

Representatives and the Republican leader of the House of Representatives. It is agreement that involves tradeoffs. But the basic underlying purpose of the agreement was and is to stimulate the economy. It may or may not do that, but the one positive effect I will stipulate it will have is it creates at least a sense that the Congress and the Government and the President and the Speaker of the House and the Democrats and the Republicans can cooperate to try to address what is clearly a slowing of our economy through some fiscal policy action.

Even though it is \$150 billion, which is a lot of money—and all that money is going to have to be borrowed from our children, unfortunately, and over 10 years it totals up to being about a \$200 billion event because of interest compounding on it—even though that is a high price tag to pay for what you might call a confidence builder, it is still something you can argue should be done if you have that type of an agreement.

For the Senate to sort of step in and say: Well, we want to tinker with it, and we want to change it there, well, it is nothing more than an execution of Senate prerogative, but it is not going to help the policy because none of the proposals coming out of the Senate committee are all that good on the side of policy—especially the unemployment insurance proposal and the lifting of the caps on the benefits proposal—what it is going to do is undermine the confidence of the American people that we as a government can act.

So the high water mark appears to me to have been reached on this issue when the President and the Speaker of the House reached agreement, working with the Republican leader in the House. I think we as a Senate ought to take sort of a mature attitude and say: Well, progress was made. We are confronting a fairly serious situation. Let's not throw out our proposal simply for the sake of putting a proposal on the table. Let's recognize that something needs to be done quickly, and that this is the best we are going to get. Hopefully, that will be the resolution of this process as we move toward concluding, and one hopes this can be done within the next week.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Missouri is recognized.

#### ORDER OF PROCEDURE

Mr. BOND. Mr. President, I have three colleagues who want to join me in discussions of the FISA bill. I realize in morning business it is supposed to be 10 minutes. Since there are three different Members with whom I wish to have those discussions, I ask unanimous consent to be allotted 30 minutes to—this will be on the FISA bill, but since we are speaking in morning business, I ask unanimous consent to be recognized, with my colleagues, for 30 minutes.

The PRESIDING OFFICER (Mr. NELSON of Nebraska). Without objection, it is so ordered.

#### FISA

Mr. BOND. Mr. President, our first Member is a distinguished member of our Intelligence Committee, the distinguished junior Senator from North Carolina. I yield to him.

Mr. BURR. Mr. President, I thank the ranking member, Senator BOND.

We have heard some people claim that the Intelligence Committee's bill will allow dragnet surveillance that will sweep up communications of innocent Americans. Is this accurate?

Mr. BOND. Mr. President, that question has been raised. We have heard that on the floor a number of times. I think it is very important that we dispel that myth right now. The answer is no—a flat no. Our committee bill only allows the targeting of persons outside the United States to obtain foreign intelligence information. It is not dragnet surveillance. The targets of acquisition must be foreign targets and they must be suspected terrorists or spies. The Attorney General and the Director of National Intelligence, whom I will refer to as the DNI, must certify that a significant purpose of the acquisition is to obtain foreign intelligence information.

For example, if a foreign target is believed to be an agent or a member of al-Qaida, then all communications of that target could be intercepted.

Only Americans who communicate with suspected terrorists abroad will have those specific communications monitored. If those same communications turn out to be innocent, they will be minimized, which is intel community speak for suppressed, so that Americans' privacy interests are protected.

It is very misleading and nonfactual to suggest that the intelligence community is spying on parents who are calling their children overseas or students who are talking with their friends, or on our own soldiers in the battlefield. Our intelligence professionals are far too busy tracking real terrorists, members of al-Qaida, than to listen to family discussions or conversations between classmates. Not only do they not have time that is not permitted under this bill.

Mr. BURR. What happens when the intelligence community does become interested in the communications of a person inside the United States?

Mr. BOND. Mr. President, I thank my colleague from North Carolina, because that is precisely what our bill, the FISA Act Amendments bill, does. That information will be turned over to the FBI, which would seek a title III criminal warrant, or a FISA order, to intercept all of the communications of that person, not just communications with targets overseas.

