the United States is based upon free enterprise; and

Whereas the principles of free enterprise are inexorably bound with our principles of individual political freedom; and

Whereas the belief of Americans in the essential justice of free enterprise is being increasingly challenged throughout the world.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the President is authorized and requested to issue a proclamation designating July 1, 1978, as "Free Enterprise Day" and calling upon the people of the United States and interested groups and organizations to observe such day with appropriate ceremonies and activities.

The ACTING PRESIDENT pro tempore. Is there objection to the immediate consideration of the resolution?

Mr. ROBERT C. BYRD. Mr. President, the joint resolution has been cleared on this side of the aisle. We have no objection.

Mr. BAKER. Mr. President, reserving the right to object, and I shall not object, the joint resolution has been cleared with the ranking member of the jurisdictional committee and we have no objection to its consideration and passage.

The ACTING PRESIDENT pro tempore. Without objection, the Senate will proceed to its immediate consideration, and, without objection, the joint resolution will be considered to have been read the second time.

Mr. HARRY F. BYRD, JR. Mr. President, first, I congratulate the able Senator from Oklahoma (Mr. BARTLETT) for presenting this joint resolution. I do not know of anything more important to the economic well-being of the majority of our citizens than the perpetuation of the free enterprise system.

It is under the free enterprise system that the overwhelming majority of the people of our Nation have attained the highest standard of living of any nation in the world.

What so deeply concerns me about what has been going on in Washington for so long, and what is going on in Washington now, are the unsound policies, excessive regulation, and uncontrolled spending which, if not checked, will destroy the free enterprise system.

I am very pleased that the Senator from Oklahoma has introduced this resolution and I am pleased that the Senate appears prepared to adopt the resolution.

Mr. BAKER. Mr. President, I associate myself with the remarks of the distinguished Senator from Virginia and offer my commendation to the distinguished Senator from Oklahoma for taking this initiative at this time. I think he does a great service to this country and to the Senate for bringing it to our attention for action at this point. I hope we can proceed now to its adoption.

Mr. BARTLETT. Mr. President, if I may briefly comment on the remarks of the distinguished Senator from Virginia and compliment him for them. Also, I wish to join not only with him but with the remarks of the minority floor leader.

Mr. President, all Americans learn at an early age that the United States is the great historical experiment in representative popular government, but too few Americans learn, or ever come to realize, that the United States is also the greatest experiment in free private enterprise—in capitalism, in the history of the world. It is unfortunate so few people realize this, because as heirs to the world's most spectacularly successful economic system, Americans should understand the basis and reasons for our current prosperity. They should understand that our political freedoms and our material well-being are inexorably intertwined. And they should understand it before they lose it.

Every society must resolve three fundamental economic problems: First, how much of and which goods and services it shall produce; second, how shall it produce these goods; and third, who is to receive the benefit of these goods and services? The United States, predominantly, has solved these problems with a system of privately determined prices and markets. By allowing such decisions to be made privately, under the pressure of price competition and consumer demand, we have provided for our collective well-being, as well as for our individual freedoms. Our capitalist free enterprise system has proven itself capable of feeding, housing, clothing, transporting, educating, entertaining and freeing an ever-growing population at standards of living unimaginable in most of the world.

Among the many different things that were responsible for the phenomenal growth in this country's wealth were an ambitious people, bountiful resources, and a government that permitted and encouraged its citizens to exercise their ingenuity. The Government's policy, for the most part, was devoted to private capitalism. It supported private enterprise, competition, and efficient production.

For example, in 1862, Congress passed the Homestead Act. It gave each person willing to take the risks of moving west 160 acres of land, for a small fee, if he lived on and improved that land for 5 years. Subsequent acts provided land even cheaper. The cheap land and the West's rich resources drew settlers out in droves. The first settlers often found life hard, but the resources and opportunities for success drew more and more people west. America's industrial revolution led to great increases in productivity for all the westward moving people. Farmers soon became involved in production for national, as well as international, markets with the introduction of railroads.

The private railroads, in fact, helped make the far-flung territories of North America a nation. Yet it is an American myth that our railroads were built mainly through the financial help of the Government and would have been impossible without it. In fact, the railroads serve as an early example of the disastrous effects government control and participation can have on private enterprise. Government help to the railroads amounted to 10 percent of the cost of all the railroads in the country, but even this limited assistance has been disastrous to the railroads. As an example, I quote from Steward Holbrook's "The Story of American Railroads":

> In a little more than two decades, three transcontinental railroads were built with government help. All three wound up in bankruptcy courts. And thus, when James Jerome Hill said he was going to build a line from the Great Lakes to Puget Sound without government cash or land grant, even his close friends thought him mad. But his Great Northern arrived at Puget Sound without a penny of federal help, nor did it fail.

Thank goodness this took place before the era of doctrinaire Government intervention in the economy, and the Government limited its involvement to 10 percent. Very soon private enterprises built railroads which crisscrossed the entire Nation.

Our economy has changed drastically since then, but Government policies have changed even more drastically. Within the last 40 years there has been a great deal of legislation passed by Congress which does not accept the free market as the basis for our economic organization. It does not foster competition or enhance growth. Instead it hampers competition and promotes inefficient production, featherbedding, inflation, and Government regulation. All of which means a lower standard of living and less personal freedom for everyone.

As a result of such Government policies, our economy has been suffering from rising unemployment and inflation, as well as declining productivity and investment. Yet a large number of people in this country apparently want more Government intervention. They want the Government to be a big brother—to provide more and more services, to guarantee higher and higher incomes, and to protect us from more and more risks. They are asking the Government to provide a utopia on Earth. To a large extent such people are asking for these things out of ignorance—ignorance of what our market system means to them and ignorance of the consequences of what they are asking for.

In an effort to provide utopia, the Government has grown out of control. Last year, government at all levels employed more than 14 million people. That is about 16 percent of America's work force. In recent years, Government employment has grown four times as fast as private employment.

Increasing Government regulation of the country's industries has distorted the price-setting mechanism of the marketplace. Government regulation has been one of the major causes of increasing costs and of shortages since the Second World War—in housing, energy, credit, cars—the list is nearly endless. Government control of the economy, no matter on whose behalf it has ostensibly been undertaken, has been the primary source of all the economic evils in our industrial history.

Despite all this, many people persist in demanding that the Government provide more—more of everything to make life easier and less risky. The problem is that Government intervention does not make life easier; it never has and it never will.

For one thing, Government planning and intervention in the economy can

never possibly be sophisticated enough to make the millions of decisions which determine what Americans buy, how much they buy, and at what prices they buy it. Only the free market system has ever been able to do that. In fact, as the economy becomes more complex we should be relying increasingly on the marketplace, not the opposite, as is the actual case today. The forces of demand and supply always operate, but they operate best, to the benefit of all, in a free market. In addition, the free market system is the only system in mankind's history which has affirmed the right of the individual to make these decisions for himself and to recognize that by so doing we all benefit. Capitalism is the only system of economic organization that asserts that men are free and not just creatures of the Government.

Mr. President, our society has faced many dangers in its 200-year history, but none, I believe, are so alarming as the withering of the will to succeed on one's own, and the confusion into which the moral justification for free enterprise has fallen. Therefore, we must demonstrate as best we can, and celebrate whenever we can, the economic efficiency and essential moral justice of our free market capitalist system. I have introduced the resolution calling for the President to set aside July 1, 1978, as "Free Enterprise Day" and I urge all my colleagues to support it.

The joint resolution (S.J. Res. 128) was ordered to be engrossed for a third reading, was read the third time, and passed.

The preamble was agreed to.

Mr. BARTLETT. I move to reconsider the vote by which the joint resolution was passed.

Mr. BAKER. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

SPECIAL ORDER

The ACTING PRESIDENT pro tempore. Under the previous order, the Senator from Virginia (Mr. HARRY F. BYRD, JR.) is recognized for not to exceed 15 minutes.

A REMARKABLE AMERICAN—GEN. LUCIUS D. CLAY

Mr. HARRY F. BYRD, JR. Mr. President, I rise to say a few words in regard to a remarkable American, who died this week.

Gen. Lucius D. Clay was one of our country's ablest sons. General Clay served as military governor of Germany and then as commander of the U.S. Armed Forces in Europe immediately following World War II.

General Clay held that important position in 1948 and 1949, at which time, the Soviet Union put into effect a land blockade of West Berlin.

General Clay came to Washington, met with then President Truman, and asserted his confidence that, given the airplanes, General Clay could supply Berlin indefinitely without war through what became known as the Berlin Airlift.

I have long thought that this is one of the most remarkable achievements in American history. As a newspaper correspondent, I was in Berlin shortly thereafter and could see first hand just how important that airlift was to the people of Berlin.

During the 327 days that the Berlin blockade was in effect, General Clay's airlift carried a total of 2,343,000 tons of food and coal; 2,343,000 tons of these essential supplies were brought into Berlin by air.

That is an average of some 7,000 tons a day.

It was the spirit and the genius, the perseverence, the determination, and the capacity of Lucius Clay, backed by a resolute President, Harry Truman, which made this operation the successful feat that it was.

I think the United States and the free world and, of course, the German people, owe General Clay a great debt of gratitude. I wanted to say these few words today in regard to one of America's ablest sons.

RHODESIA: WHY? WHY? WHY?

Mr. HARRY F. BYRD, JR. Mr. President, the Washington Star yesterday published an excellent editorial on the situation in Rhodesia.

This editorial points out the folly of the present policy of our State Department.

Our State Department is attempting to force the three moderate black leaders and Ian Smith, the four of whom have reached an agreement as to majority black rule in Rhodesia, to bring into the new government Marxist-oriented terrorist guerrillas. Our State Department is not satisfied with a transition to black rule under moderate black leadership, but demands much more.

It is attempting to force Rhodesia to include in its government Marxist-oriented terrorists, who are fighting the Rhodesian people from bases outside of Rhodesia.

The Star editorial brings out, in my judgment, a very important point in regard to this Rhodesia matter. I ask unanimous consent that it be printed at this point in the RECORD.

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

RHODESIA: WHY, WHY, WHY?

The road to Dar es-Salaam, like a more famous road, is paved with good intentions. And is it really less treacherous?

There, in the capital of Tanzania, an Anglo-American diplomatic team (Secretary Vance, Ambassador Young, and Dr. Owen, the British foreign secretary) met again with Joshua Nkomo and Robert Mugabe, the fire-eating leaders of the Rhodesian Patriotic Front.

Afterwards, the parley was pronounced a success, inasmuch as Messrs. Nkomo and Mugabe said they might join an "all-party" conference on Rhodesia's future. If this is success, what would failure consist of? The two guerrilla leaders haven't given an inch on the tough program they outlined at Malta some weeks ago. In fact, they have toughened it. They still want a single-party dictatorship on Marxist lines in Rhodesia. They still demand control of the army and the police, and a "predominant" role in the transitional government. As for the future, Mr. Mugabe now denounces political variety—that is, the toleration of any political parties other than his own—as a "luxury."

These views are unacceptable to the new government in Salisbury, where Prime Minister Ian Smith and his National Front have set in motion a plan for majority rule, adopted a new constitution, and released political prisoners.

So what is the gain? The aim of the Anglo-American plan, supposedly, is to avoid a civil war. But its effect may ultimately be otherwise. The other day in Nigeria, President Carter subscribed to a communique describing the new internal government in Rhodesia as illegal. We are not sure what that means. It may be illegal in the sense in which the Continental Congress was illegal in 1776, for whatever ice that cuts.

The heart of the matter, however, is that Bishop Muzorewa and the other black leaders inside Rhodesia have a far larger political constituency than either Mr. Nkomo (who has a slight one) and Mr. Mugabe (who reportedly has next to none). The hope of the latter two for power in Rhodesia—other than by shooting their way in—is kept alive today by an unholy collaboration between the U.S., Great Britain, and their arms suppliers in the Soviet Union.

If the issue is, as advertised, democratic rule in Southern Africa, will someone please explain to us how that objective is advanced by continuing to abase ourselves before those who spout anti-democratic and authoritarian demands?

Mr. HARRY F. BYRD, JR. I yield back the remainder of my time and suggest the absence of a quorum.

The ACTING PRESIDENT pro tempore. The clerk will call the roll. The assistant legislative clerk proceeded to call the roll.

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

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

ROUTINE MORNING BUSINESS

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that there be a brief period for the transaction of routine morning business.

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

(Routine morning business transacted and additional statements submitted are printed later in today's RECORD.)

CONCLUSION OF MORNING BUSINESS

The ACTING PRESIDENT pro tempore. Is there further morning business? If not, morning business is closed.

FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1977

The ACTING PRESIDENT pro tempore. Under the previous order, the Senate will now proceed to the consideration of S. 1566, which the clerk will state by title.

The assistant legislative clerk read as follows:

A bill (S. 1566) to amend title 18, United States Code, to authorize applications for a court order approving the use of electronic

surveillance to obtain foreign intelligence information.

The Senate proceeded to consider the bill, which was reported from the Committee on the Judiciary with amendments; and from the Select Committee on Intelligence with amendments.

The ACTING PRESIDENT pro tempore. Time for debate on this bill is limited to 2 hours, to be equally divided and controlled by the Senator from Massachusetts (Mr. KENNEDY) and the Senator from South Carolina (Mr. THURMOND), with 1 hour on any amendment, with 30 minutes on any debatable motion or appeal, and with 20 minutes on any point of order.

Mr. BAYH. Mr. President, I ask unanimous consent that the following members of my staff and the staff of the Select Committee on Intelligence be granted privilege of the floor during proceedings on S. 1566 and during the vote on the bill and any amendments: Abe Shulsky, Keith Raffel, Stan Taylor, William G. Miller, Earl Eisenhower, Tom Connaughton, Angelo Codevilla, Walter Ricks, Mark Gitenstein, Mike Epstein, Dave Bushong, Tom Crowley, Sam Bouchard, Patrick Norton, Edward Levine, Tom Moore, David Shaw and John Elliff.

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

Mr. KENNEDY. Mr. President, I ask unanimous consent that Ken Feinberg, of my staff, be granted privilege of the floor.

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

Mr. GARN. Mr. President, I ask unanimous consent that Eric Haltman, of the Judiciary Committee, be granted privilege of the floor during the debate and votes.

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

Mr. GARN. I also ask unanimous consent that Bob Heppler, of Senator HEINZ' staff, and Kay Davies, of Senator DOMENICI's staff, be granted privilege of the floor.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered. Who yields time?

Mr. KENNEDY. Mr. President, I suggest the absence of a quorum and ask unanimous consent that the time not be charged to either side.

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

The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

Mr. KENNEDY. I yield myself such time as I might use.

Mr. President, today the U.S. Senate writes a new chapter in the ongoing 10-year debate to regulate foreign intelligence electronic surveillance. In considering S. 1566, the Foreign Intelligence Surveillance Act of 1978, the full Senate at long last has the opportunity to place foreign intelligence electronic surveillance under the rule of law. The abuses of recent history sanctioned in the name of national security and documented in detail by the Church committee highlight the need for more effective statutory controls and congressional oversight.

Recent prosecutions in the Humphrey and Trong cases point out the need for this legislation. Without S. 1566 in place serious constitutional issues are raised in those cases: Is the warrantless surveillance constitutional? and, even if it is, may the Government use the evidence obtained in a subsequent criminal prosecution for espionage? or does the Government, in so doing, violate the provisions of title III? S. 1566 resolves these issues and must be dealt with expeditiously.

We have the major responsibility for seeing to it that history does not repeat itself, that civil liberties and the rights of our citizens are not bargained away in the name of national security.

S. 1566 benefits from broad bipartisan support. It has the overwhelming support of both the Senate Judiciary Committee and the Senate Select Committee on Intelligence. My distinguished colleagues, Senator BAYH, Senator THURMOND, and Senator GARN have been particularly instrumental in the development of this legislation. Working together we have fashioned a product which brings to an end the fruitless and unsatisfactory debate of the past.

S. 1566 has been endorsed and supported not only by this administration, but by the Ford administration as well. Both Attorney General Bell and Attorney General Levi have been most cooperative and helpful in the drafting of the bill. The legislation constitutes a major step forward in bringing needed safeguards to the unregulated area of foreign intelligence surveillance. It is designed to strike a balance between the protection of national security and the protection of our human liberties and rights. It is a recognition, long overlue, that the Congress does have a role to play in the area of foreign intelligence surveillance.

S. 1566—building upon S. 3197, legislation drafted in 1976 with the dedicated help of Attorney General Levi—achieves a major breakthrough in the long debate over foreign intelligence electronic surveillance. It is the culmination of past efforts and present hopes. This legislation would, for the first time, substitute carefully prescribed accountability and oversight for the arbitrariness of the past. The bill would require that all foreign intelligence electronic surveillance in the United States—as well as some overseas interceptions—be subject to a judicial warrant requirement based on probable cause. For an American citizen to be surveilled, there must be probable cause that he is an agent of a foreign power—a citizen acting for or on behalf of a foreign power—and engaging in sabotage, terrorism, or clandestine intelligence activities. It is the courts, not the executive, that would ultimately rule on whether the surveillance should occur. The bill would require that, before such surveillance could occur, a named executive branch official—such as the Secretary of Defense—certify in writing and under oath that such surveillance is necessary to obtain foreign intelligence information.

Mr. President, these statutory provisions are the very heart of the legislation. They relegate to the past the wiretapping abuses visited on Joseph Kraft, Martin Luther King, Jr., and Morton Halperin. They prevent the National Security Agency from randomly wiretrapping American citizens whose names just happen to be on a list of civil rights or antiwar activists.

The legislation provides the type of accountability which has heretofore not existed. It would for the first time expressly limit whatever inherent power the executive may have to engage in electronic surveillance in the United States. In so doing, the bill ends a decade of debate over the meaning and scope of the "inherent power" disclaimer clause currently found in title III.

S. 1566 would also provide civil and criminal sanctions to those who violate its provisions. It requires that all extraneous information—unrelated to the purposes of the surveillance—be minimized. And it mandates that before any information obtained can be used at a subsequent criminal trial, the trial court must again find that all statutory wiretap procedures have been met.

Most of the concerns expressed by some about various provisions of the bill have been satisfactorily resolved in the Senate committees. I and others in the Congress shared these very concerns over the years; thus, for example, either the Attorney General or the Deputy Attorney General must personally sign off on each application; the application must state whether "physical entry is required to effect the surveillance," thereby notifying the court whether or not a break-in is necessary in order to install the surveillance device; use of the information obtained by the surveillance is further restricted—even in the case of non-American citizens—to "lawful purposes"; any testing of new electronic surveillance equipment, tests which are not covered by this legislation, cannot be directed against specific American citizens without their consent.

Most importantly, Mr. President ,the issue of the so-called noncriminal standard has been resolved to the satisfaction of all the parties concerned. Both S. 3197 last year, and the bill introduced this year, retained a narrowly restricted provision allowing for electronic surveillance in the absence of a statutory recognition that the activity is criminal.

This provision, as originally drafted, remained a major stumbling block to prompt passage of the legislation. Many were convinced that S. 1566 would establish an unfortunate precedent if statutory recognition were conferred on electronic surveillance in the absence of a showing of criminal conduct. After long and difficult negotiations this crucial issue has been resolved. A special tribute is owed Senator BAYH, Senator GARN, and the other members of the Senate Intelligence Committee for developing alternate language and providing for a criminal standard. The bill now provides for

an explicit statutory recognition of criminality, but would also call for a lower standard of criminal conduct than the traditional "probable cause that a crime is being committed." Instead, the alternate language would speak in terms of probable cause that a person is engaged in "clandestine intelligence gathering activities that involve or may involve a criminal violation." All other clandestine intelligence activities that "involve or are about to involve" a criminal violation; or sabotage, terrorism, or activities in furtherance thereof. This latter sabotage and terrorism language will hopefully be worked out by amendment on the Senate floor.

This language goes a long way in striking a proper balance between the legitimate interests of national security and civil liberties. It is a criminal standard: but the standard which must be met for a warrant to be issued is closer to "reasonable suspicion" than evidence of an ingoing existing criminal enterprise. It is, I believe, the major breakthrough needed to develop bipartisan legislation in this area.

Mr. President, some might argue that this legislation is regressive and does not provide sufficient protection for civil liberties: others might maintain that it goes too far and will inhibit the functioning of our intelligence agencies. I disagree on both counts.

Legislation can hardly be labeled regressive which for the first time places strict statutory controls on foreign intelligence electronic surveillance. The judicial warrant and executive certification procedures guarantee the type of external and internal controls which I and others have long advocated. I am not completely satisfied with every single facet of the legislation; few people will be. In an area as sensitive and important as this, it is difficult if not impossible to support every provision. But those who would defeat this bill, because they are not satisfied with every section in it ignore the fact that today there is no statute at all. The courts currently have no role to play whatsoever in this area; executive discretion alone controls. Senate efforts at providing any safeguards have until today been exercises in futility. Despite my own reservations with a few provisions of the bill, I remain even more uncomfortable leaving the American people with no legislative protections whatsoever in this area.

Nor will S. 1566 undercut the effectiveness of our intelligence agencies. The needs of our intelligence agencies in protecting the national security have been carefully taken into account by both Senate committees, the administration and, perhaps most importantly, the intelligence community itself. The legislation has built-in safeguards to preserve the flexibility and secrecy of our intelligence effort. For example, the notice requirement is very limited, as is the power of the court to examine the validity of the certification in cases involving embassies and certain entities controlled by foreign governments. The requirements of what must go in the warrant application are similarly limited. S. 1566 is inapplicable to most overseas and national security agency electronic surveillances; and, finally, the legislation differs substantially from the provisions of current law authorizing wiretaps in domestic criminal investigations. The pending Senate bill now requires evidence of criminal activity before a warrant may be issued in foreign intelligence cases but, as already noted, establishes a less stringent "probable cause" standard of criminality, thus making it easier for the Government to secure a warrant for these limited purposes. Other provisions dealing with length of surveillance, minimization of the surveillance and congressional oversight are carefully drafted with national security interests paramount.

Two other criticisms have been raised in recent weeks—that the bill provides for too much judicial secrecy and will diminish the responsibility and accountability of the executive branch. But the first criticism is more accurately related to the sad state of existing law while the second ignores completely the theory underlying the judicial warrant requirement.

There is no "judicial secrecy" today, because the courts are not part of the process at all. It is the executive branch that exercises the secret and uncontrolled discretion, free from any statutory restraints. And, even if a lenient judge is quick to rubberstamp 99 out of 100 applications, the ever-present possibility that this application will be the one rejected by the court should act as an effective deterrent to abuse.

Mr. President, this legislation is designed to strike a balance, a careful balance that will protect the security of the United States without infringing on the civil liberties and rights of the American people. I believe the time has at last arrived when Congress and the Executive together can fill one of the last remaining loopholes in the laws governing wiretapping and other electronic surveillance in the United States. One should view this bill for what it is, a major effort by the Congress, long overdue, to place foreign intelligence electronic surveillance under the rule of law.

Finally, Mr. President, as I mentioned earlier, I acknowledge the very effective work of my colleague on the Judiciary Committee, Senator THURMOND, and the strong bipartisan support we have had throughout the fashioning of this legislation.

I mentioned in my remarks the leadership that was provided by President Ford and General Levi, who worked very closely with the committee in recent years; this bipartisan support has continued with President Carter and General Bell.

