they looked to see whether it was adding anything to this—I am thoroughly convinced that we can catch terrorists with traditional constitutional warrants.

When I have talked to former high-ranking heads of our security agencies, they freely admit they get more information with a warrant. It is a little more work. It has to be more specific. But I am also a believer in that because we have generalized what we are looking for and it is indiscriminate, that maybe we are missing people because we are overwhelmed with data. We are overwhelmed with things at the airports. I would much prefer that we have less indiscriminate searches at the airports and be more specific in looking at the manifests of who is flying and trying to find out who are the risks.

So I do think that, without question, this is not a constitutional program. It is not even legal under the PATRIOT Act, and it is not even constitutional. They also said we should do everything we can to stop it.

I appreciate the support of the Senator from Montana.

One of the things about this issue is that it really is a bipartisan issue. It is an issue where there are people who feel strongly on both sides of the aisle. The Senator from Oregon was here earlier and the Senator from New Mexico, and I now see the Senator from West Virginia who is also a loud and consistent voice on this.

Does the Senator from West Virginia have a question?

Mr. MANCHIN. Mr. President, will the Senator from Kentucky yield?

Mr. PAUL. I will, without yielding the floor.

Mr. MANCHIN. I know the Senator from Kentucky agrees with me that the protection of our civil liberties should be bipartisan and above politics. I know he agrees that we can and must protect our citizens without violating their civil liberties. Again, I don’t always agree with my good friend from Kentucky on an issue where there are people who feel strongly on both sides of the aisle.

As was he, I was deeply troubled by the revelation that our country was engaged in bulk collection—I think we all were surprised—and that millions of private citizens’ data was gathered unknowingly and unjustifiably.

In 2013, Edward Snowden revealed to the American people the NSA was engaged in “bulk data collection,” in sweeping up virtually every cell phone record of an enormous number of Americans, again for no reason. The U.S. spying program did this by systematically and indiscriminately collecting millions of Americans’ phone records by simply digging up every phone record that came into its net even if it wasn’t remotely related to a broad, general search. These are not searches that are relevant to a particular threat or an individual group; it was just a huge database of documenting what millions of law-abiding citizens were doing.

That is not what this country was based on, and I think the Senator from Kentucky has made that very clear. I know the Senator from Kentucky believes this was wrong, as I do. That is not just our opinion; national security experts, legal experts, the American public, and even several courts have said that the bulk collection of data is not only unconstitutional but also unnecessary to our national security. And my friend from Kentucky has confirmed that the President’s review group has said that bulk data collection has not made a difference in a single instance.

The bill the Senate will soon be considering—the USA FREEDOM Act of 2015—will ensure that we restore important privacy protections for Americans.

The United States will always face security threats—I think we all know that—and we will for generations to come. That is just a reality. On that horrible day of September 11, 2001, we as a country were blindsided by this fact and realized we must meet those threats with strong law enforcement and strong intelligence. However, we must also balance that necessity with our constitutional rights.

The NSA bulk data collection program clearly did not strike that balance, and the District Court of DC and the Court of Appeals of the Second Cir-
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I yield the floor back to the Senator from Kentucky to hear basically his concerns and how we can have some protections, and do we have any rights whatsoever to gather information when it is proven? I have heard the Senator from Kentucky say that if he thought we could prove it, there was a different concern we had and we could get the FISA Court involved and basically move forward from there.

I thought this bill moved us in a positive direction—the new bill before the Senate that we are about to consider. I would appreciate it if the Senator from Kentucky could explain to me his concerns about that and what we need to do.

Mr. PAUL. Let me make sure I have the question correct. The Senator’s question is on my concerns on the USA FREEDOM Act?

Mr. MANCHIN. USA FREEDOM 2015.

Mr. PAUL. I want to like it because it ends bulk collection, and I am all for ending bulk collection. So I agree—the people for it agree with the problem; it is a question of the solution.

It says there have to be specific selector terms on U.S. persons. Part of my problem is corporations are still defined as corporations. My concern is that you could put the word “Verizon” in there, and the government wouldn’t be collecting the records, but you still could get all records from Verizon. Does the Senator see what I mean? That is one of my concerns with the way it has been written.

My other general concern is that we would still be having bulk collection. It wouldn’t be bulk collection by the government, but it would still be bulk collection but through the phone companies.

I don’t like the liability protection because I think it makes it more likely than not that the privacy agreement won’t be as respected if they cannot be sued for violating the privacy agreement.

Those are a couple of concerns. I don’t know if they are insurmountable, but those are a couple of concerns.

Mr. MANCHIN. I think we both agree and most of the people in this body agree that the bulk collection is wrong. It has been proven to be illegal, it shouldn’t have been done, and it should be stopped. I think we all agree on that.

I think we still face considerable threats from around the world on a daily basis, if not even greater than that. We are looking to try to find a balance, and I think the Senator from Kentucky is valuable in helping us find that balance. That is what we are looking for. I know our colleague, Senator Lee from Utah, has made a gallant effort in trying to find that balance and making sure that we don’t overlap.

The private companies are collecting. They already have that information anyway. It is not just sweeping from NSA, as they had been doing. Basically, I am understanding by this bill, the USA FREEDOM Act of 2015, that basically we would have to demonstrate to the FISA Court reasonable, articulate suspicion that its search term is associated with a foreign terrorist organization. They can’t even go into those records until that is shown.

That is what I am not sure of. I am not sure if there is something I am missing.

Mr. PAUL. I guess the question I have is that we have some of those restrictions now, but they seem to think that they can apply that, and I think the people interpreting what we have now are interpreting 215 to mean we can collect all of the American records in bulk.

If there were a circumstance where I was necessary to pass USA FREEDOM and if it were that close, if people were willing to look at the bill and say we would make a person, an individual—see, the big thing for me is that the warrant should be individualized. And I think it is being changed in place because if we use the word “person” and if it can be replaced with the word “Verizon” and we still collect all the records, I would feel disappointed if we thought we got rid of bulk collection and a year or 2 from now we admit that if we used the word “person” and it can be replaced with the word “Verizon” and we still collect all the records. I would feel disappointed.

Mr. MANCHIN. I guess we are caught in that Citizens United decision, it sounds like.

Mr. PAUL. In a different way, we are talking about whether in the intelligence selector numbers a person is a corporation and whether can have a single warrant.

I think if you want phone records from Verizon, it should say “Verizon” and grant the records of John Doe. It shouldn’t just say that we want all the records from Verizon. That is a general warrant. I am still fearful that the USA FREEDOM Act might not limit that.

Mr. MANCHIN. If the FREEDOM Act goes away and the way they are doing bulk collection, which we agree should be done away with—and we don’t come to some agreement—are you concerned that we might be in more jeopardy by not being in place where we are able to get the necessary intelligence we need?

Mr. PAUL. I guess that is also where I probably differ. I think we are just as safe or safer with nothing, because the Constitution allows the searching of records. And I agree with it all for it, but I would do it through warrants.

The point is that in metadata, one can do a hop or two with these less-than-constitutional warrants or whatever. But with a real warrant, we can do 10 hops into the data. It really would chase the rabbit down the hole. I would look very hard with suspicion, and I think warrants are generally easy to get. This is the point I don’t get about why we have to have warrants with a lower constitutional standard, because I think the FISA warrants are almost never turned down, but neither are criminal warrants. If you are a policeman standing in front of a house, you aren’t going to get a no. But if you are a policeman saying, I want to search all my neighbors’ houses, then the judge is going to say no, and that is a good thing. So I think traditional warrants—I think people have somehow just convinced themselves that we can’t catch terrorists with traditional warrants, but I think you can go through a lot of data with traditional warrants, too.

Mr. MANCHIN. Your sincere belief is that if this sunsets, this bulk collection in the way the PATRIOT Act has been enforced before—if it sunsets and it goes away, which we agree that we are trying to replace that before the sunset—you believe the system we have now is going to be even safer?

It shouldn’t just say that we want all the records from Verizon. That is a general warrant. I am still fearful that the USA FREEDOM Act might not limit that.

Mr. PAUL. I think that also and within the context of—we have six or seven amendments that we would like to offer. I can’t guarantee that we could win any of them, but there is a chance maybe we could win another reform.

So for example, one of the reforms that some people think may be as important as all the bulk collection is the ability of the government to tell an Internet provider that they have to create a backdoor to their product for the government to go through—and some of the backdoor stuff through 702. We think there are some other things that may well be as big as this. I also think that there is the possibility for government to not only use traditional warrants. They have some they are using under Executive order, as well, and we still have a host of other types of warrants and subpoenas being used. But I would never be for this in a heartbeat if I thought it was going to put the country in danger. I think we will be safer because of it and so will our liberty.

Mr. MANCHIN. It is a good point in this bill that we will be considering, the 2015 FREEDOM Act. It expands the opportunity for the appellate review of the FISA Court decisions, which I think the Senator has had a problem
Mr. PAUL. Say that again, please.

Mr. MANCIN. The bill that we will be considering is expanding the opportunity to appellate review of the FISA Court decisions. I think and I understand that you are saying they can get a FISA order no matter what.

Mr. PAUL. I am not sure I understand the question, but I do believe as to the court case right now, the Senate stands—if the USA FREEDOM Act had passed last year, I think there was a chance that it might have made the court case moot because it would have said that Congress has already acted and Congress had a statutory authority for a variation of this and Congress already fixed the problem. So there is a part of me that would like to see the appellate court case go up to the Supreme Court. It has been remanded to a lower court so I don’t ks. It is it is ever getting there. But we ultimately have some questions in our country that won’t be decided until we have a Supreme Court case.

One of those questions is, Do papers have to be physical and in your house? What if they are digital and lodged somewhere else? Do you have any right of privacy, any Fourth Amendment protection at all for records that are held somewhere else? The current legal opinion doesn’t really give any protection to third-party records. I think that needs to be fixed, because technology has made it such that our records are no longer going to be real records that you can hold in your hand. I think almost all of our records will be virtual and held in space somewhere, and I think you still have to have a personal privacy protection in those.

Mr. MANCIN. So the bill that we have proposed, any Fourth Amendment protection at all for records that are held somewhere else? The current legal opinion doesn’t really give any protection to third-party records. I think that needs to be fixed, because technology has made it such that our records are no longer going to be real records that you can hold in your hand. I think almost all of our records will be virtual and held in space somewhere, and I think you still have to have a personal privacy protection in those.

Mr. PAUL. There is a lot that I like in the bill. It is just a matter of whether or not I can be convinced that it doesn’t allow bulk collection under another name. I am still worried about that. But I am open to it.

Some of these things—this is a very important bill. I mean, we could have a week of discussion on this bill, and amendments and a process. The only reason we are getting a little bit of this is because I am kind of forcing the issue. Like I would like to see the amendments voted on. All the other stuff we are doing around here is important but has no deadline. We could have done it next week or 2 weeks from now—all the stuff we are doing right now.

But anyway, that is what I am going to be asking for—the ability to present five or six amendments, vote on them, and then we will see. And I am more than willing to talk with the authors of the USA FREEDOM Act to see if there is a way, but it is going to have to involve some give and take to figure it out.

Mr. MANCIN. It sounds like we are not that far apart. I think we are all going down the same path, trying to keep the homeland as secure as possible while protecting the rights of all Americans. I appreciate that. I hope that we do. These are important issues. It is a different world that we live in. It is a threatened world that our children are being raised in. We want to do everything we can to protect them, and I know you do, too.

With that, I think we all came to an agreement that was done before was wrong. So we all come unanimously to that agreement, and finding a pathway forward is what we are working on now. So I appreciate your sincerity and your intent to try and reach out and find that. I hope you can find that comfort level so we can move forward and still have a protected country.

Thank you.

Mr. PAUL. I thank the Senator from West Virginia. I think he has made some really good points. I think a lot of us have come to the agreement that there is a problem with bulk collection. I don’t think we have everybody, but I think we have a significant number. The court agrees with us. So I think we are getting closer.

One of the groups that we have talked about in looking at where we are, whether this is constitutional or legal program—is it is pretty intrigu ing to think that, as a function of the Privacy and Civil Liberties Oversight Board. This is a bipartisan board. It is a board that was put in place, and I think the appointees are bipartisan appointees.

When they met, they came to the conclusion, though, that the bulk collection of records is not warranted and not given sanction by the PATRIOT Act. They had four different reasons why they say that the telephone records bulk collection of our records—does not comply even with the PATRIOT Act. The first reason they say is that there is no connection to any specific FBI investigation at the time of the collection. So, basically, when they collect your phone records, they are not even alleging that they are related to any investigation. But that is what the statute says. They are supposed to be relevant to an investigation, but there is no evidence and nothing is ever presented that there is any investigation on. The investigation actually starts after they have collected all of your records.

So how can section 215 say that you can collect these records because they are relevant to an investigation that has not yet even begun? They use this big data case later on when they say there is going to be an investigation. So I think their No. 1 reason is pretty strong. There can’t be a connection or relevancy because there really is no investigation when they collect your records.

The second reason of the privacy commission was that the records are collected in bulk, potentially encompassing all telephone calling records across the Nation. They cannot be regarded as relevant to any investigation without redefining the word ‘relevant’ in a manner that is circular. Relevant or not I can be convinced that it is.

For example, if there is someone in the northwest section of Washington, DC, and we saw something happen there. We are saying we want to look at the records there. Even though it might be bulk collection, it would be at least relevant to some sort of investigation. There would be some pertinent factor. But they are just collecting everybody’s records. It is completely without any relevancy. And I love the way they put it—that this would not be relevant unless we redefined the word, put it in another context in a manner that is circular, unlimited in scope, and out of step with case law from analogous legal context involving production of records.

The third reason why the privacy board said that this program is not legal is that it operates by putting telephone companies under an obligation to furnish new calling records on a daily basis as they are generated, instead of turning over records they already have in their possession. This is by an approach lacking foundation in the statute and one that is inconsistent with FISA as a whole.

The final reason they say that this program is illegal—is this the President’s own privacy commission—is that the statute permits only the FBI to obtain items for use in the investigation. It does not authorize the NSA to do anything. So section 215 of the PATRIOT Act is what they are saying that the bulk collection is an illegal program is illegal—this is the President’s own privacy commission—is that the statute permits only the FBI to obtain items for use in the investigation.

The next thing the policy committee looked at was they looked at and they tried to decide whether there has been any practical effect. I know Senator LEAHY was a part of this, looking at whether any of these things actually did catch terrorists. But this is what they concluded, and they actually looked at the classified data. So the Privacy and Civil Liberties Oversight Board looked at the classified data, and this is their conclusion:

However, we conclude that the Section 215 program, the bulk collection, has shown more value in the reduction of information from terrorism, . . . we have not identified a single instance involving a threat to the United States in which the (bulk collection) program made a concrete and significant contribution to the outcome of a counterterrorism investigation.
Those are pretty strong words. The Policy and Civil Liberties Oversight Board commissioned by the President, which is bipartisan, looked at the classified data and said it didn’t find a single incident—not one incident—in which bulk collection caused any adverse effect on the outcome of a counterterrorism investigation.

Moreover, we are aware of no instance in which the program directly contributed to the discovery of a previously unknown terrorist. . . .

What does this mean? We are not pushing a button and generating terrorists out of this. The terrorists are coming from real information. You have to realize that this misinforma-
tion and this wrong-headed informa-
tion has been used forever—for 15 years—to justify the fact that we should give up on the Fourth Amendment and we should give up on protect-
ions.

Over and over people say that if we only had the PATRIOT Act, we wouldn’t have had 9/11. The two terrorists they claim we would have gotten were already on the terrorist radar. We already knew about them. An informant lived with them for a year. The FBI wasn’t talking to the CIA, they weren’t looking at lists, and they didn’t know they would come back. The CIA didn’t know. It had nothing to do with having bulk collection of our records. We knew about these people. It was crummy work. It was people not doing their job. I repeat: No one was ever fired. We gave rewards. We gave medals of honor to every intelligence community and no one was ever fired. There were some true heroes—the FBI agent in Arizona and the FBI agent in Minnesota who actually discovered poten-
tial hijackers. The 20th hijacker was captured before 9/11. The 20th hijack-
er was captured a month before 9/11. That is the person who should have gotten the Medal of Honor. The person who would not listen to him should have been fired. I have no under-
standing of a system that anybody was ever fired over 9/11.

The Policy and Civil Liberties Board goes on to say that our review suggests that section 215 of the PATRIOT Act, the bulk collection of records, offers little unique value. They explore a lit-
tle bit of whether there is a privacy problem with collecting all of these records and what are the implications of collecting all of these records. The government’s collection of a person’s entire telephone call history has a sig-
nificant and detrimental effect on an individual’s privacy.

Beyond such individual privacy in-
trusions, permitting the government to routinize calling records of the entire Nation fundamentally shifts the balance of power between the State and its citizens. With its power of compul-
sion and criminal prosecution, the gov-
ernment possesses unique threats to privacy when it collects data on its own citizens.

Compound this with the fact that the government—you could say: Well, they are just collecting this data at a lower standard, but if you are not a terrorist you do not have to worry. But here is the problem. They are collecting this data with the lower standard, a less-
than-constitutional standard, but then they are also prosecuting you for do-

Section 215 of the PATRIOT Act is being used 99.5 percent of the time for domestic crime. We are putting drug dealers in jail. That is another ques-
tion and another story. But then we could say, OK. For drug dealers, we are not going to have the Constitution anymore, we are going to have the PATRIOT Act for drug dealers. Let’s be honest about it. The war on drugs has had a disparate impact, a disproportionate impact on people of color. So you have to admit to all the young Black men and all the young Brown men you put in prison that we are no longer using the Con-
stitution to stick you in prison, we are using the PATRIOT Act to put you in prison.

We need to be honest with people. If the PATRIOT Act is about terrorism, they should adopt my amendment that says you cannot be put in jail for a do-

Why? Because the PATRIOT Act has dumbed down and loosened the stand-
dards. We do not have probable cause, we have relevance. Realize that rel-

er, as they say in the Commission, has some completely circular and de-

void of meaning if you are saying that all the records in the country are somehow relevant to an investigation that has not yet begun.

They make a great point here about the fact that not only does this stifle or invade your privacy, it may well sti-
fle your speech and your association. If you are going to be associating with minority causes, unpopular causes, whether you are a kid from the North who went down to be in favor of civil rights, for someone who belongs to the NAACP or the ACLU, they say: Yet, even though there is no evidence of abuse—

And this is the big argument. Every-
one says: Well, there has never been any abuse, so it is fine to keep doing this.

Yet, while the danger of abuse may seem remote, given historical abuse of personal in-
formation by the government during the 20th century, the issue is not practical.

I could not agree more. Moreover, the bulk collection of telephone records can be expected to have a chilling ef-

ect on the free exercise of speech and association because individuals and groups engaged in sensitive or controv-

ersial work have less reason to trust in the confidentiality of their re-

lationships as revealed by their calling patterns.

Realize that they are taking your phone records, your calling lists, your buddy lists, your ISP address, your email. They are integrating this into some network where they can pull your name up and find out who are all your

buddies, who are all your friends, who are all your Facebook friends.

Realize the potential danger of hav-

ing so much information, so much of a dossier on every American citizen, even if they are not using it. But when you think about it, well, these people are not using it and good people are running these agencies, realize that the head of the Agency lied to us about this program at all. He said it did not exist. So when you get to be trusting these people to protect your individual interests, realize—at the very top of the intelligence community, the most famous person in our country dealing with intelligence lied to a congressional committee and said that this program did not even exist.

The report goes on to say that the in-

ability to expect privacy, vis-a-vis the government and one’s telephone commu-
nications, means that people engaged in wholly lawful activities, but

who for reasons justifiably do not wish the government to know about their communications, must either forgo such activities, reduce their frequency or take costly measures to hide them from the government surveillance.

The telephone records program thus highlights the ability of advocacy organiza-
tions to communicate confidentially with members, donors, legislators, whistleblowers, members of the public.

Initially, in the 1970s when we set up the surveillance court, the security court, the FISA Court, they were done with individualized warrants. They got information through individualized warrants.

Beginning in 2004, though, the role of the security court changed when the government approached the court with its first request to approve a program involving what is now referred to as bulk collection. For the first several years, we did bulk collection—they just did it. They just said it was under the inherent authorities of the President. This should scare us because there are people who believe that the inherent authorities of the President are unlimited. That would not be a President.

There would be another name for that. But if there are no limits to what the President can do, there is another name for it and it is not President. The Commission goes on to say that the judge’s decision— their decisionmaking would be clearly enhanced if they could have access to all this information.

