CONGRESS OF THE UNITED STATES

HOUSE OF REPRESENTATIVES

COMMITTEE ON THE JUDICIARY

# CONGRESSIONAL BRIEFING

# "CONSTITUTION IN CRISIS: DOMESTIC SURVEILLANCE AND EXECUTIVE POWER"

11:08 a.m.

Friday, January 20, 2006

B339 Rayburn House Office Building
Washington, D.C.

MILLER REPORTING CO., INC.
735 8th STREET, S.E.
WASHINGTON, D.C. 20003-2802
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P R O C E E D I N G S

MR. CONYERS: The Democratic subcommittee will come to order. Good morning, ladies and gentlemen. I'm so delighted that we're all here again in the basement of the Rayburn Building, like we were in the Downing Street memos hearing, perhaps in a little bit more upscale part of the basement area. We're very delighted to see all of my colleagues that are here, who will have some comments, brief comments to make, as I will. And we're very delighted to have our six witnesses present. I'm going to introduce them shortly.

Ladies and gentlemen, there can be little doubt that we're in a constitutional crisis that threatens the system of checks and balances that have preserved our fundamental freedoms for over 200 years. There's no better illustration of that crisis than the fact that the President of the United States is violating our Nation's laws by authorizing the National Security Administration, NSA, to engage in warrantless surveillance of United States citizens.

The administration offers two arguments to justify

their actions. First, they assert that warrantless searches were authorized by the Afghanistan use-of-force resolution passed by Congress. And, second, they say that the Constitution permits and even mandates such actions. To many of us, this is indeed a very remotely plausible and very little credible argument. Neither of these, I don't think, will withstand close scrutiny.

But to make sure that in fairness we got the whole story, the Attorney General had put out a 42-page memo, once again defending his position. I called Attorney General Gonzales this morning and reinvited him or his representative to come and join us here this morning to make their case before all of us, the Members of Congress and our expert witnesses. And I just want to ask: Is there any representative from the Attorney General's office present in B339?

[No response.]

MR. CONYERS: Now, as for the claim of statutory authority, a plain reading of the text of the resolution to me reveals there is no reference whatsoever to domestic surveillance, and we learned from the former Senate Majority

leader Mr. Daschle that the resolution had been narrowed from the administration's initial request to avoid such construction, and the Attorney General went so far as to admit that he had been advised that it would be "difficult if not impossible" for Members of Congress to amend the law to avoid such a program. As Harvard constitutional law professor Laurence Tribe wrote me, to argue that one couldn't have gotten congressional authorization after arguing previously that they had gotten congressional authorization takes some nerve."

In terms of inherent constitutional authority, this also flies in the face of both common sense and legal precedent. If the Supreme Court didn't let President Truman use this authority to take over the steel mills during the Korean War in 1952 and wouldn't let President Bush use the authority to indefinitely hold enemy combatants in 2005, it is obvious the Constitution doesn't allow warrantless wiretapping of United States citizens today. As Justice O'Connor famously wrote, the President does not have a blank check because of the state of war. Or to put it more in her terms, "a state of war is not a blank check."

What may be most troubling of all is that if we let domestic spying programs continue, if we let our President convince us that we are at war so that he can do what he wants, we will allow to stand the principle that the President alone can decide what laws apply to him. I submit this is not only inconsistent with the principles upon which our Republic was founded, but it really denigrates the very freedom we've been fighting for since the tragic events of September 11, 2001. And so that is why we are holding today's hearing.

The Foreign Intelligence Surveillance Act law allows domestic wiretaps to our Government and the President, both coming and going. And so I'm very delighted now to recognize my colleague from California, Mr. Adam Schiff, for a few brief opening remarks.

MR. SCHIFF: Thank you, Mr. Chairman, and welcome, everyone, to the basement. We are here in the basement today because evidently all the committee rooms are in use today.

[Laughter.]

MR. SCHIFF: Which is odd, because we are

effectively in recess, but I'm sure that's the only explanation. But we'll make do the best that we can.

Mr. Ranking Member Conyers, I want to thank you for holding this important briefing today. I must say that I would have preferred that the House Judiciary Committee conduct this important oversight through an official committee hearing and in a bipartisan fashion. I do not believe the American people are served when at least half of the elected Representatives on the relevant committees are not willing or able to engage in such a discussion. However, I am afraid that the House of Representatives has once again abdicated its oversight responsibilities.

After reading the report in the New York Times claiming that the President had secretly authorized the NSA to use electronic surveillance on Americans without any court approval, I respectfully urged that the Judiciary Committee convene hearings on this topic as soon as possible. I subsequently joined all Judiciary Democrats in another letter urging the same.

I am pleased that the Senate Judiciary Committee has announced their intention to hold hearings on this

issue, and Attorney General Alberto Gonzales' testimony will be of great interest and importance. However, I don't believe that the Senate proceedings release us from our responsibility here in the House to probe these matters as well. Therefore, I think it is both appropriate and vital that the Ranking Member has convened such a discussion in his capacity.

I'm particularly disturbed to learn that most Members of Congress on both sides of the aisle who sit on the relevant congressional committees with jurisdiction in these matters appear to have been kept in the dark regarding the Executive order, classified legal opinions asserting broad powers to order such searches, and subsequent activities of the NSA. I'm sure that the members of the committee and of the Congress on both sides of the aisle share my frustration in learning of this and other executive agency actions from media reports rather than through our constitutionally mandated oversight responsibilities.

We can all agree that congressional oversight is critically important as we continue to fight the war against terrorism. Last year, 11 oversight hearings on the PATRIOT

Act were held in subcommittee prior to action on the authorization. While I would have preferred engagement at the full committee level with more participation from minority and majority witnesses and believe that the subcommittee hearings themselves were far too long delayed, they did provide at least an opportunity for oversight. However, true oversight cannot occur in isolation or involve only certain preferred topics while ignoring other potentially more significant matters.

Domestic surveillance without court-approved warrants appears to be wholly unprecedented as a lawful exercise of power. A recent CRS report concludes that, "It appears unlikely that a court would hold that Congress has expressly or impliedly authorized the NSA electronic surveillance operations here under discussion." It goes on to say, "It may represent an exercise of Presidential power at its lowest ebb."

The report continues, "No court has held squarely that the Constitution disables the Congress from endeavoring to set limits on that power." And it goes on to say that, "Given such uncertainty that the administration's legal

justification, as presented in the summary analysis from the Office of Legislative Affairs, does not seem to be as well grounded as the intent of that letter suggests."

These extrajudicial actions are all the more troubling when one considers that there is a court empowered to review precisely such applications for domestic surveillance that could have been utilized but was not. Given the track record of this court, the FISA Court, of quickly approving Government requests and the power to seek post hoc approval where the urgency is still greater, there appears no policy justification for the administration's actions. And, thus, what may be illegal is also so plainly unnecessary.

I look forward to hearing our witnesses today, particularly those with expertise in the constitutional questions implicated. The CRS report suggests the President's actions are unsustainable. Moreover, the lack of an_official committee hearing scheduled by the majority will only further harm the administration's efforts to convince the American public of the legality or propriety of its actions.

Speaking very personally, I can't imagine that there is a single Member of the House of Representatives who believed when voting to authorize the use of military force against al Qaeda that we were also voting to create a new and vast exception to FISA that would authorize, without court approval or court review, electronic surveillance of Americans on American soil. And that personal view is borne out, I think, by the legislative history, and I want to conclude by reading one last couple lines of the CRS report:

"By including the emergency authorization for electronic surveillance without a court order for 15 days following a declaration of war, Congress seems clearly to have contemplated that FISA would continue to operate during war, although such conditions might necessitate amendments. Amendments to FISA and the USA PATRIOT Act, and subsequent legislation further demonstrates Congress' willingness to make adjustments. The history of Congress' active involvement in regulated electronic surveillance within the United States leaves little room for arguing that Congress has accepted by acquiescence the NSA operations here at issue."

We did not, we do not, and I thank you, Mr. Conyers, for calling this hearing.

MR. CONYERS: Thank you so much, Mr. Schiff, for your statement.

If we might agree to keep our statements a little more brief so that we can get to all the members and then get to our witnesses quickly, I would deeply appreciate that.

Judiciary Committee Member Chris Van Hollen from Maryland, you are recognized.

MR. VAN HOLLEN: Well, thank you very much, Mr. Conyers, and let me thank you for your leadership in organizing this hearing. Let me thank all the witnesses who are here today and the others in the audience.

I think we have all learned that the secret NSA wiretapping program, wiretapping American citizens, has raised very serious constitutional questions; it has raised serious questions about the rule of law; and it has raised serious questions about the separation of powers. And I just want to underscore the point that Congressman Schiff, my colleague, made with respect to the obligation, I

believe, of the Judiciary Committee, the full Judiciary Committee, to hold hearings on this issue. And it's important for the American people and people listening to know that the members who are here today did send a letter early on to Chairman Sensenbrenner asking him to conduct hearings.

It has now been well over a month that the American people learned of this secret wiretapping program, and yet the House of Representatives--indeed, the Congress so far has been totally AWOL in following up on the issue. And so today I think marks a very important moment, and I thank you, Mr. Conyers, for conducting this briefing.

We were here in December, and one of the last things we were debating, both in the House and the Senate, was the PATRIOT Act, trying to strike the proper balance between securing the homeland, making sure we protect the security of the American people, and at the same time securing the liberties that we all hold dear. And part of that discussion was the President's powers under the FISA Act.

And so it came as a great alarm to many of us when

we went away for the recess to learn that in many ways that whole discussion had been for nothing, was moot. In other words, here we are debating the PATRIOT Act, debating the very issues that we're going to be debating here today, only to discover that the President had secretly made a decision that it really didn't matter what Congress decided on these points of the FISA court, it really didn't matter what Republicans and Democrats and elected officials had to say about that. The President determined that he had the right to go forward anyway. And I think that raises very serious questions in this country about the rule of law.

I am going to be brief, Mr. Chairman, because I know we are going to have a lot of excellent testimony on the back and forth, but I do have to say I took the 42-page justification that came out yesterday from the Justice Department, Attorney General Gonzales, and making their argument longer did not make it any better.

[Laughter.]

MR. VAN HOLLEN: And I have to say that any first-year law student would, after reading this, quickly conclude that the arguments were specious. And I think that

if you had a private attorney in Washington, D.C., or anywhere in this country provide their client with this kind of advice, they would be sued for malpractice. And I believe that this opinion is malpractice on the American people.