Of course, I also acknowledge the very close and cooperative relationship that we have had in working with the Intelligence Committee, with our colleague on the Judiciary Committee, Senator BAYH, who was tireless in the preparation and development of this legislation, with his excellent staff, and with Senator GARN who was enormously helpful in the shaping of this legislation.

It is a bipartisan effort, involving a balancing of interests. I am, of course, cognizant of the efforts of a small group of Senators that began just after the Keith case in 1972. We have had 7 years of hearings, involving the great leadership of Senator Sam Ervin, Senator MUSKIE in chairing a Subcommittee of the Foreign Relations Committee, Senator MATHIAS and Senator NELSON, who for years have been working in this area and, of course, our former colleague, Senator Phil Hart, who was enormously dedicated to the approach in this bill. He was a leader in the Senate in insuring protection of the liberties of our citizens.

This is the culmination of an extraordinary effort by the members of those committees, and their activity and involvement should be appreciated by not only the Senate but by the American people.

Mr. President, I reserve the remainder of my time.

Mr. GARN. Mr. President, I think it would be appropriate if the chairman of the Intelligence Committee spoke first. I defer to my distinguished chairman.

The ACTING PRESIDENT pro tempore. Who yields time?

Mr. KENNEDY. I yield such time as he may need.

Mr. BAYH. Mr. President, I appreciate the courtesy of our distinguished colleague from Utah. We have been on the same wave length in working together here on this matter for some time. I am glad to follow his lead on this matter.

Mr. GARN. I thank the Senator very much.

The ACTING PRESIDENT pro tempore. The Senator from Utah is recognized.

Mr. GARN. Mr. President, for nearly 2 years, much of my time and effort as a member of the Intelligence Committee has been devoted to the problem of electronic surveillance for foreign intelligence purposes. Particularly, as vice chairman of the Rights of Americans Subcommittee, I and my distinguished colleague, Senator BAYH, have spent days and weeks trying to balance the privacy rights of Americans against the need of the Government to obtain legitimate national security information. After all, the security of Americans in their communcations is nothing without a secure America within which those communications can take place.

This has not been an easy task. But with the help and cooperation of Senators KENNEDY, EASTLAND, INOUYE, BAYH, BAKER, and THURMOND with the active interest and support of all of the members of the Judiciary and Intelligence Committtees; and with the valuable contributions of the Attorneys General of both the Ford and the Carter administrations—with the help of all of these people we have produced a bill which for the first time brings all electronic surveillance conducted within the United States under judicial review.

S. 1566 is unique in many ways. It reflects a skillful and careful blending of the sometimes competing interests of civil liberties and national security; it has matured through a 2-year period of close Senate-executive branch cooperation; and its sponsorship represents a

unique bipartisan collaboration in the interests of national security.

Some have wondered what a conservative Senator such as myself was doing cosponsoring what they though was a liberal bill. The answer is quite simple. This is not a liberal bill. It is not a conservative bill. It is neither a Democratic nor a Republican bill. The tasks of balancing cherished constitutional liberties with increasingly threatened national security needs is too important to be left to partisanship.

This bill grew out of needs created by two separate problems. One was the serious gap which developed over the last several years in the area of foreign intelligence surveillance within the United States. In the face of increasing intelligence activities in the United States by the KBG and other foreign intelligence agencies—much of which involves Americans in one way or another—in the face of this, there have been very few authorizations for electronic surveillance of U.S. citizens for foreign intelligence purposes during the last 5 years. And in one of the very few cases of such surveillances, the current Humphrey case, the defense has put forth the argument that the information obtained by surveillance is not usable since it was not authorized by a judicial warrant. This bill will put an end to that. It will remove the uncertainty and ambiguity which for the last several years has clouded the atmosphere and hindered our counterintelligence officers from carrying out their responsibilities. Let me assure my colleagues that those agencies of the Government who have responsibility for counterintelligence activities within the United States support this bill. They look forward to being able to conduct legitimate foreign security surveillance, when such is needed, with the confidence that the information they obtain will stand up in court if prosecution is sought.

The second need which gave rise to this bill is one with which we are all familiar. Clearly, there have been abuses of the so-called inherent presidential authority in the past. These abuses were unfortunate and should never have occurred. But they did, and in reaction to them we virtually have closed off an important source of foreign intelligence information. This bill initiates procedures and establishes principles which, we believe, will prevent future abuses.

To those of my colleagues who are concerned about bringing the judicial branch into an area where they previously have not been involved, I wish to remind them that when approving warrants against foreign powers and foreign officials, the judge has three responsibilities: First, he determines that the target is in fact a foreign power or foreign official; second, he finds that the procedures proposed in the application will allow an adequate minimization of the acquisition and retention, and prohibit the dissemination, of information concerning U.S. persons which does not relate to national defense, foreign affairs, terrorism, or the activities of a foreign intelligence agency; and third, he reviews a certification from the White House that the information sought by the surveillance relates to, and if concerning a U.S. person, is necessary to the national defense or the ability of the United States to protect itself against certain acts which threaten domestic tranquility.

When U.S. citizens are to be the target of surveillance, then the judge plays a more expanded role. But that is as it should be. As long as our counterintelligence officers have probable cause to believe that a U.S. person's activities may involve a violation of a criminal law, then a judge ought to be more deeply involved. He ought to be involved for two reasons: To see that the rights of the citizen are being protected and to enhance the possibility that information so obtained will be usable in court proceedings.

Many who have followed this bill will recall that when it was introduced last year, several of us requested that the bill include a noncriminal standard for the authorization of warrants. The noncrime was, or was about to be, committed of warrants. The noncriminal standard was necessary, in my judgment, for several reasons: First, it is very hard to determine if sophisticated, secret spying activities involve a particular criminal offense; second, the desire to use surveillance-obtained information to uncover a wider network of foreign agents often prevents prosecution; and third, the Government may not desire prosecution since to do so would require them to reveal even more sensitive information in a court proceeding. To require that a crime was, or was about, to be committed would have prevented the FBI from conducting much of the investigatory work which is so essential in counterintelligence activities.

Thus, the earlier version of this bill had a noncriminal standard. This bill does not and that difference should be explained. This bill contains a criminal standard, but it loosens somewhat the certainty necessary for that standard to be reached. This bill allows a warrant to be issued on probable cause that a U.S. person's activities "involve or may involve a violation of the criminal statutes of the United States." The use of the phrase "may involve" gives sufficient flexibility and has allowed us to use the more widely acceptable criminal standard. Officials of the FBI and the Department of Justice have assured me that this criminal standard is acceptable to them.

There are some who fear that this bill is too broad and might allow for future abuses. There are others who fear that this bill might preclude legitimate and necessary surveillance. The fact that we have worked for nearly 2 years to balance these needs convinces me of the soundness of this legislation. I believe that the bill protects civil liberties to the maximum extent possible while not foreclosing to our Government the tools it needs to carry out counterintelligence.

Mr. NELSON. Mr. President, will the Senator yield for a unanimous-consent request?

Mr. GARN. I would be happy to yield to the distinguished Senator.

Mr. NELSON. Mr. President, I ask unanimous consent that Peter Connelly of my staff be permitted the privileges of the floor during the debate and rollcalls on this legislation.

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

Mr. GARN. The distinguished Senator from Wisconsin interrupted me at a very appropriate time, the end of my remarks.

I yield the floor.

Mr. KENNEDY. I ask unanimous consent that Irene Emsellem and Glenn Feldman of Senator Abourezk's staff be permitted access to the floor during the consideration of this legislation.

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

Mr. BAYH. I ask unanimous consent that Mr. Ira Shapiro be granted the privileges of the floor during the debate and rollcalls in the consideration of this legislation.

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

Mr. KENNEDY. I yield the floor at this time.

Mr. BAYH. Mr. President, I appreciate very much the throughtful remarks of the distinguished Senator from Massachusetts, as well as the distinguished Senator from Utah.

I must confess to having rather mixed feelings as we gather together here. I suppose in the depths of my heart, as one who believes very strongly in the freedoms of this country, I am nervous when we get involved in legislation which has the end product of guaranteeing and prescribing the use of scientific and technological devices which can spy on and pry into our lives.

I wish we were living in a world and at a time when that was not necessary, but I think anyone who is at all realistic about what is going on in the world and, indeed, what is going on in this country, has to recognize that this is a utopian view which we hope some day will come if we all persist, but certainly is not the kind of time in which we are living today.

Part of my nervousness, I guess, also goes to the recognition that this bill is required absolutely, unqualified, because of certain misconduct and abuse which are almost unbelievable as far as conduct which one likes to believe is typical of that followed by public officials in the United States. It is conduct where the standards go back over a long period of time, and there is little to be gained, it seems to me, by rehashing those abuses incident by incident because there is enough blame to go around affecting large numbers of people and all of the political philosophies that exist in this country.

So I think the real world has to recognize a significant contribution that this particular legislation is going to make to the delicate balance which is necessary in our society between protecting individual liberties, on the one hand, and yet giving the intelligence agencies the tools they need to protect society, on the other.

The bill before the Senate today, S. 1566, the Foreign Intelligenee Surveillance Act of 1978, is the first major intelligence reform measure to be considered by the Congress. It will bring an end to

the practice of electronic surveillance by the executive branch without a court order in the United States. It establishes standards for issuing court orders that reconcile the interests of personal privacy and national security in a way that is fully consistent with the fundamental principles of the fourth amendment and due process of law.

I want to make clear what kind of surveillance this bill covers. The term "foreign intelligence surveillance" might be misleading. It is electronic surveillance targeted against persons who are within the United States, for the purpose of obtaining foreign intelligence information. The techniques include conventional wiretaps and bugging devices, television monitoring, and similar devices that invade a person's reasonable expectation of privacy.

The "foreign intelligence" obtained from this surveillance includes two basic kinds of information. The first is "positive" foreign intelligence about the intentions and capabilities of foreign powers. That kind of intelligence information is used by the President and the National Security Council for the conduct of foreign affairs and the military defense of the Nation. The second kind of information is foreign counterintelligence about spies and international terrorists. Foreign counterintelligence information is used by the FBI to protect against the activities of the Soviet KGB and other hostile intelligence services, as well as to protect against international terrorist activities.

Electronic surveillance is an essential means for obtaining both positive foreign intelligence and foreign counterintelligence information. S. 1566 authorizes such surveillance with safeguards to protect constitutional rights.

This legislation has been developed with broad bipartisan support and the strong endorsement of two administrations. Two years ago Attorney General Edward H. Levi, working closely with Senator KENNEDY and other members of the Judiciary Committee, drafted the first version of this bill. It was reported in 1976 by the Judiciary and Intelligence Committees, but failed to reach the floor before adjournment.

The present bill picked up where that bill left off. Attorney General Griffin Bell and the Carter administration, in consultation with both the Judiciary and Intelligence Committees, agreed to several major improvements in the legislation. The administration accepted the principle that the bill would establish the "exclusive means" for national security surveillance in this country. The protections of the bill were broadened to include certain international communications of Americans. The new bill allowed the judge to review all aspects of surveillance of an American citizen or permanent resident alien.

I note Senator KENNEDY pointed out the bill was not perfect. Indeed, it is not. Both he and I would like to see certain other protections provided in it. One, we do not guarantee the rights of Americans wherever they may travel. There is legislation that has been introduced by many of us who are supporting this bill, both in the Judiciary and Intelligence Committees, which is designed to provide charters for the various intelligence agencies. In that bill we provide very clear protections for American citizens wherever they travel. Whether we will be successful in reaching this goal I must say is yet to be determined. But indeed that is a goal that is very much before us.

The bill as introduced with these improvements was a good one. But I believe it is now better because of the careful deliberations by the Judiciary and Intelligence Committees during the past year. The members of these committees represent a wide range of views on electronic surveillance for intelligence purposes. I know that some of the members have been fearful that any departure from strict fourth amendment law enforcement procedures would endanger the rights of individuals. Other members have been equally concerned that a court order for intielligence surveillance might hamper the ability of the Government to protect the Nation's security.

Despite these wide differences, those of us who have considered this bill so long and so carefully have come to understand why this legislation is necessary. We have made accommodations along the way to make sure that the bill accomplishes its intended purposes. The administration, the intelligence agencies, and interested private groups have participated fully in these deliberations. The final result was agreement on two basic principles.

First is the principle that a court order is required for all electronic surveillance in the United States. The means for carrying out this objective is the establishment of a special court composed of a limited number of designated judges, who consider the applications for surveillance orders. The idea of a special court was first suggested by the Supreme Court in the Keith case in 1972.

Only, Mr. President, by insisting on the presence of the judiciary, both in providing authority and in providing review, were we able, in my judgment, to remove the temptations to which various public officials have succumbed in the past, of getting involved for purposes that were very questionable, and, indeed, in many instances, for purposes of a primarily political nature.

The judges of the special court will, under the bill, apply different standards and procedures depending upon who is the surveillance target. In the case of foreign powers and foreign officials, the judge's role is limited. His duty is to insure clear accountability within the executive branch by requiring a written certification that the surveillance is needed to obtain foreign intelligence information. He also makes certain that information about Americans obtained as a byproduct is used properly. If the surveillance is directed at an official foreign government establishment, the surveillance may last as long as a year before a new court order is required.

On the other hand, in the case of an American citizen, a resident alien, or a private foreign citizen visiting this country, the judge's responsibility is greater. He must make detailed probable cause findings of fact and review the surveillance every 90 days.

These different standards and procedures make it possible to have a court order for all surveillance, without exception.

The second fundamental principle is that a criminal standard is required for surveillance of American citizens and permanent resident aliens. Reaching agreement on this principle took the most careful study.

Mr. President, I think it is important to note that probably the most controversial, the most sensitive, and yet probably the most important aspect of this legislation was that standard, the criminal standard which is required before electronic surveillance of a more traditional kind can be targeted against Americans in this country. It took a great deal of persuasion and of willingness to compromise on the part of all the parties involved.

I would particularly point out the role played by Senator KENNEDY, of course, as chairman of the Judiciary Committee, of Mr. Feinberg, his staff member, of John Elliff, my staff member on the Intelligence Committee, of Senator GARN and his staff member, Stan Taylor, and of all of the heads of the agencies involved who were concerned. We had to work out the wording so that it would not deny them the tools they rightfully required to protect us, but at the same time we were able to establish a criminal standard, which I think was fundamental if we were to fulfill our responsibilities.

The basic problem was that foreign spies use very clever techniques to avoid detection. This makes it hard for the FBI to meet an ordinary criminal standard. However, the Intelligence Committee worked with the Justice Department, with FBI intelligence officials, and with civil liberties experts to develop a more practical standard that is still linked to the criminal laws.

These two principles—a court order for all surveillance in this country, and a criminal standard for surveillance of Americans—are critically important for the future. They establish the legitimacy of electronic surveillance for intelligence purposes. They help remove the cloud of uncertainty that has lingered too long over agencies such as the FBI.

The Intelligence Committee is making every possible effort to insure that our intelligence agencies conduct themselves properly and in accordance with the law. And I must say that I have been heartened by the kind of cooperation we have received in the Intelligence Committee from those who have the responsibility of conducting the intelligence activities of this country. I hope we can continue to build on this rapport and this cooperation, which was initiated under the leadership of my predecessor as chairman of the committee, the distinguished Senator from Hawaii (Mr. INOUYE).

Unfortunately, I think we have to recognize that the law itself is still unclear where foreign powers and foreign agents are concerned. That is why prompt enactment of this bill is vital. As long as

the law is confused and inadequate, many people will fear abuses.

The details of S. 1566 are sometimes complex and hard for the ordinary citizen to understand. But he will clearly understand these two fundamental principles. He will know that the law forbids any U.S. intelligence agency from wiretapping or bugging anyone in the United States without the approval of a Federal court. And he will know that his privacy is protected unless he engages in criminal activities.

That is what it takes: engaging in a criminal activity that has sufficient qualities or characteristics that a Federal judge will grant a request for a warrant for subsequent electronic surveillance.

The bill also sends a message around the world. In many countries, if not most, a visitor to that country has no protection whatsoever against being wiretapped or bugged by the secret police. But in the United States, where we like to feel that we establish a higher standard, and where we feel a high degree of sensitivity about the rights of all human beings, the law will protect private citizens from abroad who visit our Nation if they are not involved in detrimental activity harmful to the United States.

In some cases the protections are somewhat less than those afforded to our own people. But the legal standard has been carefully drafted to meet demonstrated counterespionage needs, and not to allow indiscriminate surveillance of foreign visitors.

I believe the American people can take pride in this legislation. It represents all that we stand for as a nation with a living Constitution that can be adapted to new problems without sacrificing its fundamental values. It shows that all three branches of Government can share responsibility for the most sensitive intelligence activities, so that our system of checks and balances will continue to work as the framers of the Constitution intended.

As James Madison wrote in Federalist No. 51:

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which must be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

How wise our Founding Father was so long ago.

Many people deserve credit for bringing this bill to the Senate floor with broad support today. Senator KENNEDY began more than 5 years ago to question the surveillance practices of the executive branch. He and the present Presiding Officer (Mr. NELSON) introduced pioneering bills in this field. Former Senator Ervin and the members of the Watergate Committee helped break through the wall of executive arrogance that concealed electronic surveillance abuses. Senator CHURCH and the members of his select committee investigated the other abuses of the past and laid them out for the public to see. Among the members of the Church committee, the late Senator Philip Hart, Vice President MONDALE, and Senator BOB MORGAN helped develop the recommendations on intelligence activities and the rights of Americans that led to this bill.

Attorney General Levi and President Ford made the decisions that brought about executive branch support for the principles of the bill. Their actions marked the end of nearly 40 years of executive opposition to meaningful legislation in this field.

Attorney General Bell and President Carter carried forward this initiative and helped refine and improve it. And I certainly think it is to President Carter's credit that he is really the first President of the United States who has given up the inherent authority that has been claimed by his predecessor to use foreign intelligence as a reason to invade our privacy through various electronic procedures.

Finally, there are scores of other people—in the Justice Department and other executive agencies, representing the private groups interested in this bill, and on the staffs of the committees—who have devoted long hours over many months to this legislation. Their constructive criticism and advice have made this bill the product of many minds working together.

This bill is a beginning, not an end. There is much more to accomplish before we have a full legislative framework for intelligence activities.

The Intelligence Committee has already begun its hearings on S. 2525, the National Intelligence Reorganization and Reform Act, which provides legislative charters for our intelligence agencies and protects the rights of Americans against improper intelligence investigations. That is our next objective.

Certainly, Senator HUDDLESTON, of Kentucky, deserves a great deal of credit for his leadership in this area.

I urge the Senate to pass S. 1566 and demonstrate to the people of this country and the world that, in the United States, liberty and national security are partners and not enemies.

I would say one last word in conclusion. I have not been involved in a piece of legislation where the issues have been more important and the sincere judgments of the parties involved have been arrayed expressing such a broad cross section of agreement and disagreement. We have had some very intense feelings expressed on this legislation. If it were not for the willingness to work toward the goals of protecting the country and protecting the rights of individuals, we would not have been successful.

I again salute the floor manager of this bill (Mr. KENNEDY) for his leadership.

I would like to say a word about my colleague from Utah (Mr. GARN), who was the ranking member of the Subcommittee on the Rights of Americans of the Intelligence Committee.

He looked at this legislation carefully. He had some reservations about it. I think probably he has reservations about it where we are now, as I do. We recognize it is not a perfect piece of legislation. But he, as well as other members of our subcommittee and the full committee, and, hopefully, Members of the Senate as a whole, are willing to put aside our personal preferences and move toward a common goal. Without that kind of tenacity and willingness to follow what I believe is the setting of an example of the legislative process that we have witnessed throughout the past several months, we would not be here today.

I would also like to express my thanks to the vice chairman of the Intelligence Committee (Mr. GOLDWATER), who moved in committee that we recommend S. 1566, as amended, for enactment. No one is more devoted than he to the defense of the Nation, and we greatly value his support.

Mr. THURMOND. Mr. President, I wish to join my distinguished colleagues, Senator KENNEDY, Senator BAYH, and Senator GARN, in expressing my support for the Foreign Intelligence Surveillance Act of 1978.

This bill comes before the Senate at a most critical point in the course of world events. International tensions are increasing and the newspapers are filled with accounts of international terrorist activities. We have no assurances that the United States will be free from this kind of activity now or in the future. That is why it is important that definite procedures be established to permit the use of foreign surveillance methods.

Mr. President, this legislation strikes a proper balance between the civil liberties of the individual and the need for this Nation to collect foreign intelligence information important to its security and its conduct of foreign affairs.

In providing a warrant procedure the American public is reassured that no individual will be subject to electronic surveillance unless a judicial officer has authorized it and that the individual is engaged or may be engaged in intelligence-gathering activities on behalf of a foreign government. The procedure will also insure that the Government will be able to collect foreign intelligence information necessary for the United States to protect itself from intelligence gathering by foreign agents within the United States.

Mr. President, this bill also provides that a court order approving electronic surveillance may be granted by any one of seven district court judges publicly designated by the Chief Justice of the United States. In addition, there shall be a special panel of three judges designated to review the denial of any application for an order approving electronic surveillance. Each judge designated shall serve for a maximum of 7 years and not be eligible for redesignation.

There are provisions for the employment of electronic surveillance in an emergency situation where an authorized order cannot be reasonably obtained. The Attorney General may authorize an emergency wiretap for up to 24 hours, but must within that period either obtain an authorized order or terminate the surveillance. If the appropriate authorization is not obtained, no information or evidence obtained may be used

in a trial, court, or other similar Government proceeding.

Mr. President, although the case law in this area has supported or left untouched the policy of the Executive in the foreign intelligence area having the constitutional power to engage in electronic surveillance for foreign intelligence purposes and without a judicial warrant, S. 1566 lays down definite congressional guidelines for the use of foreign electronic surveillance. I support this approach because I believe that the failure of the Congress to act decisively in this area may lead to a chilling effect on the use of foreign electronic surveillance in this country. The Nation needs to have the kind of information provided by electronic surveillance in order to conduct its foreign affairs, maintain its military strength, and preserve domestic peace.

There is no requirement in this bill, Mr. President, that certain targets of electronic surveillance be actually engaged in the commission of a crime. Nor should there be such a requirement for those engaged in actual spy activities.

Our espionage statutes were written before World War I, and the nature of intelligence gathering has changed a great deal since that time. Much espionage today is directed at industrial processes and trade secrets. The gathering of material of this nature by foreign agents for the benefit of foreign powers who are not our allies is generally not illegal, but the Government should be able to discover these clandestine activities.

Furthermore, even activities which in their completed state would be crimes, but have not reached the threshold of criminal conduct, may go undiscovered unless the Government is able to collect information about foreign intelligence services working at the direction of a foreign power. The retention of a noncriminal standard in the bill will allow the Government to discover this kind of foreign surveillance activity.

Mr. President, this bill comes before the Senate as the product of careful consideration by two committees, the Intelligence Committee and the Judiciary Committee. As ranking member of the Judiciary Committee I can assure my colleagues that all aspects of this legislation have been thoughtfully considered. The Department of Justice, the Central Intelligence Agency, the Defense Department—all our Federal agencies with intelligence responsibilities have been consulted. Likewise, the American Civil Liberties Union and other public groups have had the opportunity to present their views and suggestions to improve the bill. Two administrations, the present one, and the Ford administration, have supported this legislation. It has bipartisan support in this body.

Mr. President, I ask my colleagues to judge this bill on its legislative record over the past few years in the Senate. It has withstood the scrutiny of many eyes and is now ready for approval. I support S. 1566 and urge my colleagues to do likewise.