Mr. BURR. We have heard a number of people claim that the foreign tar-

geting authorized under the Intelligence Committee's bill contains inadequate protections for U.S. persons. What specific protections are included for innocent Americans?

Mr. BOND. This is where the Intelligence Committee bill goes much farther than any other law we have had in our history in protecting U.S. persons; that is, U.S. citizens and others here in the United States.

The bill includes express prohibitions against "reverse targeting," and reverse targeting is a knowledge that you can target a person overseas when the real purpose is to target someone in the United States. This is illegal. The intelligence community does not do it. Frankly, it is terribly impractical. They cannot under the law that we have presented to this body target a person inside the United States without a court order.

The bill also requires that all acquisitions comply with the protections of the fourth amendment. In addition, the Intelligence Committee bill requires, for the first time in history, that the Foreign Intelligence Surveillance Court—and I will refer to that as the FISC—for the first time in history approve any surveillance of a U.S. person, or an American citizen abroad. This goes beyond the requirement even in existing American criminal law.

Mr. BURR. As my good friend noted, the Intelligence Committee bill gives the FISA Court an important role in foreign targeting. The bill requires that any acquisition be conducted pursuant to the specific targeting and minimization processes and procedures. What is the court's role with respect to these procedures?

Mr. BOND. This provision came about as a result of discussions by members on both sides of the committee who wanted to provide protections for Americans overseas. To do that required a significant expansion and clarification, which is included in the managers' amendment that Senator ROCKEFELLER and I have produced and have pending before the body.

Under this bill, the FISC must review and approve the targeting and minimization procedures used by the Government in conducting its foreign targeting operations. The court must find that the targeting procedures are reasonably designed to ensure that the authorized acquisition is limited to the targeted persons reasonably believed to be located outside the United States. The court must then find that minimization procedures comply with the FISA law.

The court will also review the joint certification issued by the Attorney General and the DNI to make sure that it contains all of the required elements. If the court finds there is a deficiency in those procedures or the certification—that even for a minor drafting or technical reason they do not comply with the law—the court can order the Government to correct the deficiency or cease the acquisition.

Mr. BURR. There is an amendment already filed, and the amendment is filed to the Intelligence Committee bill, that allows the FISA Court to assess the Government's compliance with the minimization procedures. Why shouldn't we have the court do this?

Mr. BOND. Well, it sounds like a reasonable proposal on the surface, but when you look at the law and the structure that is set up, it does not work. The FISC was created in 1978 simply to issue orders for domestic surveillance on particular targets, but the Congress specifically left foreign surveillance activities to the executive branch and to the intelligence community.

FISA minimization procedures—the procedure to suppress information on an innocent communication with a person in the United States—are all about protecting the identities of a U.S. person or American citizen. This comes up all of the time in domestic collections. But almost all of the collection under these foreign targeting acquisitions will be on non-U.S. persons who require no protection under FISA minimization procedures.

It doesn't make sense to direct the FISC to get involved in assessing compliance with the foreign targeting realm. They have said in their opinion regarding sealed matters that they are not set up to do that, and they do not have the expertise to do that.

As a practical matter, when the court assesses compliance with minimization procedures, it would be second-guessing trained analysts' decisions about which foreign terrorist to track and how to do it. They simply are not competent, they are not set up, they don't have the expertise to do that, and they have so stated in their published opinion. They can't make these types of operational decisions.

Mr. BURR. It is my understanding that the FISA Court recently issued an opinion where it commented on the expertise of the executive branch over the court in national security and foreign intelligence matters. Shouldn't we heed the court's own words?

Mr. BOND. I am certainly glad the Senator brought that up. The court did issue a published opinion this past December where it noted that the FISA Court judges are:

Not expected or desired to become experts in . . . foreign intelligence activities, and do not make substantive judgments on the propriety or need for a particular surveillance . . . Even if a typical FISA judge had more expertise in national security matters than a typical district court judge, that expertise would still not equal that of the Executive Branch, which is constitutionally entrusted with protecting national security.

Those are the words of the judges on the FISA Court, the FISC.