The security commission advocates exactly what I am advocating for, that you should have a lawyer in there with you and that there should be an adversarial type of procedure.

Because the thing is, is that it is like any other dispute. If you have ever heard two people arguing, figuring out the truth is listening to both sides and trying to gather what the truth is. So I think that we get to the truth a lot more if we had someone asking ques-
tions. For example, that section 215 of the PATRIOT Act says that the infor-

mation has to be relevant to an inves-
tigation.
Without having someone in there to argue your case, the court appears to have not really had a great deal of discussion or, to my mind, thought about whether bulk collection is somehow relevant. You might argue that if there were a court that meets in secret, that maybe someone would stand up and say to the judge: How can this be relevant? What investigation is it relevant to?

See, I think the FISA Court became such a rubberstamping that you were not even having these questions asked because how could you ask that question. If you are an advocate for someone who does not want to give up their information, you do not think you understand or accept that, if it were an adversarial procedure where you have a lawyer on both sides, I don't think you would have not really had a great deal of discussion or, to my mind, thought about whether the Senator from Kentucky would be good enough to confirm that. This is how could you ask that question.

If you are an advocate for someone who does not want to give up their information, you do not think you would have the ability to have a court just below the Supreme Court just below the Supreme Court, that maybe someone would say: Well, we are going to do it. It will be relevant when we do an investigation.

No court, you would think, would understand or accept that, if it were an adversarial procedure where you have a lawyer on both sides. I don't think you would have the ability to have a court just below the Supreme Court, that maybe someone would say: Well, we are going to do it. It will be relevant when we do an investigation.

As far as the end result of where it goes, I want to end bulk collection. So I agree with all of the people on the USA FREEDOM side. I am a little concerned that we might be transferring government bulk collection to privately held bulk collection.

In the selectors terms they use in the USA FREEDOM Act, it says “person.” It says “specific person.” I think it defines “person,” though, as still including corporations. My concern is that you could write into specific person “Verizon” again, and we are back where we started.

So if we could get to a point of No. 1, allowing some amendments to be voted on and maybe changing it such that you can’t have—see, to me, the broad issue here is versus a specific warrant. I don’t want warrants that you can get everybody’s records all at once or even one company’s. I want the warrant to say—and I am fine with getting terrorists. I want to get terrorists. If John Doe is a potential terrorist, put his name on it. You can go as deep as you want into the phone records, but do specific warrants. But I don’t like it if you just say: I want everybody’s records from a phone company.

So I am concerned that we are trading one bulk collection for another form, and I need to be a little more assured on that. I think there might be
I don't know the outcome, but I was uncertain enough that I came today to come to try to draw attention to it. And if I had a request today, it would be the leadership to let amendments to go forward, that we agree on having a pretty free amendment process.

This is only every 3 years, and it is a big deal. We don't have much legislation come before us where an activity has been said to be illegal by an appellate court, we continue to do it, and then people want to advocate to continue to do something that is illegal. But I am going to try to see what I can get. I am not going to get an answer; maybe today—from leadership on whether they will allow amendments to this. I want to be pretty certain that it is going to happen because they seem to fall away sometimes.

Mr. PAUL addressed the Chair. The PRESIDING OFFICER. Does the Senator from Kentucky yield for a question?

Mr. PAUL. I want to continue to keep the floor. I yield for a question without changing the subject.

Mr. TESTER. Mr. President, first, I thank the Senator from Kentucky for what he is doing. I think this is very important, and I stand here today with my colleagues on both sides of the aisle to protect America's privacy rights. I am very much concerned by the overreach we have seen in the name of national security, and I oppose efforts to reauthorize any piece of it without real reforms.

People in Montana know I have been an opponent of the PATRIOT Act since it was signed into law. Why? Because the PATRIOT Act violates law-abiding citizens' rights to privacy—something we hold dear in this country. We do need to make this country as secure as we possibly can, but we cannot do that at the expense of our constitutional rights.

It has been talked about here earlier today that a Federal court recently ruled that bulk data collections are illegal, flat illegal. But keep in mind that the NSA used the PATRIOT Act to authorize those data collections. Yet, in the Senate, some of our colleagues think we should reauthorize those expiration provisions without even a debate on the merits. We have seen this before. It has happened several times since I have been in the Senate.

Trying to jam an extension of the PATRIOT Act through the Senate at the last minute is not fair to this body, and it is not fair at all to the American people. We deserve a real debate on privacy and security in the Senate. It is too important of an issue not to. We have to put some sideboards on our national intelligence agencies so that they can keep us safe without violating our constitutional rights. We need a real debate on this issue.

Last week, the majority leader made a decision to deprive the Senate and the public of debate by taking up a trade bill which we could have passed in June. No doubt about it, we are approaching the Memorial Day recess. It is a do or a done deal, but if we have work to do, I will continue to work with my colleagues to ensure that we make real reforms to the PATRIOT Act. If the people in this body don't know that this is important, they don't know the Constitution.

I thank everybody who spoke on the floor today. We need to have a debate. We need to have a debate on what the PATRIOT Act is about, how it is being utilized, and how we need to move forward. An extension is not acceptable.

I yield the floor back to the Senator from Kentucky and thank him for the work he has done on this issue.

Mr. PAUL. I think with Senator from Montana, and think that is further evidence that there is bipartisan support for the Constitution.

The PATRIOT Act went too far. We have heard from both Senators from Montana, from opposite parties, who both wanted to defend the individual, wanted to defend the Bill of Rights, and think that we have to get the government go too far. I think the American people agree with this as well.

I think with Senator from Montana, and think that is further evidence that there is bipartisan support for the Constitution.

I think the American people really have decided that the bulk collection of records is wrong, that it is unconstitutional. The second highest court in the land has said it is illegal. Yet, you still have a significant body of people in this country saying: Not only keep it, let's do more of it.

The problem is that we are going to allow records to be collected without individualized suspicion, what we are doing is allowing something, when we talk about bulk collection, has no sort of determinants for what suspect is. You can imagine what the danger of that is if you apply that to everything.

Also, in an age where we have computers that can analyze and hold so much information—their only purpose is gathering huge and bigger. We are gathering more and more and processing this information—there is great danger that could come from this.

I wrote something about "1984" a couple of years ago, and I said when I read it the first time—and a new big brother, you know, was the danger of all these things. I thought. Oh, this is terrible. But I felt comforted. I read it probably in 1978. We didn't have the technology to eavesdrop on everyone. We didn't have the technology to know everyone's whereabouts. We didn't have the technology to have cameras in every house. We didn't have the technology to know everyone's telephone numbers. Everybody, as you know, had to be careful where books were placed. You had to read in secret basically. But because the technology didn't exist when I read "1984," I really wasn't as concerned about it. But the thing is that you don't lose your freedom in one fell swoop; you lose it a little bit at a time.

People say: Well, the people doing this are good people. It is like the President said. When the President signed legislation a few years ago that said that an American citizen can be detained without a trial, he said: But I am a good man, and I won't use this power.

It is sort of a fundamental misunderstanding of the law and the rule of law that you think that the goodness of yourself or the goodness of the individuals around you somehow is the protection of the law. The law is really to protect you against bad people. The law is to protect you when bad people get in office. The law—and those who believe in the rule of law—is based on the fact that there is an understanding that in the time of history, people were democratically elected who were bad people and that people, once given power, become addicted to it and they want more of it.

Lincoln once wrote that any man can stand adversity, but if you want to challenge a power. That is what we are talking about. We are talking about unlimited power. We are not even talking about power that is constrained by law at all.

The whole idea that the PATRIOT Act has anything to do with the bulk collection is a farce. The President's privacy commission has really put this in hold for us, that really there is nothing about the PATRIOT Act that has any resemblance to what we are doing. The bulk collection is not only the rule of law, that is people within government, within the executive branch, who have made the decision that they are going to do whatever they want.

One of the things that worries me about this debate—and I think it is good that we are having the debate—there is apparently a section of the PATRIOT Act as we passed it the last time that says that if the PATRIOT Act is not extended, all things previous investigated before will continue. So we really kind of have a perpetual PATRIOT Act, if you will. That worries me a little bit, but then it
I think the American people are ready for us to be done with this. My hope is that during today we will call attention to this and that the American people will say: Who are these people who want to keep collecting our records without a warrant, and why do they feel that they have the right to what is being investigated. And I think that the people who have investigated it have determined that no one has been captured by this program, no one has been uniquely identified by this program?

So there really is a consideration of whether we are going to listen to the American people. Are we going to wake up? Are we a representative body?

This question is, Are we going to allow a debate on something that only comes around every 3 years or are we going to say “My goodness, it is the weekend, it is Memorial Day weekend, and we are up against a deadline, and we just don’t have time to listen to this. We don’t have time to talk about the Bill of Rights because we just don’t have time.” There are 3 years that we have known this date was coming up, but we don’t have time?”

I think at the very least we could make time, and that is my request today. My request of the leadership on both sides of the Capitol: Can we not make time? There are at least 10 or 15 of us who will cosponsor about 5 or 6 amendments that we want votes on. Frankly, I think with the mood of the country, we have a chance on a few of these.

I would like to see how a vote would turn out on the idea, for example, that we are using a less-than-constitutional standard to gather information that we say is for terrorism, but then we put people in jail domestically for crimes that are completely and entirely unrelated to terrorism; that whether or not we can use information gathered in a nonconstitutional or a less-than-constitutional way is going to be used for domestic criminal investigations.

If you believe that, it means we are carving out in our domestic laws an area where the Constitution doesn’t entirely apply. Section 213 allows the entering of the house in a nonconstitutional way—a way that, if it were done in a straight-up fashion, the courts would say it is illegally gathered information and wouldn’t be admissible in court.

I think we ought to have a vote. Is the PATRIOT Act our less-than-constitutional or non-American way of gathering information to be used in domestic court?

Here is the other question, if they will be honest with us: Are they using them in any other courts? Are there IRS investigations that begin as terrorist investigations but end up in IRS court? In some ways, I think yes is the answer. We have now the IRS basing investigations of people maybe for political purposes but definitely for the purposes of whether individuals are doing transactions in certain ways or whether their records are in a certain way. And because it is done this way, we are not really requiring convictions before we take their stuff. This is a separate but related problem because it has to do with using records to gain entrance to people and to then take their stuff without a conviction.

This is a poll that was commissioned by the ACLU on Monday, and they are a sample of 900 likely voters between the ages of 18 and 39 a few questions.

It says: Which of the following statements about reauthorizing the PATRIOT Act do you agree with more?

Some people say Congress should modify the PATRIOT Act to limit government surveillance and protect Americans’ privacy. Sixty percent agreed.

Other people say Congress should preserve the PATRIOT Act and make no changes because it has been effective in keeping America safe from terrorists and other threats to national security, like ISIS or Al Qaeda. That was 34 percent.

Those are the overall numbers. If you look at it by all parties—Democrats, Independents, and GOP—it is 58 percent or greater. In fact, Democrats and Republicans are pretty equal, which is interesting, with 59 percent of Democrats and 58 percent of Republicans thinking we have gone too far in the PATRIOT Act and that Americans’ privacy is being disturbed by the PATRIOT Act.

If you look at Independents, it is 75 percent among men who are Independent and 65 percent among women who are Independent.

The survey asked people: Do you find it concerning to you that the U.S. Government is collecting and storing your personal information, like your phone records, emails, bank statements, and other communications? Eighty-two percent are concerned that the government is storing such information.

Over three-quarters of voters found four different examples of government spying personally concerning to them: The government accessing personal communications, information or records without a warrant, 83 percent—using that information for things other than stopping terrorists, such as I mentioned, doing convictions for drugs, were the most compelling examples for voters.

When asked about whether the government accesses any of your personal communications, information or records you share with a company without a judge’s permission, people were asked to tell them whether they were concerned with this issue. Eighty-three percent were concerned.
warrant for things other than stopping terrorist attacks, 83 percent were concerned.

When asked about the government allowing private companies to use public school technology programs to track online activities of schoolchildren, 77 percent were concerned.

When asked if the government performs instant wiretaps on any phone or other telecommunications devices located in the United States, 76 percent were concerned.

From this ACLU study of young people—I believe they were all ages 18 to 39—participants were asked whether or not these were conditions that would lead you to believe that Americans need more protections of their privacy: Local police and the FBI need a warrant issued by an independent judge for a valid reason before they search your home or property without your permission; and the NSA now can actually get the people who are attacking us.

When we look at the privacy report we have talked a little bit about—the Privacy and Civil Liberties Oversight Board, I basically said very explicitly to the President that what he was doing is illegal—it does still boggle my mind the President was told by his own privacy board what he was doing was illegal and he just keeps doing it. It somewhat boggles the mind that he was told by the appellate court that what he is doing is illegal and yet he just keeps doing it.

It is an incredible deflection. It is incredibly disingenuous when the President says: Well, he didn't wait for Congress to tell him to collect the phone records. In fact, we never did such a thing. Have the people intimately involved with passing the PATRIOT Act—those who were the cosponsors and authors of the PATRIOT Act—have all said they never intended and don't believe the PATRIOT Act gives any justification for bulk collection of records? So Congress never authorized the bulk collection of records.

Two different Commissions the President has put forward—the privacy and civil liberties as well as the review commission—have both told him it is illegal. Yet he keeps going on.

I have heard very little questioning of the President or his people about this. I kind of wonder why we don't ask more questions, why we just sort of accept with the government is legal or illegal and then we discover that Congress didn't pass the PATRIOT Act according to the President. Then we discover that Congress didn't pass the Patriot Act but really is part of a bigger problem—is that power has drifted away from Congress or has been abdicated and given up. We gave the power to the Presidency, and we didn't do it just in one fell swoop. It wasn't just Republicans. It wasn't just Democrats. It was a little bit of both, and it has been going on for probably over 100 years now. I think it accelerated in the era of Wilson, but over decades it has gotten bigger and bigger and bigger. Under the New Deal, the executive branch grew an alarming amount, but more recently it continues to grow by leaps and bounds.

It may well be that the No. 1 issue we face as a country is that we have had what some have described as a collapse in the separation of powers. Madison talked about that each branch would have its own power to protect their own power; so we would pit ambition against ambition and then each would jealously guard their power, and, as such, power wouldn't grow. Power would be checked. But power has grown, has grown alarmingly so and mostly grown and gravitated to the executive branch.

In the short time I have been here, I have seen that in many ways the least of our bureaucrats are more powerful probably in some ways than the greatest of our legislators, and the most powerful of our legislators are somewhat of less power than bureaucrats.

Almost every constituent that comes to talk to me from Kentucky and has a problem with the government has we explored the problem and explore the solution, we discover that Congress didn't pass their problem. Congress didn't write the rule that is beleaguering them. Congress didn't inflict the punishment that is making it difficult for them to run their business. It was done by an unelected bureaucrat.

This has grown, and sometimes it has grown from even when we had good intentions. We tried to do the right thing and it turned out wrong. Probably that is really the story of Washington as well.

Take even the Clean Water Act. The Clean Water Act I support. I would have voted for it from 1974. It says you can't discharge pollutants into navigable stream. I agree with that. The problem is that over about a 40-year period we have come to define dirt as a pollutant and my backyard as a navigable stream. So, once again, we have taken our eye off the prize.

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air—there is a role for the government to be involved. But because we have people abusing the rights of private property owners and saying, if you put dirt in your backyard, we will put you in jail, it has become sort of to the point of craziness. But it is all executive branch overreach.

There was a case that went to the Supreme Court a few years ago in Idaho. A couple lived near a lake but about a mile from a lake. They didn’t live on the lake. It was on an incline, and there were houses on both sides of their property. So they bought their property and started doing what everybody else did—back-hoing, creating a footprint, filling it and putting down footers.

The EPA showed up and said: You are destroying a wetland, and we are going to fine you $37,000 a day.

They were kind of like: Well. I thought we were going to put dirt on our land in Southern Mississippi. It was what he considered to be uplands. There were trees growing on it, so usually trees are not really a typical feature of wetlands. His daughter was 43 at the time and he was 70. They were going to develop the lots and sell the property. He dumped some dirt there. The EPA got involved and they convicted him using the RICO statutes. This is what you are supposed to get gangsters and drug dealers with. It was conspiracy. They got him for conspiracy to violate the Clean Water Act by putting clean dirt on his own land where there was no water to begin with. He was given 10 years in prison. He just got out of prison about a month ago. He is now 80 years old. That is what is happening in America.

So if you wonder why some of us are worried about our records being snatched up, we are worried that our own government has run amok, that our own government is out of control, and that our government is not really paying attention to us.

To put a 70-year-old man in prison for 10 years for putting clean dirt on his own land—the person who did that did it at night, and they caught him because they spent—I don’t know what he told me. He told me: In Idaho, I was talking to one of the Senators from Idaho a year or so ago and I liked what he told me. He told me: In Idaho, we have a very precise definition of what a navigable stream is. You put a log in it—these EPA courts—but it was done a lot by executive definition of what a wetland is.

In the early 1990s, under a Republican President, we redefined wetlands. They commissioned a book—a 150-page book, 200-page book—and they just redefined what a wetland was. By redefining what a wetland was, we doubled the amount of wetlands in the country overnight—not by preserving land but by redefining a lot of land that really is not a wetland.

Now, through the waters of the United States, we are connecting everybody to the ocean somehow and saying that every bit of land is somehow connected to navigable water.

I talked to one of the Senators from Idaho a year or so ago and I liked what he told me. He told me: In Idaho, we have a very precise definition of what a navigable stream is. You put a log in it—the EPA courts—and it has to float 100 feet in a certain period of time. I just loved the definition of it because that sounds like a stream that is probably moving and there is water in it. But we now say a crevice in the side of a hill that runs over, if when it rains water goes over, it is a stream. But as a consequence, we are shutting down America.

People complain about jobs, but they are all for these regulations, and then they complain that they don’t have a job.

One gentleman decided he was going to put dirt on his land in Southern Mis-issippi. It was what he considered to be uplands. There were trees growing on it, so usually trees are not really a typical feature of wetlands. His daughter was 43 at the time and he was 70. They were going to develop the lots and sell the property. He dumped some dirt there. The EPA got involved and they convicted him using the RICO statutes. This is what you are supposed to get gangsters and drug dealers with. It was conspiracy. They got him for conspiracy to violate the Clean Water Act by putting clean dirt on his own land where there was no water to begin with. He was given 10 years in prison. He just got out of prison about a month ago. He is now 80 years old. That is what is happening in America.

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People complain about jobs, but they are all for these regulations, and then they complain that they don’t have a job.
records are stored on a server somewhere, and they have grown to expect privacy.

Some say, oh, that is crazy. Young people share their information all the time. Well, you do and you don’t. I share some of my information, not online, but I am sharing it through an agreement. The people I share it with, the companies that then market other things to me, have agreed, through a privacy agreement, not to sell my information. I am to be anonymous. They will market to me, but they promise to keep me anonymous. We are comforted by the fact that we have a privacy agreement, and that if millions of people sued them, they couldn’t get away with revealing our information.

What I don’t like about some of the different things we are doing—and this includes the USA Freedom Act—is that we give liability protection. When we give liability protection, I think it is an invitation to say: You know what. Your privacy agreement isn’t really that important, and if you breach it, nobody is allowed to sue you. So I think that is something we ought to be very suspicious of and if we do it, I think we have a debate on this and we end up having amendments on this, that we consider taking out the liability protection.

I also think the most important thing is if we decide that bulk collection is wrong, we need to understand how you get bulk collection. You get bulk collection because you have a nonspecific warrant. You don’t have an individualized warrant; you have a general warrant. This is what we have been fighting since the time of John Wilkes in 1760 in England, to James Otis in the 1760s here through John Adams. The debate and the thing that we found most egregious, I think, was the idea that we found most objectionable was the idea that a warrant for your information wouldn’t have your name on it, it wouldn’t be individualized or that it wouldn’t be without suspicion or that it would occur without a judge’s warrant. It really was one of the things that annoyed us more than anything else. One of the things that Adams said was the spark of our war for independence was just the sheer gall of British soldiers coming into a house without a warrant because most of the records are in your house. We don’t see basically the physical and abrupt entry into your house anymore, but it happens nonetheless. It happens in just less of a physical way because your records are virtual now. But how we let people come into our house is pretty important.