Mr. STONE. Mr. President, I ask unanimous consent that Tom Moore, of my staff, be granted the privileges of the floor during the votes and proceedings on this bill.

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

Mr. KENNEDY. Mr. President, I make the same request for Mr. Jim Davidson, of the staff of Senator MUSKIE.

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

Mr. THURMOND. Mr. President, I make the same request for Eric Hultman, of the staff of the Judiciary Committee.

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

Mr. WALLOP. Mr. President, I ask unanimous consent that Angelo Codevilla, of my staff, be granted the privileges of the floor during the consideration of this bill.

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

Who yields time?

The question is on agreeing to the first committee amendment.

Mr. GARN. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. On whose time?

Mr. GARN. I ask unanimous consent that it be equally divided.

The PRESIDING OFFICER. Without objection, it is so ordered. The clerk will call the roll.

The second assistant legislative clerk proceeded to call the roll.

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

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

M. THURMOND. Mr. President, I understand that the distingiushed Senator from New York desires time. How much time?

Mr. MOYNIHAN. I ask 10 minutes.

Mr. THURMOND. On behalf of Senator KENNEDY, I yield 10 minutes to the Senator from New York.

Mr. MOYNIHAN. I thank the Senator. May I amend that to ask for 12 minutes?

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

Mr. MOYNIHAN. Mr. President, I am happy to join with all my colleagues on the Select Committee on Intelligence in supporting passage of the Foreign Intelligence Surveillance Act. This bill represents the culmination of a great deal of effort, a good part of which was expended by my colleagues before I had the honor of joining them. Two successive Attorneys General, from opposite parties, worked closely with the committee in the drafting of this bill, and were fully in support of its general concept and most of its detailed provisions.

I would support the bill, if for no other reason than that it is a fitting monument to the high regard in which we should—and, in the main, do—hold the right to privacy of every American.

We were forcefully reminded, several years ago, of the necessity of vigilance in protecting this right by the work of the Church committee, the distinguished chairman of which has been on the floor this morning. Following the disclosure of abuses involving warrantless wiretapping and surveillance, the executive branch, under both Presidents Ford and Carter, responded with two Executive orders and a series of regulations promulgated by the Attorney General, to control this sort of behavior. It seems that this effort at self-regulation by the executive branch has been successful—so successful, in fact, that the Attorney General informed us earlier this year that only one U.S. citizen was the target of warrantless electronic surveillance for foreign intelligence purposes this year.

We now know that this particular citizen was reasonably suspected of passing classified Government documents to a foreign country, and that the electronic surveillance involved was of a particularly nonintrusive sort—a videotape, with no audio recording, was made of the subject's behavior in his work area in a Government office building.

Some might then ask, if the wrong has already disappeared, why do we need such a massive remedy? The first, and more obvious reason, is the need for extreme care in protecting the right of privacy of our people. In fact, I have often spoken about the incomprehensible fact—to which I will return in a few moments—that our Government has been neglecting a much more serious threat to the privacy of communications in this country than that theoretically posed by the U.S. intelligence agencies. Nonetheless, even if the wrong has disappeared, it makes sense to construct some barriers against its possible reappearance.

But there is a second, and less obvious, reason why this, or some similar, remedy is needed. As a result of the incessant attention and criticism focused on the intelligence agencies by the press and by a series of congressional committees, and as a result of the confusion created by the absence of statutes in this area, our intelligence agencies today very likely find themselves uncertain of their authority and may well be increasingly reluctant to stick their necks out and take aggressive action which will later be found to have violated the law.

This is an understandable concern on their part; while only three people have been indicted for espionage in the last year, five current or former officers of intelligence agencies—including former CIA and FBI Directors—have been indicted for alleged violations of law. While we can as little condone violation of the law by Government officials as by anyone else, we should have some sympathy for officials who thought their actions fell within a widely understood and accepted consensus—even if that consensus were tacitly rather than explicitly accepted and transmitted to newcomers.

It now turns out that this tacit consensus is recognized neither by the law nor by the political process, and that officers of the intelligence agencies are to be held to written legal standards. Yet these written legal standards were not drafted with the requirements of intelligence collection in mind.

To make matters worse, this development is taking place at a time when the

number of Soviets and Eastern European diplomats, businessmen, students and even merchant seamen visiting the United States is rising rapidly. We know from long experience, both our own and that of nations friendly to us, that many of these visitors from Communist countries are engaged in clandestine intelligence activities; for the most part this must mean inducing, by one means or another, Americans with access to sensitive information to share it with them. While it would be nice to think that this cohort of foreign agents, with one exception, has been so unsuccessful as to obviate the need for electronic surveillance, I think we must admit that this is unlikely to have been the case.

Consequently, the Judiciary and Intelligence Committees have introduced the present bill to authorize the use of electronic surveillance to obtain foreign intelligence information, while, at the same time, protecting the right to privacy of U.S. citizens and aliens from abuse by our own intelligence agencies.

In doing this, however, we are entering virgin legislative territory. Until now, no nation in the world has tried to regulate its foreign intelligence agencies in the manner in which we now propose to do. The attempt to bring a whole area of heretofore unregulated behavior under the strict rule of law exposes us to two risks: First, we may unduly restrict our intelligence agencies and so endanger our national security or the successful conduct of our foreign policy; or second, we may so distort the procedures and traditions of the judiciary as to weaken the protection it can afford individual citizens and aliens, to force it to make inherently administrative—that is, nonjudicial—decisions, and, ultimately, to dissipate the high prestige in which the judiciary is held and on which the bill itself so heavily relies.

In all candor, I must admit that I am unable to offer any assurances that these risks will not materialize. The very unprecedented nature of the bill should make us wary of accepting assurances of this sort.

I do, however, wish to call attention to a provision of the bill, on which we have not focused our attention, but which I believe speaks to these concerns. My colleagues and I included in the bill the following provision, section 2528(b):

(b) On or before one year after the effective date of this chapter, and on the same day each year thereafter, the Select Committee on Intelligence of the United States Senate shall report to the Senate, concerning the implementation of this chapter. Said reports shall include but not be limited to an analysis and recommendations concerning whether this chapter should be (1) amended, (2) repealed, or (3) permitted to continue in effect without amendment.

This provision for annual review suggests that we should devote some thought to the criteria against which the select committee should judge the adequacy of the bill. While only the members of the select committee are charged with the responsibility of reviewing the working of the bill and making recommendations, every Senator can take part in the discussion by which are established the standards against which the bill is to be measured.

In this spirit, I would like to discuss some questions which the select committee should consider in the annual reports it will issue on this bill.

First, are we receiving an adequate amount of foreign intelligence information? Or, are we being unduly restricted in our foreign intelligence activity by this bill?

Second, are we able to counter foreign espionage activities in the United States? To put the matter bluntly, are we catching Soviet and other Communist spies in proportion to the increasing opportunities for espionage which the Soviet Union and other Communist countries enjoy?

Third, have we made progress in protecting the privacy of our communications from hostile intelligence services? While this bill does not directly address this question, it does define as an "agent of a foreign power," and hence as someone whose communications are subject to interception—

any person who—knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States.

Thus, the authority provided by this bill is available to help protect the privacy of Americans from the activities of foreign intelligence services. This bill alone, however, is clearly insufficient for this purpose. For this reason, 16 colleagues joined me last summer in sponsoring the Foreign-Surveillance Prevention Act (S. 1950).

Accordingly, Mr. President, I should like to call further attention to this problem of the intrusion by foreign intelligence agencies in the private communications of American citizens. So far as one can tell, this is of an incomparably greater order of magnitude than anything ever contemplated, much less actually carried out, by American intelligence agencies.

I recall the Attorney General's report to us that this year, there has been one American citizen who has been subject to warrantless electronic surveillance by American intelligence agencies.

However, I would not be surprised if upwards of 1 million American citizens were, at this moment, having their telephone calls listened to by the KGB, the committee of state security of the Soviet Union. They are overheard by receivers on the top of the Soviet Embassy here in Washington. A new Soviet Embassy soon to be built on a hill in Washington, will, for this purpose, no doubt, be even better situated for the interception of the telephone calls of anyone on this floor, or in the gallery, or who will read this RECORD. Telephone calls are intercepted for the Soviet Mission to the U.N. in Manhattan and from their skyscraper in Riverdale, in New York City, again for the purpose of intercepting and sorting out by computer American telephone calls. This massive invasion of our privacy by Communist intelligence agencies is taking place daily and blatantly; viewers of a recent Columbia Broadcasting System program saw the receivers on the top of the Soviet Embassy here in Washington.

So, Mr. President, last year, as I said, in cooperation with 16 colleagues, I introduced a bill entitled "The Foreign Surveillance Protection Act," S. 1950. I said, in introducing the bill on July 27, 1977:

The principle here is simple: so far as electronic surveillance is concerned our law defines what Americans cannot do to each other; it is time for a law which says what foreign governments cannot do to us.

Unfortunately, Mr. President, the Judiciary Committee, to whom this bill was referred, has not until now had the opportunity to consider it and to hold hearings on the subject.

Yet, at this moment, when we adopt such a major piece of legislation protecting the privacy of Americans against their own intelligence agencies, is it not an appropriate time to ask whether we will protect ourselves, the same Americans, against the activities of foreign governments? Now that we are about to enact strong statutory safeguards for the protection of privacy against the activities of U.S. intelligence agencies, is it not all the more incumbent on us to provide adequate safeguards against the activities of foreign intelligence services?

Since I introduced the Foreign Surveillance Protection Act last July, the administration, as reported in the Atlanta Constitution of November 20, has set up an interagency committee under the chairmanship of Dr. Frank Press, who is the President's science adviser, to coordinate Government policy on communications security. It is time for Congress to assure itself that this committee is on the road to solving the problem or, if it is not, to enact legislation to clarify the duty of the Government to protect the privacy of communications from foreign intelligence services, and to authorize, if necessary, the actions by which this can be done.

Mr. President, I wish to emphasize one thing here. I admire and trust the administration and its behavior, but I cannot help but note that much of its present calm about this matter derives from its having secured its own communications against Soviet interception, not ours.

Every institution comes first, and to Government, Government comes first, but cannot the citizenry come second?

In any event, it seems to me time for Congress to assure itself that this interagency committee is doing its job and also to ask what should be done about governments who come to the United States and install facilities violating the laws.

The Soviet interception of American telephone conversations, to my knowledge, Mr. President, is a criminal act.

If the distinguished Presiding Officer, the Senator from Wisconsin, were to set up today on the roof of the University Club next to the Soviet Embassy and do during the day what the Soviets do during the day, alas, the Senator probably would be arrested and charged with criminal invasion of privacy, or whatever the law may be, and treated without ap-

propriate respect by his own Government because he would be violating the law. But if he were a Russian intelligence agent next door, that would be different.

The intelligence agent is different in that he is immune from arrest in some instances, but he is not immune from being declared persona non grata.

In the meantime, the fourth amendment rights of Americans have to be protected.

In open hearings, I asked the counsel to the CIA, who said to me, that the fourth amendment protects us only against violations by our own Government, and that the fourth amendment provides no protection against violations by foreign governments.

If that is so, it suggests to me that a statute is in order.

I do not want to detain the Senate further on this matter, but I understand that the Chairman of our Select Committee on Intelligence, the distinguished Senator from Indiana who has been so much responsible for the legislation now before us, feels that the Judiciary Committee will be in a position to hold hearings on the legislation which we have introduced, legislation having to do with foreign surveillance of American citizens in this country.

I wonder if that is not the case?

The PRESIDING OFFICER. The time of the Senator from New York has expired.

Mr. MOYNIHAN. May I ask for 2 additional minutes?

Mr. BAYH. I yield the Senator 2 additional minutes.

In response to the question of our colleague from New York, I will say that as a member of the Judiciary Committee, I will be glad to use whatever little influence I might have on those who are in a position to make this decision.

I think we should have hearings.

The Intelligence Committee, of which the Senator from New York is a member, does not have jurisdiction over this matter. However, it is certainly within reason that we could hold hearings on the subject.

Mr. MOYNIHAN. Yes.

Mr. BAYH. However, we would not be permitted to hold hearings on the bill since that is a product of the Judiciary Committee authority. It has been referred, as the Senator from New York is very well aware.

Mr. MOYNIHAN. What my friend suggests, if I understand him is that the Intelligence Committee will hold hearings on this subject, and that it will make its findings available to the Judiciary Committee for any course it may wish to pursue.

Mr. BAYH. That is accurate.

Mr. MOYNIHAN. Fine.

I want to thank the distinguished Senator from Indiana and the distinguished Senator from South Carolina who is listening with such courtesy, and say that the Judiciary Committee surely would wish to show itself as zealous to protect Americans against eavesdropping by Communist agents as by the FBI.

Mr. BAYH. Would the Senator permit me to state one thought?

Mr. MOYNIHAN. I am happy to.

Mr. BAYH. I share his concern and I am sure I shared his shock when we were first made privy to the extent of this clear invasion of the privacy of American citizens.

I must say, I would not want the record to read that the issue is quite as clearcut as it might read if we stopped a discusion of this issue right now. I talked to a number of people in high places, as I am sure the Senator from New York has, and they are concerned about this. Hopefully, we will be able to find a way to deal with it. Maybe his bill is the answer.

But I think it is important to point out that we have a problem here that is a much stickier wicket than just the traditional kind of diplomatic immunity.

I think the security of the questions involved precludes any of us discussing the details of this again. But I think it is fair to say that the United States, and aware of its activities elsewhere in the world, does not put our country and countrymen at an issue having totally clean hands in this argument.

Mr. MOYNIHAN. The Senator is entirely correct.

Mr. President, one final observation. After Watergate, after the findings of the Church committee, are we not warned against people who rise and whisper in our ears that in the interests of national security we must violate the constitutional rights of Americans?

When we hear that, we become alerted to the abuses of the past and become concerned about possible abuses of the future.

American citizens have as much right not to have the Russians eavesdropping on them as not to have their own Government eavesdropping on them.

Mr. President, I thank the Chair, I thank the chairman of the select committee, and I thank the Senator from South Carolina.

The PRESIDING OFFICER. Who yields time?

Mr. MORGAN addressed the Chair.

Mr. BAYH. I yield to the Senator from North Carolina whatever time he wants.

Mr. MORGAN. Approximately 10 minutes.

Mr. BAYH. He is a distinguished member of our subcommittee and the previous committee and is certainly well qualified to speak on this subject.

The PRESIDING OFFICER. The Senate has 7 minutes remaining.

Mr. MORGAN. I thank my distinguished colleague and I will try to make my remarks as brief as I can.

Mr. BAYH. If the Senator will permit me, I think the time restraints permit an hour for each amendment on the bill, and if the Senator from North Carolina does not have sufficient time, we have three or four amendments that will not require nearly an hour to discuss, and I am prepared to introduce one of those, if the Senator needs the time.

Mr. GARN. If the Senator will yield, we have adequate time. We have 45 minutes remaining on this side of the aisle. I would be happy to yield what time is necessary for the Senator from North Carolina and the Senator from Wyoming.

Mr. MORGAN. I thank my distinguished colleague.

The PRESIDING OFFICER. The Senator from North Carolina is yielded 10 minutes—7 minutes from the majority side and 3 minutes from the minority side.

Mr. MORGAN. Mr. President, first, I commend the distinguished Senator from Indiana, who chairs the Select Committee on Intelligence; the distinguished ranking minority member of that committee, the Senator from Utah; and the distinguished Senator from Massachusetts and the distinguished Senators from South Carolina for the splendid work they have done on this most difficulties piece of legislation, it really is landmark legislation.

I am extremely interested in this subject and have been for many years. I became interested in illegal and unlawful wiretapping when I became attorney general of North Carolina more than 10 years ago, at which time I ordered my State bureau of investigation to cease all wiretapping unless properly warranted. Then, as a member of the Church committee, I say what could happen. So I wholeheartedly endorse this bill, and I commend my colleagues who have work so hard on it.

Mr. President, there are several stories behind today's consideration of the Foreign Intelligence Surveillance Act of 1978. Not only does it mark the culmination of one of the Senate's first efforts to place the activities of our intelligence agencies under the rule of law, but it also demonstrates that within this body and the Executive there remains intact an unalterable respect for the rights of American citizens.

The history of wiretapping and electronic surveillance in this country is long and vivid. The Supreme Court, in the case of Olmstead against United States, in 1928, held as admissible evidence which had been obtained through the use of a wiretap. In his famous dissent to that decision, Justice Brandeis stated that the makers of our Constitution "conferred as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man." Justice Brandeis went on to say, speaking of techniques to be used in the future:

> The progress of science in furnishing the Government with means of espionage is not likely to stop with wiretapping. Ways may some day be developed by which the government, without removing papers from secret drawers, can reproduce them in court and by which it will be able to expose to a jury the most intimate occurrences of the home.

Justice Brandeis' words could almost be considered prophetic for that day has come. Not only has the rapid development of technology been accompanied by an increase in the use of electronic surveillance techniques, but we have also seen our most valued right—to be left alone by our Government—consistently violated.

In the series of court cases which followed the Olmstead decision, our law evolved to the point where warrantless electronic interceptions of private communications were considered "unreason-

able searches and seizures." Title 18 of the Omnibus Crime Control and Safe Streets Act of 1968 codified much of the existing case law by prohibiting government eavesdropping except to gain evidence in certain cases of serious crimes and by requiring a warrant in those cases. Case law as well as our present statutes have left unanswered the question of whether an exception to the warrant requirement exists in cases of national security where there is the possible involvement of a foreign power.

Not only did this loophole in the law exist, but our highest executive officers, going back for decades, have attempted to legitimize warrantless electronic surveillance under the guise of Presidential claims of inherent authority to do whatever may be necessary in the interest of national security. In 1940, President Roosevelt authorized the use of electronic surveillance against "persons suspected of subversive activities against the Government of the United States, including suspected spies." Litigation which rose out of the warrantless electronic surveillance of staff members of the National Security Council was concluded last year. And a current espionage trial taking place at this very moment here in Washington has as one of its primary issues the question of whether the President has an inherent right to conduct warrantless electronic surveillance for national security purposes.

Mr. President, I have been closely involved with our Nation's intelligence agencies, their activities, and the guidance and direction they receive since I first came to the Senate. Two lessons I have learned which stand out very clearly in my mind are—one, that in this time of highly charged nationalist movements and outbreaks of terrorism throughout the world, we need and must have the best available intelligence if we are to continue to maintain our stature in the world, and, two, that the activities of our intelligence agencies must be conducted pursuant to rules of law consistent with our Constitution.

I have found out intelligence agencies capable of competently carrying out their assigned tasks, and the Intelligence Oversight Committee has proven to be a workable forum for the interchange of ideas between the executive branch and the Congress. The end result in this case is the legislation before you, which I wholeheartedly endorse.

As we all know, there exists a direct conflict between the ideas of a democracy and intelligence which gives rise to a distinct difficulty in drawing a balance between what activities our Government may participate in in order to protect us and the protection of our ideals of individual liberties. I feel that too often in the past, our law enforcement agencies, followed by our intelligence agencies, came down on the side of vigorous pursuit of their activities to the detriment of the American citizen. Just as there are bad apples in every barrel, there are those in this country who will engage in espionage on behalf of our adversaries. And while we must, repeat, must be vigilant in our pursuit of these traitors, we must remember that the vast majority of American citizens love their country and would not participate in activities to its detriment, especially when cooperation with the enemy is involved.

Because of my faith in the American people, I was unable to support last year's attempt to legislate in this area. That legislation, which would have permitted electronic surveillance of persons not involved in criminal activity, was inconsistent not only with the trust I have in the American citizen, but was also contrary to my concept of how the Congress should go about implementing reform of our intelligence agencies through legislation. The past had shown me that even though our governmental leaders and members of the intelligence community may have had the best intentions, there were abuses. One abuse led to another, and another, and eventually we may have been faced with a KGB or Gestapo without even knowing it. The origins of the abuses rested in the fact that Americans who had done no wrong could be investigated, in the absence of criminal conduct. Once the investigations started, there was no stopping point.

S. 1566 has adopted a criminal standard with which I feel comfortable. Not only will the passage of this legislation constitute a significant guide as we consider other legislation dealing with intelligence, but it assures that such future legislation and the activities of our intelligence agencies will be conducted in accordance with the principles of our Constitution.

Mr. President, there are those who say that we cannot gain the kind of intelligence we need in order to protect the country and the people of this country without sometimes engaging in electronic surveillance without warrants. I would argue with these people.

As I mentioned earlier, when I came into office as attorney general of North Carolina, I immediately declared that we would not engage in any kind of illegal wiretapping or electronic surveillance, except by warrant of the courts. I found that our agents in the State bureau of investigation became more proficient. They were able to do their jobs; they did a better job.

If we establish, as we will by this bill, that we in Government, we in the intelligence agencies, we in the law enforcement agencies, must live within the law, then we will learn to do it, and we will learn to do a better job of it.

I do not see how we can continue to generate respect for our system of Government and respect for the laws of this land when we have people in Government disobeying these very laws.

I wholeheartedly endorse the proposed legislation. I commend the two committees that have worked so hard and so diligently with the members of the executive branch in coming up with a bill with which I think most Members of the Senate feel comfortable.

The PRESIDING OFFICER. Who yields time?

Mr. GARN. Mr. President, I yield 10 minutes to the distinguished Senator from Wyoming.

Mr. WALLOP. Mr. President, I thank my colleague, the distinguished senior Senator from Utah.

Mr. President, as is pointed out in the committee report, there are good reasons to pass such a bill as this. We need a clear legal authority for electronic surveillance for national security. We need standards, and there needs to be a means, an agency, to make certain those standards are observed.

Nevertheless, while we rush to protect the rights of our citizens, as individuals, in one field, I think we must take care not to trample their rights to have their system of government remain intact in other fields.

The bill provides clear legal authority, and sets out some standards. They are arguable standards. For example, a U.S. person working for the interests of a hostile power may not be surveilled under this bill unless it can be shown he is doing what he is doing under the control of the foreign power. Freelancers may not be surveilled. There are other questions on standards set forth in my additional views to the Intelligenee Committee's report.

But the main issues that concern me in the bill are of a constitutional nature. The power to surveil for purposes of national defense and foreign affairs is clearly part of the President's powers over defense and foreign affairs. Yet, this bill stipulates that before the President exercises part of his powers over defense and foreign affairs his actions must be approved by another branch of Government.

Congress has the right to set standards for the exercise of Presidential powers and I have no quarrel with that. We further have the right to demand the President adhere to them. But do we have the right to prevent him from acting until a judge has approved?

Do we have the right to direct that article III Federal judges perform functions such as the ones we have in this bill?

The Supreme Court may well say no.

Furthermore, is it wise to bring judges into the fields of defense and foreign affairs? Are we so happy with the growth of judicial power in other fields in recent years that we wish to extend it?

Mr. President, I point out certain historical precedents for this question in my additional views, and I shall quote briefly from them here. The courts themselves have questioned their ability in this matter.