The President said he had a duty to defend the American people and provide for the safety of the people. I agree. The President has that duty and obligation, and the Congress shares in those responsibilities. But the President also has a duty to abide by the Constitution and the rule of law.

If the authority was not there to do what the President said needed to be done to protect the safety of the American people, he can come to the Congress. Under the Constitution, under the separation of powers, he can come to the Congress and say, listen, I need additional authority to protect the people of this Nation. And today's debate, I don't think, is about whether or not the President should have these additional authorities. Maybe he should. Maybe he shouldn't. The point of the matter is we should argue and debate whether or not he should have those authorities

through the normal process.

Attorney General Gonzales made a very revealing statement that you, Mr. Conyers, referred to in your opening statement when he was first confronted with the exposure of this program. He essentially said we couldn't have gotten the authority if we went to Congress. Well, I don't know if they could or couldn't have. We don't know that. But the fact of the matter is that's the way in our system of Government we do things. And what is most troubling about this is the fact that the President and his administration decided to short-circuit the constitutional process and decide what Justice O'Connor in the Hamdi case said that they could not do, which was set aside the rights of American citizens.

So, Mr. Chairman, Mr. Conyers, I thank you for holding this hearing, and I look forward to the testimony of the witnesses.

MR. CONYERS: Thank you so much, Chris.

We've been joined by Congresswoman Diane Watson of California.

I now turn to a ranking subcommittee member of the

Judiciary, Robert "Bobby" Scott of Virginia.

MR. SCOTT: Thank you. Thank you, Mr. Conyers. I want to thank you for holding the second, I guess, in a series of basement hearings.

[Laughter.]

MR. SCOTT: Because we can't get regular order and we can't do this on a regular basis, but you're willing to hold these hearings and get this information to the American public, whether the majority wants to hear it or not.

You said to be brief. I will actually be brief. I just want to make one essential point, and that is, the people tried to make this a question of whether or not the President can wiretap and protect the public or not. That is not the question. The question is: When he uses a wiretap, does he have to get a warrant? Is he subject to the normal checks and balances? And under FISA, you can get a warrant without even getting--without even showing probable cause of a crime. You have to show probable cause that the agent of a foreign government is involved, but you don't even have to show a crime. If you have probable cause that a crime is committed, then a warrant obviously is easy.

So we're not talking about whether or not he can wiretap people. The question is whether or not he's subject to the same checks and balances as everybody else. Just stop by the court on the way to getting the wiretap. Or if you're in a hurry, get the warrant on the way back from starting the wiretap.

The President, I thought, agreed with this idea because on April 20, 2004, he said, Now, by the way, anytime you hear the United States Government talking about a wiretap, it requires--a wiretap requires a court order. Nothing has changed, by the way, when we're talking about chasing down terrorists. We're talking about getting a court order before we do so. Constitutional guarantees aren't waived when it comes to doing what is necessary to protect our homeland because we value our Constitution.

A couple of things are very important to understand about the PATRIOT Act. First of all, any action that takes place by law enforcement requires a court order. In other words, the Government can't move on wiretaps or roving wiretaps without getting a court order. So we're not talking about whether he can do it. We're just talking

about whether he has the normal checks and balances or whether the standard is, once he makes his judgment, there is no check and balance. And that's not what our Constitution talks to, and, Mr. Conyers, I thank you for holding this hearing.

MR. CONYERS: Thank you so much, Bobby Scott.

We now turn to the gentleman from Florida, Mr. Robert Wexler, a member of the Judiciary Committee.

MR. WEXLER: Thank you as well, Mr. Conyers. I also want to applaud your initiative and effort here today. I, too, was appalled to learn that our Nation's intelligence and military agencies have been spying on Americans at an unprecedented level without even the opportunity for legally required judicial oversight.

I was also astonished to learn that law-abiding Americans like the peace activists and retirees who make up the Truth Project in my congressional district are considered to be a credible threat to this country. Mr. Hersh is here today to represent apparently all the credible threats to the country.

The New York Times confirmed our initial fears

that these spying programs are not only a violation of our individual civil liberties but also a tremendous waste of critical resources that should be employed to fight the genuine threats America truly does face. Instead of using one of the most far-reaching invasions of privacy in our Nation's history to target immediate and credible threats, the administration is needlessly diverting the scarce time and resources of our intelligence community on what appear to be wild goose chases.

There is not a single Member of Congress who is not prepared to take every legal measure necessary to prevent another 9/11 from happening. However, this is not an excuse for the Bush administration to declare by fiat that it can ignore existing law.

If the NSA's warrantless searches and the DOD's information collection on American citizens are indeed critical to our Nation's safety and security, it would be the responsibility, as Congressman Van Hollen said, for Congress to change the law to allow these actions. The administration cannot act alone and in secret as judge and jury for its actions. But this is exactly what President

Bush has done. The administration has groundlessly circumvented judicial review and taken America down a frightening path, which preys on a culture of fear while casually disregarding existing civil liberties. Now at the very least the American people have a right to know the full extent to which our basic rights have been violated.

Following the September 11 attacks, the President came to Congress, he addressed the American people, and he said, that the terrorist hate--this is the President's quote. The President said, "Terrorists hate our democratically elected Government. They hate our freedoms," the President said. Why, then, did the President circumvent this democratically elected Government and disregard those very same freedoms.

We must discover what has been done under this misguided banner and unite to stop it.

Thank you, Mr. Conyers, for the time.

MR. CONYERS: Thank you so much.

I would now like to recognize the only lady Member of the Congress that's with us, the esteemed Diane Watson--a former Ambassador, by the way--and now a member of the

International Relations Committee and Government Reform.

MS. WATSON: I want to in turn thank the esteemed Congressman John Conyers for holding this briefing and taking advantage of a time when we ought to be in session doing the public's business, so he took the bold step of calling us together to hear from the public and so the public can hear from us as to our outrage over the administration using the law to (?) -ution.

We all know we face an enemy out there that's really an ideological enemy. We all know that there are plans, draconian plans, to destroy American society. But we have an administration that chooses to operate in the dark. They will tell you that they went to the Intelligence Committee 12 different times to tell them what they were planning on wiretaps, et cetera. The Intelligence Committee is duty-bound not to relate what goes on there. So the rest of Congress--and we all represent somewhere between 650,000 people--are unaware of what's going on. And it's done under the guise of protecting the security of Americans.

Now, I can understand when there is a need, but we have a process. And when our President, elected by the

people, takes business away from the people, we're in trouble. And so I am hoping that the panelists as well as other members of the public will shed some light on what they feel representing Americans and maybe give us some direction that we can take, because we've been the minority for too long, and we are all painted with the same brush. The trust that the people put in us to serve on their behalf and to speak for them is being violated. We've got to do something about it.

So I want to again thank the Chair for taking the bold step. I want to thank the panelists for coming forth and speaking their minds. Please give us the guidance and the help that we will need to make policy on your behalf.

Thank you very much.

MR. CONYERS: Thank you so much, Congresswoman Watson.

Ladies and gentlemen, we have been honored by a very distinguished panel. Bruce Fein, our first witness, is a constitutional lawyer and an international consultant. He has been an Associate Deputy Attorney General and General Counsel of the Federal Communications Commission, and we're

so delighted and honored that he's here today.

Mr. James Bamford is the author of "The Puzzle Palace," a national best-seller when it was first published and is now regarded as a classic. Until recently, he was the Washington investigative producer for ABC's "World News Tonight with Peter Jennings" and has written investigative cover stories for the New York Times Magazine, the Washington Post Magazine, and the Los Angeles Times Magazine.

Professor Jonathan Turley is a nationally recognized legal scholar who's written extensively in areas ranging from constitutional law to legal theory to tort law. He has challenged both Democratic and Republican Presidents in the course of his distinguished career.

Richard Hersh is a member and spokesman for a Florida-based Quaker organization known as the Truth Project. He has recently discovered that because of the organization's activities, it's been listed as a credible threat to the military, with a 400-page Defense Department report that NBC News obtained.

And we have as well the Director of the Washington

Legislative Office of the American Civil Liberties Union, Ms. Caroline Fredrickson, and we're delighted to have you here. We are aware of the recent lawsuit that has been filed in the Detroit Federal courts challenging the whole episode about executive branch authority to wiretap.

And Kate Martin, the Director of the Center for National Security Studies, and she has testified many times before the House and Senate on issues relating to homeland security, intelligence, and civil liberties since 9/11.

We are delighted, honored, and pleased that all of you have prepared yourselves to testify. If you would all stand and raise your right hand.

[Witnesses sworn.]

MR. CONYERS: Let the record show that all six witnesses have answered in the affirmative.

I include in the record the statement of Congresswoman Sheila Jackson Lee, who was called away on official duties, and we will put it in the record. And I wanted everyone to know that Congressman Jerry Nadler of New York is rushing to get here as we speak.

We begin with Attorney Bruce Fein. Welcome, and

thank you again for being with us today, sir.

MR. FEIN: Well, thank you, Congressman and other members of the Judiciary Committee. Could you signal when my time is up? I know it--

MR. CONYERS: It's a 5-minute deal. All of you are veterans up here. Everyone gets 5 minutes. We give you a 1-minute warning.

MR. FEIN: The separation of powers, checks and balances, is what the Founding Fathers viewed as the architecture of our civil liberties. They understood that men were not angels, as James Madison explained in the Federalist Papers--

MR. SCHIFF: Could you bring the microphone closer to you?

MR. FEIN: The Founding Fathers understood that men were not angels and that "Trust me" was not a good enough protection for our civil liberties. And, accordingly, they created a tripartite system of Government whereby the legislative, executive, and judicial branches would be restraints upon one another. As Madison explained, "Ambition must be made to counteract ambition." And it's

the issues of separation of powers, something that is critical to the civil liberties of the living and those yet to be born, that has been raised by President Bush's justification for his unilateral decision to authorize the National Security Agency to engage in eavesdropping without warrants against American citizens and declining to suggest that Congress has any role in the matter.

One of the reasons why the issue is so critical is that we will be in a state of permanent hostilities against terrorism for our lifetime and for the indefinite future. So the claimed authorities of the President are not temporary. They will not go away. They will become permanent fixtures of the political and legal landscape, which is one reason why we must focus so clearly and sharply on the justifications.

