

across the battlefields of the Pacific Theater and served in every Marine division from 1942 to the end of the war. Though the Japanese were able to break many American codes during the war, they were never able to decipher the system used by the Code Talkers. Their contribution to victory cannot be underestimated. There is no doubt that their efforts saved countless American lives, and it has even been said that without the Code Talkers the battle of Iwo Jima could not have been won.

I would also like to talk about the soldiers of the 200th and 515th Coastal Artillery units of the New Mexico National Guard, also known as the New Mexico Brigade, who soon after the attack on Pearl Harbor played a prominent and heroic role in the fierce fighting in the Philippines. For 4 months the men of the New Mexico Brigade helped hold off the Japanese only to be defeated by disease, starvation and a lack of ammunition. Sadly, the survivors of the Battle of Bataan from the New Mexico Brigade were subjected to the horrors and atrocities of the 65 mile "Death March," as well as years of hardship and forced labor in Japanese prisoner of war camps. Tragically, of the 1,800 men of the New Mexico Brigade more than 900 never returned home.

In closing, I hope New Mexicans will take a moment to honor the individuals who fought so gallantly 66 years ago today as well as all those who served throughout the Second World War, and remember those who paid the ultimate price for our Nation.

The ACTING PRESIDENT pro tempore. The Senator from Rhode Island.

MORNING BUSINESS

Mr. WHITEHOUSE. Mr. President, I ask unanimous consent that there now be a period for the transaction of morning business, with Senators permitted to speak for up to 10 minutes each, and that I recognized for 15 minutes.

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

The Senator is recognized for 15 minutes.

FOREIGN INTELLIGENCE SURVEILLANCE ACT

Mr. WHITEHOUSE. Mr. President, let me first say how moved I am to be on the Senate floor after the remarks of the very distinguished Senator from Hawaii commemorating this day. But I rise to discuss a different question, a question that involves the Foreign Intelligence Surveillance Act.

We will shortly consider making right the things that are wrong with the so-called Protect America Act, a second-rate piece of legislation passed in a stampede in August at the behest of the Bush administration. It is worth for a moment considering why making this right is so important.

President Bush pressed this legislation not only to establish how our Government can spy on foreign agents but how his administration can spy on Americans. Make no mistake, the legislation we passed in August is significantly about spying on Americans—a business this administration should not be allowed to get into except under the closest supervision.

We have a plain and tested device for keeping tabs on Americans. It is our Constitution. Our Constitution has as its most elemental provision the separation of governmental powers into three separate branches. When the Government feels it is necessary to spy on its own citizens, each branch has a role. The executive branch executes the laws and conducts surveillance. The legislative branch sets the boundaries that protect Americans from improper Government surveillance. The judicial branch oversees whether the Government has followed the Constitution and the laws that protect U.S. citizens from violations of their privacy and their civil rights.

It sounds basic, but even an elementary understanding of this balance of powers eludes the Bush administration. So now we have to repair this flawed and shoddy Protect America Act.

Why are we in Congress so concerned about this legislation? Why is it so vital that we energetically insert the role of Congress and the courts when the Bush administration seeks to determine the rules under which it will spy on Americans? Because look what the Bush administration does behind our backs when they think no one is looking.

For years, under the Bush administration, the Office of Legal Counsel within the Department of Justice has issued highly classified, secret legal opinions related to surveillance. This is an administration that hates answering to an American court, that wants to grade its own exams, and OLC is the inside place the administration goes to get legal support for its spying program.

As a member of the Senate Intelligence Committee, I was given access to those secret opinions and spent hours poring over them. Sitting in that secure room, as a lawyer, as a former U.S. attorney, legal counsel to Rhode Island's Governor, and State attorney general, I was increasingly dismayed and amazed as I read on.

To give an example of what I read, I have gotten three legal propositions from these secret OLC opinions declassified. Here they are, as accurately as my note-taking could reproduce them from the classified documents. Listen for yourself, Mr. President; I will read all three and then discuss each one.

One:

An Executive order cannot limit a President. There is no constitutional requirement for a President to issue a new Executive order whenever he wishes to depart from the terms of a previous Executive order. Rather than violate an Executive order, the President has instead modified or waived it.

No. 2:

The President, exercising his constitutional authority under article II, can determine whether an action is a lawful exercise of the President's authority under article II.

And 3:

The Department of Justice is bound by the President's legal determinations.

Let's start with No. 1. Bear in mind that the so-called Protect America Act that was stamped through this great body in August provides no—zero—statutory protections for Americans traveling abroad from Government wiretapping—none if you are a businesswoman traveling on business overseas; none if you are a father taking the kids on vacation to the Caribbean; none if you are visiting your aunts or uncles in Italy or Ireland; none even if you are a soldier of the United States of America in uniform serving overseas.

The Bush administration provided in that hastily passed law no statutory restrictions on their ability to wiretap you at will, to tap your cell phone, your e-mail—whatever—once you are outside the borders of the United States. The only restriction is an Executive order called 12333 which limits executive branch surveillance to Americans whom the Attorney General determines to be agents of a foreign power. That is what the Executive order says.

But what does this administration say about Executive orders?

An Executive order cannot limit a President. There is no constitutional requirement for a President to issue a new Executive order whenever he wishes to depart from the terms of a previous Executive order. Rather than violate an Executive order, the President has instead modified or waived it.

"Whenever [the President] wishes to depart from the terms of a previous Executive order," he may do so because "an Executive order cannot limit a President." And he does not even have to change the Executive order or give notice that he is violating it because by "depart[ing] from the Executive order," the President "has instead modified or waived it."

So unless Congress acts, here is what legally prevents this President from wiretapping Americans traveling abroad at will: nothing. Nothing. That was among the most egregious flaws in the bill passed during the August stampede orchestrated by the Bush administration, and this OLC opinion shows why we need to correct it.

Here is No. 2:

The President, exercising his constitutional authority under article II, can determine whether an action is a lawful exercise of the President's authority under article II.

That is right, the President, according to the George W. Bush Office of Legal Counsel, has article II power to determine the scope of his article II power. Never mind a little decision called *Marbury v. Madison* written by Chief Justice John Marshall in 1803 establishing the proposition that it is emphatically the province and the duty