> Heretofore the judicial branch has resisted temptations to declare itself competent in foreign affairs and defense. In the case of *Chicago Southern* v. *Waterman Steamship Co.* (333 U.S. 103, 111, 1948), the Supreme Court acknowledged the court's incompetence in matters of foreign intelligence. The substance of such matters, said the courts "are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil." Such decisions are in "the domain of political power, not subject to judicial intrusion or inquiry."
>
> Clearly, defense and foreign relations are political tasks. That is to say, they are to be conducted subject to the people's power to elect. The power to surveil for purposes of defense and foreign affairs belongs to that

branch of government empowered by the Constitution to command the armed forces and conduct foreign affairs. There are no judicial criteria for interpreting whether this or that foreign visitor is or is not an agent of a foreign power, whether this or that American's connection with persons who may have some relation with the intelligence services of a foreign power has sufficient connections to warrant surveillance.

The Senate should think about such questions before acting in haste.

Do we really want to view the process of gathering intelligence for our protection under the rubric of criminal law? Do we want to assume that unless a U.S. person may be guilty of something we cannot surveil him to gather information we may need to safeguard ourselves from foreign powers or from terrorists?

Will these combinations of restrictions hamper our defense? What will the American people say if and when the kind of terrorism which is now ravaging Western Europe hits us? Will they blame us for this bill?

May I suggest that if these questions are not given due attention today, a time may come when we will wish they had been examined more carefully.

Mr. President, the interesting thing is that it was not the courts but Congress who discovered the abuses of the recent past, and who brought them to the attention of the courts. Perhaps it would be a wiser choice for us to take that direction, rather than to intricately intermesh the three separate branches of our Government. When one does that one makes it impossible for one branch to render a real judgment on the other. Should all branches be involved in a decision the time could come when injured persons would have no one left to appeal to.

That is my basic concern, that once the courts have entered into this field, Americans will find it harder to redress abuses. If a court authorizes abusive surveillance Congress can finally try to do something about it. But to overrule a court is harder than to question a President's judgment.

Indeed, what we are saying here, I guess, is that we should have faith in our Presidents, that they will use their power to surveil judiciously, and that we should have faith in our ability as a Congress, through the Judiciary Committee and Intelligence Committee, to conduct such oversight as is necessary, and to bring a final appeal place; namely, the courts of the United States, within the reach of someone who may have been surveiled in an illegal manner. But if once the courts approve presidential decisions on surveillance before the fact then, it seems to me an individual's judgment that he has been wrongly surveiled is his to share in solitude, because there will be no other place for him to pursue it.

Mr. President, I have a question that I wish to direct to the distinguished chairman of the Intelligence Committee who also is on the Judicial Committee that provides the linkages in this matter, I guess, because I think perhaps an answer to these questions now might well prick the attention of Congress as we overview the results of this act in the years to come.

I ask Senator BAYH, the chairman of the Intelligence Committee, whether that committee will have authority under the bill to evaluate surveillance that a court approves, and would the oversight committee be limited by the fact that a court has approved that surveillance?

Mr. BAYH. No, it would not, I say to my distinguished colleague from Wyoming. The court and the oversight committee have different functions. The job of the Intelligence Committee is to determine whether the executive branch is following the intent of the legislation and whether the law needs to be changed. If the executive branch violates the intent of Congress and the court misunderstands that intent and approves the surveillance, then we must act. Our duty under the bill is to recommend any changes needed in the law. This gives us the authority to look into all significant aspects of the surveillance.

The PRESIDING OFFICER (Mr. HATHAWAY). The Senator's 10 minutes have expired.

Mr. WALLOP. Mr. President, will the distinguished Senator from Utah yield us another 5 minutes?

Mr. GARN. I am happy to yield 5 additional minutes.

The PRESIDING OFFICER. The Senator is recognized for 5 additional minutes.

Mr. BAYH. Mr. President, I think the purpose of the legislative branch or the role of the legislative branch has been quite appropriately emphasized by the Senator from Wyoming, in the judgment of the Senator from Indiana, he, indeed, being involved not only in this particular legislation, but in trying to get charter legislation passed, as the Senator from Wyoming is very much aware is presently before our committee. The fact that we are saying to the agencies, "Thou shalt not violate the rights of the individual Americans and thou shalt go to a judge before you undertake certain kinds of surveillance activities," in no way lessens our responsibility to oversee whether the judge is doing his job or not, or whether the whole system is working properly.

I thing the congressional oversight role is extremely important with or without the bill.

Mr. WALLOP. If the executive branch violates the intent of Congress in this bill and the court misunderstands that intent and approves a surveillance, then who acts? Do we, Congress, act?

Mr. BAYH. Congress in its oversight function hopefully would find the weakness and then would make recommendations as to how the law should be changed to keep that kind of weakness from continuing.

Mr. WALLOP. This is not part of the conversation that we have had earlier. But would there be no way in which we could draft legislation setting out the standards by which and under which wiretap surveillance or electronic surveillance would be conducted, without giving the court the yea or nay say before the pact?

Mr. BAYH. Yes, Congress could establish standards, give this authority strictly to the executive branch, either the Attorney General, the President, or some designee. There are certain responsibilities that must be carried out by executive branch in the proposed charter legislation. There is a wider area of designated responsibility to the executive branch. But it was the feeling of most of us involved in the process that led us where we are now that given the kinds of abuses that have existed in the executive branch, and not just the most recently advertised experiences, that we would be wiser if we gave the judge the authority to make that determination as to what the purpose of the executive branch was and whether it did indeed meet the standards we had put in the legislation.

Mr. WALLOP. Are we not than putting the judicial branch into the executive business, giving them the decison before the fact rather than after the fact?

Mr. BAYH. I do not think so, I say to my friend from Wyoming.

The executive branch initiates proposals, and the way this would work, of course, is that one of our intelligence agencies, their personnel in the field, would have matters brought to their attention that they thought merited electronic surveillance—that the country was about to be harmed by certain activities or could be harmed by certain activities.

Then they would make this application to the Justice Department. The Justice Department would then make the proper request through the judge, and the judge would look at the application to see whether it was meritorious. If he thought it was then he would permit, under the limitations of the bill, the surveillance to proceed.

It would not be a procedure initiated by the judicial branch.

Does the Senator from Wyoming have similar concerns about the role of the judge in granting warrants under title 3 electronic surveillance in the 1968 crime control and safe streets bill?

Mr. WALLOP. But in this particular instance I have more concern about the foreign affairs and intelligence affairs than I do have as to the standards of conduct for criminal affairs for the simple reason that the courts are less expert in the field of foreign affairs, by their own admission.

The PRESIDING OFFICER. The Senator's time has expired.

Mr. THURMOND. I yield 1 more minute.

Mr. BAYH. I understand the concerns of the Senator from Wyoming, and I appreciate the fact that he has pursued these concerns.

Our feeling was, and I think the basis for this procedure in this bill is, first of all, we have adequate precedent under the Crime Control and Safe Streets Act of 1968 where under title 3 the judicial warrant-granting procedure has been utilized now for almost 10 years. It has worked very well. Even prior to that the pursuit of judicial warrants in certain areas like this was a well-accepted pro-

cedure rooted in fundamental fourth amendment principles.

The second area I think the Senator from Wyoming should recognize—and I am sure he does, but I would just like to point it out in our colloquy—is that a person who is abused under this act does not need to wait for a judge or Congress to recognize the error. He or she, if abused, is certainly within his or her constitutional rights to pursue remedies available under this act through a court of law under a different judge, we would assume, where the rightness of the decision of the original judge and the executive branch would then be tested.

The PRESIDING OFFICER. The Senator's 1 minute has expired.

Mr. WALLOP. May I just respond?

Mr. THURMOND. I grant the Senator and yield 2 more minutes.

Mr. WALLOP. I thank my friend from South Carolina.

The only thing I would say to my friend from Indiana is in the crime bill there is a difference. There the issue is very specifically crime, and the purpose of surveillance is to bring the case to trial, whereas in intelligence cases it is doubtful that many of them will ever come to trial. There is seldom a trial for somebody who is involved in this kind of thing. We are not trying to catch criminals but to gather information to protect the national interest of the country. So I perceive a difference in the Safe Streets Act and in the use of electronic surveillance in crime as opposed to the use of electronic surveillance to conduct national defense and interior defense of the country.

Mr. BAYH. I should point out to my friend from Wyoming we established a different criminal standard in dealing with spies, and a noncriminal standard for foreign officials, and certain agencies or institutions that exist in this country, which are controlled by foreign governments as front operations, and the Senator is familiar with that. We established a different standard, a different criminal standard, than that applied under title 3. So the standard is not the same.

Mr. WALLOP. I understand that. The only thing that worries me, and worries me considerably, is it is drawn so tightly that the freelancers, the guys not under the control of the foreign government, are not subject to control.

Mr. BAYH. I would suggest to my friend that if that person is doing anything that comes close to violating a crime he comes close to title 3. I think if we believe in our Constitution and how it protects people in this country, not just our own citizens, that a freelancer, if he is to pursue activity that is close to sabotage, does it at his peril, because he then can be wiretapped under title 3, because to commit sabotage or espionage is to commit a crime covered by title 3.

The PRESIDING OFFICER. The Senator's 2 minutes have expired.

Mr. BAYH. I thank my friend.

● Mr. ABOUREZK. Mr. President, the Senate is acting today on one of the most important pieces of legislation to come before this body in some time.

For 40 years, Presidents have engaged in electronic surveillance for foreign intelligence purposes in the United States. Their common justification for these activities has been some claimed "inherent constitutional power" which somehow superceded the warrant requirements of the fourth amendment.

If enacted today, S. 1566 will end this pattern. For the first time, Congress will go on record as saying that no such "inherent power" exists. For the first time, we will require that a detached magistrate review the requests for surveillance activities within the United States. For the first time, warrants will be required in the area of foreign intelligence electronic surveillance. And for the first time, executive branch officials will be required to justify their requests for these warrants on the record.

All of these factors are important. Yet, as my colleagues know, one issue above all others has concerned me during the deliberations on this legislation. That, of course, has been the standard by which such surveillance orders may be issued against American citizens.

I have long felt and consistently argued that any legislation which allowed for the issuance of an order against an American citizen on anything less than a criminal standard would be a violation of the fourth amendment. In my view, our Government ought not to be allowed to invade the privacy of its citizens in such a massive way without a showing of probable criminal activity.

After carefully reviewing the Foreign Intelligence Surveillance Act, as amended, I have concluded that it meets that basic standard. In every instance in which a warrant can be issued against an American citizen under the bill, the Government must demonstrate, to the satisfaction of a Federal judge, that a nexus exists between the activities of the citizen and a violation of the criminal laws.

Mr. President, I have been involved in the deliberations on this legislation for over 3 years. Others, such as Senator KENNEDY, Senator NELSON, and Senator MATHIAS, have been involved for even longer. There were times that I believed that differences between the legislative and executive branches on the intricacies of this legislation would not be overcome.

Now, however, I wish to commend my colleagues in the Judiciary and Intelligence Committees, and the President and Attorney General Bell, for the diligent and thoughtful manner in which these difficult deliberations have been concluded. I believe that we have succeeded in fashioning a bill that is workable and worthwhile and one deserving of support.●

Mr. BAYH. Mr. President, I ask unanimous consent that the committee amendments be agreed to en bloc, and, as agreed to, be considered original text for the purpose of further amendment.

The PRESIDING OFFICER. Without objection, it so ordered.

The amendments of the Committee on the Judiciary are as follows:

On page 2, line 17, strike "a" and insert "any";

On page 2, line 18, after "person" insert a comma and "knowing that such person is engaged in activities";

On page 10, beginning with line 10, strike through and including line 11, and insert "or the Deputy Attorney General";

On page 10, line 15, after "and" insert "prohibit";

On page 10, line 15, after "dissemination" insert a comma and "except as provided for in subsections 2526(a) and (b),";

On page 13, line 2, after "corporations" insert "or associations";

On page 18, line 10, after "section 2521 (b)(6)" insert a comma and "and a statement whether physical entry is required to effect the surveillance";

On page 20, beginning with line 21, insert the following:

"(C) when the target of the surveillance is not a foreign power as defined in section 2521(b)(1) (A), (B), or (C), the type of information sought to be acquired and when the target is a foreign power defined in section 2521(b)(1) (A), (B), or (C), the designation of the type of foreign intelligence information under section 2521(b)(5) sought to be acquired;

On page 21, line 11, after "2521(b)(6)" insert "and whether physical entry will be used to effect the surveillance";

On page 25, beginning with line 19, insert the following:

No information acquired from an electronic surveillance conducted pursuant to this chapter may be used or disclosed by Federal officers or employees except for lawful purposes.

On page 26, line 9, after "States," insert "a State, or a political subdivision thereof,";

On page 26, line 19, after the period, strike through and including page 27, line 18, and insert in lieu thereof the following:

"(d) Any person who has been a subject of electronic surveillance and against whom evidence derived from such electronic surveillance is to be, or has been, introduced or otherwise used or disclosed in any trial, hearing, or proceeding in or before any court, department officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any communication acquired by electronic surveillance, or evidence derived therefrom, on the grounds that—

"(1) the communication was unlawfully acquired; or

"(2) the surveillance was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion.

"(e) Whenever any court is notified in accordance with subsection (c), or whenever a motion is made by an aggrieved person pursuant to subsection (d), to suppress evidence on the grounds that it was obtained or derived from an unlawful electronic surveillance, or whenever any motion or request is made by an aggrieved person pursuant to section 3504 of this title or any other statute or rule of the United States, to discover, obtain, or suppress evidence or information obtained or derived from electronic surveillance, the Federal court, or where the motion is made before another authority, a Federal court in the same district as the authority, shall, notwithstanding any other law, if the Government by affidavit asserts that disclosure or an adversary hearing would harm the national security of the United States, review in camera and ex parte the application, order, and other materials relating to the surveillance as may be necessary to determine whether the surveillance was authorized and conducted in a manner that did not violate any right afforded by the

Constitution and statutes of the United States to the aggrieved person. In making this determination, the court shall disclose to the aggrieved person portions of the application, order, or other materials relating to the surveillance only where such disclosure is necessary to make an accurate determination of the legality of the surveillance. If the court determines that the electronic surveillance of the aggrieved person was not lawfully authorized or conducted, the court shall in accordance with the requirements of law suppress the information obtained or evidence derived from the unlawful electronic surveillance. If the court determines that the surveillance was lawfully authorized and conducted, the court shall deny any motion for disclosure or discovery unless required by due process.

On page 29, line 17, strike "(d)" and insert "(f)";

On page 36, line 24, after "that" insert "no particular United States person shall be intentionally targeted for testing purposes without his consent,";

On page 38, beginning with line 25, insert the following:

(i) Section 2518(10) is amended by striking the word "intercepted" and inserting the words "intercepted pursuant to this chapter" after the first appearance of the word "communication".

On page 39, line 4, strike "(i)" and insert "(j)";

On page 39, line 8, strike "(j)" and insert "(k)".

The amendments of the Select Committee on Intelligence are as follows:

On page 1, line 4, strike "1977" and insert "1978";

On page 2, line 3, following "2527. Report of electronic surveillance." insert "2528. Congressional oversight.";

On page 3, beginning with line 6, strike through and including line 19, and insert in lieu thereof the following:

"(A) any person, other than a United States person, who—

"(i) acts in the United States as an officer or employee of a foreign power; or

"(ii) acts for or on behalf of a foreign power which engages in clandestine intelligence activities contrary to the interests of the United States, when the circumstances of such person's presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or conspires with any person knowing that such person is engaged in such activities;

On page 4, beginning with line 9, strike through and including page 5, line 10, and insert in lieu thereof the following:

"(B) any person who—

"(i) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States;

"(ii) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States;

"(iii) knowingly engages in sabotage or terrorism, or activities which are or may be in preparation therefor, for or on behalf of a foreign power;

"(iv) knowingly aids or abets any person in the conduct of activities described in subparagraph (B)(i) through (iii) above, or conspires with any person knowing that such person is engaged in activities described in subparagraph (B)(i) through (iii) above: *Provided*, That no United States person may be considered an agent of a foreign power solely upon the basis of activities protected by the first amendment to the Constitution of the United States.

On page 7, beginning with line 5, strike through and including page 8, line 4, and insert in lieu thereof the following:

"(A) information which relates to, and if concerning a United States person is necessary to, the ability of the United States to protect itself against actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

"(B) information with respect to a foreign power or foreign territory which relates to, and if concerning a United States person is necessary to—

"(i) the national defense or the security of the Nation; or

"(ii) the successful conduct of the foreign affairs of the United States; or

"(C) information which relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against—

"(i) sabotage or terrorism by a foreign power or an agent of a foreign power, or

"(ii) the clandestine intelligence activities of an intelligence service or network of a foreign power or an agent of a foreign power.

On page 11, beginning with line 11, strike through and including page 12, line 6, and insert in lieu thereof the following:

and which are reasonably designed to insure that information which relates solely to the ability of the United States to provide for the national defense or security of the Nation and to provide for the conduct of foreign affairs of the United States, under subparagraphs (B) and (C) above, shall not be disseminated in a manner which identifies any United States person, without such person's consent, unless such person's identity is necessary to understand or assess the importance of information with respect to a foreign power or foreign territory or such information is otherwise publicly available.

On page 13, line 2, after "powers" insert "as defined in section 2521(b)(1)(A) through (E)";

On page 15, beginning with line 5, insert the following:

"(d) Each judge designated under this section shall so serve for a maximum of seven years and shall not be eligible for redesignation: *Provided*, That the judges first designated under subsection (a) shall be designated for terms of from one to seven years so that one term expires each year, and that judges first designated under subsection (b) shall be designated for terms of three, five, and seven years.

On page 17, beginning with line 1, strike through and including line 2, and insert in lieu thereof the following:

"(A) that the certifying official deems the information sought to be foreign intelligence information;

On page 23, line 7, after the period, insert "At the end of the period of time for which an electronic surveillance is approved by an order or an extension issued under this section, the judge may assess compliance with the minimization procedures required by this chapter.";

On page 24, line 23, after "thereof" insert a semicolon and "and no information concerning any United States person acquired from such surveillance shall subsequently be used or disclosed in any other manner by Federal officers or employees without the consent of such person, except with the approval of the Attorney General where the information indicates a threat of death or serious bodily harm to any person";

On page 25, line 13, after "(F)" insert "and in accordance with the minimization procedures required by this chapter";

On page 26, line 4, after "Government" insert "of the United States, of a State, or of a political subdivision thereof";

On page 3, beginning with line 10, insert the following:

"(g) In circumstances involving the unintentional acquisition, by an electronic, mechanical, or other surveillance device of the contents of any radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, and where both the sender and all intended recipients are located within the United States, such contents shall be destroyed upon recognition, except with the approval of the Attorney General where the contents indicate a threat of death or serious bodily harm to any person.

On page 31, beginning with line 6, insert the following:

"§ 2528. Congressional oversight

"(a) On a semiannual basis the Attorney General shall fully inform the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence concerning all electronic surveillance under this chapter. Nothing in this chapter shall be deemed to limit the authority and responsibility of those committees to obtain such additional information as they may need to carry out their respective functions and duties.

"(b) On or before one year after the effective date of this chapter, and on the same day each year thereafter, the Select Committee on Intelligence of the United States Senate shall report to the Senate, concerning the implementation of this chapter. Said reports shall include but not be limited to an analysis and recommendations concerning whether this chapter should be (1) amended, (2) repealed, or (3) permitted to continue in effect without amendment.

"(c) In the Select Committee on Intelligence of the United States Senate shall report that this chapter should be amended or repealed, it shall report out legislation embodying its recommendations within thirty calendar days, unless the Senate shall otherwise determine by yeas and nays.

"(d) Any legislation so reported shall become the pending business of the Senate with time for debate equally divided between the proponents and opponents and shall be voted on within thirty calendar days thereafter, unless the Senate shall otherwise determine by yeas and nays.

"(e) Such legislation passed by the Senate shall be referred to the appropriate committee of the other House and shall be reported out by such committee together with its recommendations within thirty calendar days and shall thereupon become the pending business of such House and shall be voted upon within three calendar days, unless such House shall otherwise determine by yeas and nays.

"(f) If the case of any disagreement between the two Houses of Congress with respect to such legislation passed by both Houses, conferees shall be promptly appointed and the committee of conference shall make and file a report with respect to such legislation within seven calendar days after the legislation is referred to the committee of conference. Notwithstanding any rule in either House concerning the printing of conference reports in the record or concerning any delay in the consideration of such reports, such reports shall be acted on by both Houses not later than seven calendar days after the conference report is filed. In the event the conferees are unable to agree within three calendar days they shall report to their respective Houses in disagreement.".

On page 35, line 21, after the period, insert "No communication common carrier or officer, employee, or agent thereof shall disclose the existence of any interception under this chapter or electronic surveillance as defined in chapter 120, with respect to which the common carrier has been furnished either an order or certification under this subparagraph, except as may otherwise be lawfully ordered.";

On page 36, line 18, after "duty" insert "under procedures approved by the Attorney General";

On page 37, line 13, after "provided" insert "that no particular United States person shall be intentionally targeted for such purposes without his consent,"

Mr. BAYH. Mr. President, parliamentary inquiry.

The PRESIDING OFFICER. The Senator will state it.

Mr. BAYH. Is it the understanding of the Chair that the bill now before us contains the amendments added to its original text by vote of the Judiciary and Intelligence Committees?

The PRESIDING OFFICER. The Senator is correct.

UP AMENDMENT NO. 1237

(Purpose: To clarify the intent of the bill that information obtained from emergency surveillance without a court order may be used if the court issues an order approving the surveillance)

Mr. BAYH. Mr. President, I send to the desk an amendment at this time.

The PRESIDING OFFICER. The clerk will report the amendment.

The assistant legislative clerk read as follows:

The Senator from Indiana (Mr. BAYH) proposes an unprinted amendment numbered 1237:

On page 24, lines 16 and 17, strike out "without an order having been issued" and insert in lieu thereof "and no order is issued approving the surveillance".

Mr. BAYH. Mr. President, this amendment clarifies the intent of the bill with respect to emergency situations where surveillance is undertaken and the court later issues an order approving the surveillance.

We owe a debt of gratitude to our colleague from Missouri (Mr. DANFORTH) for pointing this out to us. The way the bill was originally worded, even if the emergency wiretap had been agreed to by the court, technically, the language of the bill as it was denied the use of the information gathered during that agreed-to emergency period.

The amendment is fully consistent with what we all had intended to have in the bill in the first place.

Mr. THURMOND. Mr. President, we have no objection to the amendment.

The PRESIDING OFFICER. Do the Senators yield back their time?

Mr. BAYH. I yield back the remainder of my time.

Mr. THURMOND. I yield back my time.

The PRESIDING OFFICER. Without objection, the amendment is agreed to.

UP AMENDMENT NO. 1236

(Purpose: To clarify language relating to the authority and responsibility of Congressional committees to obtain information relating to electronic surveillance)

Mr. BAYH. Mr. President, I send to the desk at this time another amendment.

The PRESIDING OFFICER. The amendment will be stated.

The assistant legislative clerk read as follows:

The Senator from Indiana (Mr. BAYH) proposes an unprinted amendment numbered 1238:

On page 31, line 12, strike out "those committees" and insert in lieu thereof "the appropriate committees of each House of Congress".

Mr. BAYH. Mr. President, this amendment deals with the requirement of other committees to have access to certain information. The amendment acknowledges that other committees, other than the Intelligence Committees, may have an appropriate need for information about surveillance under this bill to carry out their particular duties. Under the rules of the Senate, for example, the Judiciary Committee might need such information.

Mr. GARN. Mr. President, will the Senator yield for a question?

Mr. BAYH. I will be glad to yield.