The court knows what to look for when it issues a warrant to tap someone's phone in North Carolina or Virginia. But when it comes to analyzing intelligence leads and deciding which foreign terrorists or spies should be surveilled, the court is simply not com-

petent to make these judgments. That is exactly what the amendment would seek to have them do.

This bill already contains numerous oversight reporting and numerous judicial provisions. Those of us who have gone out to look at the operations know how extensive and how carefully supervised they are. There is no reason to ask the FISC to take on the additional authority in the context of foreign targeting, especially where it could result in operational problems or the loss of intelligence and, as the judges have said, is beyond their competence.

Mr. BURR. The Intelligence Committee bill allows the Attorney General and the DNI to direct a communications provider to assist the Government with a foreign targeting acquisition. What protections does this bill give to any provider who believes there is a problem with the directive?

Mr. BOND. That is a very good question, because we cannot expect carriers, telephone companies, telecom companies to work with us if they don't have protection. That is why we are seeking retroactive clarification of the civil liability for those who have, in the exercise of their patriotic duty and pursuant to valid directives, participated in the President's terrorist surveillance program. Under this bill, the providers may challenge the directive by filing a petition to modify or set aside the directive of the court. If the court finds the directive does not meet specific requirements or is unlawful, it can grant a petition. If the court does not modify or set aside the directive, it will order the provider to comply with it. Both the Government and the provider may appeal any decision to the FISC Court of review and ultimately the Supreme Court.

Mr. BURR. Mr. President, I see that the senior Senator from Virginia is here and I know he has some questions he wishes to ask, so I will limit myself to one more.

What happens if a provider refuses to comply with the directive you just talked about?

Mr. BOND. I would tell my good friend from North Carolina that the bill we reported out of our committee provides a mechanism for the Government to compel a provider to comply with a directive. If the court finds that the directive was issued properly and is lawful, it must order the provider to comply with the directive and that provider is provided immunity for doing so. But a failure to comply by a company could result in a contempt of court. Both the Government and the provider may appeal any decision to the FISC Court of review and ultimately the Supreme Court.

I thank my colleague for his service on the committee and for his very helpful questions.

Mr. BURR. I thank the Senator.

Mr. BOND. Mr. President, I see the distinguished Senator from Virginia is here, and I would turn to him if he has some questions.

The PRESIDING OFFICER. The Senator from Virginia.

Mr. WARNER. Mr. President, I thank my colleague, the ranking member of the committee. I am privileged to serve on that committee with the senior Senator from the great State of Missouri.

I would like to first make a few opening comments, if I might.

Mr. BOND. I appreciate that.

Mr. WARNER. Mr. President, first, I commend how well the distinguished Senator from Missouri has represented to this Chamber and its Members and, indeed, to all those in our Nation who are following this debate, how well he has represented a proper and balanced perspective and how a solution to the important questions that have been raised by all of us can be resolved.

In my own case, I have thought long and hard about this situation, and I would like to reflect on a bit of history. I was privileged to serve in the Department of Defense from the years 1969 to 1974 during the war in Vietnam. At the latter part of my service there, we originated the concept of the all-volunteer force. There was great skepticism as to whether this concept would work, and it was a high risk to abolish the draft and to enter into this concept of all volunteer, to be the only persons to be given the privilege of wearing the uniform of the United States of America in the branches of the Army, the Navy, the Air Force, and the Marines.

Fortunately, it was adopted by the President, eventually written into law by the Congress. That concept has worked. It is working at this very moment with brave young men and women all over the world. They are there because each of them raised their right hand and took the oath of office voluntarily.

I see a direct analogy to this question that is before this Chamber and, indeed, the Nation, the question of whether corporations, which although they did not raise their hand and volunteer, they have nonetheless volunteered comparably to the men and women in the Armed Forces.

The work product of their volunteering is every day saving and protecting the lives of our service personnel and, indeed, many others worldwide from the actions of terrorists and others who are trying to rip freedom away from our Nation and other nations.