Secondly, the President's claims do not distinguish in principle from intercepting a communication between a U.S. citizen in the United States and abroad or a communication wholly within the United States, because the gist of his authority that he claims is that if the purpose of the interception or surveillance is to advance or help

defeat terrorism, then he can do it on his say-so alone without any consideration of what Congress has enacted.

For example, we know that the 9/11 perpetrators were within the United States prior to the attacks, and communication that they would have would be solely within the United States. They may have communicated with an American citizen. There's nothing in the President's claim of authority to surveil only the wiretap to further the war against terrorism that would restrict his authority to only what he says he's doing now, surveiling or intercepting communications between the United States and abroad.

The implausibility of the President's claim seems to be self-evident. In 1978, following congressional hearings on abuse of executive authority in spying on Americans, mail openings, for example, Congress decided to cut a balance between civil liberties and national security, and they struck that balance also in considering wartime, the type the President confronted after 9/11. And the Congress concluded that there would be a 15-day window when the President would not need a judicial warrant that might be too slow and clumsy in order to protect Americans from

any imminent repeat attack. And, of course, after 9/11, we didn't know whether (?) .

At one time Congress had thought about a 1-year automatic extension but rejected that with the idea the President can come quickly and we can consider extending that period, even altering the standard, in a short time frame. Moreover, the history of the Congress is one that shows that proceedings can be in secret. The Manhattan Project, for example, was conducted and executed without any leaks to the enemy. And the first Senate sat 6 years without any openness.

There is no reason why the President couldn't have come, if he thought it was necessary, to arrange to have debate and have an amendment to FISA without revealing all secrets to the enemy. Indeed, FISA itself recognized the obvious. Our enemy recognizes that we will use surveillance and wiretapping to try to collect intelligence. And I don't think it's plausible to believe that any kind of discussion in theory that the President has extraordinary powers to surveil in wartime would permit the enemy to evade any kind of particular practice.

But, anyway, the Congress explicitly addressed the idea of the powers of the President during wartime and wiretapping. The authorization of force statute doesn't refer to FISA. The administration's claims that it sub silentio overruled FISA is on its face implausible. The rule of statutory construction for centuries is the more specific statute overrides the more general one. And I don't think anything more needs to be said about the fact that he is violating FISA.

I think it's even more worrisome to understand the claims he is making of inherent constitutional authority to undertake any efforts for the purpose of defeating terrorism, irrespective of congressional action or otherwise. For instance, under his interpretation of the authorization of force, he could suspend the writ of habeas corpus, which he hasn't done, saying: This authorization enabled me to do anything in furtherance of the war effort. I can suspend the writ of habeas corpus unilaterally even though Congress hasn't done so.

It would suggest as well that in the amendment that Senator McCain sponsored prohibiting inhumane, cruel,

or degrading interrogation, that really is an unconstitutional encroachment on his powers because if he thinks that kind of treatment is helpful to defeating terrorism, he can engage in it irrespective of what the statute says.

It would suggest that the Lindsey Graham amendment regulating the civilian review tribunals in Guantanamo Bay also are unconstitutional because the President may decide that those kinds of oversight is too great an intrusion on his ability to extract intelligence and separate out the real enemy from those who would pose a danger, and, therefore, he could ignore that statute.

Indeed, the President could claim on a customary incident or he could put people in concentration camps, as was done in World War II, claiming: These are people who are likely to be spies and saboteurs and aiders of al Qaeda. I don't need a warrant. And since Roosevelt did it in World War II, I can do it now.

He could authorize breaking and entering of homes in order to secure intelligence to fight the war against terrorism, despite the fact that there is an authorized

procedure in an amendment to FISA that governs physical searches.

Now, the principle that the President has established here, if gone unchecked, will, as Justice Robert Jackson said, lie around like a loaded gun and be utilized by any future incumbent who claims a need. And the history of power teaches us one thing, that if it's unchecked, it will be abused. There will be overreaching, whether or not you have a benevolent individual or someone who's malevolent. That is the nature of power. As Lord Acton said, "Power corrupts. Absolute power corrupts absolutely." And we ought not to risk that when there are absolutely clear, legal, responsible ways to fight terrorism with all the aggressiveness that we need.

Thank you, Mr. Chairman.

MR. CONYERS: Thank you very much, Attorney Bruce Fein.

We now turn to Mr. James Bamford. Welcome to the hearing.

MR. BAMFORD: Thank you, Mr. Chairman, and I thank members of the committee. I really appreciate the

opportunity of speaking before you today.

In the short time that I have, I think it might be useful just to discuss a little bit of the events that led up to the creation of the Foreign Intelligence Surveillance Act, how it applies to NSA, and the dangers of violating that law.

Those dangers were foreseen many years ago by Senator Frank Church, the Idaho Democrat who led the investigation into the abuses of the intelligence agencies in 1975. Following his probe, Senator Church came away from shocked and warned very dramatically about the dangers that might befall the country if NSA was ever turned loose. He said the agency's technological capability "at any time could be turned around on the American public, and no American would have any privacy left, such is the capability to monitor everything: telephone conversations, telegrams, it doesn't matter. There would be no place to hide.

"If this Government ever became a tyranny, if a dictator ever took charge of this country, the technological capability that the intelligence community has given the Government could enable it to impose total tyranny, and

there would be no way to fight back, because the most careful effort to combine together in resistance to the Government, no matter how privately it was done, is within the reach of the Government to know. Such is the capability of this technology."

When Senator Church spoke those words, that was three decades ago. Today, the NSA's capability has increased enormously. Back then, all the NSA was able to do was to eavesdrop on hardline telephones and some occasional telegrams. Today, the NSA is the largest intelligence agency on earth and by far the most dangerous if not subjected to strict laws and oversight. It has the ability to virtually get into someone's mind. It can read a person's most private thoughts expressed in e-mail correspondence sent from their home computer, eavesdrop on their cell telephones as they drive to work, read the messages from their BlackBerry as they ride the elevator, and then listen in on their office telephone and monitor their computer and fax machine as they conduct business.

NSA was created back in 1952, and it was created in absolute secrecy, as opposed to the CIA, which was formed

by an act of Congress. NSA was created by a top-secret memorandum signed by President Truman, and the existence of NSA--just the existence of it--was kept totally secret for almost a decade.

At the very beginning, NSA made a secret agreement with the heads of the various telegraph companies, including Western Union, whereby the companies would secretly give to NSA--virtually every night they would give to NSA, an employee of NSA, all the cables that went through the company during that day. That went on for about 30 years. NSA got these messages very secretly from Western Union and the other companies, and there were only a handful of people in the companies that knew that this was going on.

Then during the Watergate period, President Nixon turned NSA's giant ear inward during the Watergate affair. He was concerned about the growing anti-Vietnam protest movement, and so he called the Director of NSA into his office and ordered him to begin eavesdropping domestically on American citizens, very much the same way President Bush did more recently.

President Nixon ordered Admiral Noel Gayler, who

was Director at the time, to begin listening to Americans, and among those people were anti-war protesters: Joan Baez; Dr. Benjamin Spock was one of the people listened to; Dr. Martin Luther King. He began expanding and expanding, which is really the nature of this type of eavesdropping, and eventually they began eavesdropping on authors. Two authors who were planning to write books on NSA they began eavesdropping on. They put them on the watchlist.

Following the discovery of these things by the Church committee and also by the Rockefeller Commission, the Justice Department began a very, very secret criminal investigation of NSA. It was probably the only time an entire agency was looked at as a potential criminal defendant. Miranda rights were read to the senior officials of NSA, and they spent over a year looking into the possible criminal prosecution of people at NSA.

In the end, the Justice Department investigation decided against prosecution because they felt that there would be too many secrets revealed in court. Nevertheless, they did find 23 categories of questionable activities.

But what they did decide to do, instead of

actually prosecuting, was they recommended that Congress create some new laws that will actually make this a real violation of law. At the time it was a fairly gray area because there were no laws in this area. So a year later, Congress created the Foreign Intelligence Surveillance Act, and paramount in that legislation was preventing future Presidents from doing what Richard Nixon did--secretly ordering NSA's giant ear turned inward on American citizens.

At that time, testifying before the House Intelligence Committee, the Attorney General, Griffin Bell, made that very clear. He said, "I would particularly call your attention to the improvements in this bill over a similar measure proposed in the last Congress. First, the current bill recognizes no inherent power of the President to conduct electronic surveillance. Whereas, the bill introduced last year contained an explicit reservation of presidential power for electronic surveillance within the United States, this bill specifically states that the procedures in the bill are the exclusive means by which electronic surveillance, as defined in the bill, and the interception of domestic wire and oral communications may be

conducted." That really leaves no avenue for a President except for going through the FISA court.

The problem you have here is among the people that can be listened to, once it's taken from the FISA court judge and given to a shift supervisor at NSA, is virtually anybody. And, again, they could start turning the NSA's giant ear on the American public. NSA has an enormous eavesdropping facility for pulling in 2 million communications an hour at each listening post, so you are talking about a giant amount of communications being brought in. And once a person's in that database, there's virtually no way to get out. It's like India ink. You're in there forever. And no matter--if this President is listening to people he feels that are opposed to his administration, there's no telling when the next administration comes in that they will turn the giant ear on somebody that they may feel is opposed.

So there's a very strong need for this committee to take a very close look at NSA and the President's violation of the Foreign Intelligence Surveillance Act.

Thank you very much.

MR. CONYERS: Thank you very much, Mr. Bamford.

As I predicted, Congressman Jerry Nadler came in from New York and is with us now. We appreciate your great efforts this morning to be with us.

I am now pleased to recognize Professor Jonathan Turley.

MR. TURLEY: Thank you, sir, and thank you and your colleagues for inviting me here to speak today with such a distinguished panel.

The disclosure on December 16, 2005, of the NSA operation has pushed this country deep into a constitutional crisis and one that there are, frankly, few parallels in our history. Our system of Government rests on a certain axis, a balance of power of a tripartite system, three branches, none of which have the authority to govern alone. In that system, the very scourge is a maximum leader. It runs against the constitutional grain. It creates a dangerous imbalance.

President Bush has for many years asserted authority that is both absolute and, in my view, quite dangerous. On August 1, 2002, there was the infamous

torture memo that was put out by the Justice Department that stated in significant part that the President could indeed order Government officials to violate Federal law. In fact, that memo said that imposing a limitation on his ability to conduct exercises--for people to conduct exercises that would constitute torture would be an unconstitutional infringement upon his inherent authority. Attorney General Alberto Gonzales in his confirmation hearings insisted that he was rejecting that memo, although at the time, we now know, he was aware of an NSA operation that was based precisely on the same claim of authority.