Mr. GARN. Does the Senator believe the phrase "appropriate committees of each House" gives committees other than the Intelligence Committees and the Judiciary Committees of each House access to such information?

Mr. BAYH. I thank the Senator for bringing that up. The answer is "No." Other committees, other than the Intelligence Committees and the Judiciary Committees, already have jurisdiction over certain responsibilities set forth in S. 1566. This amendment acknowledges that jurisdiction, and does not decrease it in any way. The jurisdiction of other committees is not affected by this bill. In passing Senate Resolution 400 in the 94th Congress, the Senate expressed the view that the security of sensitive intelligence information would be enhanced if a single select committee were authorized to receive it. The Senator is aware of the safety requirements under Senate Resolution 400, and for that reason the Intelligence Committee plays that important role.

Mr. THURMOND. Mr. President, in view of the Senator's statement making it clear that the Judiciary Committee is included, we have no objection to the amendment.

The PRESIDING OFFICER. Do Senators yield back their time?

Mr. CHURCH. Mr. President, will the Senator from Indiana yield?

Mr. BAYH. Mr. President, a parliamentary inquiry.

The PRESIDING OFFICER. The Senator will state it.

Mr. BAYH. How much time remains?

The PRESIDING OFFICER. On this amendment?

Mr. BAYH. On the bill.

The PRESIDING OFFICER. The Senator from South Carolina has 24 minutes. The Senator from Indiana has used all his time.

Mr. BAYH. Before we pass this amendment, I yield to the Senator from Idaho so that we may utilize the remaining time on the amendment for a colloquy with the Senator from Idaho.

Mr. CHURCH. I thank the Senator from Indiana very much.

First of all, I wish to commend him and the other Senators on his committee and on the Judiciary Committee for having brought this bill to the floor.

The second volume of the final report of the Senate Select Committee on Intelligence Activities, which it was my privilege to chair, made the recommendation that no Americans be targeted for electronic surveillance except upon a judicial finding of probable criminal activity. The report added:

> Targeting an American for electronic surveillance in the absence of probable cause to believe a crime might have been committed or might be committed is unwise and unnecessary.

This bill is the first legislative effort to enact one of the major recommendations of the Select Committee, and for that I am most grateful.

Senators will remember that shortly following our investigation, the Senate did act upon our recommendation to establish a permanent intelligence committee, which the distinguished Senator from Indiana (Mr. BAYH), now chairs. I think all of us recognize that was a wise decision. The committee is functioning, as we hoped it would, as an effective oversight committee. It has given Congress the facts and the power that are needed to prevent abuses and excesses done in secrecy by our intelligence agencies.

I welcome the final debate today on the Foreign Intelligence Surveillance Act of 1978. It adopts the so-called criminal standard, by requiring probable cause to believe that an American is engaged in clandestine intelligence gathering activities which involve or may involve a Federal crime.

This has been the historic method by which we have sought to protect individual liberty against arbitrary government in this country. I commend the Senator most highly, and both committees most highly, for establishing this standard in the intelligence field.

I would like to ask my good friend the Senator from Indiana if it is true that this bill, if enacted into law, would also supercede any Presidential claim of inherent power to conduct electronic surveillance in violation of its provisions. As the Senator knows, in the past some Presidents or some spokesmen for Presidents have claimed that the office of the Presidency had such an inherent power, at least in the absence of action by the Congress. I am interested in establishing some legislative history that the enactment of this statute would be a definitive act of Congress in this field, and would supercede any prior claim that the President or the office of the Presidency possesses an inherent power to act apart from the provisions of this bill.

Mr. BAYH. I appreciate the question of my friend and colleague from Idaho. I had earlier, in my opening remarks, pointed out that we were here today very largely because of the stimulus provided by the Senator from Idaho and his select committee, and, indeed, this is the first legislation that has followed up on its recommendations.

I think the most important ingredient in the bill is the ability to get all the parties to sign off on the need, somewhat reluctantly by some, but to go forward, now, with the criminal standard which is fundamental to our system of jurisprudence in this country; and, indeed, the Senator did cite that language in his

report to which our staff gave so much credence.

As the Senator, who is a good lawyer, knows, the question of inherent authority ultimately will, of course, be decided by the Supreme Court of the United States, but the history of this bill indicates that the President is prepared to waive that, by joining in the preparation and introduction of this bill; and we have legislation drafted here that is intended to take away any inherent authority.

The Supreme Court itself in the steel seizure case, it seems to me, gave us very strong precedent for acting not just out of whim or out of response to Watergate and other abuses, but, indeed, under the precedent established in the steel seizure case.

Mr. CHURCH. I agree with the Senator's observation and was going to allude to the Youngstown Steel case. I believe the Senator is correct in assuming that the precedent established in that case would suggest that once the Congress has acted and a statute has been signed into law governing the procedures to be followed the statute as written by Congress would be controlling. This is true even in the intelligence field. In the case of this bill, we have established a criminal standard as in ordinary criminal cases, which will govern the use of electronic surveillance within the United States. I would hope that in the future Presidents would abide by the law as written by the Congress. I am certain the Supreme Court would sustain the validity of the law against any attempt in the future by a President to assert some inherent power.

That is why I think this is such an important historic step. I am grateful to the leadership the Senator from Indiana has given this legislation. I am grateful to the other Senators present—Senator THURMOND and Senator KENNEDY, the ranking member of the Judiciary Committee, for their long interest in this matter. Senator KENNEDY and I joined in a letter last year in which we strongly urged that the criminal standard be observed in the intelligence field.

I believe this bill represents a definite improvement over the earlier version of the bill that the Senate considered last year.

I want to say to Senator KENNEDY that he has been a tower of strength in this effort. I am very grateful to him and to everyone who worked to bring this bill to the floor of the Senate today.

Mr. BAYH. Again let me say I appreciate the great contributions of the Senator from Idaho. As he knows, the art of intelligence is an art and not a science. There are many gray areas. It is a nebulous world. Of course, we all want to protect our country. In structuring the criminal standard, we have used words which we feel are as close to the words of art as we can, to give flexibility to those who need to get involved in the use of some of this technology which is now available to protect our country but to nevertheless apply that perhaps a bit broader standard to the criminal test which I think is basic to our system in this country.

Mr. CHURCH. I agree with the Senator. I also recognize the difficulty of drawing the line between the legitimate requirements of national security and the preservation of individual liberty. It is in that definition that the survival of freedom is to be found.

Mr. GARN. Mr. President, many of us have been concerned that the adoption of a criminal standard would make it impossible for the FBI to get a court order for surveillance of people obviously engaged in traditional spying activity. For example the FBI might observe someone making "drops," and then known Soviet intelligence agents coming along and picking up what was dropped. This is traditional spying tradecraft, but the FBI cannot determine what information is being secretly transmitted to the intelligence agents. That is the kind of case where a judge might not find probable cause that a specific crime is about to be, or will be, committed. However, the standard requiring probable cause that the activity may involve a crime would allow surveillance in such cases. Therefore, I support the new standard because it provides enough flexibility to deal with the real problem faced in counterintelligence investigations. I agree with my colleagues that the standard is intended to deal with what we traditionally call spying activities.

Mr. BAYH. Mr. President, I am prepared to yield back the remainder of my time.

Mr. THURMOND. Mr. President, we yield back the remainder of our time.

The PRESIDING OFFICER. The question is on agreeing to the amendment.

The amendment was agreed to.

The PRESIDING OFFICER. Who yields time?

The Senator from Indiana.

UP AMENDMENT NO. 1239

(Purpose: To delete language relating to the time at which a judge may assess compliance with the minimization procedures required)

Mr. BAYH. Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The amendment will be stated.

The assistant legislative clerk read as follows:

The Senator from Indiana (Mr. BAYH), on behalf of Mr. ABOUREZK, proposes an unprinted amendment numbered 1239.

On page 23, beginning with the word "At" in line 7, strike out all down through the word "the" in line 9 and insert in lieu thereof "The".

Mr. BAYH. Mr. President, I submit this amendment on behalf of our distinguished colleague from South Dakota (Mr. ABOUREZK). The purpose is to clarify the language relative to the judge's ability to review compliance with minimization procedures at any time. One of the most important ingredients in this bill is the strict requirement of how information that is accidentally acquired is handled. With some of this electronic surveillance, one unintentionally picks up information about American citizens when trying to direct it at foreign entities. The minimization procedures are very important. The amendment of the Senator from South Dakota would clarify this. It is fully consistent with the language of both reports from the Judiciary and the Intelligence Committees. I would urge the committee to accept it.

Mr. THURMOND. We have no objection to the amendment, Mr. President.

Mr. KENNEDY. Mr. President, I think it is a constructive amendment, as the Senator from Indiana has explained it. That is our understanding of it. I believe it is an improvement. I would urge its acceptance. I yield back the remainder of my time.

Mr. THURMOND. Mr. President, I yield back the remainder of my time.

The PRESIDING OFFICER. The question is on agreeing to the amendment.

The amendment was agreed to.

UP AMENDMENT NO. 1240

(Purpose: To modify language relating to the standard for surveillance of persons engaged in sabotage or terrorism for or on behalf of a foreign power)

Mr. KENNEDY. Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The amendment will be stated.

The assistant legislative clerk read as follows:

The Senator from Massachusetts (Mr. KENNEDY) proposes an unprinted amendment numbered 1240.

Mr. KENNEDY. Mr. President, I ask unanimous consent that further reading of the amendment be dispensed with.

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

The amendment is as follows:

On page 5, beginning with the word "which" in line 25, strike out down through the word "therefor" in line 1 on page 6 and insert in lieu thereof "in furtherance thereof".

Mr. KENNEDY. Mr. President, the issue is what the criminal standard should be for sabotage or terrorism under the bill. The bill currently speaks in terms of "may." Our bill in the Judiciary spoke in terms of "will." This amendment is a compromise, avoiding any reference to either word. Actually, by leaving in the words "knowingly engages," the amended language speaks in terms of present activity and not conjecture.

It would read, therefore, Mr. President, on line 24, "knowingly engages in sabotage or terrorism or activities in furtherance thereof."

I understand it is acceptable and is satisfactory to both committees.

Also, Mr. President, the Intelligence Committee amended the bill to require a criminal standard for surveillance of Americans, beginning on page 5, line 11. That standard speaks of two kinds of clandestine intelligence activities—first, clandestine intelligence gathering activities that involve or may involve a Federal crime; second, other clandestine intelligence activities that involve or are about to involve a Federal crime. When it refers to "gathering" does the bill mean traditional spying activity?

Mr. BAYH. Yes, the intent of the bill is that clandestine intelligence gathering

means what is traditionally described by the word spying—in ordinary, everyday language.

Mr. GARN. I have no disagreement with that or with what Senator KENNEDY has just suggested in his amendment dealing with terrorist and sabotage activities.

I have no objection to this amendment.

Mr. BAYH. Mr. President, this was a matter of some significant negotiations among the various parties involved. I think it is pretty well reconciled right now.

The term "in furtherance" of sabotage or terrorism is intended to encompass activities supportive of acts of serious violence; for example, purchase or surreptitious importation into the United States of explosives, planning for assassinations, or financing of or training for such activities. It could reasonably be interpreted to cover providing the personnel, training, funding, or other means for the commission of acts of terrorism. The "in furtherance" provision is also adopted in order to permit electronic surveillance at some point before the danger sought to be prevented—for example, a kidnaping, bombing, or a hijacking—actually occurs.

It is a delicate kind of situation, when you are talking about terrorism. In addition to apprehending the culprits after the fact, we wanted to provide language that would increase the chance of preventing the act and thus the language "in furtherance."

Mr. President, my distinguished colleague from New Jersey (Mr. CASE) was desirous of asking us to elaborate further on this point. I should like, just for a moment, to state his thoughts:

The question might arise whether a person who engages in seemingly innocent activities which might incidentally aid a terrorist working on behalf of a foreign power should be considered an agent of a foreign power.

The answer is that it depends on the particular circumstances. A person can act in furtherance of such a terrorist and thus be considered an agent of a foreign power by engaging in an apparently innocent activity. For example, if a person's role in a terrorist act is to drive another person with a bomb to the planned bombing site, the driver could be considered to have acted knowingly in furtherance of terrorism and thus be considered an agent of a foreign power. On the other hand, if the person had dropped a friend off and had no idea that he was carrying a bomb, he would not be considered to have knowingly acted in furtherance and thus could not be considered an agent of a foreign power. In addition, in order for a person to be considered acting in furtherance of terrorism or sabotage on behalf of a foreign power, he must be engaged in activities that are an integral part of the terrorist plan. For example, a landlord who rents an apartment to a person he knows might be engaged in terrorism cannot be considered an agent of a foreign power. Of course, engaging in constitutionally protected activities cannot be the basis for considering a person an agent of a foreign power under S. 1566. For example, the trial counsel of an accused terrorist or the person who posts bail for him cannot be considered an agent of a foreign power even though it might be construed that he was acting in furtherance of terrorism. Nor could a member of a group which took no action except to support terrorists acting on behalf of a foreign government in exercise of their constitutional rights be construed an agent of a foreign power.

● Mr. STEVENSON. Mr. President, Senator KENNEDY's amendment changes that section S. 1566 which defines as an agent of a foreign power "any person who knowingly engages in sabotage or terrorism, or activities in furtherance thereof." Any person who fits that condition may be placed under surveillance through the procedures described in the bill. Senator KENNEDY's amendment substitutes the phrase, "in furtherance thereof" for the phrase, "which are or may be in preparation therefor."

I do not object to that change, however, I wish to stress one point. This change does not alter the committee's report language even though that language was written in explanation of the original phrase. The new language, "in furtherance thereof," is understood to encompass a wide range of terrorist activities, including but not limited to, knowingly funding, harboring, training, supporting, or supplying terrorist groups. This is meant to include activities which may be in furtherance of terrorist acts in general even if not in furtherance of a particular terrorist act.

Mr. President, the threats of terrorism are serious and will be more serious in the future. Intelligence community officials have assured me that the standards for electronic surveillance established by this legislation will facilitate their efforts to identify and apprehend terrorists and, hopefully, forestall terrorist incidents.

What little attention terrorism has attracted has been focused on crisis management rather than prevention. I hope this bill helps to shift that focus and to give the intelligence community the authorities it needs to enhance detection and prevention.

The intelligence community has begun a major study of international terrorism, as a result of which, I am convinced that we must prepare to more effectively prevent terrorism through improved intelligence collection. This bill, as amended, is a small step in that direction and deserves support.●

Mr. THURMOND. Mr. President, I have no objection to the amendment.

The PRESIDING OFFICER. Is all time yielded back?

Mr. KENNEDY. I yield back my time.

Mr. THURMOND. We yield back our time.

The PRESIDING OFFICER. The question is on agreeing to the amendment.

The amendment was agreed to.

UP AMENDMENT NO. 1241

(Purpose: To clarify the requirement for identifying the target of electronic surveillance in an application for an order approving electronic surveillance and in an order approving such surveillance)

Mr. KENNEDY. Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The amendment will be stated.

The assistant legislative clerk read as follows:

The Senator from Massachusetts (Mr. KENNEDY) proposes unprinted amendment No. 1241.

On page 16, line 1, after the word "identity" insert ", if known,".

On page 20, line 16, after the word "identity" insert ", if known,".

Mr. KENNEDY. Mr. President, the language is added to make clear that if the identity of the target of surveillance is known to the Government, it does not have the discretion to refuse to identify the target and just give a description. The amendment language mandates that the identity of the target must be specified if known. If not known, it is perfectly permissible to give a description. This is at the top of page 16.

Quite clearly, if the target is known, the identiy of the individual or the target should be given.

This is just clarifying language, consistent with the spirit of the legislation. It is a matter of concern to the Senator from South Dakota (Mr. ABOUREZK). I urge its adoption.

I yield back the remainder of my time.

Mr. THURMOND. Mr. President, we have no objection to the amendment. I yield back my time.

The PRESIDING OFFICER. All time having been yielding back, the question is on agreeing to the amendment.

The amendment was agreed to.

UP AMENDMENT NO. 1242

(Purpose: To permit persons whose communications or activities have been illegally subjected to electronic surveillance to move to supress the contents of any communication acquired by such surveillance)

Mr. KENNEDY. Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The amendment will be stated.

The assistant legislative clerk read as follows:

The Senator from Massachusetts (Mr. KENNEDY) proposes an unprinted amendment numbered 1242.

Mr. KENNEDY. Mr. President, I ask unanimous consent that further reading of the amendment be dispensed with.

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

The amendment is as follows:

On page 27, line 19, strike out "a subject" and insert in lieu thereof "the target".

On page 27, line 20, after "surveillance" insert "or whose communications or activities have been subject to electronic surveillance".

Mr. KENNEDY. Mr. President, this amendment is actually technical in nature. The bill now speaks in terms of "the subject." This is vague; what is meant is "the target" or the person who was overheard. This language makes that clear and conforms to the remainder of the statute. It makes it clear who has standing to raise this issue. It is basically a technical matter, one of clarification.

If there is no objection, I am prepared to yield back the remainder of my time.

Mr. THURMOND. Mr. President, I do not believe the word "subject" is used anywhere else in the bill so, in order to make it uniform, it seems that this would be a proper step to take. Therefore, we do not object to the amendment.

We yield back our time.

The PRESIDING OFFICER. All time having been yielded back, the question is on agreeing to the amendment.

The amendment was agreed to.

UP AMENDMENT NO. 1243

(Purpose: To eliminate the statutory requirement that amendments proposed by the Select Committee on Intelligence of the Senate to the new chapter (added to title 18, United States Code, by the bill) be expedited for consideration in each House)

Mr. KENNEDY. Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The amendment will be stated.

The assistant legislative clerk read as follows:

The Senator from Massachusetts (Mr. KENNEDY) proposes unprinted amendment No. 1243.

Mr. KENNEDY. I ask unanimous consent that further reading of the amendment be dispensed with.

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

The amendment is as follows:

On page 31, line 22, strike out "amendment." and insert in lieu thereof "amendment.'." On page 31, beginning with line 23, strike out all down through line 4 on page 33.

Mr. KENNEDY. Mr. President, this eliminates the statutory requirement that future amendments of the bill be considered under very strict time limitations. I understand the proponent of this language in the intelligence committee (Mr. HATHAWAY) has no objection to deleting these requirements. The language is drawn from the 1976 version of the bill, where it was considered necessary because of the noncriminal standard. Since we have changed that to a criminal standard, there is no need for the language. Obviously, if an emergency arises necessitating prompt consideration of amendments to the law, I trust that the Senate would give a top priority to the amendments.

With that information, Mr. President, if there is no objection, I am prepared to yield back the remainder of my time. I urge the adoption of the amendment.

Mr. THURMOND. Mr. President, as I understand it, the amendment will strike sections (c), (d), (e), and (f).

That is correct, is it not?

Mr. KENNEDY. The Senator is correct.

Mr. THURMOND. Mr. President, we have no objection to the amendment.

We yield back our time.

The PRESIDING OFFICER. Is all time yielded back?

Mr. KENNEDY. I yield back my time.

The PRESIDING OFFICER. All time having been yielded back, the question is on agreeing to the amendment.

The amendment was agreed to.

● Mr. PAUL G. HATFIELD. Mr. President, I rise in strong support of S. 1566, a bill which would, at long last, establish fair and uniform procedures for the procurement of warrants by the executive branch to conduct electronic surveillance in the United States when it finds that the security of our Nation is at stake. I would like to commend my distinguished colleagues on the committee, especially the Senator from Massachusetts (Mr. KENNEDY), who spearheaded this effort, and the Senator from Indiana (Mr. BAYH), who, as chairman of the Select Committee on Intelligence, lent his expertise to this endeavor, for their patience and persistence in finally bringing to legislative fruition the need to balance the rights of our citizenry from unreasonable intrusions into their privacy and the need for our Government to protect all of us from dessication of our precious liberties from abroad. This bill is also a fitting tribute to the late Senator from Arkansas, John L. McClellan, whose concern in this area was well known.

It goes without saying that our Government must have a strong capability to be able to identify those who, by surreptitious means, are bent upon weakening our Nation's foundations from within. Few would dispute the fact that we live in a dangerous world in which hostile intelligence activities are still carried on, often right under our noses, to our detriment. Realism demands that those whose mission it is to ferret out threats to our security be equipped with legal tools sufficient to do the job.

But, Mr. President, we are a free people, and it is our strong desire to remain free which has not only protected us and our institutions from collapse but has also kept us us from enslaving ourselves behind barricades designed to protect us from others. It is testament to our collective desire to live free that we have emerged from recent disclosures of domestic attacks on our freedoms even more determined and confident than before. The revelation of those abuses was like a cleansing fire—they did not weaken and threaten us, they forged a new purpose. We understand that electronic surveillance, if co-opted by the lawless for abusive ends, is a threat to our freedom and cannot be permitted. We are strong enough, however, to understand that electronic surveillance is a useful detection and enforcement tool and can be used, within sufficiently clear and narrow legal constraints, as a weapon against the unscrupulous. As the Select Committee on Intelligence has pointed out—

Electronics surveillance techniques have understandably enabled (our intelligence) agencies to obtain valuable information relevant to their legitimate intelligence missions. Use of these techniques has provided the Government with vital intelligence, which would be difficult to acquire through other means, about the activities and intentions of foreign powers and has provided important leads in counterespionage cases.

I do not discourage skepticism, I invite it. Jefferson once said that a healthy skepticism of government's self-professed capacity for protecting us from ourselves and our enemies is the main ingredient of democracy and, as the elected servants of the people, we ought never to forget it. So we must always be skeptical when the Government proposes to protect us and study such a proposal carefully to assure ourselves that our individual freedoms do not fall before the need for collective security. The Senator from Massachusetts (Mr. KENNEDY) stated the dilemma well:

The complexity of the problem must not be underestimated. Electronics surveillance can be a useful tool for the Government's gathering of certain kinds of information; yet, if abused, it can also constitute a particularly indiscriminate and penetrating invasion of the privacy of our citizens. My objective over the past six years has been to reach some kind of fair balance that will protect the security of the United States without infringing on our citizens' human liberties and rights.

Mr. President, I have studied this proposal carefully and have read, with skepticism, the testimony of the witnesses and the reports of the committees. I am satisfied that the proper balance has been struck. I am satisfied that the right of the people to be secure in their persons, houses, papers and effects, secured by the fourth amendment to the Constitution, will be protected. I am satisfied that electronic surveillance in the name of national security will have to pass the judicial muster envisioned by the framers when they drafted that amendment. I am satisfied that the need to move swiftly against those engaged in clandestine, subversive activity on behalf of a foreign power will not suffer as a result of the imposition of these procedures. Finally, I am satisfied that enactment of this bill will end the ability of surveillers to convert the principle of "national security" to perverse purpose.

The bill provides external and internal checks on the executive. The external check is found in the judicial warrant procedure which requires the executive branch to secure a warrant before engaging in electronic surveillance for purposes of obtaining foreign intelligence information. Such surveillance would be limited to a "foreign power" and "agent of a foreign power." U.S. citizens and lawful resident aliens could be targets of electronic surveillance only if they are: First, knowingly engaged in "clandestine inteligence activities which involve or will involve a violation" of the criminal law; second, knowingly engaged in activities "that involve or will involve sabotage or terrorism for or on behalf of a foreign power"; or third, "pursuant to the direction of an intelligence service or intelligence network of a foreign power" are knowingly or secretly collecting or transmitting foreign intelligence in a manner harmful to the security of the United States. All other persons—such as illegal aliens or foreign visitors—could also be targets if they are either officers or employees of a foreign power or are "knowingly engaging in clandestine intelligence activities for or on behalf of a foreign power under circumstances which indicate that such activities would be harmful to the security of the United States." For such surveillance to be undertaken, a judicial warrant must be secured on the basis of a showing of "probable cause" that the target is a "foreign power" or an "agent of a foreign power." Thus, the courts, for the first time, will ultimately

rule on whether such foreign intelligence surveillance should occur.