On the issue of warrants—this isn’t specific to the PATRIOT Act, but it is a related issue. The issue is whether we should allow people to come into our house in the middle of the night with what is called a no-knock raid. The sneak-and-peek, they come in and leave. But the no-knock raid, you know they are there when they come. The problem is that people were being woken up in the middle of the night and they were grabbing their gun by their bedside. If they are in a high-crime neighborhood, they have a gun by their bedside, they are sometimes shooting the police. Mostly they are looking for drugs. I hate drugs about as much as anybody. I have seen addiction to drugs, I have worked with people as a physician and I know what addiction is. And I am worried about a war­rant, even a warrant can be supported by someone making an accusation. It is not perfect. In fact, there are some people who complain warrants are too easy to get. But the thing is there is no evidence that it is really overly hard to get a warrant. If we went back to the Constitution—I had this debate years ago the last time I came up for renewal, and I was walking along with one of the other Senators who supported the PATRIOT Act. He acted as if I knew something at the Constitution. In 1805, I think in 2002, they burst into a home at 1 or 2 in the morning, yelled and screamed: Everybody get on the ground. There was an 11-year-old kid. He got on the ground, and the officer’s shotgun accidentally discharged. It was an accident, but it didn’t help him.

The thing is, do we really need that? Do we need to come in the middle of the night looking for marijuana or any kind of drug? Couldn’t we come in the daytime and knock on the door and say: We have a warrant? I know police work is not without risk and people do shoot back at them. So I understand where they are coming from, and I want to protect them and for them to be safe. I want to protect the police, but I actually think it protects the police more if we go in the way we do with traditional warrants and not without unannounced warrants.

Of course, there are different circumstances or exigencies. There are times when the police go in without any warrant at all. If there is something imminent going on or some threat of a danger or situation inside, the police go in. I think, for the most part, we are better off if we do things and do them in the traditional way with warrants.

When we talk about how warrants have changed, one of the changes is the standard for what the warrant is issued with. Even if it were individualized, if it says that you only have to say they are relevant to an investigation. That is a big step down from probable cause. People have defined ‘probable cause’ over time in different ways.

This is from Ballentine’s Law Dictionary. A common definition of ‘probable cause’ is “a reasonable amount of suspicion, such circumstances sufficiently strong to justify a prudent and cautious person’s belief that certain facts are probably true.”

Some lawyer must have written that. But you can kind of get a little bit of suspicion, it is supposed to go through some kind of thought process and there is supposed to be evidence of suspicion. It is not the standard of proving guilt, proving beyond the preponderance of the fact or any kind of doubt. It is a standard, and it is a standard we have had for a long time.

The Oxford Companion to American Law defines ‘probable cause’ as: ‘Information sufficient to warrant a prudent person’s belief that . . . evidence of a crime or contraband would be found in a search. ‘Probable cause’ is a stronger standard of evidence than a reasonable suspicion, but weaker than the standard required to secure a criminal conviction. Even an apparently probable cause if it is from a reliable source or supported by other evidence.’

It is kind of interesting because people actually say that there is no such thing as a warrant, even a warrant can be supported by someone making an accusation. It is not perfect. In fact, there are some people who complain warrants are too easy to get. But the thing is there is no evidence that it is really overly hard to get a warrant. If we went back to the Constitution—I had this debate years ago the last time I came up for renewal, and I was walking along with one of the other Senators who supported the PATRIOT Act. He acted as if I knew something at the Constitution. The Fourth Amendment has its origins in English common law. The saying that a man’s home is his castle, this is the idea that someone has the right to defend their castle or home from invasion from the government.

Based on the castle doctrine in the 1600s, landowners first recorded legal protection from casual searches from government. Some of the famous cases are actually in the 1760s, but even at least 100 years in advance of that, they were beginning to develop protections for people from the government.

It is interesting to realize this is not a new phenomenon where we are talking about protecting ourselves from government. We protect ourselves and government helps us protect ourselves from others who may be violent against us. But we have always—for hundreds and hundreds of years—been aware that government does bad things too. If you do not ration the amount of power you give to government, you can get to the point where the great abuse comes from government itself. So they began to use warrants. But in England they did this quickly, developed over whether a general warrant was adequate or a specific warrant. This is where John Wilkes comes in. This is where James Otis comes in.

One of the debates over the separation of powers that we have—is pretty commonly going on, although I think the people who believe in unlimited inherent powers are probably the majority of Washington. But there is a debate over what people call article II powers. The article II is where the Executive is given power over the Constitution, but there are people who sort of believe in this unlimited nature. There is really nothing that restrains
it. In fact, some have said even in the debate over this, the Executive Order No. 1233 that is involved in some of this records production, it is really none of our business because it is article II. It is part of the inherent powers of the President to, in times of war or times of conflict, to do whatever they need to do.

I think that is a dangerous supposition, to think that really there are times when there are no checks and balances. I personally think probably one of the more genuine things we did as part of our Founding Fathers was the checks and balances and the division of power.

Montesquieu was one of the philosophers the Founding Fathers looked to and some say when we were setting up the separation of powers that he was probably where we got the example. Montesquieu said that when the Executive begins to legislate, a form of tyranny will ensue because you have allowed too much power to gravitate to one body and you have not divided the power. The division of power was one of the—if not the most important—the most important things we got from our Founding Fathers. But we are having this collapse of the equilibrium. This equilibrium is what kept power in check. When I think who is to blame for this, it is not one party; it is really both parties.

When we have a Republican in office, Republicans tend to forgive the Republican President and give them more power. When we have a Democrat in office, the Democrats tend to forgive a Democrat and give the Democrat more power.

My friend, the honorable Senator from Indiana, was pitting our ambition to keep our country to build something we didn’t even need to do. You can almost make the analogy of looking at the debt clock. When you go to debtclock.org and watch the debt clock, as the debt grows larger and larger, you basically are seeing a diminishment of a corresponding diminishment of your freedom. It is of concern.

It is of concern how rapidly this is happening. There are two philosophic reasons we should be concerned about power. One is that power corrupts. More basic than that is that as power grows, there has to be a corresponding loss of your freedom. I call this the liberty argument for minimizing government. The other argument is that you are giving away your liberty. You own liberty is what you produce with your hands, and your liberty is what people will pay you to do with your hands, what you do to produce. That is your income. That is you. That is your liberty.

If we have 100 percent taxation, I would say you have no liberty. You are essentially a slave to the State. If you have 50 percent, you are only half slave, half free. The thing is that the smaller your government, the lower your taxation and the more free you are. But it is an argument for, if you are concerned about freedom, you would want as small a government as you possibly could have that still did the things that you think are necessary.

The other argument I like for why you should keep your government small is what I call the efficiency argument. The efficiency argument was best expounded by Milton Friedman, who said that nobody spends somebody else’s money as wisely as their own. There is sort of a truism to that. You think about it in your own life. If I ask you to pay $1,000 to invest in an enterprise, you will think: How long did it take me to earn $1,000. You will think: I had to pay taxes, I had to save, I had to pay all my expenses to get this $1,000. You will think how much you prize that, and you will not make the decision in an easy fashion. You will make your decision not perfectly, but if you compare your decision spending your money to a politician spending the money, it is just bound to be a wiser decision. It is a more heartwarming decision, typically being a better decision. If you ask a politician for $1 million, that might be equivalent to $1,000 or it might not mean anything to him. You might ask him for $10 million.

Think about it this way: We gave $500 million to one of the richest guys in our country to build something nobody seemed to want, and he lost all of the money. And you think to yourself, do you think the person in the Department of Energy that gave $500 million to one of the richest guys in the country to build something we didn’t want feels bad or doesn’t sleep well at night? No. I think they gave that person the money because that person was a big contributor. They are an activist for their candidate. So when the candidate got in power, they used the Department of Energy as their own personal piggybank to pass out loans to their friends. Nobody feels bad about the fact that they lost the money because they are using the efficiency argument for why you should think the government should be small.
Before the PATRIOT Act, there was something called Stellar Wind. This was a secret also, and we didn’t learn about this for many years, but this was started immediately after 9/11 and was revealed by Thomas Tamm at the New York Times in 2008. But it was basically the same thing as bulk collection under two different administrations. One administration got a great deal of grief for this, and then the next party ran and said: We are going to change these things and do things differently. And they did them the same or more so. There really had not been any change, and I guess that is why some people are concerned as to whether we will truly get change.

The program’s activities in Stellar Wind revolve around large databases of communications of American citizens, including emails, telephone conversations, financial transactions, and Internet activity. William Binney, a retired leader within the NSA, came forward with whistleblowing because he believed these programs to be unconstitutional.

The intelligence community was also able to obtain from the Treasury Department suspicous activity reports. So we are back to those banking reports that are issued.

If we decide to fix bulk records and try to do something about this injustice, the main thing is we should be aware that this is not the only program. There are probably a dozen programs. There are probably another dozen we have not even heard of that they will not tell any of us about. And realize that they are not asking Congress for permission; they are doing whatever they want.

We did not give them permission under the PATRIOT Act to do a bulk collection of phone records. They are doing it with no authority or inherent authority or some other authority because the courts have already told them there is no authority under the PATRIOT Act. There is also no commonsense logic that could explain—no commonsense logic that could say there is a relevancy to all the data of every American.

When Stellar Wind came about, there were internal disputes within the Justice Department about the legality of the program because the data was being collected for large numbers of people, not just the subjects of FISA warrants. The Stellar Wind cases were referred to by FBI agents as pizza cases because many seemingly suspicious cases turned out to be food takeout orders. Imagine also that if we are looking for interconnecting spots, a lot of people are吸收 and collect all of your credit card information. I have a feeling it is probably done. I don’t know, and I have not been told, so I am not revealing a secret. I guess it is done. I am guessing all of your records are collected because the thing is, we have the audacity of the executive branch saying they have inherent constitutional authority to do anything they want, to order warrantless wiretapping. According to the executive branch, they have an authority that Congress cannot curtail. That doesn’t sound like the Office of the Presidency to me; it sounds like a governmental official whom you have no control over. It sounds inconsistent or antithetical to a constitutional republic. How can you have a Presidency that has unlimited power? That is what they are telling you.

They are telling you it is in the service of good. We are going to catch terrorists, and we are going to do good things. We are going to look at all of your information, but we are never going to abuse your privacy.

During September 2014, the New York Times asserted, “Questions persist
after the release of a newly declassified version of a legal memo approving the NSA Stellar Wind program, a set of warrantless surveillance and data collection activities secretly authorized after 2001.’ The article addressed the release of a redacted classified version of the 2004 memo. Notice was made that the bulk program—telephone, Internet, and email surveillance of American citizens—remained secret until the revelations by Edward Snowden and that to date, significant portions of the memo redacted in the newly released version as well as that doubts and questions about its legality continue to persist.

When we go back to the Privacy and Civil Liberties Oversight Board, as they get closer to their conclusion, they talk once again about the idea that you are only hearing one side. I think that no matter how honest and no matter how patriotic people are, one side just won’t do it. You can’t find the whole truth when only one of the government presents their position. The Privacy and Civil Liberties Oversight Board said that the proceedings with only one side being presented raised concerns that the court does not take adequate account of positions other than those of the government. They recommended the creation of a panel of private attorneys and special advocates who can be brought into cases involving novel and significant issues by FISA Court judges.

I think this would be a step in the right direction, but I think also that what we need to do is we should really probably give you the ability to have your own attorney. If this is a court proceeding, I think you need your own attorney so you have somebody who works for you and is your advocate. But a special advocate would be better than what we have.

The Board goes on to conclude that ‘transparency is one of the foundations of democratic governance. Our constitutional system of government relies upon the participation of an informed electorate. This in turn requires public access to information about the activities of the government. Transparency supports accountability.’ I could not agree more. It is even more important when we talk about the intelligence agency because of the extraordinary power we give to these people, the extraordinary power we give to them. The surveillance we give to these people, the extraordinary power we give to them. The surveillance we give to these people, the extraordinary power we give to these people, the extraordinary power we give to these people.

So we should have an open debate in a free society about how it should be done and whether we can gather information in a way that is consistent with the Constitution.

When we get to the Privacy and Civil Liberty Board’s recommendations, they have several good recommendations.

No. 1, the government should end its section 215 bulk telephone records program. They say that the program as it is constituted implicates constitutional concerns under the First and Fourth Amendments. This is the President’s Privacy and Civil Liberties Oversight Board.

Without the current section 215 program, the government would still be able to seek telephone calling records directly from the communications providers through other existing legal authorities. I think the other existing legal authorities could be the Constitution. Could we not just call a judge and get a warrant and go down to the phone company and get what we want? I think there is a way we can do this that is still consistent with the Constitution.

(Mr. GARDNER assumed the Chair.) The other recommendation they have, other than ending the program, is that when the bulk collection program is in the future, it should be purged so there is no chance that this can be abused again in the future. One of the arguments for the NSA is that they collect the database, it is in a database, but it is only accessed in the future. So when these records have been purged, it presents a position. The Privacy and Civil Liberties Oversight Board said that that is a good idea. But Patrick Eddington points out a flaw. He says that the FISA Court has sole discretion to appoint or not appoint these amicus curiae or these special advocates. So it could be that a FISA Court that really has not seen any inadmissible, a FISA Court that has determined that all of your records are somehow relevant, may not be the most inquisitive to appoint an advocate for you if they have been able to define relevance as meaning all of the records.

Another deficiency of the USA FREEDOM Act is that it does not address bulk collection under Executive Order 12333. The bill also fails to address the USA FREEDOM Act, and this is sort of the big debate because many people on both sides of the aisle think the bulk collection of records is unconstitutional. We think it exceeds the government’s power and it exceeds the Constitution. But what many are proposing to replace it with is the USA FREEDOM Act.

This is what Patrick Eddington writes: The USA FREEDOM Act claims to address the controversy of the bulk metadata program, but a close reading of the bill reveals that it actually leaves key PATRIOT Act definitions of ‘person’ or ‘U.S. person’ intact, so a person is defined as any individual, including officer or employee of the Federal Government, or any group, entity, association, corporation, or foreign power.

So the question I have is, it sounds good that we are going to make the court the mechanism of our concern, but then what do we do when we say it is going to be a specific U.S. person? The problem is that we then define ‘person’ as ‘corporation.’ So we get back to the same argument: If we are going to search the database of a person’s phone, does this mean that a person is Verizon, we are again stuck collecting everybody’s records.

What I don’t want to have happen and what I won’t be able to support is that we just do not propose to replace the program of a person’s records, just under a different venue. I am not sure that one’s privacy has been protected more if it were now just asking the phone companies for bulk collection where we were taking their data, sourcing it, and getting it from the companies after they gave it to the government. I am just not sure if it is that much—distinctly different.

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we would never have any debate. Even though we are only having it every 3 years, it is still uncertain whether I will be granted any amendments to this bill.

So, yes, I would like to address everything while we can. I think we ought to address section 702. I think we ought to—for goodness sake, why won't we have some hearings on Executive Order 12333? I think they may be having them in secret, but I go back to what Senator Wyden said earlier. I think the principles of the law could be discussed in public. We don't have to reveal how we do stuff. Do we think anybody in the world thinks we are not looking at their stuff? Why don't we explore the reality and the laws of how we are doing it as opposed to leaving it unsaid and unknown in secret?

Part of our secrecy is sort of back-firing on us also because what is happening is in keeping this secret, people believe the worst. Everybody around the world believes the worst about it. Everybody around the world believes that they are having all their stuff looked at, that their emails are being looked at. This is a business person in Europe and you are trying to negotiate a secure deal—a deal where you don't want your competitors to know what you are offering to buy a certain company—I would think you probably wouldn't use the American email, and I would guess that is what is happening.

American companies are starting to try to figure out a way around this, are trying to offer encryption. What does the government do? The President's administration is all over Washington, all over the place talking about how the companies are somehow evil for wanting to encrypt their data.

I wrote the Secretary of the Department of Homeland Security in my committee the other day, and I said: You realize it is your fault. Is it the companies' fault that they are trying to protect their information for their customers—definitely reenacting the Marching of the Clowns? It is your fault for bullying them and stealing their information and stealing all of Americans' information. We are simply reacting to the bully that you are.

Most of the issues Patrick Edington points out in his piece are issues that we actually have amendments for that would make the bill stronger. So if there are arguments that maybe the USA FREEDOM Act could be made better—definitely reauthorizing it by itself is a big mistake, but if alternatives are going to be offered, maybe we could try to offer alternatives that make the USA FREEDOM Act better.

The Patriot Act that the government puts forward is that there is no bar on the government imposing backdoors being built into electronic devices. That is what we have talked about before, that the government is mandating to different companies that they have to have access to their product. I think it is an under-discussed development that the companies are going to be more at risk for sabotage by foreign governments, and sabotage from hackers if they build a portal. So if the government says "We need a portal to stick our big nose in your business and suck up all your data if they think the will develop programs to look for flaws and churn through until they find our flaws." It is the opposite of what we should be doing. We should be trying to keep foreign governments, foreign spooks, and foreign competitors out of our stuff, including the U.S. Government, but we are doing the opposite.

There is a lot left to be desired with the USA FREEDOM Act. I try to be supportive of moving forward, but I can't support it unless we are able to incorporate some of the other ideas I think are necessary.

The people say we are just not doing enough. They are trying to make a living, but we are not doing enough. This week, many have come out and said: We have to collect more data. We are only collecting a third of the data. We have to get more data.

The interesting thing is that we are spending $52 billion a year on intelligence in our country—$52 billion. We are spending $10 billion in the NSA alone. It is $167 per person in the United States. I think it is hard to argue we are not doing enough already. I think they can be made, though, that we are doing it in such a haphazard, all-collecting, all-consuming, indiscriminate way that maybe we are not getting the best bang for our buck.

There is been many groups out there. We mentioned Electronic Frontier Foundation, TechFreedom, Liberty Coalition, GenOpportunity, Competitive Enterprise Institute, FreedomWorks—a lot of different groups forming that are opposed to this bulk collection of data. There is an interesting article recently written by Anthony Romero with the ACLU, and the title of it is "The Sun Must Go Down on the PATRIOT Act." It refers back to both of the review groups we talked about and the Privacy and Civil Liberties Oversight Board, and he says and reiterates a point that is incredibly important, that "there was no evidence at all that the NSA's massive surveillance program had ever played a pivotal role in any investigation."

I think we ought to be able to figure out something from this, and we ought to be able to show not only is there a constitutional question of this, there is also the question of whether practically it is doing anything to make us safer. If it is not making us safer, it is extraordinarily expensive and we are losing our freedom in the process. Why don't we shut it down?

Different advocacy groups for a variety of opinions have put forward the idea that I think was represented in the NAACP v. Alabama. I believe this was back in the seventies, which set forth a First Amendment claim, and this claim is that there is a vital relationship between freedom of association and freedom of expression. The point is that sometimes when you are expressing either for or against something that is very unpopular, sometimes you even worry about your safety. There were people who lost their lives in the freedom movement, in the civil rights movement. There were people who lost their lives. And you can understand how in those days people might have been worried for anybody to know they belonged to the NAACP or they opposed the Jim Crow laws in the South. But it was an important case because it talks about how the fact is that information can be kept private and should be kept private for fear it will chill speech, for fear it will put a damper on who people would associate with, for fear it would put a damper on dissent, which is a fundamental aspect of a Republic.

In a letter from a couple weeks ago from some congressional leaders, they point out something that I think bears repeating. Mass surveillance, the bulk collection, harms our economy. Mass surveillance will cost the digital economy up to $130 billion in lost revenue by 2016.

We are not getting any new bad guys with this, we are abrogating privacy, and we are losing money.

The Internet companies in our country, the whole software world, the whole hardware, all of this, have been some of America's greatest triumphs, some of America's greatest ingenuity. Yet we are willing to squall all that in a battle that really is going to damage our privacy, isn't helping us in the war against terrorism, and is going to make it such that nobody in the world is going to want to do business with our products. I think it is a disgrace and, once again, I don't think it is purposeful. Nobody wants to harm our companies, but I think it is just another unintended consequence—a bad policy not thought through.

The ACLU commentary on the USA FREEDOM Act has come up with some ideas of things they think would make the bill stronger. One, they say the bill could be amended to prevent surveillance of individuals with no nexus to terrorism.

The 2015 USA FREEDOM Act would authorize the collection of records and communications identified by a "specific term," which would stop the government from conducting indiscriminate surveillance of virtually all citizens and from engaging in narrower but still-regretable forms of abuse, like the surveillance of everyone in an entire zip code or all those who use a given communications provider, like Gmail. However, the current SST definition is still not strong enough to prevent "bulk data collection..."