The President has also claimed authority in enemy combatant cases to unilaterally declare a citizen to be an enemy combatant, to strip him entirely of his constitutional rights, including the right of access to counsel and the courts.

On December 30, 2005--just recently--the President signed the torture bill that was enacted by this body and by the Senate. When he did so, he used what was a signing reservation, a signing statement, where he reserved the right to violate that law if he considered it to be in the

Nation's interest. Now we know that there is an NSA operation based upon the same extreme theory of Presidential power.

The problem with these claims is that they're devoid of any limiting principle. They place this country on a slippery slope that inevitably leads to a maximum leader.

Now, I read the document that was put out yesterday by the Department of Justice, and I have changed my written testimony to address that document, and I have given copies of a longer statement to this body.

If there is any doubt about how extreme these claims are, I suggest you read that document. But, frankly, what is most remarkable is not the sweeping claims of authority, but the conspicuous lack of authority to support those claims.

Now, in our system of separation of powers, the Framers designed what was a unique system, a system where no branch could govern alone. That creates an inherent tension that is healthy for a democratic process. There has never been a President that didn't want to be Congress. Frankly,

there has never been a Congress that didn't want to be President. And, frankly, we have had judges that wanted to be both at times. But all of these branches have an institutional integrity and interest, and so they protect that delicate balance.

The Supreme Court has rejected the very claims being made by the President with regard to the NSA operation. This operation falls under what Justice Jackson referred to as the lowest possible exhibit in terms of executive authority. It is in direct contradiction of FISA.

Now, I want to be absolutely clear. What the President ordered in this case was a crime. We can debate whether he had a good or bad motivation, but it was a crime. Federal law makes it clear you cannot engage in this type of surveillance, in a domestic surveillance operation, without committing a crime and that you can go to jail for 5 years.

Now, we can debate the wisdom of that. We can debate why the President may have done it. But, in my view, the President committed a crime, and we have to deal with that as citizens and, unfortunately, you have to deal with that as Members of Congress. It gives me no pleasure to say

that, but it also strikes me as an alarming circumstance when the President can go into a press conference and announce that he has violated a Federal statute 30 times and promises to continue to do so until someone stops him. That's the most remarkable admission I've ever heard from a President of the United States.

Now, the Federal law is clear because of the exclusivity provision under Title III. Title III says quite clearly that all surveillance done domestically must be done pursuant to Title III or to FISA, and then FISA makes it a crime to engage in this type of surveillance without a court order.

Now, this is the most user-friendly law a President has ever been given. FISA virtually is devoid of a basis to turn down the President. That's why we've had over 13,000 FISA applications and only a handful of denials.

When I first went into the FISA court as a lowly intern at the NSA, frankly, it started a lifetime opposition for me to that court. I was shocked with what I saw. I was convinced that the judge in that SCIF would have signed anything that we put in front of him. And I wasn't entirely

sure that he had actually read what we put in front of him. But I remember going back to my supervisor at NSA and saying, "That place scares the daylights out of me." And my supervisor said something interesting. He said, "You know what? It is scary. But we're here, the lawyers of the NSA"--I was a law student at that time--"and we won't let things happen, we won't let a President exceed his authority."

Well, this President has exceeded his authority. Under FISA there are three exceptions that allow the President to, in one case, engage in surveillance and proceed later to get approval. The suggestion that time was of the essence is a ludicrous one.

I have reduced the White Paper by the Justice Department into five central claims, all of which, frankly, I believe is meritless.

The first and most important is that the President has inherent authority to violate Federal law and the Fourth Amendment. That is the most dangerous claim of all. Historically, our most serious wounds as a Nation have been self-inflicted wounds. They have been done when we have

been afraid. They have not been done by external evil forces. We did it to ourselves. And the way that that happens is when we remain passive and silent in the face of unchecked authority.

If you take a look at these claims--and I won't go through them because time is limited here. I will simply remind this institution of its duty. The Framers believed that, despite any affiliation to the President, Congress would jealously protect its authority. It's a duty to protect a legacy that you were given and all citizens were given. What's at stake is not a President who has committed crimes. It's much more serious than that. What's at stake is a President who is committing crimes in a name or a pretense of legality. He is saying that he has the authority to do that.

Now, members that stay silent are making a choice. Very few members have faced this type of test of faith. But you are facing it now, and as citizens and as members, it's now up to us. We're called to account to the many benefits that we have gotten from this system. We're called to account to do something and not to remain silent.

I thank you very much for inviting me today.

MR. CONYERS: Thank you, Mr. Turley. Your additional written comments and those of all of our witnesses will be incorporated into the record.

We now turn to Mr. Richard Hersh, and we welcome you to these proceedings.

MR. HERSH: Good afternoon, Congressman Conyers, and other esteemed Members of the House. Can you hear me?

MR. CONYERS: No. Pull it closer, please.

MR. HERSH: Good afternoon. There we go. Good afternoon, Congressman Conyers, and other esteemed Members of the House. I thank you for including me on such an august body of expert witnesses. I can only conclude that I'm the expert in being spied upon.

[Laughter.]

MR. HERSH: My name is Richard Hersh. I'm a 59-year-old male with a painful neurological condition that severely limits my physical abilities. I've traveled from Florida to Washington to advise you of the enormous amount of surveillance and disruption of peaceful groups by agents of the Bush administration.

In November of 2004, people who represented an association of religious, educational, environmental, peace, and social justice activists met at the Quaker Meeting House in Lake Worth, Florida. This group formed the Truth Project, Incorporated, a Florida nonprofit corporation whose purpose is to help educate high school students and their parents about military service and to give them enough accurate information to make informed choices about critical decisions. As a group, we are various ages, sexes, ethnicities, creeds, and political philosophies, but we are all proud Americans.

The Quakers welcomed us into their church because they believed our intent was nonviolent and was in keeping in their deeply felt beliefs of teaching peace and understanding. They knew our purpose was solely to exercise our First Amendment rights to assemble peaceably, to speak freely, and worship as we choose.

We had no idea until one year later that the unfamiliar faces in the church had been sent by the President's Department of Defense to spy on us. NBC News investigators showed us that agents of the 902nd Military

Intelligence Group from Fort Meade, Maryland, where the National Security Agency is headquartered, infiltrated the Quaker Meeting House, and then filed a report designating us a credible threat. The President's agents did not come to worship alongside us, to help us plan our educational program, or to protect us.

And it wasn't just us. Shortly after NBC aired its report, churches and other groups began sharing their experiences of infiltration and intimidation with us: St. Maurice's Catholic Church in Dania, the Unitarian Universalists, the Fort Lauderdale Friends, members of Pax Christi in West Palm Beach, environmental groups, and many others. Agents rummaged through trash, attacked and snooped into e-mail, hacked websites, and listened in on phone conversations. Indeed, address books and activist meeting lists have disappeared.

President Bush tells us only a few phone calls are listened to, but that's not true. Mr. Bush says they only monitor calls to foreign countries, but that is absolutely untrue. He tells us he spies only on known al Qaeda contacts or affiliates, but I know for a fact that is not

true because I was spied on in a house of worship in the United States and in private homes in Florida where I was meeting with other peaceful persons engaged in constitutionally protected activity.

I have reason to believe that the Federal Government listens to my phone calls to family members and friends about purely personal matters. I have every reason to believe that the President's agents read my e-mail, photograph me as I exercise my constitutional rights, record the license numbers of cars I ride in, and create huge databases within information about me and my fellow activists because all this specific activity is on record from Government files as having been visited on American citizens around the United States by members of the Joint Terrorism Task Force, the FBI, the NSA, and other agencies.

If, as George Orwell once said, "In times of universal deceit, telling the truth is a revolutionary act, we members of the Truth Project, Incorporated, must be revolutionaries. I thought Congress passed safeguards against indiscriminate domestic spying after the gross violations of citizens' rights during the civil rights

movement and Vietnam peace activism. But here we are again--like the Church committee. Today, I think President Bush should confess the true extent of his domestic spying program. Confession is good for the soul. I think he should tell us the truth, and that truth should set us all free.

MR. CONYERS: Actually, you had a minute when I raised my hand, if you want to just continue.

[No response.]

MR. CONYERS: Well, thank you for turning back your time, Mr. Hersh, and thank you for your testimony.

Attorney Caroline Fredrickson, American Civil Liberties Union.

MS. FREDRICKSON: Congressman Conyers, distinguished members of the panel, thank you very much for having the ACLU to speak at this, the first of what I hope is many congressional hearings into the NSA's classified program of warrantless domestic spying.

And, Congressman Conyers, we applaud you for your dedication to civil liberties and the rule of law, and I think this hearing could not come at a more appropriate

time, falling within the week of the Martin Luther King Day.

As you know, Dr. Martin Luther King was perhaps the most famous victim of the out-of-control "national security" surveillance conducted by the Government in the '50s and '60s. Supposedly to fight communism, the FBI illegally wiretapped, spied on, and eventually tried to blackmail one of this Nation's great citizens.

I'd like to make three short points today about the NSA surveillance.

First of all, Congress must hold more such hearings. The White House must be held accountable, and the Congress must perform a critical role in this scheme of checks and balances.

I also would call on the Justice Department to appoint a special counsel to investigate the program. The American people deserve to know how our rights were violated, and that won't happen unless someone independent of the President runs the investigation.

Second, I urge lawmakers from both sides of the aisle to reject specious arguments being made by the White House to justify the spying.

Third, and most significant, as we have already heard today, it is crucial to remember that this is not an isolated incident. The Bush administration has a long record of hostility to basic constitutional norms and democratic values.

The clearest indication of the White House's disdain for fundamental American freedoms, aside from this scandal, has to be the PATRIOT Act. For more than 4 years, reasonable men and women from both sides of the aisle have called on the White House to accept very modest changes to the PATRIOT Act to better balance national security and constitutional liberties. The answer has been a categorical "no."

In addition, again, as we have already heard today, the Pentagon has been spying and maintaining files on Americans exercising their First Amendment rights.

And so is the FBI. As part of an ACLU FOIA effort in 20 States on behalf of over 100 domestic political and religious groups, the ACLU received numerous documents confirming that the FBI's Joint Terrorism Task Forces are investigating peaceful activists working on issues from

affirmative action, animal rights, environmental rights, to opposition to the Iraq war.