Before a warrant can be requested, a designated executive branch official must first certify in writing to the court that the information sought to be obtained is "foreign intelligence information" as defined, and that the purpose of the surveillance is to obtain such information. Moreover, the Attorney General is required to make a finding that the requirements for a warrant application have been met before he authorizes the application. These provisions provide an internal check on applications for electronic surveillance by establishing a method of written accountability within the executive branch.

Other procedural safeguards assure that the Government will not engage in illegitimate eavesdropping or misuse of information so acquired. The bill requires that each order include a detailed procedure to minimize the extraneous or irrelevant information that might otherwise be obtained. Information required concerning U.S. citizens or lawful resident aliens can be used and disclosed only for foreign intelligence purposes or in connection with the enforcement of the criminal law; even if the target is not a U.S. citizen or lawful resident alien, information acquired can only be used for "lawful purposes." Detailed provisions safeguard the right of the criminal defendant to challenge the validity and propriety of the surveillance. If the target is an individual or a specified type of foreign power, the application for a warrant must state the means by which the surveillance will be effected. When the target is an "official" foreign power, as defined, the application must still designate the type of electronic surveillance to be used and whether or not physical entry will be used to effect the surveillance. Finally, the Attorney General is required to transmit to the Congress annually certain statistics concerning the surveillances engaged in during the preceding year.

It must also be emphasized that warrant orders issued subject to the bill's procedures would not be "open-ended." Electronic surveillance could be conducted against persons other than a special foreign power for 90 days or the period necessary to achieve the order's purposes, whichever is less. When the special class of "official" foreign powers is targeted for surveillance, such surveillance cannot exceed 1 year without specific reauthorization. The special court would always retain the right to review the minimization procedures under such orders to insure that, during the course of the surveillance, sufficient steps are taken to protect the rights of collateral parties who may be surveilled during that period.

Let us serve notice on potential enemies that we are strong enough to safeguard our people and their servant institutions in a manner consistent with the Constitution. Let us show our people that we are deserving of their confidence because we have found a way to protect them from our enemies without making the means of protection an enemy to their liberty. Mr. President, I urge my colleagues in the Senate to support S. 1566 as reported.●

● Mr. NELSON. Mr. President, S. 1566, the Foreign Intelligence Surveillance Act is landmark legislation. From Watergate and the Church committee report, we learned that warrantless electronic surveillance had been used by every administration from Roosevelt to Nixon. This legislation responds by bringing this most intrusive investigative technique under the rule of law, worked out painstakingly by Members of Congress and two administrations. The legislation sensitively balances civil liberties and national security, preserving both. It is a singular achievement.

It is the culmination of years of effort by concerned citizens both within and outside the Congress.

I first introduced legislation to curb warrantless national security electronic surveillance in December 1973. Since that time I have worked continually with Senators KENNEDY, MATHIAS, other Members of Congress and two administrations in an effort to legislate curbs on warrantless electronic surveillance. Before the Church committee was established by Congress I met with then Attorney General Saxbe in an effort to persuade the administration to agree to legislation subjecting national security taps and bugs through a judicial warrant procedure. Subsequently, Senators MATHIAS, KENNEDY, and I met with Attorney General Levi on the same issue. Ultimately, these meetings and other cooperative efforts led to the Ford administration's initiative in this area, S. 3197, the predecessor to the bill before us today.

Throughout these efforts my premise has been that national security electronic surveillance, like any other electronic surveillance, must be subject to the fourth amendment's prohibition or unreasonable searches and seizures. Two principles have guided these legislative efforts. First, the fourth amendment demands that before the privacy of an individual is invaded, a judicial warrant based on probable cause must be obtained. The amendment states:

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.

For some years, every American President has asserted that he was not bound by the fourth amendment requirement of probable cause when the "national security" of the United States was in question. They asserted an "inherent authority" to wiretap persons who they subjectively believed to present threats to the national security of the United States without any prior approval by a judge.

The abuses reported by the Church committee occurred because for 40 years Presidents asserted, unchallenged, the "inherent" power to authorize warrantless electronic surveillance for foreign intelligence when they deemed it necessary. I believe that there is no inherent authority to disregard the fourth amendment in the name of national security. If anything, we now know that the need for judicial warrant procedure is particularly acute when national security is involved because first amendment rights of speech and association are often implicated, along with fourth amendment rights. The entire premise of the fourth amendment is that those involved in ferreting out crime or responsible for producing foreign intelligence cannot be trusted to judge the reasonableness of the searches they propose.

The second principle has been that no American should be the target of electronic surveillance unless and until a judicial finding is made that there is probable cause to believe that the person may be involved in criminal conduct. This criminal standard asserts the traditional protections of the fourth amendment and provides the fullest possible guarantee that constitutionality protected rights will not be jeopardized by electronic surveillance in the future in a way that they have in the past.

In the 94th Congress I joined with Attorney General Levi, Senator KENNEDY and others in the cooperative effort which produced S. 3197. That legislation represented the first time that an administration expressed the willingness to submit its national security wiretapping to a judicial warrant procedure. It was a vital step for which President Ford and Attorney General Levi deserve great credit. However, by the end of the Congress I was forced to note my opposition to the bill in the form that it had finally taken. The legislation contained a careful, limited, but troublesome departure from the criminal standard for American citizens. It also contained a section which suggested the continued existence of inherent Presidential power to authorize warrantless electronic surveillance in the United States in "unprecedented circumstances."

S. 1566 represents a continuation of the effort started by the Ford administration. However, two principal issues which have concerned me and other Members of Congress have been resolved. This legislation contains no reservation of, or reference to, inherent Presidential power. Once enacted, it would represent the sole authority for national security electronic surveillance in the United States. Whether the target is a U.S. citizen, foreign visitor, or foreign embassy, the judicial warrant must be obtained. Additionally, the legislation guarantees that an American citizen could not become the target of electronic surveillance without a judicial finding of probable cause to believe that that citizen may be involved in criminal activities. Along with the existing statute dealing with criminal wiretaps, this legislation blankets the field. If enacted, the threat of warrantless electronic surveillance will be laid to rest.

The Church committee noted that a root cause of the intelligence abuses it uncovered was our complete failure to

apply the constitutional system of checks and balances to intelligence operations. One of the strongest features of this bill is that it fully reasserts our faith in our basic constitutional system. Congress' failure with respect to intelligence operations has been twofold: First, we have failed to enact statutes which told the intelligence community what was permitted and what was prohibited. Second, we have failed to conduct meaningful oversight of intelligence operations, with a sensitive eye to their constitutional implications. The passage of this legislation marks a first step toward providing the intelligence community with clear, written legislative guidance. The inclusion in the statute of stringent oversight provisions reflect the Intelligence Committee's commitment to continue to assure that this statutory scheme operates as Congress has intended, meeting legitimate national security needs while protecting constitutional rights.

In addition to the central role played by the judiciary, consistent with the commands of the fourth amendment, a frequently overlooked but vital feature of this legislation is that it insures executive accountability. Before electronic surveillance can take place, a high ranking official in the national security on foreign relations area must certify its necessity in writing. The Attorney General must also approve every application before it comes before the judge. This is a striking departure from the pattern of the past in which "deniability" was often built into the system to insure that responsibility for intelligence abuses could not be traced.

The flagrant abuses of warrantless wiretaps in the past will be doubly prevented. Not only can the court reject applications which are not consistent with the statutory requirements, but few executive officials will sign an application unless they can personally assert that the electronic surveillance proposed is in line with the statutory authorization. In sum, the legislation assigns to each branch of government a clear, responsibility, appropriate to the experience and talents of that branch. It is consistent with fundamental principles.

Recent events underscore the need for this bill. We know that this administration authorized electronic surveillance of Ronald Humphrey, a USIA employee suspected of conspiring with the North Vietnamese citizen to commit espionage. This electronic surveillance was conducted pursuant to the claimed inherent power: Presidential authority to proceed without a warrant in the foreign intelligence area.

Without prejudging the outcome of the Humphrey case, I note that the case raises substantial national security issues. If this legislation had been in effect, a warrant could undoubtedly have been obtained to conduct this electronic surveillance. But the incident should remind us of potential dangers inherent in the current process. If this legislation does not pass, it is easy to predict the course of future events.

With passing time, perhaps in periods of internal discord, the memory of recent abuses will fade. Future Attorneys General will be less scrupulous about requiring proof that the proposed target of electronic surveillance is actually the agent of a foreign power. The required showing of collaboration will degenerate, and people will again be surveilled because of their social relationships with foreign citizens, or simply because their views are unpopular. Constitutionally protected activity will again be jeopardized. Legislation is needed to place the final decision about where national security electronic surveillance is justified, not rity electronic surveillance is justified, not in the executive branch, but in the judiciary consistent with what the fourth amendment commands.

The position of the Carter administration has been straightforward. They have supported this legislation, and will adhere to it as the sole authority for electronic surveillance in the United States. However, until it is passed, they will rely on their Executive order, and where necessary, in inherent power to proceed without a warrant. Quite clearly, the solution for Congress is to enact this legislation and resolve the issue.

The passage of this legislation is important in its own right, but it is also vital for what it signifies for the future. This legislation could not have been written and passed without extraordinary contributions by the Justice Department; the national security community, the Judiciary and Intelligence Committees and the civil liberties communities, and an impressive commitment to compromise on the part of everyone concerned. The same principals will face other formidable tasks in the future: most notably, the crafting of legislative charters for the FBI and the CIA. While this legislation will not be easily achieved, what we are accomplishing today carries with it the possibility of future successes as well. We have demonstrated that it is possible to react to the Church committee's revelations without overreacting; to balance the conflicting claims of national security and civil liberties.

This legislation serves our country well.●

● Mr. DOLE. Mr. President, I would like to commend the members of the Judiciary and Intelligence Committtees for their work in putting together a reasonable answer to the many problems encountered in regulating foreign intelligence wiretaps. S. 3197, a bill very similar to this one, has been reported out of committee during the 94th Congress but was never considered by the full Senate. This bill reflects that earlier efforts as well, as additional study and further refinements by both committees.

A COMPROMISE

Of course, S. 1566 is a compromise between a number of Senators who hold somewhat different views on the regulation of wiretapping in the foreign intelligence area. However, all parties seem to agree that reform and clarification of the law in this area is badly needed and I believe that this bill is a reasonable reform. As such, I support the bill.

The basic thrust of this legislation is found in the requirement that warrants be issued for all wiretaps made in connection with U.S. foreign intelligence operations. The bill both sets up the judiciary machinery for issuing such warrants and lays out the standards for their issuance. I trust that this legislation will provide an expeditious procedure for granting such warrants while limiting their use and protecting people from unwarranted violation of privacy.

The fourth amendment has been the principal legal bulwark protecting privacy-related rights in this country. However, interpreting its prohibition on "unreasonable searches and seizures" has not been a matter free of difficulty. Of course, the fourth amendment was adopted long before the telephone and long before the need for intensive foreign intelligence operations became apparent. The fourth amendment is very near the heart of our American structure of rights and freedoms. While highly relevant to contemporary intelligence operations, it does not itself provide the detailed prohibitions and restrictions which are needed if we are to best protect privacy while maximizing the effectiveness of our intelligence efforts. Hopefully, more effective regulation will be provided under S. 1566.

PROTECTING THE FOURTH AMENDMENT

In regulating wiretaps we need to stay within the meaning of the fourth amendment, which remains the conceptual bulwark and the literal foundation of privacy-related rights in this country. This legislation is within the fourth amendment requirements and should always be interpreted in a way that will keep it there.

However, this Senator does have some reservations about this bill. This bill is a compromise in a very difficult area—and so it can be predicted that many of us would not view this as a perfect bill. Therefore, I would encourage my colleagues to keep their eye on the use of wiretaps in the future, in case additional reforms or refinements are needed.

THE RESPONSIBILITY OF THE EXECUTIVE BRANCH

I hope that the establishment or judicial machinery for granting warrants will not lessen the degree of responsibility of the executive branch to examine carefully the need for such wiretaps prior to asking for them. The stamp of judicial approval should not be used to sanction an abdication of the responsibility of the executive branch in protecting the privacy of Americans.

I would also hope that the language incorporated into the standards for issuance of wiretaps will not be too restrictive. For instance, before a warrant can issue in certain cases, the standards require that the subject of the wiretap have "knowingly" engaged in the activity prompting the wiretap request.

As a former county attorney charged with the prosecution of criminal offenses, I recognize the difficulties inherent in a burden of proof incorporating the word "knowingly." These difficulties become very obvious in the court room, and I hope that they will not prove too burdensome in the sort of ex parte hearing anticipated by S. 1566. Certainly, I hope a reasonable interpretation will be given

to that word, and that it will not cause problems in obtaining wiretaps for appropriate intelligence efforts.

Once again, let me reiterate my support for this legislation and let me express my hope that it will work to the satisfaction of those, like myself, who are concerned about protecting privacy-related rights while providing for an effective foreign intelligence surveillance system for this country.●

● Mr. MATHIAS. Mr. President, I rise to speak in support of S. 1566, the Foreign Intelligence Surveillance Act of 1978.

A few years ago, I joined with some of my colleagues in an effort to enact legislation to provide clear guidelines regarding the use of electronic surveillance in foreign intelligence cases. We knew we faced a long, uphill struggle. We knew we faced a formidable task in convincing both a majority of our colleagues and the intelligence community of the need for such statutory guidelines.

Momentum was slow in building. Regrettably, support for this concept began to mushroom only after it became clear that numerous abuses in the use of electronic surveillance in foreign intelligence cases had already occurred. These abuses were carefully and comprehensively documented in the final report of the Select Committee on Intelligence, on which I served.

Much to their dismay, the American people learned that beginning with President Franklin Roosevelt, every administration has asserted the right to conduct, and has conducted, warrantless wiretapping and bugging of Americans in foreign intelligence cases.

These revelations shocked the conscience of the American people. Americans demanded prompt, effective remedial action by the Congress and the executive branch. These calls for reform were not ignored.

In the 94th Congress, I joined with a bipartisan group of Senators and Representatives in sponsoring S. 3197, the first bill ever supported by a President and an Attorney General to require judicial warrants in foreign intelligence cases. Although S. 3197 was not enacted, it laid the groundwork for the bill before us today.

President Ford and his Attorney General, Edward Levi, deserve great credit for breaking with the long-standing tradition of the executive branch and submitting S. 3197 to the Congress. President Carter and Attorney General Bell deserve similar credit for fulfilling their pledges to strongly support S. 1566.

Enactment of S. 1566 would assuredly be a milestone in our Nation's history. It would be a ringing reaffirmation of America's commitment to the fundamental liberties embodied in our Constitution. Above all, it would insure that electronic surveillance in foreign intelligence cases would be conducted in conformity with the principles set forth in the fourth amendment. It would require an impartial magistrate outside the executive branch and the intelligence community to authorize such wiretaps. As the Supreme Court properly noted in the Keith case:

> The Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised. This judicial role accords with our basic Constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of government. (*United States* v. *United States District Court*, 407 U.S. 297 (1972).)

At the time S. 1566 was introduced last year, I expressed my concern over certain provisions in the bill, especially the section allowing for electronic surveillance of an American citizen who is not involved in criminal activity. I urged the appropriate committees to scrutinize this issue and to consder amending this provision to bring it into conformity with the recommendations of the Senate Select Committee on Intelligence calling for a criminal standard in foreign intelligence cases.

This issue was a subject of intense debate in both the Judiciary and Intelligence Committees. And, the bill has now been amended in response to concern such as my own. As drafted at present, S. 1566 requires that U.S. citizens and resident aliens not be subjected to electronic surveillance unless they engage in intelligence-gathering activities which involve or may involve violations of the criminal laws of the United States.

I support this important change. In my view, it is consonant with recommendations of the Church amendment and strikes an appropriate balance between the intelligence-gathering needs of the United States and the constitutional rights of Americans.

In moving promptly to enact this bill, Congress can take an important step toward restoring the balance between the legislative and executive branches contemplated in the Constitution. For the past several decades, Congress has abdicated its responsibility to establish by law the framework in which executive power is to be discharged. As the select committee found, this abdication contributed to many of the abuses of power it uncovered.

Unless this bill is enacted, there will continue to be no statute whatever regulating the executive's conduct in the area of foreign intelligence. This situation must be corrected. It would resolve once and for all the debate over executive power to order electronic surveillance in national security cases—a debate that has heated up dramatically since the disclosure of the Humphrey case.

I urge my colleagues to join me in supporting this important legislation.●

● Mr. BIDEN. Mr. President, enactment of S. 1566, the Foreign Intelligence Surveillance Act represents the culmination of an arduous but productive legislative process. It is a reaffirmation of the principle that it is possible to protect the national security and at the same time the Bill of Rights. This legislative process has produced a bill which effectively accommodates the first and fourth amendment rights of our fellow citizens with the needs of our national security community to protect our liberties from enemies foreign and domestic.

Foreign intelligence surveillance was the very first matter on the agenda of the newly created Intelligence Committee when I joined it in May of 1976. For almost 2 years we have struggled with this ancient dilemma of our democracy—whether we must risk our liberty in order to protect it. Although this process of drafting and redrafting, endless meetings and negotiations with all levels of the executive branch has taken what appears to be an inordinate amount of time. It is indeed rewarding to find that it is not necessary to compromise civil liberties in the name of national security. It is for that reason that I rise in support of S. 1566.

There have been times during the past 2 years when representatives of the executive branch, and indeed, even some of my colleagues, surely have been impatient with me and other critics of earlier proposals. There have been times when we have appeared to allow our doubts about the wisdom of such legislation to lead to a "nitpicking" approach to the legislative process. However, I am convinced that this careful analysis of the legislation born of considerable doubt about how to accommodate these interests has led to legislation which does not compromise either national security or civil liberties.

In the words of our Founding Fathers, "eternal vigilance is the price of liberty." They intended we be vigilant of enemies, foreign and domestic, and equally vigilant of those who claim the necessity to sacrifice liberties in the face of those enemies. As long as we are willing to invest our energies in this pursuit, we can preserve our democracy and the Bill of Rights.

For the last four nights we have been witness through the NBC program "Holocaust" to the terrifying consequences of the failure to honor the principle of vigilance. On the last night of that program my 9-year-old son asked me, "Daddy, will this ever happen in our country?" I thought a moment and then told him no it will not, as long as we are willing to put in the time and energy to seek an accommodation of national security with civil liberties and insist that neither principle be compromised, we will never grant to the state the horrifying powers the Germans delegated to their leaders. So in a sense it is poignant that on the day following this presentation we should enact legislation which restricts the power of the executive branch to spy on its citizens in the name of national security. It is a testament to the fact that a police state is less likely in our country than any other in the world.

Finally, it is important to remember that legislation as comprehensive and complicated as S. 1566 is also the product of political courage and the investment of many manhours of work. Many Members of this body and their staffs deserve much credit for the enactment of this legislation but none more than the senior Senator from Massachusetts and the senior Senator from Indiana. As representatives of the two committees primarily responsible for this legislation, they invested literally thousands of hours of work in developing this bill and they

deserve our thanks and congratulations.●

The PRESIDING OFFICER. Who yields time?

Mr. KENNEDY. Mr. President, I shall ask for the yeas and nays on passage, so I suggest the absence of a quorum, the time to be evenly divided.

The PRESIDING OFFICER. The time will have to come out of the time of the Senator from South Carolina.

Mr. THURMOND. That is fine. I have no objection.

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

The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

Mr. KENNEDY. Mr. President, I ask for the yeas and nays on passage of the bill.

The PRESIDING OFFICER. Is there a sufficient second? There is a sufficient second.

The yeas and nays were ordered.

Mr. KENNEDY. I ask for third reading, Mr. President.

The PRESIDING OFFICER. If there be no further amendments to be proposed, the question is on the engrossment and third reading of the bill.

The bill was ordered to be engrossed for a third reading and was read the third time.

Mr. KENNEDY. Mr. President, I suggest the absence of a quorum on the time of the Senator from South Carolina.

Mr. THURMOND. I have no objection.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

Does the Senator from South Carolina yield back his remaining time?

Mr. THURMOND. Mr. President, I yield back my time and suggest we have a vote on the bill.

The PRESIDING OFFICER. The question is, Shall the bill pass? The yeas and nays have been ordered and the clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. CRANSTON. I announce that the Senator from Colorado (Mr. HASKELL), the Senator from New Hampshire (Mr. MCINTYRE), and the Senator from Ohio (Mr. METZENBAUM) are necessarily absent.

I further announce that, if present and voting, the Senator from Ohio (Mr. METZENBAUM) and the Senator from New Hampshire (Mr. MCINTYRE) would each vote "yea."

Mr. STEVENS. I announce that the Senator from Idaho (Mr. MCCLURE) is necessarily absent.

The result was announced—yeas 95, nays 1, as follows:

[Rollcall Vote No. 128 Leg.]

YEAS—95

Abourezk	Glenn	Morgan
Allen	Goldwater	Moynihan
Anderson	Gravel	Muskie
Baker	Griffin	Nelson
Bartlett	Hansen	Nunn
Bayh	Hart	Packwood
Bellmon	Hatch	Pearson
Bentsen	Hatfield,	Pell
Biden	Mark O.	Percy
Brooke	Hatfield,	Proxmire
Bumpers	Paul G.	Randolph
Burdick	Hathaway	Ribicoff
Byrd,	Hayakawa	Riegle
Harry F., Jr.	Heinz	Roth
Byrd, Robert C.	Helms	Sarbanes
Cannon	Hodges	Sasser
Case	Hollings	Schmitt
Chafee	Huddleston	Schweiker
Chiles	Humphrey	Sparkman
Church	Inouye	Stafford
Clark	Jackson	Stennis
Cranston	Javits	Stevens
Culver	Johnston	Stevenson
Curtis	Kennedy	Stone
Danforth	Laxalt	Talmadge
DeConcini	Leahy	Thurmond
Dole	Long	Tower
Domenici	Lugar	Wallop
Durkin	Magnuson	Weicker
Eagleton	Mathias	Williams
Eastland	Matsunaga	Young
Ford	McGovern	Zorinsky
Garn	Melcher	

NAYS—1

Scott

NOT VOTING—4

Haskell	Metzenbaum
McClure	McIntyre

So the bill (S. 1566), as amended, was passed, as follows:

S. 1566

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Foreign Intelligence Surveillance Act of 1978".

SEC. 2. Title 18, United States Code, is amended by adding a new chapter after chapter 119 as follows:

"Chapter 120.—ELECTRONIC SURVEILLANCE WITHIN THE UNITED STATES FOR FOREIGN INTELLIGENCE PURPOSES

"Sec.
"2521. Definitions.
"2522. Authorization for electronic surveillance for foreign intelligence purposes.
"2523. Designation of judges authorized to grant orders for electronic surveillance.
"2524. Application for an order.
"2525. Issuance of an order.
"2526. Use of information.
"2527. Report of electronic surveillance.
"2528. Congressional oversight.