So as we reach our decision on this issue, let's stop to think about the United States of America, while not written into the Constitution, the Bill of Rights, or otherwise, has throughout its history adopted a concept of voluntarism by its citizens, by its companies to step forward and take on serious problems that confront our Nation.

I see a direct analogy, I say to my distinguished colleague, and I stand steadfast with our committee which voted 13 to 2 to provide this framework which we hope will eventually become the law of the land, to give reasonable

protections to these companies that are part of the overall volunteer force, be they in uniform or corporations, working to protect our Nation.

Having said that, I say to my distinguished colleague, I think it is very important that we proceed to prepare a complete record for the scrutiny of all on these issues. I wish to suggest a question to my distinguished colleague.

All of us have heard a number of comments that more time is needed to study this issue, the issue of carrier liability, carriers being those companies that stepped up to work on behalf of the cause of freedom and preservation of our safety here at home. Hasn't the Intelligence Committee conducted a thorough and bipartisan review of the President's surveillance program? And hasn't the committee determined the providers acted in good faith?

Mr. BOND. Mr. President, I thank my distinguished colleague from Virginia. The answer to that question is yes. I wish to say what a pleasure it is to serve with the distinguished representative of Virginia, who served his country in the Department of Defense, who pushed through the landmark decision to have a volunteer military, which I might say my son was proud to participate in, and to say that his previous experience on the Intelligence Committee and his long and devoted service on the Senate Armed Services Committee has made him an invaluable member of the committee.

Mr. WARNER. For purposes of the record, I do not claim the credit. I was but one of many who worked on the concept of that great program. I found in this town, and as I know the Senator does likewise, the less credit you try and take, the more effective one can be in other tasks.

Mr. BOND. I say through the Chair, the distinguished Senator from Virginia deserves far more credit than he is ever given. I was trying to sneak in a little bit to say how much we appreciate his service. When he needs to correct me, I always stand corrected.

To return to the question, I do have an answer, and that is, the committee conducted a comprehensive and bipartisan review. We interviewed witnesses, we went out to NSA to see how the Terrorist Surveillance Program was implemented, examined documents, including the Department of Justice legal opinions and letters from the Government to providers.

The letters were provided to the carriers in regular intervals and stated the activities had been authorized by the President. All the letters also state the Attorney General had determined the activities to be lawful, except for one which stated the determination had been made by the counsel to the President.

After conducting this extensive review, the committee concluded the providers that allegedly assisted the TSP acted in good faith and, based on representations of the highest level of the

Government, that the program was lawful. Therefore, the committee concluded the civil liability protection for these providers was appropriate, and I draw upon my experience at the law school at the University of Virginia, where my distinguished colleague also studied law, to say that reviewing those documents and letters led me to the conclusion that it was clear on its face that the carriers were receiving a valid, legal directive from the highest authorities in the Federal Government.

Mr. WARNER. Mr. President, I thank my colleague. He said the committee "concluded." It concluded by the manifestation of a vote of 13 to 2, so that an overwhelming majority of the committee, bipartisan, made this decision.

Mr. BOND. That is correct.

Mr. WARNER. I think that is an important reference point.

Further, I say to my colleague, the committee's liability provision in the matters pending before this Senate today extends only to civil—I underline civil—liability protection for those providers that allegedly assisted with the TSP program. Isn't this already a compromise from what the Director of the National Intelligence had initially requested of the Congress?

Mr. BOND. Mr. President, I say to my friend from Virginia, in April of 2007, the DNI submitted his request to modernize FISA to Congress, to our committee, and it included a request for full liability for all persons, including Government officials who had allegedly participated in the President's Terrorist Surveillance Program.

As my colleague has stated, the committee passed this bill by a 13-to-2 bipartisan vote. It included civil liability protection for those providers that allegedly assisted with the TSP. The protection was not extended to Government officials or to criminal prosecution. We did not seal off all potential liability of anyone who may have acted criminally—that would be up to the Department of Justice to determine—or Government officials who are named, I believe, in seven pending lawsuits.