This is the point I have been making, and this is something you need to be very careful about in Washington, because the minute you think you have the
won a battle, secretly you have been beaten. You just don’t know it yet. We may still get a reform like this and then find out we are still going to get bulky collection; that a corporation’s name can be put in the specific selector term, and we were worried about the government giving a warrant to Verizon’s records. Now we are just sending a warrant to Verizon that has their name in it and we are getting all of their records.

The example they put here is that you could still end up having the surveillance of everyone in the entire ZIP Code or all of those who use a given communications provider like Gmail. So Gmail is a specific term. Are we not still back where we were and have we really fixed the problem?

The ACLU goes on to say that the bill should be amended to narrow the SST definition—the selector term—to prevent this kind of bulky surveillance. The bill should also make crystal clear with the Second Circuit—which has come out since this bill was written—that section 215 cannot be used to amass Americans’ records for open-ended data-mining purposes unmoored from any specific investigation. I think this is incredibly important. The USA FREEDOM Act wants to take a step forward, but we need to make sure the ruling from the Second Circuit that has already passed, that we don’t do something that means more and might even create a case where we don’t do something that actually expands the power of 215 when the court has already restricted the power of 215.

The ACLU’s second recommendation is that we should include procedures to ensure that the government purges irrelevant information. Right now the bill would allow the collection of irrelevant information under 215 and other authorities without minimization procedures.

This kind of reminds me—if you want to know how much information we are grabbing up and how worried to be about it, there was an article in the Washington Post a couple of months ago, and it said the President had been minimized 1,227 times. We are collecting the President’s data, all right. You can say, well, we are being fair, we are getting everybody’s. For goodness’ sake, we should not be collecting the President’s data. If we want to talk to the guy over here, and now we are talking to them, that really means something.

The fourth suggestion that the ACLU has made to the USA FREEDOM Act is to limit additional authorities that have been used to collect America’s records in bulk. We now know that the government has conducted bulk surveillance not only under 215 but also under a host of other statutes, including existing administrative subpoena authorities. For example, for two decades, up until 2013, the Drug Enforcement Agency operated a program that collected the international call records of Americans involved in existing administrative subpoena laws. So here is a real question: What other authorities are we operating under that are collecting bulk records? They are doing it under administrative subpoena laws. They are doing it for the DEA. I still think the more I learn about this, the more important questions I have as to how many other authorities are still collecting things. I would still like to know, are they collecting all the credit card information in the country? Are they doing things that the DEA does not have authority?

Are we really living in a country now where nobody in the government questions someone when they say that under article II authority the President can do whatever he wants and that this is what he should correct or challenged at all by Congress?

The fifth recommendation from the ACLU is to stop the government from using section 702 of FISA as a backdoor for bulk collection. This is the kind of our amendments that we also have. In fact, most of these are amendments that I would present, if we are allowed to present them, which is sort of the purpose for being here, for wearing my feet out and my voice today, is that we would like to find out, Will the leadership allow us to have amendments?

We would like to know and have an agreement that we can open debate to offer these amendments we have worked on for 6 months to a year now. We have waited for 3 years for the opportunity. We would like to know, Will leadership let us have these amendments? Will leadership allow a real debate on how to fix this bulk collection program?

The backdoor thing with 702 is a pretty important thing. It is collecting enormous amounts of data. Earlier today we talked about how this data, that 9 out of 10 pieces of data are not about the target, they are just incidental. I think there was one estimate that we have had 90,000 targets, but it means that we have really had 900,000 bits of information on other individuals protected, but all stuck in a database. So the database keeps growing and growing and sometimes it is intentionally so, that we want to investigate a guy here, but we don’t want to ask for a warrant, so we investigate a guy overseas that we know already through the 702s, and now we are really investigating Americans without a warrant. So they recommended we stop this backdoor access. This is something Senator WYDEN and I have also been in favor of as well. Another recommendation the ACLU has is that our current laws punish individuals for providing material support to terrorists. I have no problem with that, but they have been used apparently to prosecute people seeking to provide humanitarian assistance. The USA FREEDOM Act should add an explicit intent requirement to the material support law.

There is another comment from the Sunlight Foundation by Sean Vitka, and the title is the “USA FREEDOM Act is about to pass through the House—is it a step backwards?”

Sunlight and others have had major concerns about the USA FREEDOM Act for some time. Broadly speaking, it isn’t a satisfactory level of reform given what we’ve learned in the past two years about government surveillance and the immense secrecy that surrounds it. Until last week, it was fair to say some considered the bill a net positive, some a net negative and that no one thought it was enough for reform.

As time has progressed, we’ve seen what began in 2013 as a decent, if tunnel-visioned, reform chip away at, including the transparency and accountability provisions.

I think this is an important point, because the USA FREEDOM Act started out pretty good. It got a little bit less good over time. But think about where we are right now. It passed overwhelmingly in the House. The majority in the Senate does not want it because they think there is too much bulk collection too much. So they are going to chip away at it again. So imagine where we are going to be in the end if
that is what we are going to pass. I think it would be better to be done with bulk collection. Let's be done with bulk collection. Let's start over.

But let's not replace it with something that may end up being just as bad. The sacrifices made in the bill in order to secure modest gains grew more dramatic. For instance, the USA FREEDOM Act was always a threat to court challenges and may have mooted the ACLU’s tremendous court win last week, if it had passed last week. At the point I have been making. The luckiest thing we ever got is that we did not pass the USA FREEDOM Act last year because the courts are probably going to do right now a better job than legislation.

If fact, we might be better off not passing the USA FREEDOM Act and seeing what the courts will do for us on this because there is a danger it moots the case. But there is a danger also that it is seen as actually giving justification up to the program, which I guess is kind of mooting the case as well. The ruling in the appellate court could also—they are agreeing with what I just said—do more than USA FREEDOM aimed to do, because it interprets the words "relevance" saying it does not authorize bulk collection and that that word is not used in section 215.

So I think that is a good point, that the court is saying that the word "relevance" does not authorize bulk collection. So we had bulk collection going on, but there is no authorization from 215 on it.

Here is the question: Is USA FREEDOM going to allow bulk—perhaps bulk—collection, and do we wind up actually giving back more power to the intelligence community when we are trying to limit their power? I think we need to be very careful with what we do here.

Sunlight goes on to say—Sean Vitka: It’s unclear whether the primary goal of USA FREEDOM, the rewriting of Section 215 to stop bulk collection, is already accomplished and whether USA FREEDOM could open the door to more secret interpretations and new venues of surveillance.

I think that is an incredibly important question. Several groups that initially supported USA FREEDOM have backed away from it. ACLU and EFF agree that the USA FREEDOM Act as it stands now is not worthy of support. I think some of these may be neutral or even growing or not growing it into bulk collection?

They include the following among those selection terms—one is worried about: the Internet protocol address or cloud source accounts of entities organizations, in contravention of the Fourth Amendment’s particularized probable-cause-based warrant.

Additionally, Sunlight goes on to point out what I pointed out as well, that the term “person” is not defined as an individual natural person, and the bill does not alter the PATRIOT Act’s original definition of person, which includes any individual, officer or employee of the Federal Government or any group, entity, association, corporation.

You know, I really feel what we could be doing back here is—we think we won. We get the USA FREEDOM Act, and then 2 years from now, we find out they are plugging the name Verizon into their secret interpretations and they are still collecting all the records from Verizon. So I think unless you can limit this to an individual, a natural person, I think really this is one of the biggest problems I have with the USA FREEDOM Act at this point.

Sean Vitka goes on to say that there is a concern that it expands the corporate immunity. We have discussed that as well today—that by removing that companies act in good faith, we also are going to pay the companies now to do this as well.

Judge Napolitano wrote about just this the other day, May 14. He writes: A decision last week about NSA spying by a panel judge of the Court of Appeals in New York City sent shock waves through the government. The court ruled that a section of the PATRIOT Act that is due to expire this month, on which the government has relied as a basis for its bulk collection and acquisition of telephone data the past 14 years, does not authorize that acquisition. This may sound like legal mumbo-jumbo but it goes to the heart of the relationship between the people and their government and a free society.

The PATRIOT Act is the centerpiece of the Federal Government’s false claim that by surrounding our personal liberties to it, it can somehow keep us safe. The liberty-for-corporate-safety offer has lasted for millennia and was poignant at the time of the founding of the American Republic.

The Framers addressed it in the Constitution itself, where they recognized the right to privacy and assured against its violation by government, by intentionally forcing it to jump through some difficult hoops before it can capture our thoughts, words, or private behavior. These hoops are the requirement of a search warrant and judicially-issued on evidence called probable cause, demonstrating that it is more likely than not that the government will find what it is looking for from the person or place it is targeting. Only then may a judge issue a warrant which must specifically describe the place to be searched, or specifically identify the person or thing to be seized.

Napolitano goes on to say this in new. It has been at the core of our system of government since the 1790s. It is embodied in the Fourth Amendment which is the heart of the Bill of Rights. It is based on the idea with essentially American. The PATRIOT Act has purported to do away with the search warrant requirement, by employing language so intentionally vague that the government can interpret it as it wishes.

Add to this the secret venue for this interpretation, the FISA court, to which the PATRIOT Act directs that NSA applications for authority to spy on Americans are to be made, and you have the totalitarian stew that we have been force fed since 2001.

Because the FISA court meets in secret, Americans did not know that the feds were spying on us all of the time and relying on their own unnatural reading of the words in the PATRIOT Act to do this. It is only since Edward Snowden spilled the beans on his former employer nearly 2 years ago.

Here is another reason I think to question whether USA FREEDOM may be the best bill for us. There was an article in the Daily Beast the other day called “The War on Privacy” which is the heart of the relationship between the people and their government and a free society.

It was supposed to be the declawing of America’s biggest spy service, but what no one wants to say out loud is that this is a big win for the NSA, and a huge nothing burger for the privacy community.”

Rather, it requires that phone companies, like legal mumbo-jumbo but it goes to the heart of the relationship between the people and their government and a free society.

It was supposed to be the declawing of America’s biggest spy service, but what no one wants to say out loud is that this is a big win for the NSA, one former top spook says. Civil libertarians and privacy advocates were applauding yesterday after the House of Representatives overwhelmingly passed legislation to stop the NSA from collecting Americans phone records in bulk. But they’d best not break out the bullhorn yet.

The real big winner here is the NSA. Over at its headquarters in Fort Meade . . . intelligence officials are high-fiving, because they know things could have turned out much worse. “What no one wants to say out loud is that this is a big win for the NSA, and a huge nothing burger for the privacy community,” one former senior intelligence official, one of half a dozen who spoke to The Daily Beast about the phone records program and efforts to change it.

Here’s the dirty little secret that many spooks are loath to utter publicly, but have been admitting in private for the past two years: the program.

The bulk collection program— which was exposed in documents leaked by Edward Snowden in 2013, is more trouble than it’s worth. “Mary expensive and very cumbersome,” the former official said. It requires the agency to maintain huge databases of all Americans’ landline phone calls. But it doesn’t contribute many leads on terrorism. It has helped prevent few—if any—attacks. And it’s nowhere near the biggest contributor of information about terrorism that ends up on the President’s desk or other senior decision makers.

If, after the most significant public debate about balancing surveillance and government in a generation, Congress says that NSA has to give up, they’re getting off easy. The bill that the House passed yesterday, called the USA FREEDOM Act, doesn’t actually suspend the program. Rather, it requires that phone companies, not the NSA, hold on to the records.
That bears repeating. At least from the author’s perspective of this article, the USA FREEDOM Act does not actually suspend the phone records program. Rather, it requires the phone companies, not the NSA, to hold onto the records.

“Good! Let them take them. I’m tired of holding onto this,” a current senior U.S. official told The Daily Beast. It requires teams of lawyers to ensure that the NSA is complying with Section 215 of the PATRIOT Act, which authorizes the program, as well as the internal regulations on how the information cannot be used. The phone records program has become a political lightning rod, the most controversial of all of the classified operations that Snowden exposed. This applies to NSA still getting access to the records but not to have to hold on to them itself, all the better, the senior official said.

And one of the ideas officials considered was having Congress to require phone companies, not the NSA, to hold onto the phone records in the agency’s computers.

This week, evidently, as you cite that article, that one of the key things about the encryption debate is several years ago, those involved at the highest levels of government basically decided that instead of being able to break the encryption code, that maybe it would be a good idea to put an actual government chip in every computer. That was called the clipper chip. And the notion was that then the NSA and other people wouldn’t have to worry about breaking the code. They would just have a government backdoor to our technology.

In fact, there were many people—an Internet age... The agency has circumvented or cracked much of the encryption, or digital scrambling, that guards global commerce and banking systems.

Continuing: “For the past decade, NSA has led an aggressive, multipronged effort to break widely used Internet encryption technologies,” said a 2010 memo describing a briefing about NSA accomplishments for employees of its British counterpart.

I think the encryption thing is a big deal and will continue to be something that is a bone of contention between the tech industry and the government.

With regard to what we do in order to protect ourselves from the government, I think encryption will continue to take off.

Ms. CANTWELL. Will the Senator yield for a question without losing the floor?

Mr. PAUL. Yes, without losing the floor.

Ms. CANTWELL. I am so pleased to hear my colleague talk about encryption technology because it is clearly something very important in this privacy debate. I hear with interest, as you cite that article, that one of the key things about the encryption debate is several years ago, those involved at the highest levels of government basically decided that instead of being able to break the encryption code, that maybe it would be a good idea to put an actual government chip in every computer. That was called the clipper chip. And the notion was that then the NSA and other people wouldn’t have to worry about breaking the code. They would just have a government backdoor to our technology.

In fact, there were many people—I kept saying you are going to say in stead of “Insi... You are going to say “U.S. Government inside” of every computer. Is that what we were trying to do?

So the clipper chip battle in the 1990s was a very famous debate about exactly how we were going to proceed on making sure that we were guaranteeing privacy to U.S. citizens. So clearly we were successful in defeating the clipper chip, but it took a lot of time and a lot of energy.

So I thank my colleague for continuing to fight on these important issues. You mentioned many of the organizations that were also involved in that battle. Are you saying that now you believe there are new government efforts to thwart our encryption capabilities?

Mr. PAUL. I thank the Senator for that question. I think there is a new sort of political rhetoric attacking encryption, but I think there will be more efforts. This article is from about a year ago, but I think what is going to happen from this—and what I have been hearing from people—is that there is ultimately going to be encryption that is going to be authorized by law. They are going to have encryption—the only way to get to the encryption is through the individual. This is being done because the government has overplayed their hand. Because the government was so busy, such as with this company, companies are going to continue to get further and further away. What they are going to do is the encryption will only be in control of the user. When that happens, the government is not getting any information at all.

So they are taking a tool that probably has been useful to a certain degree—and I don’t mind if we are doing it through warrants and specific extra-dition—but I think they are pushing companies so hard that I think encryption is going to be put in a place where even the company cannot get to it.

Ms. CANTWELL. If I could ask another question of the Senator without losing him the right to the floor, this is a debate, as you were just saying; I think I understand your premises that there are three legs to the stool. There is a Federal Government that wants access, but they should go through the judiciary system, and there are separately the entities that have the actual records, which are the telecom companies, and that keeping those separate, not blending them, not actually giving the telephone companies the right to keep all the data and information of individuals is a critical distinction.

You were just describing. I think I understood, that in this case the government was just saying: Oh, keep all of the data, and that which is not exactly what the phone companies had acquired or kept for any business purposes, but it just puts personal data and information at risk.

Am I understanding that correctly?
Mr. PAUL. I think I understand that question. The phone companies aren’t excited about it, but they will do it if they are paid and told to do it, basically. But the phone companies, I don’t know. I don’t how much objection they have had to the current system and the new system. They probably don’t want to have to hold all this. There are rumors that the people who want more will require them to.

I don’t think, under the current USA FREEDOM Act, they are going to be required to do anything more than the records, but they are going to be encouraged to and paid to hold the records.

So I think the real question is, is the USA FREEDOM an improvement or are we just going to have bulk collection done by another name, with phone companies holding the records. That is what my fear is.

Ms. CANTWELL. I would say to the Senator or ask the Senator, in this debate, I think you raised an important question, if I understand it correctly, which is, How much will the U.S. Government spy on U.S. citizens? And that, combined with the question you were asking to the changes to the PATRIOT Act and the accumulation of business records is when that individual could be a U.S. citizen.

For example, you and I could be somewhere—you could be an individual of interest to one of these Federal agencies, but just because I happen to have a cup of coffee with you, now all of a sudden all of my business records, all of my personal information could be under investigation by the U.S. Government, and I wouldn’t even know about it; is that the Senator’s understanding?

Mr. PAUL. Yes, I think that is a big concern. There are a couple of things that I think are alarming. Even two domestic emails could be routed through a server in another country, and that is what that individual’s access to two Americans who are communicating from New Jersey to South Carolina.

But also I think as Senator Wyden has pointed out, it often or sometimes sounds like we are targeting a foreigner simply to get access to an American.

Does the Senator have a question in that vein?

Mr. WYDEN. I think my colleague has asked the good question, and it is my intention to rejoin him here in a few minutes.

But I think it is important—and I would be interested in your reaction—do people understand what is at stake here?

We are talking about section 702 of the FISA Act and that involves a very important issue of making sure, when there is somebody dangerous overseas, that we can, in effect, go up on that person to get that kind of information that we have to have.

But what we are seeing increasingly—and we have actually put it on our Web site—Americans are being swept up in those searches and their emails are being read.

And what is especially troubling to me—and I would be interested in my colleague’s views with respect to this backdoor search loophole—this is a problem today, but it is only going to be a bigger problem ahead because increasingly communications systems around the globe are merging. They are becoming integrated. It is not as if the communications systems stop at a nation’s border.

So I think this is a particularly important issue. As we have talked about, the amendments we are interested in offering, I think this is a particularly important bipartisan effort. I don’t think people have known a whole lot about how the backdoor search loophole takes place.

We have supported section 702, because when there are dangerous threats overseas, we want our government to be able to ensure it is taking steps to protect the American people. But having more and more Americans swept up in these searches, particularly the changing nature of a communications system being integrated, strikes me as a very big problem.

I am going to be back to join my colleague very shortly, but I would be very interested in my colleague’s thoughts on the importance of closing this backdoor search loophole.

We have tried in the past, I think that now that we have had a chance to walk this through in terms of what it really means, my hope is we can finally close it.

What would my colleague’s reaction be with respect to the importance of this?

Mr. PAUL. I think it is a great question, and some are saying that through the backdoor of abusing 702, that if there were 90,000 people targeted last year through using this 702, that we could collect information on 900,000 individuals who were incidental and were not the target at all. So for every one byte of data we are collecting on somebody, we are collecting nine bytes of data on somebody who is not the target.

But that becomes part of this enormous data center that we are building. And many of those people are Americans who were getting through the backdoor.

But why am I here today is I want the leadership to allow us to have our amendments. That is one of our amendments. That is a joint amendment we have worked on. We have been working on these things for months. This only comes up every 3 years. Should they not give us a day to have a vote on some of these amendments?

Mr. WYDEN. I thank my colleague. I will be back to rejoin him in a few minutes, I do so appreciate my colleague’s stamina and passion.

I went to school on a basketball scholarship, and I think I have been able to stay in a little bit of shape, but my friend from Kentucky has sure shown both his commitment and his stamina. I am going to have to take a brief meeting on one of the issues pending, but I intend to join my colleague here before too long.

I thank the Senator. I will have additional questions at that time.

I return the floor to Senator Paul.

Mr. PAUL. I thank the Senator for that question.

In the New York Times, in March of 2014, Clara Miller writes about some of the costs on U.S. tech companies that are occurring from some of this:

Microsoft has lost customers, including the government of Brazil.

Spending more than a billion dollars to build data centers overseas to reassure foreign customers that their information is safe from the prying eyes in the United States.

And tech companies abroad, from Europe to South America, say they are gaining customers that are shunning U.S. providers, g Wilkinson because of the revelations by Edward J. Snowden that tied these providers to the National Security Agency’s vast surveillance programs.

The estimates are in the billions of dollars lost to American companies.

Even as Washington grapples with the diplomatic and political fallout of Mr. Snowden’s leaks, the more urgent issue, many tech company executives, say, is economic. Tech executives, including Mark Zuckerberg of Facebook, raised the issue when they went to the White House...for a meeting with President Obama.

It is impossible to see now the full economic ramifications of the spying disclosures—in part because most companies are locked into multiyear contracts, but the pieces are beginning to add up as businesses question the trustworthiness of American technology products.