"§ 2521. Definitions

"(a) Except as otherwise provided in this section the definitions of section 2510 of this title shall apply to this chapter.

"(b) As used in this chapter—

"(1) 'Foreign power' means—

"(A) a foreign government or any component thereof, whether or not recognized by the United States;

"(B) a faction of a foreign nation or nations, not substantially composed of United States persons;

"(C) an entity, which is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments;

"(D) a foreign-based terrorist group;

"(E) a foreign-based political organization, not substantially composed of United States persons; or

"(F) an entity which is directed and controlled by a foreign government or governments.

"(2) 'Agent of a foreign power' means—

"(A) any person, other than a United States person, who—

"(i) acts in the United States as an officer or employee of a foreign power; or

"(ii) acts for or on behalf of a foreign power which engages in clandestine intelligence activities contrary to the interests of the United States, when the circumstances of such person's presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or conspires with any person knowing that such person is engaged in such activities;

"(B) any person who—

"(i) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States;

"(ii) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States;

"(iii) knowingly engages in sabotage or terrorism, or activities in furtherance thereof, for or on behalf of a foreign power;

"(iv) knowingly aids or abets any person in the conduct of activities described in subparagraph (B) (i) through (iii) above, or conspires with any person knowing that such person is engaged in activities described in subparagraph (B) (i) through (iii) above: *Provided,* That no United States person may be considered an agent of a foreign power solely upon the basis of activities protected by the first amendment to the Constitution of the United States.

"(3) 'Terrorism' means activities which—

"(A) are violent acts or acts dangerous to human life which would be criminal under the laws of the United States or of any State if committed within its jurisdiction; and

"(B) appear to be intended—

"(i) to intimidate or coerce the civilian population,

"(ii) to influence the policy of a government by intimidation or coercion, or

"(iii) to affect the conduct of a government by asassination or kidnaping.

"(4) 'Sabotage' means activities which would be prohibited by title 18, United States Code, chapter 105, if committed against the United States.

"(5) 'Foreign intelligence information' means—

"(A) information which relates to, and if concerning a United States person is necessary to, the ability of the United States to protect itself against actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

"(B) information with respect to a foreign power or foreign territory which relates to, and if concerning a United States person is necessary to—

"(i) the national defense or the security of the Nation; or

"(ii) the successful conduct of the foreign affairs of the United States; or

"(C) information which relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against—

"(i) sabotage or terrorism by a foreign power or an agent of a foreign power, or

"(ii) the clandestine intelligence activities of an intelligence service or network of a foreign power or an agent of a foreign power.

"(6) 'Electronic surveillance' means—

"(A) the acquisition by an electronic, mechanical, or other surveillance device of

the contents of any wire or radio communication sent by or intended to be received by a particular, known United States person who is in the United States, where the contents are acquired by intentionally targeting that United States person, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes;

"(B) the acquisition by an electronic, mechanical, or other surveillance device, of the contents of any wire communication to or from a person in the United States, without the content of any party thereto, where such acquisition occurs in the United States while the communication is being transmitted by wire;

"(C) the intentional acquisition, by an electronic, mechanical, or other surveillance device, of the contents of any radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, and where both the sender and all intended recipients are located within the United States; or

"(D) the installation or use of an electronic, mechanical, or other surveillance device in the United States for monitoring to acquire information, other than from a wire or radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes.

"(7) 'Attorney General' means the Attorney General of the United States (or Acting Attorney General) or the Deputy Attorney General.

"(8) 'Minimization procedures' means procedures which are reasonably designed to minimize the acquisition and retention, and prohibit the dissemination, except as provided for in subsections 2526 (a) and (b), of any information concerning United States persons without their consent that does not relate to the ability of the United States—

"(A) to protect itself against actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

"(B) to provide for the national defense or security of the Nation;

"(C) to provide for the conduct of the foreign affairs of the United States;

"(D) to protect against terrorism by a foreign power or an agent of a foreign power;

"(E) to protect against sabotage by a foreign power or an agent of a foreign power; or

"(F) to protect against the clandestine intelligence activities of an intelligence service or network of a foreign power or an agent of a foreign power;

and which are reasonably designed to insure that information which relates solely to the ability of the United States to provide for the national defense or security of the Nation and to provide for the conduct of foreign affairs of the United States, under subparagraphs (B) and (C) above, shall not be disseminated in a manner which identifies any United States person, without such person's consent, unless such person's identity is necessary to understand or assess the importance of information with respect to a foreign power or foreign territory or such information is otherwise publicly available.

"(9) 'United States person' means a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 101(a)(20) of the Immigration and Nationality Act), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence or a corporation which is incorporated in the United States, but not including corporations or associations which are foreign powers as defined in section 2521(b)(1)(A) through (E).

"(10) 'United States' when used in a geographic sense means all areas under the territorial sovereignty of the United States, the Trust Territory of the Pacific Islands, and the Canal Zone.

"§ 2522. Authorization for electronic surveillance for foreign intelligence purposes

"Applications for a court order under this chapter are authorized if the President has, by written authorization, empowered the Attorney General to approve applications to Federal judges having jurisdiction under section 2523 of this chapter, and a judge to whom an application is made may grant an order, in conformity with section 2525 of this chapter, approving electronic surveillance of a foreign power or an agent of a foreign power for the purpose of obtaining foreign intelligence information.

"§ 2523. Designation of judges authorized to grant orders for electronic surveillance

"(a) The Chief Justice of the United States shall publicly designate seven district court judges who shall constitute a special court, each member of which shall have jurisdiction to hear applications for and grant orders approving electronic surveillance anywhere within the United States under the procedures set forth in this chapter, except that no judge designated under this subsection shall have jurisdiction of the same application for electronic surveillance under this chapter which has been denied previously by another judge designated under this subsection. If any judge so designated denies an application for an order authorizing electronic surveillance under this chapter, such judge shall provide immediately for the record a written statement of each reason for his decision and, on motion of the United States, the record shall be transmitted, under seal, to the special court of review established in subsection (b).

"(b) The Chief Justice shall publicly designate three judges, one of whom shall be publicly designated as the presiding judge, from the United States district courts or courts of appeals who together shall comprise a special court of review which shall have jurisdiction to review the denial of any application made under this chapter. If such special court determines that the application was properly denied, the special court shall immediately provide for the record a written statement of each reason for its decision and, on petition of the United States for a writ of certiorari, the record shall be transmitted under seal to the Supreme Court, which shall have jurisdiction to review such decision.

"(c) Proceedings under this chapter shall be conducted as expeditiously as possible. The record of proceedings under this chapter, including applications made and orders granted, shall be sealed and maintained under security measures established by the Chief Justice in consultation with the Attorney General and the Director of Central Intelligence.

"(d) Each judge designated under this section shall so serve for a maximum of seven years and shall not be eligible for redesignation: *Provided*, That the judges first designated under subsection (a) shall be designated for terms of from one to seven years so that one term expires each year, and that judges first designated under subsection (b) shall be designated for terms of three, five, and seven years.

"§ 2524. Application for an order

"(a) Each application for an order approving electronic surveillance under this chapter shall be made by a Federal officer in writing upon oath or affirmation to a judge having jurisdiction under section 2523 of this chapter. Each application shall require the approval of the Attorney General based upon his finding that it satisfies the criteria and requirements of such application as set forth in this chapter. It shall include the following information—

"(1) the identity of the Federal officer making the application;

"(2) the authority conferred on the Attorney General by the President of the United States and the approval of the Attorney General to make the application;

"(3) the identity, if known, or a description of the target of the electronic surveillance;

"(4) a statement of the facts and circumstances relied upon by the applicant to justify his belief that—

"(A) the target of the electronic surveillance is a foreign power or an agent of a foreign power; and

"(B) the facilities or the place at which the electronic surveillance is directed are being used, or are about to be used, by a foreign power or an agent of a foreign power;

"(5) a statement of the proposed minimization procedures;

"(6) when the target of the surveillance is not a foreign power as defined in section 2521(b)(1) (A), (B), or (C), a detailed description of the nature of the information sought;

"(7) a certification or certifications by the Assistant to the President for National Security Affairs or an executive branch official or officials designated by the President from among those executive officers employed in the area of national security or defense and appointed by the President with the advice and consent of the Senate—

"(A) that the certifying official deems the information sought to be foreign intelligence information;

"(B) that the purpose of the surveillance is to obtain foreign intelligence information;

"(C) that such information cannot reasonably be obtained by normal investigative techniques;

"(D) including a designation of the type of foreign intelligence information being sought according to the categories described in section 2521(b)(5);

"(E) when the target of the surveillance is not a foreign power, as defined in section 2521(b)(1) (A), (B), or (C), including a statement of the basis for the certification that—

"(i) the information sought is the type of foreign intelligence information designated; and

"(ii) such information cannot reasonably be obtained by normal investigative techniques;

"(F) when the target of the surveillance is a foreign power, as defined in section 2521(b)(1) (A), (B), or (C), stating the period of time for which the surveillance is required to be maintained;

"(8) when the target of the surveillance is not a foreign power, as defined in section 2521(b)(1) (A), (B), or (C), a statement of the means by which the surveillance will be effected, and when the target is a foreign power, as defined in section 2521(b)(1) (A), (B), or (C), a designation of the type of electronic surveillance to be used according to the categories described in section 2521(b)(6), and a statement whether physical entry is required to effect the surveillance;

"(9) a statement of the facts concerning all previous applications that have been made to any judge under this chapter involving any of the persons, facilities, or places specified in the application, and the action taken on each previous application; and

"(10) when the target of the surveillance is not a foreign power, as defined in section 2521(b)(1) (A), (B), or (C), a statement

of the period of time for which the electronic surveillance is required to be maintained. If the nature of the intelligence gathering is such that the approval of the use of electronic surveillance under this chapter should not automatically terminate when the described type of information has first been obtained, a description of facts supporting the belief that additional information of the same type will be obtained thereafter.

"(b) The Attorney General may require any other affidavit or certification from any other officer in connection with the application.

"(c) The judge may require the applicant to furnish such other information as may be necessary to make the determinations required by section 2525 of this chapter.

"§ 2525. Issuance of an order

"(a) Upon an application made pursuant to section 2524 of this title, the judge shall enter an ex parte order as requested or as modified approving the electronic surveillance if he finds that—

"(1) the President has authorized the Attorney General to approve applications for electronic surveillance for foreign intelligence information;

"(2) the application has been made by a Federal officer and approved by the Attorney General;

"(3) on the basis of the facts submitted by the applicant there is probable cause to believe that—

"(A) the target of the electronic surveillance is a foreign power or an agent of a foreign power; and

"(B) the facilities or place at which the electronic surveillance is directed are being used, or are about to be used, by a foreign power or an agent of a foreign power;

"(4) the proposed minimization procedures meet the definition of minimization procedures under section 2521(b)(8) of this title;

"(5) the application which has been filed contains the description and certification or certifications, specified in section 2524(a)(7) and, if the target is a United States person, the certification or certifications are not clearly erroneous on the basis of the statement made under section 2524(a)(7)(E) and any other information furnished under section 2524(c).

"(b) An order approving an electronic surveillance under this section shall—

"(1) specify—

"(A) the identify, if known, or a description of the target of the electronic surveillance;

"(B) the nature and location of the facilities or the place at which the electronic surveillance will be directed;

"(C) when the target of the surveillance is not a foreign power as defined in section 2521(b)(1)(A), (B), or (C), the type of information sought to be acquired and when the target is a foreign power defined in section 2521(b)(1)(A), (B), or (C), the designation of the type of foreign intelligence information under section 2521(b)(5) sought to be acquired;

"(D) when the target of the surveillance is not a foreign power, as defined in section 2521(b)(1)(A), (B), or (C), the means by which the electronic surveillance will be effected, and when the target is a foreign power, as defined in section 2521(b)(1)(A), (B), or (C), a designation of the type of electronic surveillance to be used according to the categories described in section 2521(b)(6) and whether physical entry will be used to effect the surveillance; and

"(E) the period of time during which the electronic surveillance is approved; and

"(2) direct—

"(A) that the minimization procedures be followed;

"(B) that, upon the request of the applicant, a specified communication or other common carrier, landlord, custodian, contractor, or other specified person furnish the applicant forthwith any and all information, facilities, or technical assistance, necessary to accomplish the electronic surveillance in such manner as will protect its secrecy and produce a minimum of interference with the services that such carrier, landlord, custodian, contractor or other person is providing that target of electronic surveillance;

"(C) that such carrier, landlord, custodian, or other person maintain under security procedures approved by the Attorney General and the Director of Central Intelligence any records concerning the surveillance or the aid furnished which such person wishes to retain;

"(D) that the applicant compensate, at the prevailing rate, such carrier, landlord, custodian, or other person for furnishing such aid.

"(c) An order issued under this section may approve an electronic surveillance not targeted against a foreign power, as defined in section 2521(b)(1)(A), (B), or (C), for the period necessary to achieve its purpose, or for ninety days, whichever is less; an order under this section shall approve an electronic surveillance targeted against a foreign power, as defined in section 2521(b)(1)(A), (B), or (C), for the period specified in the certification required in section 2524(a)(7)(F), or for one year, whichever is less. Extensions of an order issued under this chapter may be granted on the same basis as an original order upon an application for an extension made in the same manner as required for an original application and after new findings required by subsection (a) of this section. In connection with applications for extensions where the target is not a foreign power, as defined in section 2521(b)(1)(A), (B), or (C), the judge may require the applicant to submit information, obtained pursuant to the original order or to any previous extensions, as may be necessary to make new findings of probable cause. The judge may assess compliance with the minimization procedures required by this chapter.

"(d) Notwithstanding any other provision of this chapter when the Attorney General reasonably determines that—

"(1) an emergency situation exists with respect to the employment of electronic surveillance to obtain foreign intelligence information before an order authorizing such surveillance can with due diligence be obtained, and

"(2) the factual basis for issuance of an order under this chapter to approve such surveillance exists, he may authorize the emergency employment of electronic surveillance if a judge designated pursuant to section 2523 of this chapter is informed by the Attorney General or his designate at the time of such authorization that the decision has been made to employ emergency electronic surveillance and if an application in accordance with this chapter is made to that judge as soon as practicable, but not more than twenty-four hours after the Attorney General authorizes such acquisition. If the Attorney General authorizes such emergency employment of electronic surveillance, he shall require that the minimization procedures required by this chapter for the issuance of a judicial order be followed. In the absence of a judicial order approving such electronic surveillance, the surveillance shall terminate when the information sought is obtained, when the application for the order is denied, or after the expiration of twenty-four hours from the time of authorization by the Attorney General, whichever is earlier. In the event that such application for approval is denied, or in any other case where the electronic surveillance is terminated and no order is issued approving the surveillance, no information obtained or evidence derived from such surveillance shall be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in or before any court, grand jury, department, office, agency, regulatory body, legislative committee, or other authority of the United States, a State, or political subdivision thereof; and no information concerning any United States person acquired from such surveillance shall subquently be used or disclosed in any other manner by Federal officers or employees without the consent of such person, except with the approval of the Attorney General where the information indicates a threat of death or serious bodily harm to any person. A denial of the application made under this subsection may be reviewed as provided in section 2523.

"§ 2526. Use of information

"(a) Information concerning United States persons acquired from an electronic surveillance conducted pursuant to this chapter may be used and disclosed by Federal officers and employees without the consent of the United States person only for purposes specified in section 2521(b)(8)(A) through (F) and in accordance with the minimization procedures required by this chapter, or for the enforcement of the criminal law if its use outweighs the possible harm to the national security. No otherwise privileged communication obtained in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character. No information acquired from an electronic surveillance conducted pursuant to this chapter may be used or disclosed by Federal officers or employees except for lawful purposes.

"(b) The minimization procedures required under this chapter shall not preclude the retention and disclosure, for law enforcement purposes, of any information which constitutes evidence of a crime if such disclosure is accompanied by a statement that such evidence, or any information derived therefrom, may only be used in a criminal proceeding with the advance authorization of the Attorney General.

"(c) Whenever the Government of the United States, of a State, or of a political subdivision thereof intends to enter into evidence or otherwise use or disclose in any trial, hearing, or other proceeding in or before any court, department, officer, agency, or other authority of the United States, a State, or a political subdivision thereof, any information obtained or derived from an electronic surveillance, the Government shall prior to the trial, hearing, or other proceeding or at a reasonable time prior to an effort to so disclose or so use the information or submit it in evidence notify the court in which the information is to be disclosed or used or, if the information is to be disclosed or used in or before another authority, shall notify a court in the district wherein the information is to be so disclosed or so used that the Government intends to so disclose or so use such information.

"(d) Any person who has been the target of electronic surveillance or whose communications or activities have been subject to electronic surveillance and against whom evidence derived from such electronic surveillance is to be, or has been, introduced or otherwise used or disclosed in any trial, hearing, or proceeding in or before any court, department officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any communication acquired by electronic surveillance or evidence derived therefrom, on the grounds that—

"(1) the communication was unlawfully acquired; or

"(2) the surveillance was not made in

conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion.

"(e) Whenever any court is notified in accordance with subsection (c), or whenever a motion is made by an aggrieved person pursuant to subsection (d), to suppress evidence on the grounds that it was obtained or derived from an unlawful electronic surveillance, or whenever any motion or request is made by an aggrieved person pursuant to section 3504 of this title or any other statute or rule of the United States, to discover, obtain, or suppress evidence or information obtained or derived from electronic surveillance, the Federal court, or where the motion is made before another authority, a Federal court in the same district as the authority, shall, notwithstanding any other law, if the Government by affidavit asserts that disclosure or an adversary hearing would harm the national security of the United States, review in camera and ex parte the application, order, and other materials relating to the surveillance as may be necessary to determine whether the surveillance was authorized and conducted in a manner that did not violate any right afforded by the Constitution and statutes of the United States to the aggrieved person. In making this determination, the court shall disclose to the aggrieved person portions of the application, order, or other materials relating to the surveillance only where such disclosure is necessary to make an accurate determination of the legality of the surveillance. If the court determines that the electronic surveillance of the aggrieved person was not lawfully authorized or conducted, the court shall in accordance with the requirements of law suppress the information obtained or evidence derived from the unlawful electronic surveillance. If the court determines that the surveillance was lawfully authorized and conducted, the court shall deny any motion for disclosure or discovery unless required by due process.

(f) If an emergency employment of the electronic surveillance is authorized under section 2525(d) and a subsequent order approving the surveillance is not obtained, the judge shall cause to be served on any United States person named in the application and on such other United States persons subject to electronic surveillance as the judge may determine in his discretion it is in the interest of justice to serve, notice of—

"(1) the fact of the application;

"(2) the period of the surveillance; and

"(3) the fact that during the period information was or was not obtained.

On ex parte showing of good cause to the judge the serving of the notice required by this subsection may be postponed or suspended for a period not to exceed ninety days. Thereafter, on a further ex parte showing of good cause, the court shall forego ordering the serving of the notice required under this subsection.

"(g) In circumstances involving the unintentional acquisition, by an electronic, mechanical, or other surveillance device of the contents of any radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, and where both the sender and all intended recipients are located within the United States, such contents shall be destroyed upon recognition, except with the approval of the Attorney General where the contents indicate a threat of death or serious bodily harm to any person.

"§ 2527. Report of electronic surveillance

"In April of each year, the Attorney General shall report to the Administrative Office of the United States Courts and shall transmit to Congress with respect to the preceding calendar year—

"(1) the total number of applications made for orders and extensions of orders approving electronic surveillance; and

"(2) the total number of such orders and extensions either granted, modified, or denied.

"§ 2528. Congressional oversight

"(a) On a semiannual basis the Attorney General shall fully inform the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence concerning all electronic surveillance under this chapter. Nothing in this chapter shall be deemed to limit the authority and responsibility of the appropriate committees of each House of Congress to obtain such additional information as they may need to carry out their respective functions and duties.

"(b) On or before one year after the effective date of this chapter, and on the same day each year thereafter, the Select Committee on Intelligence of the United States Senate shall report to the Senate, concerning the implementation of this chapter. Said reports shall include but not be limited to an analysis and recommendations concerning whether this chapter should be (1) amended, (2) repealed, or (3) permitted to continue in effect without amendment."

SEC. 3. The provisions of this Act and the amendment made hereby shall become effective upon enactment: *Provided,* That any electronic surveillance approved by the Attorney General to gather foreign intelligence information shall not be deemed unlawful for failure to follow the procedures of chapter 120, title 18, United States Code, if that surveillance is terminated or an order approving that surveillance is obtained under this chapter within ninety days following the designation of the first judge pursuant to section 2523 of chapter 120, title 18, United States Code.

SEC. 4. Chapter 119 of title 18, United States Code, is amended as follows:

(a) Section 2511(1) is amended—

(1) by inserting "or chapter 120 or with respect to techniques used by law enforcement officers not involving the interception of wire or oral communications as otherwise authorized by a search warrant or order of a court of competent jurisdiction," immediately after "chapter" in the first sentence;

(2) by inserting a comma and "or, under color of law, willfully engages in any other form of electronic surveillance as defined in chapter 120" immediately before the semicolon in paragraph (a);

(3) by inserting "or information obtained under color of law by any other form of electronic surveillance as defined in chapter 120" immediately after "contents of any wire or oral communication" in paragraph (c);

(4) by inserting "or any other form of electronic surveillance, as defined in chapter 120," immediately before "in violation" in paragraph (c);

"(5) by inserting "or information obtained under color of law by any other form of electronic surveillance as defined in chapter 120" immediately after "any wire or oral communication" in paragraph (d); and

(6) by inserting "or any other form of electronic surveillance, as defined in chapter 120," immediately before "in violation" in paragraph (d).

(b)(1) Section 2511(2)(a)(i) is amended by inserting the words "or radio communication" after the words "wire communication" and by inserting the words "or otherwise acquire" after the word "intercept".

(2) Section 2511(2)(a)(ii) is amended by inserting the words "or chapter 120" after the second appearance of the word "chapter," and by striking the period at the end thereof and adding the following: "or engage in electronic surveillance, as defined in chapter 120: *Provided, however,* That before the information, facilities, or technical assistance may be provided, the investigative or law enforcement officer shall furnish to the officer, employee, or agent of the carrier either—

"(1) an order signed by the authorizing judge certifying that a court order directing such assistance has been issued; or

"(2) in the case of an emergency interception or electronic surveillance as provided for in section 2518(7) of this chapter or section 2525(d) of chapter 120, a certification under oath by the investigative or law enforcement officer that the applicable statutory requirements have been met,

and setting forth the period of time for which the electronic surveillance is authorized and describing the facilities from which the communication is to be acquired. Any violation of this subsection by a communication common carrier or an officer, employee, or agency thereof, shall render the carrier liable for the civil damages provided for in section 2520. No communication common carrier or officer, employee, or agent thereof shall disclose the existence of any interception under this chapter or electronic surveillance, as defined in chapter 120, with respect to which the common carrier has been furnished either an order or certification under this subparagraph, except as may otherwise be lawfully ordered.".

(c)(1) Section 2511(2)(b) is amended by inserting the words "or otherwise engage in electronic surveillance, as defined in chapter 120," after the word "radio".

(2) Section 2511(2)(c) is amended by inserting the words "or engage in electronic surveillance, as defined in chapter 120," after the words "oral communication" and by inserting the words "or such surveillance" after the last word in the paragraph and before the period.