Mr. WARNER. Mr. President, I thank my colleague for that because the DNI, Director McConnell, a former admiral—I knew him in the Navy going way back when I was there. As a matter of fact, as a point of reference, when I was Secretary, he was one of the junior officers who briefed me every morning at 7:30 on intelligence. But he has done an extraordinary job in presenting in a very fair and objective way the need for the revisions to this legislation which are reflected in the pending bill before the Senate as submitted by the committee.

I think the Senator has carefully delineated those portions which we resolved, as a committee, were essential and did not accept in full measure all his recommendations; am I not correct in that?

Mr. BOND. That is correct. Now I understand why Admiral McConnell is

doing such a good job because he obviously had very good early training. I did not know he had been through the Warner course in intelligence, but that ties up the loose ends, and now I understand more fully.

Mr. WARNER. Again, Mr. President, I have to tell you, I was learning at a very young age and taking on responsibility in that critical period of history. I learned as much from him, if not more, than he did from me.

I have another question for my colleague. What consequences or risks are there if our private volunteer—I underline volunteer—participants by way of corporations are not given civil liability protection from the pending and ongoing lawsuits and perhaps others?

Mr. BOND. Mr. President, that is a very serious question because if those lawsuits should continue, either directly against carriers alleged to have participated or substitution or indemnification, No. 1, the identities of the providers could be revealed which would compromise our intelligence sources and methods. No. 2, the providers would be far less willing to cooperate with legitimate requests for assistance in the future, thus crippling our intelligence collection. Why is this? Quite frankly, because this would have a huge damage to their business reputations. They have already been accused falsely of all sorts of things that have raised questions that are reflected in damage to the value of the shareholders of the company and potentially bring great risk to the employees of those corporations and their facilities. These lawsuits would occur not only in the United States but even more likely they would occur overseas, and there could be real personal danger if the companies are confirmed as assisting the Government's fight against terrorism. Their facilities, their personnel could be at risk of terrorist targeting or other vigilante actions.

Mr. WARNER. Mr. President, I thank my colleague. I think it is very important that we portray the risks that are associated with these endeavors taking place in the court system now. Again, I draw the attention of all colleagues to the thorough work done by this committee on which I am privileged to serve and the bipartisan manner in which we resolved these issues.

A question to my colleague: We heard some Members advocate substitution—in other words, a substituted solution—rather than a civil liability protection. Perhaps the Senator can address exactly what that substitution is and how, in his judgment, this would not be a means by which to resolve this very serious problem.

Mr. BOND. Mr. President, as I indicated, the dangers to the providers would be as great under substitution as if they were sued directly. While the providers might not be parties to the litigation, under the amendment offered by Senators SPECTER and WHITEHOUSE, discovery would be allowed to proceed against the providers,

and this puts them at the same risk of disclosure as allowing the litigation to proceed directly against them. That is one of the most sensitive intelligence programs in our history. The intelligence community has done a thorough bipartisan review of the providers' conduct, and we in the committee feel we cannot risk our intelligence sources and methods by allowing litigation to continue and by allowing the potential of significant damage to those companies and their shareholders who may be widows and orphans and certainly members whose pensions may be invested in shares of those companies.

Mr. WARNER. Mr. President, I thank my colleague. I would also add that there will be further chapters in the history of this country, and I cannot try to look that far into the future as to what those chapters may be when we, as a successor government to the one we now have in terms of our President, will be faced with another challenge and look to volunteers—volunteers—to solve this problem. This is going to be a landmark precedent for future Presidents as we address problems which could be assisted by the participation of the corporate world here in our United States.

A further question of my colleague. We have also heard some Members say the Foreign Intelligence Surveillance Court should decide whether the providers acted in good faith. Wouldn't this duplicate the bipartisan work of the Intelligence Committee?

Mr. BOND. Mr. President, that is why we have an Intelligence Committee. The Intelligence Committee concluded on a bipartisan basis that they acted in good faith. There is no need for the FISC to duplicate the work. The FISC was set up to issue orders on individual targets for domestic collection. We expanded their responsibilities. The court is not set up and was not set up for protected en banc litigation. The amendment offered by Senator FEINSTEIN would allow parties to litigate the good-faith providers.