The confirmation hearing last week for the new NSA chief, the video appearance of Mr. Snowden at a technology conference in Texas and the drip of new details about government spying have kept attention focused on an issue that many tech executives hoped would go away.

Despite the tech companies’ assertions that they provide information on their customers only when required under law—and not knowingly through a back door—the perception that they espied on their customers is growing. “It’s clear to every single tech company that this is affecting their bottom line,” said Daniel Castro, a senior analyst at the Information Technology and Innovation Foundation, who predicted that the United States cloud computing industry would lose $25 billion by 2016.

Forester Research, a technology research firm, said the losses could be as high as $180 billion, or 25 percent of industry revenue, based on the size of the cloud computing, web hosting and outsourcing markets and the worst case for damages.

The business effect of the disclosures about the NSA is felt most in the daily conversations between tech companies with products to pitch and their wary customers. The topic of the surveillance, which rarely came up before, now has become a part of these conversations, as one tech company executive described it. “We’re hearing from customers, especially global enterprise customers, that they care more than ever about where their content is stored and how it is used and secured,” said John E. Frank, deputy general counsel at Microsoft, which has been publishing that it allows customers to store their data in Microsoft data centers in certain countries.
Isn’t that sad? Isn’t it sad that a great American company is having to advertise that they are storing their information in other countries because in America we are not protecting your privacy? Isn’t that sad, that a great American company, in order to stay in business, no advertise to their customers that they are keeping their information in another country? At the same time, Mr. Castro said, companies say they believe the Federal Government is making a bad situation worse. “Most of the companies in this space are very frustrated because there hasn’t been any kind of response that’s made it so they can get more answers from customers and say, ‘See, this is what’s different now, you can trust us again.’” he said.

In some cases, that has meant forgoing potential revenue. Though it is hard to quantify missed opportunities, American businesses are being left off some requests for proposals from foreign customers that previously would have included them, said James Staten, a cloud computing analyst at Forester who has written reports—on—German companies, Mr. Staten said, “explicitly not inviting certain American companies to join.” He added, “It’s like, ‘Well, the very last vendor we do is IBM, and you didn’t invite them.’

The reality has been a boon for foreign companies. Runbox, a Norwegian email service that markets itself as an alternative to American services like Gmail and says it does not comply with foreign court orders seeking personal information, reported a 34 percent annual increase in customers after news of the NSA surveillance.

Brazil and the European Union, which had used American undersea cables for intercontinental communication, last month decided to build their own cables between Brazil and Portugal, and gave the contract to Brazilian and Spanish companies. Brazil also announced plans to abandon Microsoft Outlook for its own email system that uses Brazilian data centers.

And who else thinks that bulk collection is a good idea for America?

Mark J. Barrenechea, chief executive of OpenText, Canada’s largest software company, said an anti-American attitude took root after passage of the PATRIOT Act, the counterterrorism law passed after 9/11 that expanded the government’s surveillance powers.

“This is all coming from a New York Times article by Claire Miller from March of 2014. But “the volume of the discussion has risen significantly post-Snowden,” he said. For instance, after the NSA surveillance was revealed, the company’s clients, a global steel manufacturer based in Britain, demanded that its data not cross U.S. orders. “Issues like privacy are more important than ever,” he said. “The cheapest price, said Matthias Kunisch, a German software executive who spurned U.S. cloud computing providers for Deutsche Telekom. “Because of Snowden,” he added, “the perception is that American companies have connections to the NSA.”

Security analysts say that ultimately the fallout from Snowden’s revelations could mimic what happened to Huawei, the Chinese technology and telecommunications company, which was forced to abandon major contracts in 2012 after American lawmakers claimed that the company’s products contained a backdoor for the People’s Liberation Army of China—even though this claim was never definitively verified. Silicon Valley companies have complained to government officials that federal actions are hurting American technology businesses. But companies fall silent when it comes to specifics about economic harm, whether to investment banking or to small businesses because it is too early to produce concrete evidence. “The companies need to keep the priority on the government to do something about it, but they don’t have the time to go to the government and say billions of dollars are not coming to this country,” Mr. Staten said.

Some American companies say the business hit has been minor at most. John T. Chambers, the chief executive of Cisco Systems, said in an interview that the NSA disclosures had not affected Cisco’s sales “in a major way.” Although deals in Europe and Asia have been slower to close, he said, they are still being completed—an experience echoed by other companies.

Security analysts say tech companies have collectively spent millions and possibly billions of dollars adding state-of-the-art encryption features to consumer services, like Google search and Microsoft Outlook, and to the cables that link data centers at Google, Yahoo and Microsoft. IBM said in January that it would spend $1.2 billion to build 15 new data centers, including in London, Hong Kong, and Sidney, Australia, to avoid having to pay fees that are sensitive to the location of their data.

Isn’t it sad that companies want to avoid being in America? Why do they want to avoid having their information cross our borders?

Salesforce.com announced similar plans this month.

Germany and Brazil, where it was revealed that the NSA spied on government leaders, have been particularly adversarial towards American companies and the government. Legislators, including in Germany, are considering legislation that would make it costly or even technically impossible for American tech companies to operate inside their borders. Yet some government officials say laws like this would be harder than protecting privacy. Shutting out American companies “means more business for local companies,” Richard A. Clarke, a former White House counterterrorism adviser, said last month.

This is an article that was published on NPR’s Web site. The headline is “As Congress Haggles over Patriot Act, We Answer 6 Basic Questions.”

Quoting from the article:

“…a key section of the Patriot Act—a part of the law the White House uses to conduct mass surveillance on the call records of Americans—is set to expire June 1. That leaves lawmakers with a big decision to make: Rewrite the statute to outlaw or modify the practice or extend the statute and let the National Security Agency continue with its work.

I think it will be interesting to see how the debate ultimately plays out. You have what has been passed in the House—the USA FREEDOM Act—and passed in the House overwhelmingly. The majority here probably believes we are not collecting enough bulk data. They would prefer to collect more bulk phone data and aren’t too concerned that any privacy interests are being trampled upon.

So you have two sort of contrary opinions in wondering which direction we go. Some who want more collection of data and say we are not collecting enough data say they might live with it if we add in and force the phone companies to keep the data. Right now, the businesses are free to decide if they want to keep the data. But the concern for some of those of us who believe in privacy is that we may just be trading one form of bulk collection for another, that we may be trading a system where the government collects the data to a system where the phone companies have the bulk collection but you are still having the same sort of collection of data.

My concern with the USA FREEDOM Act is that it still, I believe, may allow for a nonspecific warrant. It still may allow for bulk collection in the sense that it says you have to select a specific person, but the specific person can be a corporation. So if you still have a bulk collection of data in the sense that we put the name “Verizon” in and you are getting all of Verizon’s customers and the only difference is the phone company is holding the information and then divulging it versus the government holding it, I am not so sure we have had so much of an improvement.

Some will say we just need to be safe, we just need to do whatever it takes, that it doesn’t matter if we give up any kinds of basic freedoms or privacy in the process. But I think we give up on what we are as a people, that basically, at all cost, regardless of what it takes, we are going to do this to keep ourselves safe.

The thing is that even the President’s privacy commission and the President’s review commission—two independent, nonpartisan bodies—ended up saying that they didn’t think anybody was independently captured, that there was no unique information that was actually gotten from either of those programs, that the collection of data hadn’t made us safer but it has infringed upon our privacy.

I think if we don’t have a significant debate on this, if we continue to say “Well, we are up against a deadline, and because there is a deadline, we don’t have time for amendments,” I think we run a real risk with the American people. Congress has about a 10-percent approval rating right now, and some argue that might be a little bit too high considering how great a job we are doing—a 10-percent approval rating.

The vast majority of the American people think we have gone too far in the bulk collection of records. In the ACLU survey we looked at a little bit earlier, in the age group between 19 to 39, over 80 percent of people think we have gone too far and we are not protecting privacy.

(Mr. SCOTT assumed the Chair.)

We received an article from the New York Times in which they talk about what kind of business is potentially being lost because people don’t want
American products. I think it is kind of sad. Not only do they not want their data held in a center in our country, they don’t want their data crossing into our country.

I don’t think we have to be that fearful of the government collecting information. We used to have to give up who we are in the process.

I have met some of our young soldiers who have come back with missing limbs. I have met the parents of some who have died. And to a person, they say they were fighting for our Bill of Rights and they were fighting for our Constitution. It is difficult for me to understand how we can take into account the sacrifice they made in war and at the same time, while we are here safe at home, we can’t even protect the documents they are fighting for.

I see no reason why we can’t rely on the Constitution. I see no reason why we can’t rely on traditional warrants. Warrants are not hard to get. Warrants are almost impossible to get. Warrants are, if anything, very easy to get. On the FISA Court, turning down a warrant is almost nonexistent. So I see no reason why we can’t try using the Constitution for a while.

I am concerned that the problem is bigger than just what we are talking about today. We are talking about the bulk collection of records supposed under section 215 of the PATRIOT Act. If we stop that, how much have we stopped? How much is still in existence? How much are we still doing through other venues?

I think probably the most alarming thing we have come across as I have been talking today is the idea that some people believe the President has inherent powers that are not subject to Congress. That, to me, is very alarming.

It also means that I think that because this opinion persists within the executive, there are in all likelihood many programs like the bulk collection of data—many programs that we don’t know about, some that we have heard about. It is still not clear to me whether the Stellar Wind Program is completely gone, which involves more than just telephone data, email conversations, computer addresses, and credit cards. What is the government collecting? How much is being collected and under what authority?

It seems to me that there are people—some of them elected officials—who believe in the inherent powers of the Presidency that cannot be challenged even by Congress. We have a lot of work if that is really what we are up against.

I think it would be a big step forward if we do something about the bulk collection of data. But I think, given the court case, it is concerning to me that we might actually make the court case or the future of it moot and that we actually could make things worse. It wouldn’t be the first time we have made things worse, thinking we were fixing things and made it worse.

From the opinion of the Second Circuit Court, here are some quotes:

The court writes:

That telephone metadata do not directly reveal the content of telephone calls does not vitiate the privacy concerns arising out of the government’s bulk collection of such data. . . . the startling amount of detailed information metadata can reveal, information that cannot or be obtained by examining the contents. . . .

I think this is a good point because many people want to downplay what metadata is or what you can determine from it. But here is the court acknowledging that you may actually get more detailed information from metadata than what you once got from obtaining the content.

When we think about how true this is, think about if someone was just reading a newspaper and take your papers. What could they find? How many people even have personal letters anymore? People don’t have anything on paper that is personal at all. A lot of people pay their bills online. Amazing, if you put the compilation of all the metadata together, what you can determine.

Remember that a high-ranking intelligence official said that we kill people based on metadata. But if we are killing people based on metadata, the assumption is that they can get an enormous amount of information from metadata, and we should be very careful about relying on metadata.

They give an example of the sort of metadata and what it can determine: For example, a call to a single-purpose telephone number such as a “hotline” might reveal that on individual is a victim of domestic violence or rape; a veteran; suffering from an addiction of one type or another; contemplating suicide; or reporting a crime. Metadata can reveal civil, political, or religious affiliations; they can also reveal an individual’s social status, or whether and when he or she is involved in intimate relationships.

The more metadata the government collects and analyzes, furthermore, the greater the capacity for such metadata to reveal more and previously unascertainable information about individuals.

That is sort of interesting also about metadata. We have so much online and so much information on our phones that you could probably be in someone’s house for a month and never find that in paper because so much of our lives revolve through the phone, through things we order and phone calls and all of that, that in the olden days what could have been gotten through someone’s castle, through someone’s actual papers in their house, I think pales in comparison to what you can get simply through metadata even without a warrant.

They make another point, too: Finally, as appellants . . . point out, in today’s technologically based world, it is virtually impossible for an ordinary citizen to avoid coming in contact with himself (or herself) on a regular basis simply by conducting his ordinary affairs.

The order thus requires Verizon to produce call detail records every day on all telephone calls made through its systems or using its service where one or both ends of the phone call are located in the United States.

It is hard for me to believe that there are people who don’t understand that what we are talking about here is a general warrant. This is what we fought the Revolution over. This is, as John Adams said, the spark that led to the Revolution. The spark that led to the Revolution was the whole worry and concern, one, that soldiers were writing the warrants, and the other concern was that in writing the warrants, they weren’t specific to anyone, they were being written in a general fashion, and that by writing them generally so, there could be an injustice in having an entire group who ends up being subject to a warrant that is not specific.

Some have the appellate court, we also hear that the metadata has a reach far beyond almost imagination.

In the article “As Congress Haggles over Patriot Act, We Answer 6 Basic Questions,” which was published on nationaljournal.com, there are several questions they ask about the PATRIOT Act debate.

Most of the talk has been about telephone surveillance, but the question is this: What about the NSA’s surveillance of email and other Internet activities?

This congressional debate has nothing to do with any of NSA’s surveillance Internet activity.

That’s mostly because of the fact that those programs are authorized by different laws.

The PRISM program, for example, which collects a vast amount of Internet data . . . is covered under section 702 of the FISA Amendments Act.

Some have said that the PRISM Program probably is collecting more information in many ways, maybe even dwarfing the bulk collection of the phone records. So if we don’t address section 702 in this debate, this is also what we were talking about earlier, is the backdoor, the ability to say: Well, we are investigating someone in a foreign country, but really they are trying to get access to someone in our country through the backdoor. If we don’t address this, we may well be addressing a significant part of the problem.

This is one of the other questions: Is there anything else in the House bill we should know about?

The bill [the USA FREEDOM Act] lifts the secrecy surrounding key decisions made by the secret Foreign Intelligence Surveillance Court. Going forward, some will be made public.

I think this is a step in the right direction. There are a lot of legal decisions, and I think we can discuss the pros and cons of the legal decision without having to know the specific details. I think Senator Wyden made a good point on this earlier when he said that it is not the operational details we need to know, but when we are questioning and debating the law, there is
no reason why that shouldn’t be public knowledge.

One of the reasons we would like to see the court rulings, too, is that the FISA Court found bulk data collection constitutional. I still find that somewhat implausible that anything less than a rubberstamp could find it somehow reasonable to say that collecting all of our records in advance really is relevant to an investigation. I think it is a pretty significant intrusion into your affairs and also into your banking, and it is a pretty significant intrusion into the banking affairs and also into an individual’s affairs.

This is an article that was written by the ACLU about suspicious activity reports.

Law enforcement agencies have long collected information about their routine interactions with members of the public. Sometimes these are "field interrogation reports" or "stop and frisk records," this documentation, on the one hand, provides a measure of accountability over police activity. But it also creates a duty for police to collect the personal data of innocent people and put it into criminal intelligence files with little or no evidence of wrongdoing. As police activity records increasingly become automated, law enforcement and intelligence agencies are increasingly seeking to mine this data.

The Supreme Court identified "reasonable suspicion" as the standard for police stops in Terry v. Ohio in 1968. This standard required suspicions supported by articulable facts suggesting criminal activity was afoot...

In the suspicious activity reports, though, these kinds of programs threaten this reasonable time-tested law enforcement standard by encouraging agents to report behaviors that do not rise to reasonable suspicion. So it is one thing to say that someone has done something that rises to reasonable suspicion, but it is another to say that activity that could be perfectly normal, like withdrawing $1,000 from the bank or putting $1,000 in the bank, somehow is suspicion of a crime that we should be investigating.

A lot of this stuff has gotten really bad, really bad. It is one of the things where actually the newspapers have done a pretty good job of reporting some of the stuff—not necessarily the suspicious activity reports but on some of the other confiscations of people’s assets without really evidence of a crime but maybe evidence that they have cash.

You can be driving down the road in DC and make an unsafe lane change and the government asks you if you have more than $20 and then they take it, that is one thing where the government takes it or the government says: Well, you have $2,000. We will let you keep $1,000 if you sign a statement saying that you will not sue us to get the $1,000 back.

Believe it or not, that is stuff that is still happening in our country. It is called civil asset forfeiture. To make it worse, we actually give a perverse incentive. We say to the local officials that if you capture money from people, we will give you a percentage of it—so the more money you take, the more you get.

Some people have shown that people actually go after things that are paid off. There was a motel in New Jersey, the Motel Caswell. Local officials decided they would go after it because, they said, there had been some drug dealings at the motel. It turned out there were 6 people in the motel selling drugs out of 180,000 visits or something ridiculous.

It turned out there were other hotels that had a higher percentage of drug busts done at the hotel, but they owed money and the Motel Caswell was completely paid off. It may have been part of the decisionmaking process, because when the government came and seized the hotel for illegal activity, they took the hotel and went and sold it, but it has a lien against it. The bank owns it, and you do not get to sell it very easily. It will pass title. They were going to sell it. It is a $1.5 million hotel and then, I guess, the local police forces would benefit by that.

It is not just with our records that there is a problem. It is also with the concern for how we adjudicate justice in our country. As we see things moving forward, I think we need to be worried about not only the way our records are collected, but we need to be concerned about justice in general.

As I have traveled around the country, one of the things I have seen is what I call an undercurrent of unease in our country. I traveled to Ferguson. I have traveled to Chicago. I have been to most of our major cities, and I have also been to some of the places where there has been this anger.

I think people are angry because they do not feel that government is treating them justly. People do not like to be treated arbitrarily. In fact, there are some who have given the notion of what is acceptable, what is good government and what is bad government, what is good law and what is bad law, what is just and what is unjust. But whether it is arbitrary or not, Hyack in ''The Road to Serfdom'' talks about that arbitrariness, not having the predictability of knowing what the law will do. That the law does not do the same thing to all individuals is a definition of the injustice that causes people to be unhappy about the way their government treats them.

My fear is that this arbitrary nature of collecting bulk records, of collecting all of our records without a significant warrant—the problem here is going to be the thing that causes people to be unhappy about the way their government treats them.

One of the little-noticed sections in the USA FREEDOM Act deals with the safety of maritime navigation and nuclear terrorists and conventions implementation. Interestingly, there is a provision somehow in this for civil forfeiture. But I think the biggest problem with civil forfeiture is that we allow it to occur without a conviction. I think no one should have their possessions taken from them. I think you should be innocent until proven guilty. I see that the Senator from Connecticut has a question. I would be happy to entertain a question without losing the floor.

The PRESIDING OFFICER. The Senator from Connecticut.

Mr. BLUMENTHAL. Mr. President, I thank my colleague from Kentucky for giving me the opportunity to ask a
question. In the preface to that question, I would like to make a couple of remarks if he will yield to me for that purpose.

My colleague from Kentucky has taken the floor tonight in the highest tradition of the Senate to make a point that should be meaningful to all of us who care about our democracy. My colleagues, including the Senator from Kentucky, have made a number of important points about the dangers of mass surveillance and the harms caused by the bulk collection of Americans' data. I agree with those who have pointed out that the USA FREEDOM Act is a strong compromise solution for protecting Americans' freedom and security at the same time as striking a balance between preserving our security and protecting our precious rights.

I want to highlight for the Senator from Kentucky, in his very insightful remarks, as well as for my colleagues and others who are interested in this topic, a particular part of that legislation—the provisions that deal with the adversarial process in the FISA Court. The bulk collection program is a powerful example of why we need a strong adversarial process. We know that bulk metadata collection is unnecessary. The President's own review group has made that clear. We also know that bulk metadata collection is un-American. This country was founded by people who rightly abhorred the Star Chamber, that sounds a lot like what we are going to do, what we are going to think, and what we are going to say. It is the genius of the American system of jurisprudence that judges listen to both sides in open court before they make a decision.

The Second Circuit held that the Federal Government's interpretation is "unprecedented and unwarranted." Those are strong words for a court normally extraordinarily reserved and understated in its characterization of illegality by the executive branch. But the court clearly and emphatically that the Government was breaking the law.

Never before in the history of the Nation had such a bizarre interpretation been entertained. At the very least, the FISA Court would recognize that its May 2006 decision was important.

If this question had gone to a regular article III court, it would have been immediately recognized as a momentous decision, permitting bulk collection of data on every American. Litigants on both sides would have, in effect, pulled out all the stops in their arguments. Yet not only did the FISA Court get the question wrong in May of 2006, it appears not even to have spotted the issue, not even to have raised it and addressed it in its opinion. Of course, nobody knew it at the time because the opinion itself was kept secret, as were all of the proceedings on this issue.

The FISA Court upheld the government's bulk collection program, and it did so without even writing an opinion explaining its legal reasoning. Not until the program was made public, the Senate Intelligence Committee, and every opinion released so far has omitted key issues or ignored key precedent.