This is the same administration that had retired Rear Admiral John Poindexter develop the Total Information Awareness data-mining system at the Pentagon. That program was supposed to track in real time the electronic footprints of every individual in the United States. The administration also proposed Operation TIPS, which would have recruited postal workers and cable technicians to be snoops for the Government.

And the list goes on: torture; eavesdropping on attorney-client conversations; implementing an air travel system called CAPPS II that promises to tar millions of innocent air travelers as potential terrorists, including, as we know, small children and infants; actively seeking to paint its critics as traitors; secretly deporting suspects to countries that use torture as an interrogation technique; rounding up thousands of non-citizens after 9/11 on the weakest of leads; aggressively using what should be limited anti-terrorism powers to sidestep traditional checks and balances; and creating, arguably, the most secretive

administration this country has ever known.

The NSA scandal is only the latest in a long line of abuses.

I would also like to remind everyone here just why we now require judicial supervision of national security surveillance.

First, historically, the executive branch has repeatedly used vague claims of "national security" to justify the sabotage of its political rivals. For instance, many would point to J. Edgar Hoover's deep dislike of Dr. King as the reason for the smear campaign against him.

And, second, without a neutral decisiomaker keeping tabs on wiretaps, physical searches, and other invasions of privacy, overeager agents push the limits. In the Cold War, legitimate concerns about Soviet espionage morphed into a wholesale snoop campaign into the lives of activists and intellectuals who had nothing whatsoever to do with our national security.

And, third, because of that tendency to overreach, judicial supervision actually enhances national security by focusing limited investigative resources on real threats.

As the New York Times reported last weekend, the NSA surveillance flooded the FBI with thousands and thousands of useless tips. And according t the story, it got so bad that the agents said they were actually spending time pursuing what turned out to be a lot of "calls to Pizza Hut."

And as we know, this country has had numerous other examples of scandals involving warrantless security under the false banner of "national security."

In the years following the Russian Revolution, the FBI used the Red Scar to infiltrate labor groups, round up immigrants, and ruin innocent lives.

In the '50s, '60s, and '70s, J. Edgar Hoover's FBI, the CIA, and the U.S. military conducted a dizzying array of programs in the United States to hunt down subversives, all of which allegedly were justified by the Cold War, but had little or nothing to do with fighting it.

These programs invariably spied on, harassed, and kept dossiers on labor leaders, civil rights workers, and students opposed to the Vietnam War.

Now there is a growing public outcry against the NSA's warrantless surveillance. Polls show that not only is

the public wary of the NSA's actions, it's aware of the depth of the scandal. Two-thirds of respondents in a recent poll said they were following this story closely.

This week, the ACLU filed suit on behalf of a distinguished group of plaintiffs, including journalists, scholars, and advocates whose work makes them obvious targets of illegal NSA wiretapping. We are challenging the program under the First and Fourth Amendments, and we argue that it violates longstanding separation-of-powers principles.

Before I conclude, I'd like to just make one more point to correct the record on a key issue. While the ACLU has compared the NSA surveillance to Watergate, I want to make very clear that the NSA surveillance is, by the President's own admission, far more extensive than that at issue in Watergate. As Nixon's White House counsel John Dean wrote last month, "here, Bush may have outdone Nixon."

In closing, I urge Congress to continue to investigate this warrantless surveillance, and I urge the Justice Department to appoint a special counsel.

Thank you again for inviting me.

MR. CONYERS: Thank you so much.

Attorney Kate Martin, welcome.

MS. MARTIN: Thank you, Representative Conyers, and I want to thank all of the distinguished Members of the House of Representatives for holding this hearing. I want to echo the remarks made by people today about the abdication of the constitutional responsibility of the House of Representatives in failing to hold any formal hearings, and such formal hearings would conduct oversight over this program and are necessary not only to protect our basic civil liberties but, in addition, to ensure that the departments inside the executive branch are, in fact, engaging in effective counterterrorism activities and not once again going down the path looking at easy and perhaps politically unpopular targets while missing those who would actually do us harm, and that oversight which the House of Representatives to date has refused to engage in is necessary for both purposes.

I want to elaborate just for a moment on the legal analysis presented before you today by my colleagues here on this panel and make just a couple of points.

First, as has been pointed out, the Foreign Intelligence Surveillance Act in three different ways prohibits the President from conducting wiretapping outside of the four corners of that act and criminal wiretap statutes. And, in fact, the specific issue of whether or not the President had inherent authority to conduct warrantless wiretaps outside of those statutes was considered during the 2 years in which Congress debated and then enacted the Foreign Intelligence Surveillance Act and expressly rejected by the Congress at the time. The President's signed the bill, and there was no statement that that limitation was unconstitutional.

The President now argues that, to the extent that the FISA prohibits the President from engaging in warrantless wiretapping outside of its procedures, it is unconstitutional.

In deciding that claim, I agree that it's a specious claim, but I think that we can look more specifically to the text of the Constitution. Fundamentally, their argument goes, the President is acting here as Commander in Chief to respond to the 9/11 attacks,

and as Commander in Chief he has the sole power to make certain kinds of decisions. In my judgment, that's true. For example, when and where to attack in Afghanistan is a matter on which Congress, once the attacks in Afghanistan have been authorized, can have nothing to say. What kind of troops to insert into a specific place is a matter within the President's Commander in Chief authority. But the question of whom and when to wiretap on Americans inside the United States is a matter that the Constitution specifically commits to more than one branch when, in the Fourth Amendment, it states that searches and seizures require a warrant, and that warrant is to be issued by the judiciary branch.

So the claim here of inherent authority is structurally contradicted by the Constitution itself, which says that the power to conduct searches and seizures belongs in part to the judiciary, as well as to the Congress, which here has set the standards for the judiciary to apply in issuing warrants.

I think it's necessary and we should not forget that it is not simply a claim that the President has the

sole power to decide which laws to violate and when to go outside the judicial power, but that he has the power to do so in secret. Remember that until the New York Times reviewed this program, he withheld the fact from the American people that his view was that FISA did not limit his powers. He secretly believed that he had broader authority than was laid out in the public statutes, but he withheld and misled the American people about that view of his own powers. And that's evidenced in the statement that Representative Scott quoted, but it is again evidence in many of the testimonies that were put before the House of Representatives in connection with the PATRIOT Act.

One thing I would urge you to do is to examine what kind of misleading statements, if not deception, were put before the Congress in connection with this program. We were assured repeatedly that Americans' privacy was safe because there were checks and balances in place and the administration was following the law. We all understood the law to be that which was publicly enacted, when it turned out that the administration with a wink and a nod has apparently deemed there to be some kind of secret law and

then misled the American people and the Congress in what that law and what those authorities were.

Just one final comment on that. The President has claimed that the secrecy was necessary for national security reasons to prevent al Qaeda from knowing that we were wiretapping them. That claim is absurd on its face, I submit to you. From day one, before 9/11, al Qaeda knew that we were trying to wiretap them, as we should be doing. Al Qaeda knew that the PATRIOT Act was about amending the Foreign Intelligence Surveillance Act to make it easier to wiretap on al Qaeda. It makes no difference to al Qaeda whether or not they're being wiretapped with a warrant or without a warrant.

[Laughter.]

MS. MARTIN: It makes a difference to the American people whether or not the President is engaging in wiretaps of Americans without a warrant, and that, I submit to you, is most likely the justification for keeping this program secret.

Thank you.

MR. CONYERS: Thank you so much.

Ladies and gentlemen, the testimony, the written statements, the comments of these six witnesses I think reach a level of such historical importance that I am so flattered and honored that not just the members here but all the members in the Congress who feel that there should have been more formal hearings will rest more comfortably in their beds tonight knowing what we have done. What you have presented us with has been so important. And I assure you that this is not just a hearing and then we will move on to other things.

But before I go into that part of it, I want to begin with our members seeking questions and adding comments to this remarkable testimony from you six witnesses today. But I would like to begin with our distinguished member from New York, Mr. Jerry Nadler, whose extraordinary energies were required to get him here when he did, because he was almost in two places at once. I am very delighted and pleased to recognize Jerry Nadler at this time.

MR. NADLER: Well, thank you, Mr. Chairman.

Mr. Chairman, I want to thank you for--I gather that Mr. Scott joined me, but for a different reason, in

asking that this hearing be moved from 10:00 to 11:00, because he had one problem and I had to make a speech in New York at 8:15 this morning. I went home last night, made the speech, and came back just now for this hearing, which is of extraordinary importance.

Let me just state briefly, because I didn't make an opening statement before, I regard--and I have looked into and I have read the stuff that people here put out, and others. The legal arguments the administration makes are not even debatable. They're frivolous arguments. They're arguments that can only be made by a monarch, by someone who is trying to justify absolute power in the executive branch. And as I read what they think the President can do--and Professor Turley said that the arguments of the Justice Department have no limits. There is no limiting principle. And as I read their arguments, the President would have the inherent power to order a hit man to walk in and murder anybody sitting in this room if he in his sole discretion thought that would help matters of security, and he would be accountable to no one for that judgment.

That cannot be the law of the United States.

Absolute power cannot be the law in the United States. As I read the statements by the Justice Department, the power the President claims he has, if he were in Germany in 1933, he would not have required the enabling act to pass the Reichstag to claim the power. He is claiming absolute power that no one in American history has ever claimed.

This cannot stand. And it is far beyond the question of just this warrantless surveillance. The idea that the President says, "I am breaking the law"--and he won't admit he's breaking the law, but "I am doing X"--which are clearly beyond the law--"and I will continue to do them," is a challenge to the rule of law in this country such as we have not seen since 1861, since the rebellion by the South who said, "We will break the laws because we will break away from this country."

How can we remedy this? Well, the House should be having hearings, official hearings with subpoena power, to look into this and to take action. I hope that this hearing will lead to that. I do not trust that it will because I do not believe that the current leaders in this House have the gumption to stand up for the Constitution. I hope I am

proved wrong.

Secondly, I wrote a letter the day after this was announced to the Attorney General asking for a special prosecutor--and the ACLU and others have followed suit--because obviously if you are dealing with what appears to be a criminal conspiracy by the President, the Vice President, the Attorney General, and others, you cannot ask the Attorney General and the people under him to fairly investigate that. That is why we have the statute that authorized the appointment of a special prosecutor. Obviously, they will dismiss this out of hand because they will not admit that this is--how real this is.