I see my time has expired. I believe the Senator from Virginia has sought time, and I see one of my colleagues on the other side has sought time, so I will yield to them for their comments, and I ask unanimous consent that I be recognized at the end of the remarks of these two colleagues.

The PRESIDING OFFICER (Mrs. McCASKILL). Is there objection?

Mr. WARNER. Madam President, no objection.

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

Mr. WARNER. I would just ask if it would be possible—and I see my distinguished colleague on the floor seeking recognition—may I have but a few minutes to conclude my remarks here with my good friend and the ranking member of the committee?

Madam President, last year, when the important legislation passed by the Senate Intelligence Committee came

to the floor, I spoke about several elements in this bill. Specifically, I spoke about how the Intelligence Committee bill ensures that the intelligence gap that was closed by the Protect America Act in August remains sealed. I spoke about the important balance the Intelligence Committee bill strikes between protecting civil liberties and ensuring that our hard-working and dedicated intelligence professionals have the tools they need to protect this Nation—a point I cannot too strongly emphasize. I also highlighted one of the most important provisions of the bill: retroactive liability protection for carriers alleged to have assisted the Government with the terrorist surveillance program. I said in December that, based on the documents and testimony provided to our committee, I strongly believed the carriers that have participated in the program relied—I repeat, relied—upon our Government—that is, the executive branch of the Government of the United States—that their actions were legal and in the best interests of the security of America. Further, I stated that, in my opinion, these companies deserve and must be protected from costly and damaging litigation in our court system.

During the Senate's Christmas recess, I had additional time to further study this issue, as I have day after day, and gather additional information. That time to reflect and study and to deepen my knowledge on this issue has only reinforced my view that the carrier liability protections in the Intelligence Committee's bill are not only necessary but vital for the protection of our future national security.

One item in particular has played a key role in my thinking about this issue. It was a thoughtful opinion piece written by three gentlemen I know very well, former public servants, and I wish to say a few words about that, and then I will conclude my remarks.

Three individuals stepped forward to give their perspectives on this critical issue. The first was Benjamin Civiletti, U.S. Attorney General under President Jimmy Carter; the second was Dick Thornburgh, U.S. Attorney General under President George Herbert Walker Bush; and thirdly, Judge William Webster, known very well by almost all of us here in the Chamber, former Director of the CIA and former Director of the Federal Bureau of Investigation. The article these fine public servants authored, titled "Surveillance Sanity," appeared in the October 31, 2007, edition of the Wall Street Journal.

Madam President, I ask unanimous consent to have printed in the RECORD a copy of that article following my remarks.

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

(See exhibit 1.)

Mr. WARNER. I wish to share some of the thoughts in that article with my colleagues.

First, regarding the Intelligence Committee's carefully crafted and lim-

ited liability protections, the three public servants said:

We agree with the committee. Dragging phone companies through protracted litigation would not only be unfair, but it would deter other companies and private citizens from responding in terrorist emergencies whenever there may be uncertainty or legal risk.

Our committee has heard testimony that without such protections, some companies believe they can no longer cooperate and assist our Government because they would risk hundreds of millions of dollars of their shareholders' money in protracted lawsuits. They have a fiduciary responsibility, those companies, to their shareholders. That is intrinsic in all of our corporate structures.

Second, the boards of directors of these companies have a fundamental obligation to those shareholders. On this issue, the three public servants wrote:

The government alone cannot protect us from the threats we face today. We must have the help of all of our citizens. There will be times when the lives of thousands of Americans will depend on whether corporations such as airlines and banks are willing to lend assistance. If we do not treat them fairly when they respond to assurances from the highest levels of the government that their help is legal and essential for saving lives, then we will be radically reducing our society's capacity to defend itself.

Moreover, I believe that companies which assisted the Government will not be treated fairly by the provision being offered by my Judiciary Committee colleagues to substitute the Government in currently pending lawsuits.

I strongly believe the substitution proposal is not an acceptable alternative to the Intelligence Committee's bill.