If the court had written an opinion, at least Congress would have quickly known what the court had done, not to mention the American people would have known what the court had done, but the court wrote nothing. It chose to be silent and secret, and apparently it believed this issue merited no notice to the Congress that could get such an important issue so disastrously and desperately wrong is fundamentally broken.

Let me be clear. I do not mean to denigrate the judges of the FISA Court. Any judge, no matter how wise and well attuned to legal issues, needs to hear both sides of an argument in order to avoid mistakes. Courts make better decisions when they hear both sides.

In fact, during a hearing on this issue in the Senate Judiciary Committee, I had the opportunity to ask one of the Nation's foremost jurists whether she could do her job without hearing from both sides of an argument, and she was quite clear that she could not. Adversarial briefing, she explained, is essential to good decisionmaking.

We know as much from our own everyday lives that we make better decisions when we know the argument against what we are going to do, what we are going to think, and what we are going to say. It is the genius of the American system of jurisprudence that judges listen to both sides in open court before they make a decision.

The USA FREEDOM Act would fix this systemic problem. It would demand, under certain circumstances, that the FISA Court hear from both sides of the issue and explain why it is making a decision and also explain why it has decided not to hear the other side if it chooses to do so. That would bring transparency to the FISA Court decision, requiring them to be released unless there is good reason not to release them. It preserves the confidentiality of the court when necessary, but it also protects the fundamental, deeply rooted sense of American justice that an adversarial, open process is important—indeed, essential—to democracy. And it would provide some appellate review, some form of review, an appellate court so that if mistakes are made, they are more likely to be caught and stopped before they result in fundamental invasion of private rights.

The USA FREEDOM Act will make the FISA Court look more like the courts Americans deal with in other walks of life, more like the courts Americans deal with in their own lives, more like the courts they know when they are litigants, and more like the courts our Founders anticipated.

What would they have thought about a court that hears cases in secret, makes secret decisions, operates in secret, and issues secret rulings? They would get it wrong. They would have thought that that sounds a lot like the Star Chamber, that sounds a lot like the so-called courts that caused our rebellion.

This change will help ensure that we are not back in this Chamber 9 years from now debating the next mass surveillance program that started without
Congress actually authorizing it, as did metadata collection. It will help ensure that strictures of our Constitution are obeyed in spirit and letter. It will help ensure that programs designed to keep Americans safe can command the respect and trust they need to be effective. We need those programs. National security must be preserved and protected, but we need not sacrifice fundamental rights in the process.

Unless and until this essential reform is enacted, along with the other essential reforms contained in the USA FREEDOM Act, I will oppose any reauthorization of section 215.

The question that I ask my colleague from Kentucky and the point that I think he has made so powerfully and eloquently relates to this essential feature of our American jurisprudence system. Are not open adversarial courts essential to the trust and confidence of the American people, and do we not need this kind of fundamental reform in order to preserve our basic liberties?

I ask this question of my colleague and friend from Kentucky because I think he made the point on the floor of this Senate tonight raises fundamental issues that need to be discussed and addressed.

I thank the Senator from Kentucky for the opportunity to ask this question and address this body.

I thank the Presiding Officer.

Mr. PAUL. I thank the Senator from Connecticut for that question.

The interesting thing is that we want a body that works a little more like a courtroom, and I know the Senator from Connecticut has been in favor of having a special advocate and trying to make it more like a courtroom. I think you can only get the truth if you have people on both sides. If you have people on one side, it is an inevitability that the truth is going to be lost and you are going to lose in one direction.

I think the other thing you can do is to have a special advocate and that is a very good kind of undertaking at finding the truth.

So I think the Senator is exactly right, and I believe there are things we can definitely do to make it better. I think the bottom line is that we should not collect bulk data on people who are not suspected of a crime.

One of the sections of the PATRIOT Act that doesn’t get quite as much discussion, but it is one of the sneak-and-peek sections and it is not up for renewal, but it is something that also shows how we have really gone awry on that.

Radley Balko has written about this in the Washington Post, and it is how something started just a little bit at a time and grows bigger and bigger.

From 2001 to 2003, law enforcement only did 47 sneak-and-peek searches. The 2010 report said it was up to 3,970, and 3 years later, in 2013, there were 11,129 sneak-and-peek searches. That is an increase of over 7,000 requests. That is exactly what privacy advocates argued in 2001 would happen.

The interesting thing is that when you look to see who exactly we are arresting at the very least be given the time to read it. There’s also a lot of Beltway scorn for demands that bills be concise, limited in scope, and out of step with the case law.

To make matters worse, there are accusations and implications from data that maybe the war on drugs has a disproportionate racial outcome. I think it is concerning that we are actually not using a constitutional standard but a lower standard.

I have an article that was written by Radley Balko in 2014 that appeared in the Washington Post. He says:

Washington establishment types are often dismissive and derisive of the idea that members of Congress should actually be required to read legislation before voting on it—or at least be given the time to read it. There’s also a lot of Beltway scorn for demands that bills be concise, limited in scope and open for public comment in their final form before they’re voted on. If you’re looking for evidence showing why the smug consensus is wrong, here is Exhibit A.

He is talking about the sneak-and-peek and how if we had known what was in it, we would have known in advance that it was not really going to end up being used for terrorists and instead end up being used for domestic crime.

He says:

This is also an argument against rashly legislating in a time of crisis. On Sept. 11, 2001, the federal government failed in most important and basic responsibility—to protect us from an attack. We responded by granting law enforcement and national security officials see the Bill of Rights not as the foundation of a free society but as an obstacle that prevents them from doing their jobs. I think this in mind when regional emergency to argue for exceptions to those rights.

When critics point out the ways a new law might be abused, supporters of the law often accuse those critics of being cynical—they say we should have more faith in the judgment and propriety of public officials. Always assume that when a law grants new powers to the government, that law will be interpreted in the vaguest, most expansive, most pro-government manner imaginable. If they don’t have the kind of parliamentary power to protect the risk? Why leave open the possibility?

Better to write laws narrowly, restrictively and with explicit safeguards against abuse.

11,000 search warrants that were issued, 51 were used for terrorism. We lowered the constitutional standard, but we ended up using it for domestic crime, not for terrorism.

This is happening in other forums. There is something that folks are calling parallel construction. This is an article from the Electronic Frontier Foundation by Hanni Fakhoury entitled “DEA and NSA Team Up to Share Intelligence, Leading to Secret Use of Surveillance in Ordinary Domestic Crime.”

Add the IRS to the list of Federal agencies obtaining information from NSA surveillance. Reuters reports that the IRS got intelligence tips from a NSA unit and were also told to cover up the source of that information by coming up with their own independent leads to recreate the information obtained from the NSA.

So let me explain what happens. We once again use a lower standard, a non-constitutional standard, the standard we are supposed to be using for terrorists. We get information on people who are not terrorists, who may or may not be committing an IRS violation. We tell the IRS. They know it is illegally obtained information, so then they look for another way to prove that this information—other information that they can find—to prove the point that they only know about it from legally obtained information.

A startling new Reuters story shows one of the biggest dangers of the surveillance state: The unquenchable thirst for access to the treasure of information by other law enforcement agencies.

As the NSA scoops up phone records and other forms of electronic evidence while investigating national security and terrorism leads, they turn over “tips” to a division of the Drug Enforcement Agency known as the Special Operations Division. FISA surveillance originally only obtained information only in specific authorized national security investigations, but information sharing rules...
implemented after 9/11 allows the NSA to hand over information to traditional domestic law-enforcement agencies, without any connection to terrorism or national security investigations.

But instead of being truthful with criminal defendants, judges, and even prosecutors about where the information came from, DEA officials are reportedly obscuring the source of these tips.

For example, a law enforcement agent could receive a tip from foreign surveillance, and he could look for a specific car in a certain place. But instead of relying solely on the tip, the agent would pretend to find his or her own reason to stop and search the car.

Agents are directed to keep SOD under wraps and not to mention in their reports where they got their information.

If we are going to use standards that are less than the Constitution for IRS investigations, for drug investigations, we ought to just be honest with people that we are no longer using the Constitution. If we are going to use the Constitution, then we shouldn’t hide the evidence obtained through foreign surveillance and through a lower standard to be used in domestic crime.

(Mr. CRUZ assumed the Chair.)

Parallel construction, which is basically the use of tips and then using them and reconstructing and trying to come up with a different reason for why law enforcement stopped someone, is something that really—if we are not going to be honest about it, someone has the ability to fix this.

After an arrest was made, agents then pretended that their investigation began with the traffic stop, not with the tip they got from our foreign surveillance agencies.

The training document reviewed by Reuters refers to this process as parallel construction.

Senior DEA agents who spoke on behalf of the Agency but only on the condition of anonymity said the process is kept secret to protect sources and investigative methods. Realize they are also keeping it secret from a judge, the defense lawyers, and the prosecution.

Some have questioned the constitutional legitimacy of this program.

‘‘That’s outrageous,’’ said Tampa attorney James Felman, a vice chairman of the criminal justice section of the American Bar Association. ‘‘It strikes me as indefensible.’’

Lawrence Lustberg, a New York defense lawyer, said any systematic government effort to conceal the circumstances under which information was obtained not only is alarming, but pretty blatantly unconstitutional.

Former Federal prosecutor Henry Hockmeier wrote: ‘‘You shouldn’t be allowed to game the system. You shouldn’t be allowed to create this subterfuge. These are drugs crimes, not national security crimes. If you don’t draw the line here, where do you draw it?’’

This is an article from the Washington Post by Brian Fung entitled ‘‘The NSA is Giving Your Phone Records to DEA. And the DEA is Covering It Up’’.

A day after we learned of a draining turf battle between the NSA and other law enforcement agencies over bulk surveillance data, it now appears that these same agencies are working together to cover up when those data get shared.

The Drug Enforcement Agency has been the recipient of multiple tips from the NSA.

Realize also that the NSA is supposed to be investigating foreign threats. The NSA was not supposed to be doing anything domestically. We now have them involved in bulk collection, but we also now have them involved in drug enforcement.

The article continues:

DEA officials in a highly secret office called the Special Operations Division are assigned to handle incoming tips, according to Reuters. Tips from the NSA are added to a DEA database that includes intelligence intercepts, wiretaps, informants, and a massive database of telephone records. This is problematic because it appears to break down the barrier between foreign counterterrorism investigations and ordinary domestic criminal investigations.

Because the SOD’s work is classified, DEA cases that began as NSA leads can’t be seen to have originated from an NSA source.

So what does the DEA do? It makes up a story of how the agency really came to the case in a parallel construction, explains Rodriguez. Some defense attorneys and former prosecutors said that parallel construction may be legal to establish probable cause for a warrant, but they said employing the practice as a means of disguising how an investigation began may violate pretrial discovery rules by burying evidence that could prove useful to criminal defendants.

The report makes no explicit connexion between the DEA and the earlier NSA bulk phone surveillance uncovered by Snowden.

In other words, we don’t know for sure if the DEA’s Special Operations Division is getting tips from the same database that has been the subject of multiple congressional hearings. We just know that a special outfit within the DEA sometimes gets tips from the NSA.

There is another reason the DEA would rather not admit the involvement of NSA data in their investigations. It might lead to a constitutional challenge to the very law that gave rise to the evidence.

Earlier this year, federal courts said that if law enforcement agencies wanted to use NSA data in court, they had to say so beforehand and give defendants a chance to contest the legality of the surveillance. Lawyers for Adile Daoud, who was arrested in a federal sting operation and charged, suspect that he was identified using NSA information but were never told.

Surveys show most people support the NSA’s bulk surveillance program strongly when the words ‘‘terrorism’’ or ‘‘courts’’ are included in the question. When pollsters draw no connection to terrorism, the support tends to wane. What will happen when the question makes it clear that the intelligence not only isn’t being used for terrorism investigations against foreign agents, but it is actively being applied to criminal investigations against American citizens?

Some of the companies have begun to push back on the backdoor mandates that are coming from government to get into our information.

In one of the most public confrontations of a top U.S. Intelligence official by Silicon Valley in recent years, a senior Yahoo Inc. official peppered [NSA] director, Adm. Mike Rogers—on a conference on Monday over digital spying.

The exchange came during a question and answer session at a daylong summit on cyber-security. . . . Mr. Rogers spent an hour at the conference answering a range of questions.

The tense exchange began when Alex Stamos, Yahoo’s chief information security officer, asked Mr. Rogers if Yahoo should act on requests from Saudi Arabia, China, Russia, France and other countries to build a “backdoor” in some of their systems that would allow the countries to spy on certain users.

‘‘It sounds like you agree with [FBI Director] Comey that we should be building defects into the encryption in our products so that the US government can decrypt,’’ Mr. Stamos said. . . .

‘‘That would be your characterization,’’ Mr. Rogers said, cutting the Yahoo executive off.

Mr. Stamos was trying to argue that if Yahoo gave the NSA access to this information, other countries could try and compel the company (to do the same).

Mr. Rogers said he believed that it is “achievable” to create a code in software that allows the NSA to access encrypted information without upsetting corporate security programs. He declined to be more specific.

At one point, Mr. Stamos asked the NSA why law enforcement should build backdoors for other countries?” Mr. Stamos continued.

‘‘What is the motivation—hey, look—’’

This is from Mr. Rogers, Admiral Rogers—

‘‘I think that we’re lying that this isn’t technically feasible’’ . . .

Mr. Rogers said the framework would have to be worked out ahead of time by policymakers—not the NSA. . . .

The back and forth came less than two weeks after Apple Inc. chief executive Tim Cook leveled his own criticism of Washington, saying at a White House cybersecurity conference in California that people in “positions of responsibility” should do everything they can to protect privacy, not steal information.

Mr. Rogers attempted to parry the questions but also signaled he welcomed the debate.

Still, Mr. Rogers did little to deflect recent accusations about the NSA activities. For example, he refused to comment on recent reports that the NSA and its U.K. counterpart spied on information from Gemalto NV, a large Dutch firm that is the world’s largest manufacturer of cellphone SIM cards.

I think the accusations continue to mount. Everywhere we look, we see the anger beginning in our tech industry. We see them wondering about having backdoor mandates built into their product.

I think the Senator from Oregon has been great at pointing this out and has written several op-eds talking about what the harm is of leaving basically a portal or an opening for our government but one that may well be exploited by hackers and may well be exploited by foreign governments.

Does the Senator from Oregon have a question?

Mr. WYDEN. I think my colleague has made the point with respect to our current—perhaps—PHI Director—actually arguing that companies should build weaknesses into their systems.
I note my colleague has been on his feet now for somewhere in the vicinity of 9 hours, so I think we are heading into the home stretch. For people who are listening, I think they really are first and foremost interested in how this Senate, as a bipartisan basis, can come to conclusions that enable us to both protect our privacy and our security. As my colleague said, they are not mutually exclusive.

So I think what I would like to do is wrap up my questioning tonight by talking about how this bulk phone record collection and related practices is an actual intrusion on liberty, and to start the conversation, you have to first and foremost get through this whole concept of metadata. We heard people say: What is the big deal about metadata? And for quite some time we had Senators saying: What is everybody upset about? This is just “innocent metadata.”

Well, metadata, of course, is data about data, but it is not quite so innocent. If you know who someone calls, when that person calls, and for how long they talk, that reveals a lot of private information. Personal relationships, medical concerns, religious or political affiliations are just several of the possibilities. Most people that I talk to don’t exactly like the government vacuuming up private information if those persons have done nothing wrong. Now, this is especially true if the phone companies are not told about the location and movements of everyone with a cell phone. And we have not gotten into this in the course of this evening, but I want to take just a minute because I think, again, it highlights what the implications are.

I have repeatedly pushed the intelligence agencies to publicly explain what they think the rules are for secretly turning American cell phones into tracking devices. They have now said that the collection is not collected by that information today, but they also say the NSA may need to do so in the future. And General Alexander, in particular, failed in a public hearing to give straight answers about what plans the NSA has made in the past.

Now, to be clear, I don’t think the government should be electronically tracking Americans’ movements without a warrant. What is particularly troubling to me is there is nothing in the PATRIOT Act where the addition that is this sweeping bulk collection authority to phone records. Government officials can use the PATRIOT Act to collect, collate, and retain medical records, financial records, library records, gun purchase records—you name it. Collecting that information in bulk, in my view, would have a very substantial impact on the privacy of ordinary Americans.

I want to be clear, I am not saying this is what is happening today, but I want to add clearly that this is what the government could do in the future. So my question, as my colleague, who has been on his feet for a long time, moves to begin to wrap up his comments this evening, I would like my colleague’s thoughts on the impact of NSA collection of bulk records on innocent Americans. I also would be interested in his views with respect to this by saying there is a limit and a deadline and we don’t have time for debate and we are going to put it off yet again.

I thank the Senator from Oregon for helping to make clear what my hope is that we can get an answer from the leadership of both parties that they are going to allow the amendments that your office and my office have been working on for 6 or 7 months now. My understanding of my colleague’s request—and that was my point of once again coming back to bulk collection of phone records, past practices with respect to tracking people on cell phones, and any policies that may be examined for the future—I think my colleague is saying it is time to ask some tough questions. Many of these amendments we have been working on are basically designed to address those situations that we haven’t been able to get answers in the past.

After 9/11, it was clear the people of our country were worried and there was just a sense that if you were told it was about security, you were supposed to say: OK, that is it. But that is not the kind of oversight the Congress—particularly after we had a time stamp on the PATRIOT Act, we all thought it was going to end, and then it was time to start asking these questions. And not enough tough questions have been asked. And my colleague in the amendments we are talking about really seeks to get answers and use that information to change practices on a lot of these areas that have really gotten short shrift in the past. I appreciate my colleague talking about the FISA Court in connection with this. This is, for listeners, the Foreign Intelligence Surveillance Act Court—one of the most bizarre judicial bodies in our country’s history, created to apply commonly understood legal concepts, such as probable cause, to the government’s request for warrants to track terrorists and spies. But over the last decade, the FISA Court has been tasked with interpreting broad new surveillance laws and has been setting sweeping precedents about the government’s surveillance storing, all of it done in secret.

And I will say—and I would be interested in my colleague’s thoughts on this—that it is time that the court’s significant legal interpretations be made public—be made public so there are no more secret laws; that the people of this country have the chance to engage in debate about laws that govern them. I also think there ought to be somebody there who can say on these questions where there are major constitutional questions there ought to be somebody there who can say: Look, there may be other considerations than the government’s point...
of view. But transparency here is critical so that Congress and the courts can hold the intelligence community accountable. I want to mention, once again, we are talking about policies. We are not talking about matters that are going to reveal secret operations or sources and methods. We are talking about policy.

So I think it would be helpful, again, as we move to wrap up, if my colleague from Kentucky could outline some of the reforms in the foreign intelligence court, which he thinks would be the most helpful in terms of promoting transparency and accountability, that do not compromise sources and methods—because I think my colleague has some good ideas in this area—and what, in my colleague's view, would be most important with respect to getting reforms in this secret court in a way that would ensure more transparency for the public and still protect our valiant intelligence officials who are in the field.

Mr. PAUL. I think that is a good question, and the Senator's office and my office have worked for a while to try to come up with FISA reforms. One of them is sort of in the USA FREEDOM Act. We could be talking more about that, saying that there ought to be a special advocate so there is an adversarial proceeding.

One of the problems in the USA FREEDOM Act, as it is written, is that the only advocate appointed was an advocate in FISA and doesn't have to be appointed by the FISA Court. It may well be that a FISA Court that has given a rubberstamp to bulk collection may not be as inclined to give a special advocate so there is an adversarial proceeding.

I also think it is important, as the Senator mentioned many times, that we should get outside of a secret court to a real court, where you really have an advocate that is actually on your side, thinking allowing for an escape hatch for people to appeal.

For example, if you are being told by a FISA Court that bulk collection of all the phone data in our country is legal, you should have a route to an appellate court, an automatic route out of FISA to an appellate court. I think the appellate courts are fully capable of redacting, going into closed session if they have to, but then you have a real trial, with a real advocate on both sides. I think that is important as well. I don't know if it is a question or a question that you may be able to reframe into a question; that is, can you give the public a general idea of what percentage of the overall problem of collecting Americans' data is in the form of bulk data and what percentage you do think is coming from Executive order and what do you think is coming from the 702 backdoor collection of data.