(3) Section 2511(2) is amended by adding at the end of the section the following provisions:

"(e) Notwithstanding any other provision of this title or section 605 or 606 of the Communications Act of 1934, it shall not be unlawful for an officer, employee, or agent of the United States in the normal course of his official duty under procedures approved by the Attorney General to conduct electronic surveillance as defined in section 2521 (b)(6) of chapter 120 without a court order for the sole purpose of:

"(i) testing the capability of electronic equipment, provided that no particular United States person shall be intentionally targeted for testing purposes without his consent, the test period shall be limited in extent and duration to that necessary to determine the capability of the equipment, that the content of any communication acquired under this paragraph shall be retained and used only for the purpose of determining the capability of such equipment, shall be disclosed only to the persons conducting the test, and shall be destroyed upon completion of the testing, and that the test may exceed ninety days only with the prior approval of the Attorney General; or

"(ii) determining the existence and capability of electronic surveillance equipment being used unlawfully, provided that no particular United States person shall be intentionally targeted for such purposes without his consent, that such electronic surveillance shall be limited in extent and duration to that necessary to determine the existence and capability of such equipment, and that any information acquired by such surveillance shall be used only to enforce this chapter or section 605 of the Communications Act of 1934 or to protect information from unlawful electronic surveillance.

"(f) Nothing contained in this chapter, or section 605 of the Communications Act of 1934 (47 U.S.C. 605) shall be deemed to affect the acquisition by the United States Government of foreign intelligence information from international or foreign communications by a means other than electronic surveillance as defined in section 2521(b)(6) of this title; and the procedures in this chapter and chapter 120 of this title, shall be the exclusive means by which electronic surveillance, as defined in section 2521(b)(6) of chapter 120, and the interception of domestic wire and oral communications may be conducted.".

(d) Section 2511(3) is repealed.

(e) Section 2515 is amended by inserting the words "or electronic surveillance, as defined in chapter 120, has been conducted" after the word "intercepted", by inserting the words "or other information obtained from electronic surveillance, as defined in chapter 120," after the second appearance of the word "communication", and by inserting "or chapter 120" after the final appearance of the word "chapter".

(f) Section 2518(1) is amended by inserting the words "under this chapter" after the word "communication".

(g) Section 2518(4) is amended by inserting the words "under this chapter" after both appearances of the words "wire or oral communication".

(h) Section 2518(9) is amended by striking the word "intercepted" and inserting the words "intercepted pursuant to this chapter" after the word "communication".

(i) Section 2518(10) is amended by striking the word "intercepted" and inserting the words "intercepted pursuant to this chapter" after the first appearance of the word "communication".

(j) Section 2519(3) is amended by inserting the words "pursuant to this chapter" after the words "wire or oral communications" and after the words "granted or denied".

(k) Section 2520 is amended by deleting all below subsection (2) and inserting in lieu thereof: "Any person other than a foreign power or an agent of a foreign power as defined in sections 2521(b)(1) and 2521(b)(2)(A) of chapter 120, who has been subject to electronic surveillance, as defined in chapter 120, or whose wire or oral communication has been intercepted, or about whom information has been disclosed or used, in violation of this chapter, shall (1) have a civil cause of action against any person who so acted in violation of this chapter and".

Mr. KENNEDY. Mr. President, I move to reconsider the vote by which the bill was passed.

Mr. THURMOND. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

(Later the following occurred:)

Mr. METZENBAUM. Mr. President, in connection with the last vote on S. 1566, I failed to vote on that measure because I was walking in the door when the vote was being announced.

I wish to announce at this time that had I been present I would have voted "aye." It is a measure on which I have spent a good deal of time and in which I have a tremendous interest. I think it is good legislation. I ask unanimous consent that my remarks in connection with the measure be carried immediately following the vote.

Mr. BAYH. Mr. President, will the Senator yield?

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

The Senator from Indiana.

Mr. BAYH. I would just like to say a word in support of the statement of the Senator from Ohio. He has been one of the long-time advocates of providing additional protection in this area, and without his help and assistance it would have been much more difficult than was otherwise the case to move this legislation along as rapidly as it was able to be moved along.

Mr. METZENBAUM. I thank the Senator from Indiana.

(Conclusion of proceedings which occurred later.)

Mr. KENNEDY. Mr. President, I wish to acknowledge the excellent work that was done by the staffs of the Judiciary Committee and the Intelligence Committee, as well as the Department of Justice and the American Civil Liberties Union. The work of the following people was invaluable to the fashioning and the shaping of this measure: Ira Shapiro, Mike Mullen, Glen Feldman, Irene Emsullem, Eric Hultman, Herman Schwartz, and Mike Klipper. From the Department of Justice: Frederick Baron, John Hotis, Newell Squires, and Doug Marvin. And, from the ACLU: John Shuttuch, and Jerry Berman.

I especially wish to commend my administrative assistant, Ken Feinberg, who made a very special contribution to this entire legislative process.

Mr. President, I ask unanimous consent that the Secretary of the Senate be authorized to make technical and clerical corrections in the engrossment of S. 1566.

The PRESIDING OFFICER (Mr. ZORINSKY). Without objection, it is so ordered.

Mr. THURMOND. Mr. President, I simply wish to say that I think this is an important bill. I congratulate the distinguished Senator from Massachusetts for his leadership in this bill and commend the able Senator from Utah (Mr. GARN) for his good work on this bill. Also, I join with Senator KENNEDY in commending the majority and minority staff for the splendid work they did in connection with it.

Mr. ROBERT C. BYRD. Mr. President, I wish to compliment the distinguished Senator from Massachusetts (Mr. KENNEDY) for his managership of this important legislation. He has demonstrated on this occasion as he has on so many occasions complete knowledge and complete grasp of the issues, and he has done a commendable and outstanding job.

Also, Mr. President, I wish to commend the ranking minority of the committee, Mr. THURMOND) for his able leadership in joining with Mr. KENNEDY in managing this bill.

I think they are both to be commended and the Senate is in their debt.

Mr. President, I commend Senator KENNEDY and Senator THURMOND, the distinguished managers of S. 1566 on behalf of the Judiciary Committee, and Senator BAYH and Senator GARN, the distinguished managers on behalf of the Intelligence Committee, on what has been accomplished here today. Few issues have been fraught with more difficulty or controversy than the question of electronic surveillance for foreign intelligence purposes. The effort to draw a proper balance between the rights of individuals to be free from unwarranted surveillance and the right of this Nation as a whole to protect itself from foreign intelligence activities has been one of the most challenging that we have faced—and one that has greatly concerned the people of the country.

Thanks to the efforts of the members of the Judiciary and Intelligence Committees—and particularly to the efforts of these four Senators—that balance has been struck. For the Foreign Intelligence Surveillance Act, which the Senate has just now passed overwhelmingly, represents that necessary compromise between individual rights and the rights of the people as a whole that assures the protection of both interests and has made this country the great democracy that it now is and will always be.

The people of the country owe Senators KENNEDY, BAYH, THURMOND, and GARN a profound debt of gratitude for their long and arduous labors in bringing about the enactment of this bill.

Mr. BAYH. Mr. President, I wish the RECORD to show my special commendation for the members of the Intelligence Committee staff. This was a joint effort, as the Senator knows, and without the help of Mr. Miller, Mr. Eisenhower, Mr. Taylor, Mr. Epstein, Mr. Raffel, Mr. Levine, Mr. Gitenstein, Mr. Shulsky, Mr. Codevilla, Mr. Norton, Mr. Bushong, Mr. Evans, Mr. Shaw, Mr. Ford, Mr. Ricks, Mr. Elliff, and Nancy Brooks—who I think spent until the wee hours of the night putting all this together—and also Mr. Tom Connaughton, my personal staff, we would not have accomplished what we have, and we owe them a debt of gratitude.

● Mr. MUSKIE. Mr. President, the adoption today of S. 1566 represents a landmark achievement in congressional efforts to strike a working balance between the legitimate need to collect national security intelligence and the individual rights of citizens in a democratic society.

Many Members of the Senate have worked for several years to bring about the passage of this important legislation. Particular credit is due to the untiring leadership and dedication of Senator KENNEDY and Senator BAYH representing the work of the Judiciary and Intelligence Committees. Their judgment and patience have prevailed over a long period of time and have advanced the protection of civil liberties for all Americans.

Many other Members, however, played vital roles in the development of these procedural safeguards including the late Senator Philip Hart of Michigan, Senator GAYLORD NELSON of Wisconsin, former Senator Sam J. Ervin, Jr., Senator JAMES ABOUREZK of South Dakota, and former Senator John Tunney of California.

In a democratic society citizens must be ever vigilant to protect against government infringement of their liberties. As we have seen all too clearly in recent years, democracy is a fragile system which can be endangered as surely by

citizen neglect as by government despotism.

Lord Acton's maxim that "power corrupts and absolute power corrupts absolutely" should serve as a constant warning against the common tendency of those who govern to justify the use of ignoble means to achieve noble objectives.

The means by which government officials seek to achieve objectives, whether it be the protection of the nation from foreign attack or the distribution of the Nation's health, will in the long run determine the success or failure of our experiment in self-government.

I applaud the work of the Senators who have brought forth this major victory for it is yet another affirmation of success this country has had in protecting the liberties of its citizens.●

ROUTINE MORNING BUSINESS

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that there now be a period for the transaction of routine morning business not to extend beyond 30 minutes with statements limited therein to 5 minutes each.

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

MESSAGES FROM THE PRESIDENT

Messages from the President of the United States were communicated to the Senate by Mr. Chirdon, one of his secretaries.

EXECUTIVE MESSAGES REFERRED

As in executive session, the Presiding Officer laid before the Senate messages from the President of the United States submitting sundry nominations which were referred to the appropriate committees.

(The nominations received today are printed at the end of the Senate proceedings.)

PRESIDENTIAL APPROVAL

A message from the President of the United States stated that on April 17, 1978, he approved and signed the following joint resolution:

S.J. Res. 124. A joint resolution to authorize the President to issue a proclamation designating the week beginning on April 16 through April 22, 1978, as "National Oceans Week."

COMMUNICATIONS

The PRESIDING OFFICER laid before the Senate the following communications, together with accompanying reports, documents, and papers, which were referred as indicated:

EC-3399. A communication from the Secretary of Agriculture, transmitting, pursuant to law, a report covering the activities of the Rural Electrification Administration for fiscal year 1977; to the Committee on Agriculture, Nutrition, and Forestry.

EC-3400. A communication from the Assistant Secretary of Defense, reporting, pursuant to law, the intent to obligate $1.6 million of funds available in the Marine Corps Stock Fund for war reserve stocks; to the Committee on Appropriations.

EC-3401. A communication from the Director, Legislative liaison, reporting, pursuant to law, that the Air Force recycling programs have been initiated in full compliance with the Environmental Protection Agency's criteria; to the Committee on Armed Services.

EC-3402. A communication from the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics), reporting, pursuant to law, on the adequacy of pays and allowances of the uniformed services; to the Committee on Armed Services.

EC-3403. A communication from the Assistant Secretary of the Army (Installations, Logistics, and Financial Management), transmitting a draft of proposed legislation to amend section 2575 of title 10, United States Code, to provide for more efficient disposal of lost, abandoned or unclaimed personal property that comes into the custody or control of military departments; to the Committee on Armed Services.

EC-3404. A communication from the Deputy Assistant Secretary of Defense, transmitting, pursuant to law, a statistical summary of reports received by OSD pursuant to section 410, Public Law 91-121, together with the reports; to the Committee on Armed Services.

EC-3405. A communication from the Secretary of Housing and Urban Development transmitting a draft of proposed legislation authorizing appropriations for fiscal years 1979 and 1980 for the section 312 rehabilitation loan program; to the Committee on Banking, Housing, and Urban Affairs.

EC-3406. A communication from the Secretary of the Treasury, transmitting a draft of proposed legislation to change the size, weight and design of the one-dollar coin, and for other purposes; to the Committee on Banking, Housing, and Urban Affairs.

EC-3407. A communication from the Director, National Park Service, transmitting for the information of the Senate, a document entitled "Access National Parks," a handbook of accessibility for handicapped visitors to the areas of the national park system; to the Committee on Energy and Natural Resources.

EC-3408. A communication from the Secretary of Energy, transmitting, pursuant to law, an annual report on the weatherization assistance program; to the Committee on Energy and Natural Resources.

EC-3409. A communication from the Deputy Assistant Secretary of the Interior, reporting, that the Secretary of the Interior has determined that certain lands in the States of Nevada, Idaho, and Colorado are considered as not suitable for disposal under the provisions of the Unintentional Trespass Act (UTA) of September 26, 1968 (43 U.S.C. 1431); to the Committee on Energy and Natural Resources.

EC-3410. A communication from the Secretary of the Treasury, transmitting a draft of proposed legislation to authorize a supplementary fiscal assistance program of payments to local governments, and for other purposes; to the Committee on Finance.

EC-3411. A communication from the Director, National Science Foundation, reporting, pursuant to law, a planned addition to the NSF system of records; to the Committee on Governmental Affairs.

EC-3412. A communication from the Deputy Under Secretary of State for Management, transmitting, pursuant to law, its report of two new systems of records; to the Committee on Governmental Affairs.

EC-3413. A communication from the Administrative Director, U.S. Arms Control and Disarmament Agency, transmitting, pursuant to law, a report on a new system of records that the agency proposes to establish; to the Committee on Governmental Affairs.

EC-3414. A communication from the Comptroller General of the United States, transmitting, pursuant to law, a report entitled "The Federal Information Processing Standards Program; Many Potential Benefits, Little Progress, and Many Problems," April 19, 1978; to the Committee on Governmental Affairs.

EC-3415. A secret communication from the Comptroller General of the United States, transmitting, pursuant to law, a report on the contingency plans for evacuating U.S. civilians from selected foreign areas and suggests several ways to improve these plans; to the Committee on Governmental Affairs.

EC-3416. A communication from the Assistant Secretary for Education, Department of Health, Education, and Welfare, transmitting, pursuant to law, the third annual report of the Advisory Council on Education Statistics; to the Committee on Human Resources.

EC-3417. A communication for the Secretary of Labor, transmitting proposed amendments to the Comprehensive Employment and Training Act of 1973 (CETA); to the Committee on Human Resources.

EC-3418. A communication from the Chairman, National Endowment for the Arts, transmitting, pursuant to law, a report on compliance with the Freedom of Information Act; to the Committee on the Judiciary.

EC-3419. A communication from the Acting Deputy Attorney General, transmitting, pursuant to law, a report on compliance with the Freedom of Information Act; to the Committee on the Judiciary.

EC-3420. A communication from the Administrator, Veterans' Administration, reporting, pursuant to law, on the need for special pay agreements; to the Committee on Veterans' Affairs.

PETITIONS

The PRESIDING OFFICER laid before the Senate the following petitions, which were referred as indicated:

POM-598. A resolution adopted by the legislature of the State of Hawaii; to the Committee on Agriculture, Nutrition, and Forestry:

"HOUSE RESOLUTION

"Whereas, the United States Department of Agriculture (USDA) is the Federal agency responsible for and authorized to implement federally mandated agriculture related predeparture inspection requirements at the various airports in the State of Hawaii for aircraft destined for airports located within the continental United States; and

"Whereas, major pre-departure inspection programs and activities within the aegis of the USDA include inspection of the aircraft itself, passengers, luggage, and cargo; and

"Whereas, the sole, if not key objective of such pre-departure inspection activities, is the prevention of the entry of pests harmful to agricultural production in the continental United States; and

"Whereas, official statistics indicate that nearly 21 million passengers passed through the airports of the State of Hawaii in 1977 of which total, 3,608,138 passengers were destined for the continental United States; and

"Whereas, the Hawaii State House of Representatives finds that the USDA lacks sufficient resources, namely, personnel and funds to adequately perform the pre-departure inspection requirements, particularly as they relate to luggage inspection at the major airports on the Neighbor Islands; and

"Whereas, as a result of the lack of adequate USDA resources, the State of Hawaii through the "Airport Special Fund", is absorbing the costs for the payment of services of State of Hawaii inspectors performing federally mandated inspection activities at Hilo Airport, Kahului Airport, Ke-ahole Air-

port, and Lihue Airport, all located on the Neighbor Islands; and

"Whereas, experience by the State of Hawaii has clearly documented the feasibility of effectively detecting and controlling the various target pests, principal among which are those generally classified as a fruit fly, through existing luggage inspection and closely allied procedures; and

"Whereas, informed experts have voiced the firm opinion that strengthened inspection activities at the Neighbor Island airports will serve to achieve the principal objective of curtailing pest entry into the continental United States without attendant inconvenience to passengers or the effective and efficient movement of passengers through and within the State's airport system; now, therefore,

"Be it resolved by the House of Representatives of the Ninth Legislature of the State of Hawaii, Regular Session of 1978, that Hawaii's delegation to the Congress of the United States is respectfully urged to introduce and actively support passage of legislation so vitally needed to insure adequate compliance with federally mandated pre-departure inspection requirements at the Neighbor Island airports in the State of Hawaii; and

"Be it further resloved that certified copies of this Resolution be transmitted to each member of Hawaii's delegation to the Congress of the United States, the United States Secretary of Agriculture, the President Pro Tempore of the United States Senate, the Speaker of the United States House of Representatives, the Governor of Hawaii, the Chairperson of the Hawaii State Board of Agriculture, the Director of the Hawaii State Department of Transportation, and to the Mayors of the counties of Kauai, Maui, and Hawaii of the State of Hawaii."

POM-599. A resolution adopted by the National Cowboy Hall of Fame and Western Heritage Center, relative to the Metric Conversion Act; to the Committee on Commerce, Science, and Transportation.

POM-600. A resolution adopted by the Colorado Commission on Indian Affairs, relating to Native Americans; to the Select Committee on Indian Affairs.

"PREPAID HEALTH PLANS AND HEALTH MAINTENANCE ORGANIZATIONS" —SPECIAL REPORT OF A COMMITTEE (REPT. NO. 95-749)

● Mr. JACKSON. Mr. President, I file today a report of the Committee on Governmental Affairs prepared by its Permanent Subcommittee on Investigations on prepaid health plans (PHP's) and health maintenance organizations (HMO's). The report is the result of a more than 3-year investigation and review of the performance of PHP's in California receiving funds from the medicaid program and the Federal health maintenance organization program.

The inquiry was begun following wide publicity given alleged problems surrounding the prepaid health plans of the California medicaid program.

The State of California implemented in 1972 an alternative form of delivering, organizing, and financing health care services to beneficiaries of Medi-Cal, the State's medicaid program. Program costs in California had risen rapidly and continuously under the old system of paying physicians, hospitals, and other providers fees for their services.

PHP's are comparable to HMO's. Both are private entities—primarily corporations—which agree to provide a broad range of health care services to groups of individuals for a fixed monthly rate per individual or family. This is known as a capitation payment. These enterprises either employ or contract with physicians and other providers of health services. Similarly, they either own or contract with health care facilities. The PHP/HMO approach envisions that by grouping physicians togther, often in one medical center, comprehensive health care can be made avialble at reasonable cost and that the quality of care to patients can be enhanced through physician peer group pressure.

In theory, the HMO's aim is to provide enrollees with preventive medical services, thereby reducing hospitalization and the resulting high costs. In a properly administered HMO, persons who need treatment receive full care. The incentive exists to keep patients healthy and to detect and treat illnesses in their early stages so they will not need more expensive care. The HMO's fixed monthly income forms a ceiling under which administrators agree through contracts to provide for the health care needs of the people they serve.

In short, there is no financial incentive to provide unnecessary medical services, whereas in the fee-for-service system, there is a financial incentive to provide patients with more services than they need, because medical providers are paid for each service.

The decision in 1972 by California to provide health care services to its medicaid beneficiaries through prepaid plans was followed by passage by the Congress of the HMO Development Act of 1973 to stimulate the growth of prepaid systems.

Public hearings on PHP's and HMO's were held by the subcommittee. Senator PERCY and I said at the opening of our inquiry that the subcommittee hoped to learn from the mistakes of California's PHP program so that the same errors would not be made in other State medicaid programs and in the new Federal HMO development program. I said then and I still believe that the HMO concept is a "good idea that should not be abandoned, because men without consciences, profiteers, and scam artists took the initiative in California from those with good intentions."

Senator PERCY noted that the intention of Congress in passing the HMO Development Act in 1973 was "to test this health care delivery system nationwide. Our thinking was and is that such a one-step complete health delivery system based on preventive care might be ready for implementation when national health insurance becomes law."

The report which is being filed today summarizes information obtained by the subcommittee evidencing: Fraud and abuse of the California prepaid health plan program; failures by the State government in program management; inadequacies in Federal oversight of the California program; and questions concerning the adequacy of the present Federal program to encourage the development of health maintenance organizations across the Nation.

I would like to express my appreciation to Senator SAM NUNN, the subcommittee vice chairman, for his fine work throughout the inquiry and for the extraordinary support and assistance of Senator CHARLES H. PERCY, the ranking minority member.●

REPORTS OF COMMITTEES

The following reports of committees were submitted:

By Mr. RIBICOFF, from the Committee on Governmental Affairs, without amendment, unfavorably:

S. Res. 404. A resolution disapproving reorganization plan numbered 1 of 1978 (Rept. No. 95-750).

By Mr. ALLEN, from the Committee on the Judiciary: separation of power annual report (Rept. No. 95-751).

INTRODUCTION OF BILLS AND JOINT RESOLUTIONS

The following bills and joint resolutions were introduced, read the first time and, by unanimous consent, the second time, and referred as indicated:

By Mr. JACKSON (by request):

S. 2955. A bill to modify the authority of the Government Comptrollers for Guam and the Virgin Islands, and for other purposes; to the Committee on Energy and Natural Resources.

By Mr. JAVITS (for himself, Mr. MOYNIHAN, Mr. BAYH, Mr. BROOKE, Mr. CLARK, Mr. DURKIN, Mr. HUDDLESTON, Mrs. HUMPHREY, Mr. RIBICOFF, Mr. RIEGEL, Mr. KENNEDY, and Mr. CASE):

S. 2956. A bill to amend section 1682A of title 38, United States Code, to eliminate the State matching requirement under such section in connection with the program of accelerated payment of educational assistance allowances provided for in such section; to the Committee on Veterans' Affairs.

By Mr. MATHIAS:

S. 2957. A bill to provide for a coordinated national policy on stable economic growth; to the Committee on Governmental Affairs.

S. 2958. A bill to encourage investment by private industry in urban areas through use of the investment tax credit; to the Committee on Finance.

S. 2959. A bill to amend the Internal Revenue Code of 1954 to provide a special deduction for the employment of unemployed residents of urban areas by businesses locating in those areas; to the Committee on Finance.

S. 2960. A bill to amend the Internal Revenue Code of 1954 to allow the tax-exempt treatment allowed to certain industrial development bonds to bonds the proceeds of which are to be used within economically distressed cities, and to allow national banks to underwrite these bonds; to the Committee on Finance.

S. 2961. A bill to amend section 2687 of title 10, United States Code, to require notification of local officials, as well as Congress, before the closure, realignment, establishment, or expansion of a military installation may be carried out and to change the period of time which must elapse after notification before such action may be carried out; to the Committee on Armed Services.

S. 2962. A bill to provide surplus federal property for economic development purposes; to the Committee on Governmental Affairs.

S. 2963. A bill to provide financial assistance to State educational agencies to help control violence in the schools of local educational agencies, and for other purposes; to the Committee on Human Resources.