Additionally, if lawsuits are allowed to proceed, companies will still be forced to participate and provide evidence. The continuing damage in terms of business reputation and stock valuation even if the Government ultimately prevails, will surely be extremely harmful to the companies.

Further, the Government being substituted as the defendant in a trial opens up evidentiary problems regarding sources and methods which, if exposed, would hinder the ability of the intelligence community to intercept terrorist communications and those of our other enemies.

Finally, the last point I would like to raise relates to the right of individuals to file suit. Let me be clear—individuals who believe that the Government violated their civil liberties can pursue legal action against the Government—the Intelligence Committee's bill does nothing to limit that legal recourse.

This issue is underscored by the final quote I would like to share with you by Messrs. Civiletti, Thornburgh, and Webster:

Whether the government has acted properly is a different question from whether a private person has acted properly in responding to the government's call for help. From

its earliest days, the common law recognized that when a public official calls on a citizen to help protect the community in an emergency, the person has a duty to help and should be immune from being hauled into court unless it was clear beyond doubt that the public official was acting illegally. Because a private person cannot have all the information necessary to assess the propriety of the government's actions, he must be able to rely on officials' assurances about need and legality. Immunity is designed to avoid the burden of protracted litigation, because the prospect of such litigation itself is enough to deter citizens from providing critically needed assistance.

Madam President—I agree with these distinguished gentlemen.

Bottom line, companies who participate in this program do so voluntarily to help America preserve its freedom and security. And that security will ensure for the very safety—both individually and collectively—of its citizens.

In closing, I would like to state that I have long supported the idea of “an all-volunteer force” for our military and I believe “an all-volunteer force” of citizens and businesses who do their part to protect our great Nation from harm is equally important.

Without this retroactive liability provision, I believe companies will no longer voluntarily participate. This will result in a degradation of America's ability to protect its citizens.

It is for these reasons that I urge my colleagues to support the Rockefeller-Bond substitute amendment to grant the men and women of the intelligence community the tools they need to protect our country.

#### EXHIBIT 1

[From The Wall Street Journal, Oct. 31, 2007]

#### SURVEILLANCE SANITY

(By Benjamin Civiletti, Dick Thornburgh and William Webster)

Following the terrorist attacks of Sept. 11, 2001, President Bush authorized the National Security Agency to target al Qaeda communications into and out of the country. Mr. Bush concluded that this was essential for protecting the country, that using the Foreign Intelligence Surveillance Act would not permit the necessary speed and agility, and that he had the constitutional power to authorize such surveillance without court orders to defend the country.

Since the program became public in 2006, Congress has been asserting appropriate oversight. Few of those who learned the details of the program have criticized its necessity. Instead, critics argued that if the president found FISA inadequate, he should have gone to Congress and gotten the changes necessary to allow the program to proceed under court orders. That process is now underway. The administration has brought the program under FISA, and the Senate Intelligence Committee recently reported out a bill with a strong bipartisan majority of 13-2, that would make the changes to FISA needed for the program to continue. This bill is now being considered by the Senate Judiciary Committee.

Public disclosure of the NSA program also brought a flood of class-action lawsuits seeking to impose massive liability on phone companies for allegedly answering the government's call for help. The Intelligence Committee has reviewed the program and has concluded that the companies deserve targeted protection from these suits. The

protection would extend only to activities undertaken after 9/11 until the beginning of 2007, authorized by the president to defend the country from further terrorist attack, and pursuant to written assurances from the government that the activities were both authorized by the president and legal.

We agree with the committee. Dragging phone companies through protracted litigation would not only be unfair, but it would deter other companies and private citizens from responding in terrorist emergencies whenever there may be uncertainty or legal risk.

The government alone cannot protect us from the threats we face today. We must have the help of all our citizens. There will be times when the lives of thousands of Americans will depend on whether corporations such as airlines or banks are willing to lend assistance. If we do not treat companies fairly when they respond to assurances from the highest levels of the government that their help is legal and essential for saving lives, then we will be radically reducing our society's capacity to defend itself.