Thirdly, the ACLU and the Center for Constitutional Rights have brought two lawsuits seeking injunctive relief, and they will oppose this, claiming that nobody had standing, that nobody is injured. And given the current Supreme Court, they may get away with this standing claim. I don't know.

I do know one thing that I hope will give pause to every official who is asked to carry out illegal acts as well as the President, and that is that these are clearly

crimes and that crimes are prosecutable and the statute of limitations lasts beyond the term of this President. Under the next President, this President, the Vice President, the Attorney General, and anyone who participates in what are clearly crimes could be prosecuted. And I hope people will understand that and it will govern their actions accordingly.

Let me ask Professor Turley, you stated that--before I do that, let me say that my belief that Congress, that this House will not stand up to its responsibilities I hope will be proved wrong, because if it doesn't, if it doesn't launch the proper investigation and the proper hearings and the proper actions, it will be greatly endangering American liberties, and it will be saying, Why do need a Congress at all if the President can do anything he wants just by claiming national security and if he can just violate the laws that we pass with impunity.

Professor Turley, you said that these were clearly crimes. Under Section 1809, someone who, under color of law, meaning a Government official, who wiretaps outside the exclusivity clause against the FISA law, as is being done

here, is guilty of a crime punishable by up to 5 years in jail and a $10,000 fine. Do you believe that these are high crimes and misdemeanors?

MR. TURLEY: You know, it's ironic, because the two hearings I've done a lot of writing is, is Federal surveillance and impeachment, so this is--

MR. NADLER: I remember you from the prior impeachment hearings.

MR. TURLEY: --a perfect storm for me, but frankly, I do. If you believe that the President has violated the criminal provisions of these laws, I don't see how you could possibly claim it would not qualify under the impeachment standard. There have been a lot of people who have said things like, "Well, he was doing it for the correct motivation. He was doing it to protect the country." Most high crimes and misdemeanors, as they've been defined in the past, have involved questions of official conduct.

In fact, as you recall, in the hearing that we had on impeachment, one of the great issues was: can private conduct fall under the impeachment standard? And we took

different views on that point, but I think that there's no question it would. And also the question of what the President's position on the crime would be--is a little bit ambiguous. I don't see how you can argue that this does not violate the statute, but he's argued that regardless of what the statute may say--he makes one statutory argument, that "I actually satisfied the statute," which is pretty darn weak. But then his backup is, "Whatever the statute may have said, I trump it with my inherent authority."

That's precisely the issue impeachment goes to. Regardless of what a Federal Court may say about the crimes, that's not your domain. Your domain and responsibility is that if a President has committed a criminal act, you are obligated to hold hearings. What I would caution members of this body is you're establishing a precedent by not holding hearings.

MR. NADLER: There's no hearings.

MR. TURLEY: Right, because it doesn't mean that you're going to actually find, or actually impeach a President and send it to the Senate, but at a minimum you can't establish precedent that you're not even going to hold

hearings to determine crimes are committed by the President against citizens of the United States.

MR. NADLER: Can I just suggest one thing, and comment on it, and my time probably already has expired.

The question, from the high crimes and misdemeanors point of view is not really whether a criminal act is committed. As you point out, that's not our provenance. But the purpose of the impeachment provision was precisely, if you read the Federalist, to protect American liberty against the encroachments of a Chief Executive who would abuse his or her power to encroach upon liberty, regardless of whether it is a crime or not. But if it is a crime, it is a little more clear. So the question here really is--in terms of is it a high crime or misdemeanor--is it an unconstitutional encroachment upon liberty beyond the power of the President, and so abusing his office?

MR. TURLEY: I think that actually this type of violation should be a textbook example of an impeachment issue because not only is it a Federal crime, but it violates the doctrine of separation of powers, and so at

issue is not just criminal conduct, but a rejection of a central premise of the system. When the President held up his hand and took an oath to God that he would uphold the United States Constitution, he was promising to uphold the doctrine of separation of powers.

When the President says that he can't live within those limitations, it is sort of a self-disqualifying concession in terms of holding that office. And so I would submit to you that you're absolutely right, it doesn't have to be a crime, but in this case I think it clearly is a crime.

MR. NADLER: Thank you very much.

MR. CONYERS: And thank you very much, Mr. Nadler.

What I am going to do, I have just one question that I would like to take up with you. But before I do, I wanted to ask Attorney Bruce Fein this one question. What would you have done when you were the Deputy Attorney General under President Reagan if you had learned about a program like this, sir?

MR. FEIN: My baptism in Washington was Watergate. I came to the Justice Department at the time of Archibald

Cox's discharge. And I very much had revered Eliot Richardson. He was the Attorney General at the time. William Ruckelshaus was the Deputy Attorney General. Both of them resigned. Judge Bork, who then fell into the leadership post by default, was prepared to resign until he was urged by Ruckelshaus and Richardson to stay on to keep the Special Prosecutor's Office alive.

I think those are the standards that ought to apply here. You can't tell in advance--you know, in retrospect, how you would have acted. But it does seem to me that an attorney has an obligation in the Justice Department to secure and defend the Constitution of the United States, and in cases of clear and open and imperious breaches, I think resignation is the only method of responsible conduct.

If I could make just one additional observation, Mr. Chairman, and other members. As a practical matter, I think if we're going to move forward and try to get a renunciation of this claim of omnipotence of the President during wartime--which, in effect, means forever because we'll be fighting terrorism forever--it has a

confrontational element to it, crimes. There's going to be an offishness and a difficulty and a fight over information that isn't going to be constructive.

Even if there have been sins in the past, the best way to try to approach this is to say, "But we need to get recognition by all, especially the executive branch, that separation of powers is a lie." Not required, you know, Henry IV at Canossa and groveling, self-flagellation, but a recognition, without casting a particular characterization of the past, that that is not consistent with our principles, and that going forward we agree it maybe can be unwritten understandings of how the President consults and works with Congress during wartime and fighting terrorism.

And this is not the time initially to say impeachment is what we want to have. We need to recognize after 9/11 everybody was frightened. Maybe the President overreached. No one knew whether there are sleeper cells.

But we're well beyond that. Now is the time for sober second thoughts. The President and the administration should be given a chance, not to have to grovel, but to say, "Yes, maybe we now have our senses, and maybe we

overreached, and we will agree to a set of ground rules going forward." Now, if he then balks at that, that is the time to say, "Now, we really do have a King George III, who received a coronation rather than an inauguration in 2004, and we've got to go forward."

But as you well know, if you're getting involved with the executive branch and fighting over information, you'll be in lawsuits for five or six years and will make very little progress.

Thank you.

MR. CONYERS: Thank you very much for that response that goes back into history, and into another administration. I appreciate your candor, Attorney Fein.

The question that I have to present is essentially where you can go from here. Attorney Caroline Fredrickson has given us a list of to-do items that I thought were excellent. While we were in the testimony here this morning, I have signed a letter to all phone and Internet providers, to inquire how and when they have turned over customer content and records, as has been reported to the press, to the Government. Once we can confirm what access

the Government has and how it has been used, I think that we can move forward.

I now invite any of you to make any additional recommendations for our to-do list, for what I am certain will be a growing number of members in the Congress that will be joining us on other hearings that will follow this one.

MR. FEIN: I would encourage you, Mr. Chairman, to consider holding some hearings, not in Washington, D.C. You're sort of like a Rump Parliament here, to go back to British history. But to get a sense of how the American people, who are not viewing this as an academic separation of powers issue, feel about the sense of intimidation or aura of Government overreaching with the principles that the President has announced.

And there's going to be different views out there, but I do think this is an issue that has to be kept away of being an inside-the-beltway issue, where one party or one group is trying to get the head of another group. It's so large and so important for the institutions and for the people to come together and say, "There's one thing we ought

to all agree on when we're fighting terrorists, and that is keep intact the separation of powers, which is the Bill of Rights for posterity."

MR. CONYERS: Thanks for the recommendation.

MS. MARTIN: I would echo that. As long as the House refuses to undertake its oversight responsibilities, that you all continue what you are doing today, which is to talk about it and to educate the American people about it, and that that is key.

I think the one place that you will have, perhaps, an opportunity to question the administration about it, is that every time an official from one of the intelligence agencies involved, or the Justice Department, or the Department of Homeland Security, appears before your committees, that the questions be asked about how you can be sure that the answers you are getting are in fact candid answers. If the questions have to do with, "What are you doing," and "How are you protecting American civil liberties?" How can you know, as long as the President continues to make the claim that he is making, which is that "I have this power and I can exercise it in secret without

telling you," and that that's a way to demonstrate to people what is at stake here.

MR. CONYERS: Attorney Fredrickson?

MS. FREDRICKSON: I want to add one thing, back inside the Beltway. Senator Specter has announced that he's holding a hearing. I think that's creditable, but I think it's very, very important that members of this body explain to the American public what a real hearing is. We need to insist that this is not a one-shot deal, that it's a whitewash; they go up there, they have a chance to give their side of the story, and then that's it, because I think that will not do service to what the American people really deserve.

So I would ask you to look into what you believe would really inform us all about this program, what the Senators need to inquire into, and not allow this administration to characterize Attorney General Gonzales going up and speaking once to the Senate as an appropriate oversight activity.

MR. CONYERS: Excellent.

Professor Turley?

MR. TURLEY: The only thing I would add is--I'm not as solicitous as Bruce is when it comes to issues of impeachment. To me, impeachment is not an effort to get a President to come around. It's not the job of this body to try to coax a President into fulfillment of his constitutional duties. This President has already stated quite clearly that he believes he can violate Federal law. That, for our system, is the equivalent of a declaration of war on the separation of powers.

But one thing I would encourage you to think about as a collateral matter is how important the is for Congress to pass a shield law for journalists. This is a great example of why journalists need to have a Federal shield law. The fact that the administration's first act was to pursue the whistleblower and potentially threaten these journalists shows how vital it is for us to have a statutory protection supporting the First Amendment. If the administration continues the way it's going, it's going to significantly diminish the ability of journalists to hear from whistleblowers.

I'm referring to the fact that this administration

has used a waiver that is given to all officials in a particular office, and they're all asked to sign to waive confidentiality, so that if you don't, you self-identify, but if you sign it, then you're signing something false unless you actually did waive.

We're in a very precarious position unless we get a shield law so that these types of abuses can be disclosed.

MR. CONYERS: Mr. Bamford?