Mr. WYDEN. I would say that all of the matters we have talked about this afternoon, this evening, would be significant concerns with respect to ensuring the liberties of the American people are protected without compromising our safety. Let's check them off: bulk phone collection, millions and millions of phone records of law-abiding Americans; the Executive order No. 12333 that we talked about today, another very important area; and then section 702, the Foreign Intelligence Surveillance Act where a foreigner is the target and the records of Americans are swept up. So I think we are addressing exactly one of the concerns that has come out in the last few days with respect to what Americans are concerned about.

I know there has just been a brand-new major survey that has been done. My colleagues may have touched on it sometime in the course of the day. Americans particularly want to know what information about them is being collected and who is doing the collecting. In each of those three areas that I mentioned, there are substantial questions with respect to the privacy rights of Americans.

Mr. PAUL. Well, one of the comments that we went through tonight was an opinion by one of the attorneys in the Bush administration. They said, basically, that there were authorities that they were given that were inherent powers that made it okay that they gave them the right to collect data on Americans. But they also then concluded by saying that Congress had no business at all review this data; that there was no authority—that they were basically powers given to the President and that Congress has no ability—I guess I would be interested, in the form of a question, if the Senator can answer whether he believes there are article II powers of surveillance of American citizens that Congress has no business questioning.

Mr. WYDEN. My colleague is—and I remember those days well—basically summing up the argument of the Bush administration. I and others pushed back, pointed out very hard, because it would essentially, if taken to this kind of legal analysis, basically strip the legislative branch of its ability to do vigorous oversight.

So my colleague has summed up what was the position of the Bush Administration. But like so many other positions that were taken during that period of time, once there was an opportunity to make sure people understood how sweeping it was—what my colleague has described is an extraordinary power. That program does not make us safer, and we could get rid of it and obtain the information by conventional sources. So I think we have begun to reign in this unchecked executive branch power. I think a big part of that has been the work my colleague has done in terms of trying to highlight these kinds of practices and why I have appreciated the chance to work closely with my colleague since I came to the Senate.

Mr. PAUL. I think one of the most exciting things probably is the court case—the Second Circuit Court of Appeals—and their ruling. My hope,
though, had been that it would go to the Supreme Court. My understanding is it has been remanded to a lower court. I think one of the things that we really need is that we need a ruling that updates Maryland v. Smith. We need a ruling that talks about the fact that these requirements for these records being held in a virtual fashion, I think there needs to be a ruling that comes from the Court that acknowledges that you still retain a privacy interest in your records, even when they are being held outside of your house or in other hands.

The idea of old fashioned papers in your house—the concept is good, that we should protect that privacy. But I think also the concept technologically is that you know you will not have papers in your house, but you will have private matters that will be held virtually outside the house—and whether or not the Fourth Amendment protects those. You often have advocates from the government who say that the fourth amendment does not apply to any records once they are outside your house or in other hands. I really think that you do not give up your privacy interest when you let someone else hold your records, that you still maintain a privacy even though someone else holds these records.

Mr. WYDEN. I think my colleague has made an important point with respect to the Smith case. The Smith case was not made for the digital age. That is a big part of what we have sought to do throughout this debate, is to try to make sure that people really understand the implications in the digital age of what these policies, you know, mean for their privacy.

I see my colleagues are on the floor and I want to give them some time. But since you mentioned this question of the court cases, I think there was really striking language recently by Judge Leon of the U.S. District Court for the District of Columbia in the case of what he has sought to do throughout this debate, is to try to make sure that people really understand the implications in the digital age of what these policies, you know, mean for their privacy.

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will not be—the same people who work there 1 year from now or 2 years from now or 5 years or 10 years or 15 years from now.

And we know something about human nature, which is that humans, when given power, will sometimes abuse that power. Sometimes they will abuse that power to the detriment of others. Sometimes they will do it for personal financial gain. Sometimes they will do it for political gain. Sometimes they will do it in order to further certain policies. That is exactly why it is so important to put boundaries around the authority of government. That, of course, is what the Constitution is. This is our set of boundaries. This is our fence around government authority. It is there for a reason. It is there to make sure the American people are protected against government.

So, first, the Founding Fathers put in place this structure that explained how government would work, and when it was subsequently reauthorized several years later, Congress put in place a relevance requirement. Congress put in place—in section 215 of the PATRIOT Act—a requirement that the business records that were obtained by the NSA, pursuant to section 215 of the PATRIOT Act, had to be relevant to an investigation, relevant to some things they were doing.

Here again, as with the language of the Fourth Amendment of the Constitution, there is some play in the joints of the term “relevance.” Some things might be relevant in one situation and not another. Whether it is relevant is going to depend on a lot of facts and circumstances pertinent to the investigation in question, but it stretches the term “relevant” or the concept of relevance beyond its breaking point, beyond any reasonable definition.

If you deem something to be relevant, so long as it might in some future investigation—one that has not yet arisen—become relevant, such that you had to gather every record of every phone call made in America, such that the NSA wants to go after every record of every phone call made by every American going back 5 years, storing that series of records in a single database that can be queried for up to 5 years in advance.

Let’s just go through this exercise for a minute. Think to yourself, how many phone calls have I made in the last 5 years? How many distinct phone numbers have I called in the last 5 years?

Well, if somebody has called 1,000 phone numbers—or, let’s say, made phone calls to 500 phone numbers and received phone calls from another group of 500 phone numbers, for a total of 1,000 phone numbers over the last 5 years, then that is 1,000 numbers. Then the NSA goes out one hop beyond that and connects each person, each phone number with whom the original person had contact. Let’s assume that each of those phone numbers had, in turn, contacts that we will connect after—let’s get to 1 million phone numbers pretty quickly.

But each time the NSA collects these data points, each data point taken in isolation might not say much about the person. But as our colleague and our colleague from Oregon noted a few minutes ago, it is by using that combination of data points, by aggregating all of those data points together, someone can tell an awful lot about a person.

In fact, there are researchers who, having used similar metadata and similar sets of metadata in their own databases, have concluded that they can tell what religion a person belongs to, what are their hobbies, how healthy they are, what physical ailments they might suffer from. In many instances, they can tell what medications they are on. And all of these things are made more efficient by virtue of the automation in this system.

So while it is true people point out that under section 215 of the PATRIOT Act, under this particular program, the NSA is not listening to telephone conversations. They are not listening to them.

Interestingly enough, this is very often a straw man argument that is thrown out by those who want to make sure that section 215 of the PATRIOT Act is reauthorized without any reforms. They claim that those who are opposed to this type of action are out there falsely claiming that the NSA is listening to phone calls over this program.

Well, that accusation of falsehood is, itself, false. That accusation of falsehood is, itself, a straw man effort. It is a red herring. It is a lie. It is a lie intended to malign and mischaracterize those of us who have genuine, legitimate concerns with this very program, because the fact is we don’t make that argument. The argument we are making is that the NSA doesn’t even need to do that. The NSA can tell all kinds of things about people just by looking at that data.

And it’s true. It’s true. Because it is automated and because it is within a system that operates with a series of computers, they can tell very quickly it is a lot less human resource-intensive than it would be if they were having to listen to countless hours of phone conversations. It is a lot more efficient by virtue of that automation.

Again, I want to be clear. I have no proof that the NSA is currently abusing this particular program. I am not aware of any evidence that such abuse is occurring. And I am willing to assume, for purposes of this discussion, that there is nothing but the best interests of the American people and American nation that are at risk.

But how long will this remain the case? And how safe, how fair is it of us to assume that will always be the case? We can scarcely afford—for the sake of our children, our grandchildren, and the people who will come after us—we cannot afford to simply assume this will always be the case.

We have to remember what happened a few decades ago when Senator Frank Church and his committee looked into wiretap abuses that had happened within the government. We have to remember the Church report that was released at the end of that investigation.

That report concluded that every presidential administration through Richard Nixon had utilized law enforcement and intelligence-gathering agencies within the Federal Government to go engage in political espionage. That technology, which was then only a few decades old, had been around for a long time. The abuse of this technology had gone, of course, unreported for many decades, but it had nonetheless been occurring.

Again, I don’t know. I can’t prove it. I have no evidence that such abuse is going on right now. But I think all of us, in order to be honest with ourselves, would have to acknowledge that there is at least some risk that if it is not occurring now, at some point it will occur in the future. This temptation is simply too strong for most mortals to resist, particularly in an area such as this where there is, with good reason, very little ability for the outside world to observe what is going on inside the particular government.

Now, that is exactly why I happen to support what was passed by the House of Representatives last week. What was passed by the House of Representatives last week in the form of the USA FREEDOM Act was something that would require the NSA to, instead of going out to all the telephone companies and saying, send us all of your records, we want your calling records, just give us your calling records, and care not whether it is relevant to a particular phone call, particular to a specific number that was itself involved in terrorist activity or foreign surveillance activity, we don’t care about that, just give it to us—far from doing that, what the USA FREEDOM Act would require is for the government to show that they needed records related to a telephone number that was itself involved in some kind of activity. They wouldn’t have the ability to go to all the telephone companies and just say send us everything.

They would instead have the power to get a court order, to get those
records of those phone calls that might well be connected to terrorism based on their contact with a phone number that was related to such activities or their contact with somebody else, with some other phone number that was, in turn, having some kind of communication with someone involved in those activities.

Not all of us agree on this and, Senator Paul, you and I don't agree on this particular bill, but we do agree on the underlying principle. And we agree that the Senate works best, that the Senate serves the American people well when it lives up to its self-described reputation as being the world's greatest deliberative legislative body. We would all be better off if we were able to put this bill on the floor right now—if this bill were able to come to the floor and it were subjected to open, honest debate and discussion so the American people could see we were debating this and so that you, Senator Paul, and our other colleagues who have ideas as to how we could make this legislation better would have the opportunity to introduce, in the form of an amendment, improvements to this legislation. We thought quite articulately just a few hours ago some very thoughtful reforms, some very well-thought-through improvements, amendments that you would make to this legislation. I think we would all be better off if we took that kind of approach.

Now, we have seen in the last few months what can happen. When we came back in January, we saw that the desks in the Senate Chamber had been rearranged. Many of us were pleased. We didn't shed a tear at the realignment of the desks, and we have noticed that this realignment of the desks reflected a change in the political attitude among Americans. But, more importantly for us, it was the precursor to some very positive developments in the Senate.

We saw that within just a few weeks after this shift in power had occurred, we had cast more votes on the floor of the Senate than we had in the entire previous year. Within a few months, we had cast more votes on the floor of the Senate than we had cast in the 2 years previous to that. This was a good sign. This is a good sign. It is not just because we have equalized, because some senators have more seats on committees, it is because those votes represent something—they represent the fact that we are actually debating and discussing and we are allowing each Senator to have his or her views heard. We are putting ourselves on record as to what we believe represents good policy and what does not.

I think we would be in a much better position to address the national security needs of our great country if we had such an opportunity with respect to this legislation. That is one of the reasons I came to the floor yesterday, along with one of our colleagues, the senior Senator from Vermont, and asked unanimous consent to bring this bill—the House-passed USA FREEDOM Act, H.R. 2048—to the floor and to have open debate and discussion and an open amendment process, with the understanding we would turn back to the trade promotion authority bill as soon as possible after we completed this legislation, as soon as we had finished debating and discussing it, voting on amendments and voting on the legislation.

I am a big believer in free trade. I like free trade. I think free trade is good. I would like to see us get to both of these pieces of legislation. But importantly, H.R. 2048 is a piece of legislation that has kind of a fuse attached to it. Section 215 of the PATRIOT Act is set to expire at the end of this month, and many of us believe we ought to at least have a debate and discussion before that happens, a debate and discussion about what, if anything, would take its place, about whether we need it in place and, if so, what that might look like. So that is why we made this request. This request we regarded as a very reasonable one was, unfortunately, one that drew an objection, so we were not able to bring it to the floor.

The U.S. Court of Appeals for the Second Circuit, based in New York, recently addressed this issue of whether section 215 of the PATRIOT Act can appropriately be read to authorize the collection of something called metadata and collection program. The U.S. Court of Appeals for the Second Circuit answered that question in the negative and concluded there is no statutory authority for the NSA to collect this type of metadata. It doesn't have the authority. It cannot collect bulk metadata on this basis.

As the Second Circuit concluded, the business records sought under that provision have to be relevant. There has to be a specific investigation they are investigating. And of course their only relevance here, under this program, is that they exist; it is that they represent phone calls made by someone in the United States, that they were made under a telephone network in the United States. That can't be the answer. That cannot reflect a proper understanding of this concept of relevance that is in section 215 of the PATRIOT Act. It can't, and it doesn't.

This court ruling is one of the many reasons why we are having this debate and why we shouldn't be willing to simply reauthorize section 215 of the PATRIOT Act with the understanding that the NSA will continue operating this program as is if we reauthorize it. It is one of the reasons why I have been so insistent on having this discussion and so unwilling to support even a shorter term reauthorization of the PATRIOT Act—because they are interpreting section 215 in the PATRIOT Act beyond its breaking point.

We have to remember that the Constitution is worth protecting. It is worth protecting even when we can't point to anything bad that is happening right now, even when we can't point to any specific abuse that is occurring.

Bulk data collection is itself a type of abuse. There is a type of constitutional injury, even where you can't point to anything secondary from that. We can't point to any horrible secondary effect from it; it is in and of itself wrong.

The wrongness of this program can be illustrated when we take to its logical conclusion the very arguments presented by the NSA for this type of activity. Let me explain. The metadata that is collected by the NSA right now relates exclusively to telephone calls. The records they collect involve records of who you call, when you called them, who calls you, when they called you, and how long the phone call at issue lasted. That is it.

But if the NSA is correct in its interpretation of section 215 of the PATRIOT Act and we don't do anything, but if it were correct, there is absolutely no reason why the NSA could not also collect a number of other types of metadata—metadata records, for example, involving the use of your credit card, involving hotel reservations, involving bank transactions, metadata regarding emails you have either sent or received, who you sent them to and who you received them from, your Internet traffic, where you have purchased online, who has purchased something from whom, all kinds of things. From that metadata, they could clearly paint a much more vivid picture of you, a profile built as a mosaic from a billion data points. They can tell everything about you from that type of metadata.

Sure, the NSA is not collecting that type of metadata right now. They are not doing it right now. But if we reauthorize this without limitation, if we reauthorize section 215 of the PATRIOT Act and we don't do anything, there is absolutely no reason why the NSA couldn't conclude tomorrow or next week or a year from now or later that it wants to collect this kind of data as well.

I would suspect nearly all Americans would be shocked and horrified to think the NSA could and would and might at some point in the future collect that kind of information on where you shop online, your credit card bills, your hotel reservations, like that, things that could easily be connected back to an individual and easily give rise to abuse either for partisan political purposes or for some other nefarious purpose.

I also want to point out that those who are in favor of this program and those who vigorously defend its constitutionality routinely rely on a decision rendered by the Supreme Court in the late 1970s in a case called Smith v. Maryland. They point out that in that case the Supreme Court upheld the constitutionality of some police activity that involved the collection of calling data. The Supreme
Court concluded in that case that there was not a sufficiently significant expectation of privacy in records of calls that somebody had made and received such that the collection of that data would require a search warrant.

It is worth certain that Smith v. Maryland was decided correctly, but let’s assume for a minute it was decided correctly and just address the fact that it is a decision that remains. It is precedent that is followed throughout the courts of the United States. That is fine. Let’s just accept the fact that it is on the books. But it is very, very different—not just qualitatively different but also qualitatively different—when you are dealing with an individual criminal investigation and not just with maybe a few weeks of calling records but when you are dealing with 5 years of calling records not on one person, of one target in one criminal investigation by one group of law enforcement officers, but 300 million people stretched out over 5 years.

That calling data becomes more significant, moreover, when Americans become more attached to their telephones when their telephones aren’t something that is just plugged into the wall but something that is carried with them every moment of every day. This, by the way, adds to the potential list of metadata that could be collected because of course many people now have telephones that track their location. I don’t see any reason why, based on the interpretation of section 215 of the PATRIOT Act and the interpretation of the Fourth Amendment that the Supreme Court has put forward, they couldn’t start collecting the location data as well, which would further undermine privacy issues.

So Smith v. Maryland, whether you like it or not, is precedent. It is precedent that is followed by the courts in America, but it is not the end of the story. It certainly doesn’t get you over the hump when it comes to this type of collection. Saying that what was held in Smith v. Maryland is the same thing as what the NSA is trying to do here is a little bit like comparing a pony ride to a ride to the Moon and back. They both involve some form of transportation, but they are worlds apart, drastically different, and so much so that they can’t really even be compared.

Our technology has changed dramatically over the years—so much so that if we don’t stop and think about it, we might not even recognize it.

A few years ago when my son James was about 10 years old, he came up with a really good idea that he announced to us. He said: You know, I have the answer to that, and I am going to invent something.

We said: What is that?

He said: Well, I am going to invent a telephone that is attached to the wall. It will be attached to the wall so it can’t be removed. It will have a wire that runs into the wall, and that is how the telephone will work.

We looked at him and wondered what gave him this idea and what gave him the idea that that was somehow unique.

We said: Well, first of all, what makes you think that hasn’t already been invented? And secondly, why would you want to do that?

He said: Well, I think it is a great idea because it is the only way you wouldn’t lose your phone.

Only then did we realize what he was saying. Only then did we realize that what he was telling us was that during his lifetime, he had never seen in our home a phone that was attached to the wall. He had seen cell phones and he had seen cordless landline phones, and he had seen telephones get lost from time to time.

So our technology does change, and as our technology changes, we have to take that into account. Well, our technology has changed now to the point where our telephones carry all kinds of personal facts about us through metadata, through the type of metadata involved here, and it is only getting more and more and more this way every single day as we transact more and more of our day-to-day business over the phone. The telephones become more sophisticated, more portable, and more capable of processing more and more data.

The text of the Fourth Amendment I quoted just a few moments ago is still relevant today. In fact the Fourth Amendment refers specifically to the right of the people to be secure in their persons, their houses, and their papers and effects is still relevant today and should remind us of the fact that our persons, our houses, and our papers and effects more and more really become a part of this—they really become a part of our telephones.

Our papers are not always physical papers. More and more, they are not. It is increasing, for example, to sign documents that previously would have been physically signed on a hard copy, a stack of papers—increasingly you can do business transactions without ever handling a physical paper. Increasingly, you can do those things electronically. People often prefer to do it that way. It saves time. It saves money. But as more and more of our lives are played out on these portable digital devices, it becomes more and more important for us to be remember that the Fourth Amendment ramifications when the government wants to get involved in what we do on those same devices.

That is why it is not really fair any more to simply rely reflexively on Smith v. Maryland to say this is all constitutional, nor is it fair to say that your phone company already has this record, so there is no reason why the government shouldn’t have it. I actually don’t even see that comparison.

Some people think this is somehow persuasive. I don’t find it persuasive at all. There is a world of difference between allowing a private business with which you have voluntarily chosen to interact to have your business records, particularly when it is a private business that you want to have that information so that private business can keep track of how much you owe them or how much they owe you—there is a world of difference between a private business entity having those records and the government having those records.

The worst thing that a private business can do is perhaps send you too many bills. We don’t want that. We are asking you for more business or maybe it can give some of your personal data to somebody else who will in turn make phone calls you don’t want to receive or send you emails you don’t want to receive.

That private business has no ability to put you in prison. That private business has no ability to levy taxes on you. That private business has no ability to make your life a living hell in the same way that your government has the ability to do those things—not just the ability but, lately, with increasing frequency, with strong and seemingly irresistible inclination.

This is not a victimless offense against the way that your government with the letter of the Constitution. These kinds of things have real-world ramifications. They ought to be troubling to all of us, and we ought to want to do something about them.

For these reasons, Senator Paul, I would ask you, don’t you think it would be much better to put this bill on the floor now and allow for an open amendment process, one in which you and each of our other colleagues could have an opportunity to provide input, to try to improve the legislation, and to try to do something meaningful with this legislation, rather than just simply ignore it, pretend it didn’t exist, sweep it under the rug or wait until we are up against the critical cliff between when the Senate, much to my chagrin and the chagrin of many of our colleagues, is set to adjourn and leading up to the moments when this program is set to expire? Wouldn’t we be better off to take this up and debate this under the light of day, under the view of the American people?

Mr. Paul. I think the Senator from Utah asked a great question, and I think he framed the debate over the Fourth Amendment very well.

I think if we asked to put the bill on the floor at this hour, we may not be able to find anybody awake to ask permission to have the bill this evening. We haven’t been able to locate anyone to get the bill this evening, so I am afraid we will have to say no.

But we have been asking for a full and open debate. Your solution, as well as mine, as well as Wyden’s, as well as other’s, is to have a full debate on the floor before this.