This concern is particularly acute for our nation's telecommunications companies. America's front line of defense against terrorist attack is communications intelligence. When Americans put their loved ones on planes, send their children to school, or ride through tunnels and over bridges, they are counting on the “early warning” system of communications intelligence for their safety. Communications technology has become so complex that our country needs the voluntary cooperation of the companies. Without it, our intelligence efforts will be gravely damaged.

Whether the government has acted properly is a different question from whether a private person has acted properly in responding to the government's call for help. From its earliest days, the common law recognized that when a public official calls on a citizen to help protect the community in an emergency, the person has a duty to help and should be immune from being hauled into court unless it was clear beyond doubt that the public official was acting illegally. Because a private person cannot have all the information necessary to assess the propriety of the government's actions, he must be able to rely on official assurances about need and legality. Immunity is designed to avoid the burden of protracted litigation, because the prospect of such litigation itself is enough to deter citizens from providing critically needed assistance.

As the Intelligence Committee found, the companies clearly acted in “good faith.” The situation is one in which immunity has traditionally been applied, and thus protection from this litigation is justified.

First, the circumstances clearly showed that there was a bona fide threat to “national security.” We had suffered the most devastating attacks in our history, and Congress had declared the attacks “continue to pose an unusual and extraordinary threat” to the country. It would have been entirely reasonable for the companies to credit government representations that the nation faced grave and immediate threat and that their help was needed to protect American lives.

Second, the bill's protections only apply if assistance was given in response to the president's personal authorization, communicated in writing along with assurances of legality. That is more than is required by FISA, which contains a safe-harbor authorizing assistance based solely on a certification by the attorney general, his designee, or a host of more junior law enforcement officials that no warrant is required.

Third, the ultimate legal issue—whether the president was acting within his constitu-

tional powers—is not the kind of question a private party can definitively determine. The companies were not in a position to say that the government was definitely wrong.

Prior to FISA's 1978 enactment, numerous federal courts took it for granted that the president has constitutional power to conduct warrantless surveillance to protect the nation's security. In 2002, the FISA Court of Review, while not dealing directly with the NSA program, stated that FISA could not limit the president's constitutional powers. Given this, it cannot be said that the companies acted in bad faith in relying on the government's assurances of legality.

For hundreds of years our legal system has operated under the premise that, in a public emergency, we want private citizens to respond to the government's call for help unless the citizen knows for sure that the government is acting illegally. If Congress does not act now, it would be basically saying that private citizens should only help when they are absolutely certain that all the government's actions are legal. Given the threats we face in today's world, this would be a perilous policy.

Mr. WARNER. Madam President, I yield the floor at this time.

The PRESIDING OFFICER. The Senator from North Dakota.

Mr. DORGAN. Madam President, are we in morning business?

The PRESIDING OFFICER. We are.

Mr. DORGAN. Madam President, I ask unanimous consent that I be allowed to speak for such time as I may consume.

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

#### STIMULUS PACKAGE

Mr. DORGAN. Madam President, we will have a piece of legislation come to the floor, we believe tonight—and perhaps tomorrow morning—that deals with the economic stimulus package, as it is called, to try to stimulate the economy. We are either in a recession or near a recession.

The Federal Reserve Board today took additional action to cut interest rates by another half of 1 percent. That follows the three-quarters of 1 percent cut recently by the Fed, within the last week and a half. So the Federal Reserve Board is using monetary policy tools to jump-start the economy, and the thought was that the fiscal policy side coming from the Congress and the President would require—or recommend, at least—some kind of stimulus package. So there is a stimulus package being developed that would provide payments—rebates of sorts—to American taxpayers. The discussion in the U.S. House is \$600 per taxpayer. The Senate bill that has been proposed is \$500 or \$1,000 per couple.

One can make a number of observations about this, wondering about the advantage and the importance of a fiscal policy that has a stimulus package. I think it is probably necessary for psychological reasons, if not for economic reasons. It is about 1 percent of the GDP that is being proposed. We have a \$13-plus trillion economy, and I don't know how about 1 percent of that—\$130 billion, \$150 billion—for a stimulus