MR. BAMFORD: I just have one small suggestion. I think one of the problems in terms of the public paying attention to this is they have the idea when you talk about wiretapping, that it's some FBI agent climbing up a telephone poll outside their house and putting some alligator clips on a wire, and they have no concept of the whole idea of signals intelligence. This is what NSA engages in, which means whole scale eavesdropping, eavesdropping on the entire streams of communications entering and leaving the country, virtually everything entering and leaving the country.

And if there were any more hearings that would further elaborate how the NSA does its job and the

difference between the public conception of a wiretap and signals intelligence, I think it would be very helpful for the public to understand that it's not just somebody that may climb up a wire, but it's somebody who just pushes a button in an office thousands of miles away, and it's their cell phone, their e-mail, their Blackberry, their fax, everything goes into it.

Thank you.

MR. CONYERS: Thank you. Very good.

Did you want the last word, Attorney Fein?

MR. FEIN: I would just suggest consideration of a Joint House/Senate Committee, as was done with the Iran Contra investigation. I think that does underscore the importance of the issue to the American people, and it has a sustaining element to it as Iran Contra did, that I think would further illuminate the questions.

MR. CONYERS: Thank you so much.

Mr. Hersh?

MR. HERSH: Thank you. Can I just say that as a citizen, I have heard today that the President has obviously broken the law, that he has claimed unjust powers to

himself, which is characteristic of tyrants and kings, that he has admitted that he's broken the law, and if you read to oath of office, he's not upheld the Constitution of the United States.

I think it's time for us to act. I think to protect our civil liberties and our constitutional rights, it's important to hold him accountable, hold the President and his entire administration accountable for their misbehavior.

MR. CONYERS: Thank you so much.

The Chair recognizes Congressman Adam Schiff.

MR. SCHIFF: Thank you, Mr. Chairman. I wanted to just, at the outset, before I ask a question, to make a couple other suggestions for immediate steps.

And following up on your comments, Mr. Fein, I would hope that those within the administration who have been working on this program would immediately cease and desist from any further electronic surveillance not approved by the FISA Court. If not, because very legitimate and very serious legal questions have been raised, then out of respect for their own potential liability. I would hope if

there's anybody at DOJ that is watching this, or at NSA, that they are mindful of the very serious legal questions that have been raised, and that any future surveillance go through the FISA Court.

Second, I think that we should use the opportunity of the PATRIOT Bill Conference Committee to make it abundantly clear, if it is not clear already--and, frankly, I think it is very clear--that the Congress, in the authorization to use military force, was not authorizing the President to do electronic surveillance outside of FISA. I think we have an opportunity legislatively, because if we wait for this to be resolved through litigation or even oversight hearings, if the administration continues taking the position that it is going to continue this form of surveillance, then it is going to go on for months and months without abatement.

So those are at least two things that I think should be done in the very near term.

I wanted to push back just a little bit on your comment, Mr. Hersh, and something you said, Mr. Turley, and that is that I don't believe the President has said that he

believes he can violate Federal law. I think what the President has said is that he believes he is not violating Federal law. And part of the reason I am not confident that the President will cease and desist is that I believe the administration would view it as an admission of culpability, in doing something it wasn't authorized to do.

Basically, to me what the administration is arguing in its legal papers, there are perhaps five arguments that you point out, Mr. Turley, but for me there are only--there is only really one credible argument, and that is--it is a three-part argument: one, FISA allows exceptions; two, the authorization of use of military force is such an exception; and three, if it isn't, FISA is unconstitutional.

Now, I don't, frankly, on those three points, the only one I think that has any merit is that FISA does allow exceptions. I don't think there is any merit, frankly, my point of view to the argument that the authorization of using military force was such an exception. Indeed, as I think Mr. Van Hollen pointed out so eloquently in his opening statement, all of the debate that we have been

having over FISA and the PATRIOT bill is completely meaningless.

The administration could have come in to the first hearing and said, "You can debate all you want, we don't care what you do with the PATRIOT bill or FISA. It doesn't matter because we can do what we want. You have already authorized it. And what's more, if you try to unauthorize it, it is unconstitutional and you lack the authority."

So, plainly, the administration I think believed that it still needed to come to Congress for authorization of just this type of surveillance under the PATRIOT bill and under FISA.

But I would like to ask you, Mr. Turley, and Mr. Fein, Ms. Martin, if you would--and, Ms. Martin, I think your point is right on the money, because it was really nagging me too, from the very moment the administration argued that the mere disclosure of this surveillance was injurious to national security, that they could not come to the Congress without impairing national security on this, if the terrorists don't think that we are doing electronic surveillance, then they are a lot less sophisticated than

they seem to be. And I agree completely, to them, they don't care whether it goes to the FISA Court or not, but we do care. The whole argument about whether it goes through FISA or not and somehow injure national security, I don't buy. I think it is palpably false on its face.

But I would like to ask you is what is the most credible argument you believe the administration has? Because you are all of one mind really on this panel, I would like you to take the other voice today. What is the most credible argument they have, and why do you feel that that is not legally merited?

MR. FEIN: I think that the--the administration has not, in their most recent filing, claimed inherent constitutional power to ignore FISA on the theory that it is too much constraining of the President's hands. What it has argued is that it would be such a close constitutional question if FISA did attempt to constrain him, notwithstanding the authorization of use of force, that any ambiguity as to whether the authorization to force overrode FISA should be resolved in favor of the overriding of FISA by the statute.

That is my judgment is their best argument, and already on its face is so implausible that it's hard to have gradations here, because the argument basically comes down to the idea that they have articulated, that when it comes to conducting warfare, there are no limits that the Congress can place on the President.

For example, you may recall that during the Vietnam War, Congress prohibited Nixon from bombing in Cambodia in 1970, and this argument would be, well, the Congress couldn't do that. If Congress tried to prohibit the use of Federal funds to send gun ships to the Persian Gulf to launch missile attacks against an Iranian nuclear facility, the theory would be Congress is trying to handicap or arrest the President's ability to conduct the war.

Now, I went back and looked at one of the early decisions of Chief Justice John Marshall, who was one who idolized George Washington. He fought in the Revolutionary War and he wasn't abashed about Executive powers. But during the War of 1812, the issue arose as to whether or not the President could confiscate and seize enemy property within the United States without any authority of Congress.

And Chief Justice Marshall said no, said, "It appears to the Court that the power of confiscating enemy property is in the legislature." This is a case, of course, not cited by the administration in their brief. That is why I would say even though that is their strongest argument, it is anemic.

MS. MARTIN: I think I would say that their strongest argument is based on the claim that they need to do this as part of intelligence directed against the enemy, and that that's a constitutional authority on their part.

I think that the difficulty with that argument is that they then claim that they can't adequately exercise that either within the statute or with the oversight of the FISA Court, and that they can't adequately exercise that inside the United States, and that they haven't made that case. And that to make that case, they're going to have to read away the limits of the Fourth Amendment, because the Fourth Amendment says that searches and seizures in the United States have to be two things: reasonable, and unless there is a good reason to avoid it, have to have a warrant. And they can't make the case that they need to avoid FISA and still meet the requirements of the Fourth Amendment,

even if the President does have some inherent presidential, commander-in-chief authority to conduct surveillance on the enemy. The question is how and within what limits inside the U.S.

MR. TURLEY: Congressman Schiff, first of all, let me clarify what I meant when I said that the President believes he can violate Federal law, as I lay out in the written testimony. I think you have correctly laid out what the administration is putting forward is a series of alternative arguments, and, frankly, it comes across as an intelligence operation in search of legal rationales. The first one is that they are not violating the Federal statute because the statute says that you cannot conduct electronic surveillance under the color of law, except as authorized by a statute, and they are claiming the force resolution is a statute that does that.

I think on its face, that one can't be in the running because it is perfectly absurd. The reason is that the Congress had in fact refused to make some changes during that period to expand the authority of the President. The resolution itself was changed so not to be too broad. And

nobody can cite to a single piece of evidence in legislative history--and as you know, you guys produce the legislative history by the bushel load--no one can find a single page, a single reference, a hint that anyone thought that the resolution meant this. So that one we have got to take off the table.

When I was learning to be a litigator I was told that you have to follow what is called "the red face test," that you have to make sure that any arguments you make in court you don't get a red face, and that one violates the red face test.

[Laughter.]

MR. TURLEY: Now, the second argument is that the President has the inherent authority, regardless of FISA, to carry this out, that he, because we are at war, et cetera, that Congress cannot limit it. There are sort of two arguments in there, but dealing with both of them together, I think that is probably where their best option is. I mean, frankly, I think the only way they could get through this is to say that FISA is unconstitutional. It is the only clear argument to say, "You just simply can't restrict

me with regard to domestic surveillance."

The problem with that argument is that, as we talked about no limiting principle, is that it would involve any statute. We have already heard that the President said that he is reserving the right to violate the torture prohibition. We have seen with enemy combatants that he has reserved the right to strip citizens of all their rights including access to counsel and the court. We have seen here that they believe that regardless of that initial argument under FISA, at the end of the day, FISA may be unconstitutional because of his inherent authority. Well, then it doesn't matter what the statute is. It could be surveillance today. It could be a torture statute tomorrow. It could be a banking statute the next day. The point is, the President is saying as long as I am acting under the color of national security, I have an inherent authority that trumps the Federal law.

That is probably their best one, but, boy, I would hate to make that in a court of law.

MR. SCHIFF: I just want to thank you all. I think the last point that you made, and, Mr. Fein, you made

also, just have different forms. What they're arguing is to avoid any limiting principle, Mr. Turley, I think is right on the mark. There is no way to limit the authority they are claiming. That is what of such great concern.

Mr. Chairman, the Mayor of Pasadena asked me to offer something in the record. If I could, I would like that to be included in the record.

MR. CONYERS: Without objection, we will take that into the record.

MS. FREDRICKSON: Can I say one thing?

MR. CONYERS: Yes.

MS. FREDRICKSON: I just wanted to add to my colleagues' comments to your question, Congressman Schiff. I think what the very learned panelists have shown that this is not an argument that is going to take place, at least in the President's mind, in a court of law, and that he thinks he is going to win in the court of public opinion. I think that is why it is so critical that you are holding this hearing today and why it is incumbent on Congress to continue such hearings, because without that, there will be no oversight and no holding this President accountable.

MR. CONYERS: Thanks for that very illuminating question, Congressman Schiff, that you posed.

Congressman Van Hollen?