There were a couple of things you said that I thought were particularly worth commenting on.
People say that because there is no evidence that the program is being abused, there is no evidence that we are searching the records of certain people of certain race or religion or abusing people for some reason, that is proof somehow that no abuse is occurring.

But I agree with you that the collection alone is an abuse in and of itself. To me, the basic point and the biggest part of the point is that what we are dealing with is something that is a genuine violation of constitutional rights.

There is nothing specific about collecting all of the records from all Americans all of the time. There is nothing specific about the name "Verizon." I tell people that I don't know anybody named Mr. Verizon. So that can't be a specific individualized warrant. That is a general warrant.

That is what we fought the Revolution over—to individualize warrants, to individualize what we were requesting, and, of course, we accepted a lower standard to go after foreigners, to go after terrorists. And part of me says that maybe we could do that just for terrorists. But now we are using it for domestic crime.

One of the biggest things I would like to change is that nothing within the PATRIOT Act or any of this could be used to convict somebody in a domestic court.

Section 213—sneak-and-peek—99.5 percent of the time is used for domestic drug crime now. We have the NSA sharing data that is supposed to be collected on foreigners with the domestic DEA and then making up another scenario where they might have heard about this. But they didn't really hear about this from the NSA.

I think the public at large thinks we have gone way too far—way too far with the bulk collection records. It is not only what we have done, but it is just a real, absolute, gross violation of the text of the PATRIOT Act, which I object to—no justification for collecting the records. The idea that records could be relevant to an investigation that has not yet occurred puts logic on its head, puts it topsy-turvy to where words don't mean anything.

I am very concerned that there is a lot of surveillance that we don't know about, not only through the PATRIOT Act justification but through Executive order. It concerns me that there are still people who are arguing that article II gives unlimited authority to the President, that there is no congressional check and balance to the President with regard to surveillance. There are people making that argument—that there is no limitation to Presidential power.

I think one of the best things our Founding Fathers gave us was this check and balance so we had coequal branches. I think it is a great thing with the Fourth Amendment that a warrant had to be signed by somebody who wasn't a policeman, who wasn't a soldier.

This is one of the additional things I would like to do because we don't get to talk about this very much. We have the ability, and we are talking about the bulk collection of records, but we should also talk about whether we should have hundreds of thousands of agents listening to the phone calls of Americans by FBI and other Executive order agents. I think warrants should have a check and balance where you have a judge.

There is something that is so civilizing and something that levels the playing field is when something is happening when a policeman tonight in DC, in front of a house, who wants to go in, is calling someone who is not in hot pursuit and who hasn't just had a physical altercation with the people they are chasing—someone who is dis-passionate and unconnected to the heat of the crime—who is going to give permission for this policeman to go into a house.

We say that a man's house is his castle, and he can defend it. That was the whole idea—that things within the castle were the man's or woman's, we would say now. But it is not only that your records are in the castle anymore. They are in the cloud. And records are virtual. We have whole households that have no paper records.

The amazing thing about records is they are now saying that with metadata records, they can discover more than we could have discovered in a lifetime of your personal letters in your house, because so much information is there, so much can be connected between the dots between all of these things.

I am still not convinced that we aren't collecting data on credit cards, on emails. I think some of this is done through the Executive order that most of us are not privy to. The only people that know anything about Executive Order 12333 and what they are doing on it are the Intelligence Community. I am not convinced we aren't collecting email data.

They currently say that your email—this is the bill you promoted—after 6 months, your email has no protection. Before 6 months, I think the only protection is to the content, not to the header, not to the addressee.

We currently have the opinion. We desperately need the Supreme Court to rule on this. We have the Smith v. Maryland decision, which was in the premodern age, as far as data goes and as far as your papers being held. We desperately need a decision.

My hope was that the appellate court decision would go to the Supreme Court. But my understanding—being just a doctor—looking at the other way. It has been remanded lower and may never make it to the Supreme Court. I don't know that. But I think we do need something at the Supreme Court level.

There have been many who are now arguing that the appellate court—this is again from a physician, not a lawyer—is really binding and that there could eventually be some legal injunction against what the government is doing.

But for goodness sake, it perplexes me that the President says: Oh, yes, we need a balanced approach, and I am listening to my privacy commission, I am listening to the review board. Yet I created the board, got it out of whole cloth as an Executive order, and I am unwilling to stop it even though the appellate court has told me it is illegal.

He is unwilling to stop it. I think that sort of defines disingenuous—that he is going to stop it as soon as Congress stops it.

It is so hard to get anything done here. We have had vast majorities—not only for the USA Freedom Act but for Thomas Massie's act. We had a vast majority over there to defund it—for Justin Amash, for defunding things that we were doing—big majorities. It is another evidence that the Senate is further distanced from the people, that the House is closer. They are hearing the message stronger.

I think the message is a strong one, and the message is unprecedentedly—I mean, really, the vast majority of Americans are very unhappy with having all of their records collected. That really to me gets back to the whole idea of whether we should accept or validate general warrants. It is still part of my concern, a little bit, with the reform. I want the reform—it could go a long way if we no longer have the ability to put the word "corporate" in there and if it were specifically individuals. And I think we have a chance to go maybe even a little further than we have gone in the reform that is being offered to say that we shouldn't be able to request all of the records from a corporation, because there is some retained privacy and there is some retained property interest even in your records. And I think there always has been.

They talk about an expectation of privacy. I would think that if you have a contract, when you sign the agreement, you are agreeing to a privacy contract with an Internet provider or a search provider or a telephone company. I think that is indicating, as they talk about in the cases, an expectation of privacy. Well, I have signed an agreement with the company, and they promised me and I promised them. I would think that for certain is an expectation of privacy in the eyes of the court.

(Mr. RUBIO assumed the Chair.)

So I don't understand how they can argue we have completely given up our reed, and that we are at all to retain an interest in our records.

I am very much convinced this is an important debate—that the Bill of Rights is something that we shouldn't look at lightly; that we should, as we are moving forward, make sure we protect the things that are important. We shouldn't hurry up and have deadlines, and then say we are not going to have time to debate it.
I see the Senator from Texas, who is also a defender of the Fourth Amendment, is here, and I would be happy to take a question without losing the floor.

Mr. CRUZ. I thank the Senator from Kentucky. I want to note that he and I agree on a great many issues, although we don’t agree entirely on this issue. But I want to take the opportunity to thank the Senator from Kentucky for his passionate defense of liberties. His is a voice this body needs to listen to. I would note that the Senator from Kentucky’s voice have altered the debate in this Chamber and have helped refocus the Congress and the American people on the critical importance of defending our liberty.

I think protecting the Bill of Rights is a fundamental responsibility of the Federal Government. And it is breaking that the last 6 years we have seen a Federal Government that not only fails to protect the Bill of Rights but that routinely violates the constitutional liberties of American citizens and routinely violates the Bill of Rights.

I listened to the learned remarks and questions from the Senator from Utah, where he noted that under the justifications for the current bulk collection of metadata, it is the position of the Federal Government that they have the full constitutional authority not only to collect metadata but to collect the positional location of every American. If any of us carry our cell phone, wherever we go, it is the position of the Obama administration that the Federal Government has the full constitutional authority to track the location of every American citizen no matter where we are. That is a breathtaking assertion of power.

I would note that we do not merely need to speculate that that is the Obama administration’s position. Indeed, in a recent case before the U.S. Supreme Court, the Obama administration argues that law enforcement could place a GPS locator on the automobile of any and every law-abiding citizen in this country and track the location of your automobile and my automobile with no probable cause, no articulable suspicion, no nothing.

The Obama administration argued that the Fourth Amendment and the Bill of Rights say nothing about the Federal Government placing a GPS locator on the automobile of private law-abiding citizens.

Thankfully, the U.S. Supreme Court rejected that position. It did not reject that position 5 to 4 or 6 to 3 or 7 to 2; the U.S. Supreme Court rejected that radical antiprivacy position of the Obama administration unanimously, 9 to 0.

I am entirely in agreement with my friend the Senator from Utah that the right resolution of the issue before this body is for the U.S. Senate to pass the USA FREEDOM Act. I am an original sponsor of that bipartisan legislation.

The USA FREEDOM Act does two things: No. 1, it ends the Federal Government’s bulk collection of phone metadata for law-abiding citizens. I am entirely in agreement with my friend, the Senator from Kentucky, that the Federal Government should not be collecting the data of millions of law-abiding citizens with no evidentiary basis to do so. And end this program, and the USA FREEDOM Act does that.

At the same time, the USA FREEDOM Act maintains the tools to target terrorists. We are living in a dangerous world with the rise of ISIS and Al Shabaab and Boko Haram, not to mention Al Qaeda and radical Islamic terrorism across the globe. The threat to the American homeland has never been greater.

It is critical that law enforcement and national security maintain the tools so that if there is a credible basis to believe that a particular individual is planning a terrorist attack, we can intercept that individual, and we can prevent that terrorist attack before, God forbid, they murder innocent Americans in the homeland. Those critical words there are “particular individual.”

What the Fourth Amendment envisions is not that law enforcement’s hands are tied; law enforcement has tools to stop crimes. But as my friend the Senator from Kentucky has so powerfully observed, the Fourth Amendment was designed to prevent general warrants. It was designed to prevent the government from assuming that everyone in the country is automatically guilty and we will seize your information. Rather, the tools of law enforcement and national security should be particularized based on the facts of the evidence.

That is why I support the USA FREEDOM Act because it accomplishes the goals of our privacy rights and the Bill of Rights of law-abiding citizens, but it ensures we have the tools to prevent acts of terrorists.

I would note two points that are important. There are a number of Members of this body, including a number of Members of my party and the party of the Senator from Kentucky, who argue that the PATRIOT Act should be reauthorized with no changes, and they argue that we should not jeopardize our national security.

There are two facts that are critical to assess to responding to that argument. No. 1, the Members of this body have received confidential classified briefings from the Department of Justice and the intelligence community of this administration. We are not at liberty to convey the specific details of those briefings. But the Members of this body have been told, No. 1, the USA FREEDOM Act would provide effective tools so that we can prevent acts of terrorists.

Indeed, they have gone further to say that it is entirely possible that under the USA FREEDOM Act, the national security team would have more effective tools to stop actual terrorists than they do today under the bulk metadata collection of law-abiding citizens. That is worth underscoring. The national security professionals have said the USA FREEDOM Act could well be more effective in providing the tools to stop terrorists than the current status quo.

That argument needs to sit in for everyone arguing that we have to maintain the status quo of stop terrorism. It is our case, as we have been told, that the USA FREEDOM Act could be more effective, that argument suddenly falls to the ground.

Secondly, I address my friends in the Republican Party who have preferred to reauthorize the PATRIOT Act. Even if that is their preference, it is abundantly, abundantly clear that a clean reauthorization to the PATRIOT Act “ain’t” passing this body and it certainly “ain’t” passing the House of Representatives. I would note that the USA FREEDOM Act passed the House of Representatives 335 to 88. It was not a narrow victory. It was overwhelming. So even if Members of this body would prefer to reauthorize the PATRIOT Act in its entirety, the votes “ain’t” there. So the choice they face is letting it expire altogether, losing the tools we have to prevent real terrorists from carrying out acts of terrorism or accepting a commonsense middle ground that the House and the Senate have supported.

I will say this: With my friend the Senator from Kentucky, I entirely agree that he is fully entitled to introduce his amendments to that bill. This body should engage in a full and open debate considering amendments, and the Senator from Kentucky should be able to propose reasonable commonsense improvements to the USA FREEDOM Act.

We ought to debate them on the merits in a full and open process. There was a time not too long ago when this body was called the world’s greatest deliberative body. Debate is what we are supposed to do on the merits.

If the defenders of the PATRIOT Act right now are so confident of their position, they should be prepared to debate the Senator from Kentucky on the tools that we need to protect real terrorists, and they should be prepared to debate each of the Members of this body on the merits, and to arrive at the right policy that both protects our constitutional rights and ensures we have all the tools we need to protect the safety of American citizens against acts of terrorism.

I will note standing here with the Senator from Kentucky and with the Senator from Utah at 11:40 p.m., I am reminded of the movie “The Blues Brothers” saying: Jake, we have got to get the band back together again. I am 0% in favor of panning standing here with this same band of brothers in the wee hours of the morning. I will make a couple of final observations in
the President's chair presiding, and the entire hour I was there, there was a glass of water on Senator PAUL's desk, and he did not drink a sip of it.

I will note that was advice I endeavored to follow. It was good advice, and I am glad to see my friend is following it as well.

This is an exceptionally important issue that this body should be focused on, the responsibility to protect the Bill of Rights and the constitutional rights of every American.

Mr. PAUL. I want to thank the Senator from Texas for joining in the battle to defend the Bill of Rights and the Fourth Amendment. I know he is sincere in that approach. There is absolutely no excuse not to debate this and no excuse not to vote on a sufficient amount of amendments, to try to make this better, to try to make the bulk collection of records go away.

That is what the American people want. It is what the Constitution demands. My voice is rapidly leaving. My bedtime has long since passed. I think it is time we summarize why we are here today and what my hope is for the future with this issue.

We have had American Senators come down from both parties, from right, left, conservative, liberal, progressive, and Libertarian. We have had several friends come over from the House as well. There is a hunger in America for standing up, for somebody to do the right thing, to say that the Bill of Rights needs to be defended, that the Bill of Rights is important.

When I think of the Bill of Rights, I think it is not so much for the popular person. It is not so much for the high school quarterback or the prom queen; the Bill of Rights is for the least among us and the Bill of Rights is to try to prevent any kind of systemic bias from entering into the law for the people. People say: Well, we collect all this data, but we are not abusing anyone. We are doing it perfectly in order.

I agree with Senator LEE that just the collection of the data is the issue today. We have debated them today, and my hope is that the debate today will let the American public, as well as our leadership in the Senate, know that we are serious about this and that we want to vote on reforms and that we want to vote on several different ways we can fix this issue. If this issue comes up every 3 years, for goodness' sake, can't we spend a couple of days trying to amend this and make it better?

I thank the Senator for coming in and staying. I don't think that had much choice in the matter, but I thank them for staying and not throwing things. We will try not to do this but every couple of years or so.
I thank my staff for their help in a long day, and I thank the American people for considering the arguments and for helping us to hopefully push this toward the reform where we all respect the Fourth Amendment and the Bill of Rights once again.

I thank the Presiding Officer, and I relinquish the floor.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The senior-most legislative clerk proceeded to call the roll.

Mr. CASSIDY. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

MORNING BUSINESS

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

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

END OF AERIAL DRUG FUMIGATION IN COLOMBIA

Mr. LEAHY. Mr. President, I want to speak briefly about a recent decision of the Government of Colombia to end the aerial fumigation of coca.

Since the beginning of Plan Colombia 15 years ago, the United States, at huge cost, has financed a fleet of aircraft, fuel, herbicide, and pilots to spray coca fields in Colombia. When this first began we were told that in 5 years the spraying, along with billions of dollars in U.S. military and other aid, would cut by half the flow of cocaine coming to the United States.

Fifteen years later, that goal remains elusive. While the cultivation of coca has been reduced, aerial fumigation is not the solution to this problem. It is prohibitively expensive and unsustainable by the Government of Colombia. It also defies common sense. One Colombian official told me the cost of aerial fumigation is approximately $7,000 per hectare, while the cost to purchase the coca produced in one hectare is $400. In other words, for one-fifteenth the cost of aerial fumigation you could buy the coca and burn it.

This process also ignores the reality of rural Colombia where most coca farmers are impoverished and have no comparable means of earning income. Absent viable economic alternatives they resort to the dangerous business of growing coca, often at the behest of the FARC rebels or other armed groups.

The active ingredient in the herbicide used in the fumigation is glyphosate, a common weed killer. It is used by farmers and gardeners in the United States and other countries, including Colombia.

But controversy has plagued the aerial fumigation since its inception. It is no surprise that Monsanto, which manufactures the chemical, insists that glyphosate poses no threat to humans. But some Colombian farmers, whose homes are often located next to their fields, have claimed that they or their children suffered skin rashes, difficulty breathing, and other health problems after their property was sprayed. Others have complained that the herbicide has drifted into and destroyed licit food crops.

Scientists have studied glyphosate for many years and have differed about its safety. Some studies have concluded it is harmless. The Environmental Protection Agency says it has "low acute toxicity." Others have linked it to birth deformities in amphibians. Most recently, the International Agency for Research on Cancer, IARC, an affiliate of the World Health Organization, reported that glyphosate is "probably carcinogenic to humans," and that there is "limited evidence" that it can cause non-Hodgkin’s lymphoma and lung cancer.

I have been concerned for years about aerial fumigation in Colombia. While I am no scientist, I have wondered how the people of my State would react to the repeated spraying of a chemical herbicide in areas where they live, grow food, and raise animals. I have also noted the conflicting views in the scientific literature, and we are all aware of instances when manufacturers insist that a product was safe only to discover years later—too late for some who were exposed—that it was not.

And, of course, there have been times when companies knew of the risk and chose to either ignore it or cover it up, motivated by profit over the welfare of the public.

It is for these reasons that I have included a provision in the annual Department of State and foreign operations appropriations bill that requires the Secretary of State to certify that "the herbicides do not pose unreasonable risks or adverse effects to humans, including pregnant women and children, or the environment, including endemic species." Each year, the Secretary has made the certification.

The IARC study changes things. Although glyphosate remains controversial and Monsanto points out that the IARC study is not based on new field research, President Santos has responded in a responsible way unless further research definitively contradicts it. It would simply be unconscionable for the Government of Colombia to ignore a study by the World Health Organization that a chemical sprayed over inhabited areas is potentially carcinogenic.

I commend President Santos for this decision. I am sure it was not an easy one, as it will inevitably be blamed for increases in coca cultivation. But anyone who thinks that spraying chemical in the air is a solution to the illegal drug trade is deluding themselves. It is enormously expensive and not something U.S. taxpayers can or should pay for indefinitely. It has already gone on for a decade and a half. And it does nothing to counter the economic incentive of coca farmers to support their families.

The Department of State reacted with the following statement:

"Any decision about the future of aerial eradication in Colombia is a sovereign decision of the Colombian government, and we will respect that. The United States began eradication at the government's request and our collaboration has always been based on Colombia's willingness to deploy this useful technology. Going forward, the President intends to redouble our efforts to use other tools such as enhanced manual eradication; interdiction (both land and maritime); and improved methods to investigate, dismantle, and prosecute criminal organizations, including through anti-money laundering programs. We will also continue our long-term capacity building programs, especially those related to rule of law institutions, and continue to help Colombia increase its governmental presence in the countryside as we recognize those to be the real keys to permanent change."

That was the right response. President Santos has staked his legacy on negotiations to end the armed conflict in Colombia. After decades of war that have uprooted millions of people and destroyed the lives of countless others, a peace agreement would finally make it possible to address the lawlessness, injustice, and poverty that are at the root of the conflict. The United States should support him.

TRIBUTE TO POLICE CHIEF MICHAEL SCHIRLING

Mr. LEAHY. Mr. President, it is with great appreciation and a touch of sadness that I note the pending retirement of Michael Schirling, who has served as police chief of the city of Burlington, VT, with great distinction for the last 7 years.

His youthful appearance belies the fact that Chief Schirling has been with the department for more than 25 years, first serving as an auxiliary officer while still attending the University of Vermont.

Chief Schirling has held many titles over those years: patrol officer, detective, investigator, director, commander, deputy chief, and finally chief. In other words, this Burlington native rose through the ranks. And throughout this impressive career, Chief Schirling has always sought a better way to do the job.

Early in his career, he co-founded the Vermont Internet Crimes Against Children Task Force, which recognized the potential for abuse as the Internet came of age. The task force has been critical to the investigation and prosecution of high-technology crimes that target those who are most vulnerable.

After he took reins of the department, Chief Schirling grew concerned that officers were spending too much time on paperwork and data entry, taking precious time away from policing. In response he designed his own dispatch and records management software system. The Valcour system—

KNOWLEDGE GRAPH:
1. Aerial drug fumigation
2. Glyphosate
3. Monsanto
4. Colombia
5. FARC
6. Agricultural program
7. Environmental Protection Agency
8. International Agency for Research on Cancer
9. World Health Organization
10. Chemical herbicide
11. Non-Hodgkin’s lymphoma
12. Lung cancer
13. President Santos
14. United States Department of State
15. Michael Schirling
16. Vermont Internet Crimes Against Children Task Force
17. Valcourt system