MR. VAN HOLLEN: Thank you, Mr. Chairman. And I want to thank all of the panelists here this morning for your excellent testimony, input on this very important issue facing our country.

You know, all our children learn in elementary school at some point the general process that we go through to pass laws in this country. The House and the Senate has to pass it, and the President has to either sign it or veto it. If he vetoes, then it goes back to the Congress for potential override of decision there.

A lot of people have marveled over the fact that this President does not veto any legislation, and now we know why.

[Laughter.]

MR. VAN HOLLEN: He doesn't veto any legislation because he has taken it upon himself to decided to ignore those laws that he decides he doesn't like, at least in the national security area, or ignore those parts of those laws

which he doesn't like. And he has these signing statements that accompany these things saying, "Yes, except for this, and I'm not going to pay attention to it." It is something that I think anybody going through even the simplest explanation how our system works realizes how ludicrous the position he has claimed here is. It would be funny if it wasn't so serious, the issues that we're facing today.

I just want to underscore a point that my colleague, Congressman Schiff, made with respect to notice to people who are right now today engaged in wiretapping activities. I think people would have a plausible defense that they were operating in accordance with a presidential directive if they were not later put on notice about the serious questions that have been raised with respect to the legality of that authority. But certainly people have been put on notice within the last month, and through hearings that will take place, that there are extremely serious legal questions here, and I think the testimony of the panel, in my view, is that it is a pretty slam-dunk case here that the President is not operating according to his authority. I hate to quote George Tenet on that, but in this case, it is

a slam-dunk case.

So I think it is very important that people come forward. Obviously, the people who originally came forward with the reports to the New York Times or whoever, were concerned potentially about their reliability and their responsibilities in these areas.

I want to go back to what I think is this essential question of a living principle, because the way the Vice President has talked about this, the way the President and the Attorney General has talked about it, it makes it sound like, well, this is a very, very narrow program as they have put it in place. Now, we don't know all the facts about how they are conducting these operations, but I think it is important that the American people know, number one--and I would like all of you to confirm this if it is true--that the President, when he is conducting wiretapping operations overseas, he has the authority without going to a FISA Court to undertake that wiretapping. Would everyone agree with that?

MR. FEIN: Yes. If he's intercepting battlefield intelligence in Afghanistan, he doesn't need to go to any

court.

MR. VAN HOLLEN: Exactly.

MS. MARTIN: Of if he's intercepting conversations in Paris, he doesn't need to go to any court.

MR. VAN HOLLEN: Exactly. Now, if you have two people here in the United States on tourist visas, neither of whom is a United States citizen or a resident of the United States, the President can wiretap their communications, or can he not wiretap those communications?

MS. MARTIN: He needs a warrant. The Fourth Amendment covers everyone inside the United States, but the FISA provides for a lower standard to wiretap those people than to wiretap Americans and legals.

MR. VAN HOLLEN: Let me rephrase the question, and just looking at FISA, not the Fourth Amendment issue, under FISA, my understanding is that as long as there is not a significant probability that he is going to be wiretapping a United States person, defined as a citizen of the United States or alien lawfully admitted for permanent residence, the President can do that, but I guess we can follow up on that.

The point I want to make is this, that I think there are a lot of American citizens out there saying, "This can't happen to me, the way the Vice President and the President are talking about. It will never happen to me." And Mr. Bamford, in his testimony, talked about exactly what happened before we had the FISA, and why the FISA provisions were put in place. Mr. Hersh's testimony is clear that even with this in place, it looks like they decided to ignore the law, and that is what this whole operation has been all about.

But if you could just very briefly, in sort of lay man's terms, talk about why it is the President's argument has no limiting principle. I think from a legal point of view, we can see it, but just if you could briefly explain to any people watching, why it is that their legal position, regardless of how they are putting it into operation, the logic of their legal position means that the President can, if he so determines in the interest of national security, to wiretap the telephone conversations taking place between any of us in this room?

MR. FEIN: Representative Van Hollen, I think the

easiest way is to describe the President's position as a codicil to something President Richard Nixon asserted, which was, if the President says to do it, it's constitutional, whether it's breaking into homes of Daniel Ellsberg's psychiatrist or otherwise. That was repudiated. Now, all of the difference that President Bush has maintained is, as long as I say I am doing it in order to fight terrorism, then it is automatically legal.

As I say, when he is making the assertion that there's any provision that has historically been associated with wartime activity, "I can do it on my own no matter what Congress says." That means we could have concentration camps like World War II. And even if Congress prohibited them by statute, he could say, "That's an incident of war." That is how broad and sweeping this is. And we didn't have to go back to 1861. Richard Nixon is in my lifetime. I'm not all that old. And this is an example, again, of power trying to overreach itself unless it's checked, and that is what is at issue here. It seems a little academic, but it's having your liberties encroached upon by inches rather than miles all at once, and then you lose them on the installment

plan rather than a balloon payment.

MR. CONYERS: Thank you so much.

Congressman Scott? Excuse me. Professor Turley?

MR. TURLEY: Well, I just had a very small thing to add, and first of all, appearing academic is not a vice.

But there's another aspect to the lack of a limiting principle. We have been talking about the inherent authority argument advanced by the President, how that doesn't have a limiting principle. But there's other aspects that are equally extreme. For example, the President has put forward the principle of constitutional avoidance. His argument, through the Attorney General, is that because he considers there to be ambiguity in whether he has this authority or not, that you have to avoid the conflict, that you have to read FISA in a way to recognize his authority. That argument would have no limits.

First of all, there is no more law--there is no law that is more specific than FISA. I mean FISA is as specific as you can get, and it is as clear as you can get. But the President's argument seems to be, "If I don't accept its clear meaning, it's ambiguous, and therefore, you have

to avoid a conflict with me."

Now, under that argument, the President could engage in interstate auto theft and say that, "I didn't think that I was prohibited from stealing cars and moving them across State lines." That's not what the constitutional doctrine is about. And so there's aspects, not just the constitutional claim on the Article II issue, that are quite extreme and without limit.

MS. MARTIN: As a litigator, I always like to articulate the other side's argument as powerfully as they might, and I think their most powerful argument on the no-limit question is they would say, "Yes. No, no, no. You're wrong, that we--the limit on our domestic wiretapping is that we only wiretap individuals who the President determines have some kind of connection or link to al Qaeda, an associated group or terrorism. So that's not limitless," they would say. And I think that the response to that is: it's limitless because the President decides solely on his own, and does so in secret. And we see what happens because Mr. Hersh and his colleagues, and other religious groups, are now on those lists, the President's determination. And

that we have a system that says when you want to make that determination that someone is connected to terrorism, that the judiciary or some other branch, we have some oversight on that.

That's where the lack of limit comes in, is that the President is free to, on his own, pick and choose who he is going to go after.

MR. HERSH: Could I say something, please? I am not an attorney, so I'm not going to try to play one on TV here. I can't speak to the legality or the justice of what the President claims to be doing, to send his agents into a Quaker Meeting House to violate my First and Fourth Amendment rights is as ludicrous as saying we had to burn the village in order to save it.

I taught writing at the University of Florida and Florida Atlantic University. And I can tell you that that's a non sequitur. It's illogical. It's not illegitimate or unjust, as these distinguished jurists have stated, but it makes no sense.

MR. BAMFORD: If I could make just one brief comment.

MR. CONYERS: All right.

MR. BAMFORD: I will just take a minute here, but just to agree with Mr. Hersh there. During Watergate one of the targets of NSA under Richard Nixon was the Quakers. He ordered--I interviewed an official from NSA, who told me that that was one of the targets Richard Nixon ordered, was to eavesdrop on the Quakers because they were active in the anti-war movement at the time. These aren't frivolous worries I don't think.

MR. CONYERS: Now Mr. Scott.

MR. SCOTT: Thank you, Mr. Chairman.

I just wanted to follow up on another round of questioning, because if the President, in his own mind, determines that war protesters are undermining the war effort, does that make them fair game for wiretapping?

MR. FEIN: He's not rejected that idea, which I would say is a disturbing element that is in all of his explanations, both directly and through his surrogates. He's never said, "Of course, I can't do this." I remember at one recent press conference a reporter asked whether there are any limits, and his retort was, "I'm not a

dictator." He didn't say how he wasn't a dictator, but that was his response.

[Laughter.]

MR. FEIN: And that's what's troublesome, he's refused to say there are any principles that he would utilize as a matter of Executive self-restraint, to say, "Not going there." And that betrays a mindset that is very worrisome.

MR. SCOTT: Well, Mr. Hersh has outlined some infiltration. Are you familiar, Mr. Fein, with the Levy guidelines?

MR. FEIN: Yes.

MR. SCOTT: Under the Levy guidelines, could you do that?

MR. FEIN: Well, the Levy guidelines have been changed and altered, but I do think--

MR. SCOTT: Could you describe what they are?

MR. FEIN: The Levy guidelines were intended to set limits on the FBI's infiltration of various domestic groups in search of possible criminal activity.

MR. SCOTT: Without investigating a crime and with

no probable cause that a crime is going on.

MR. FEIN: That is correct. But they were in circumstances where typically you wouldn't necessarily have a Fourth Amendment privacy issue at stake, for example, surveilling a group that was holding a public demonstration that everyone else could see. Now, in this instance, if you have an open place that's generally available to anybody in the public, it wouldn't necessarily be a Fourth Amendment violation for the FBI to go where anyone else could go, even if they had some purpose that wasn't--that was some nefarious purpose. But certainly, it's calculated to create a kind of chilling effect by suggesting there's going to be data there that could be utilized for an improper purpose later on.

MR. SCOTT: So what do the Levy guidelines say about that situation?

MR. FEIN: Well, if there is absolutely no suspicion to think that there would be any utility in pursuing some criminal activity of this kind of surveillance, then that ought not to be done. But there were exceptions that were made, I think, by General

Ashcroft, that authorized the FBI to go into public places if they had some belief they might come across a terrorist activity.

MR. SCOTT: The Levy guidelines were set up to prevent the FBI from infiltrating groups where there was no criminal investigation going on, there's no probable cause that any crime was going on, and under the Ashcroft administration, they eliminated the guidelines.

MR. FEIN: No, I don't think they eliminated the guidelines. They did say that in pursuit of terrorists, that there were--there was proper--where activity was occurring in an open place, where persons were not prevented from entering, for the FBI to make observations that they thought might be clues to terrorism, even if it might not have been included earlier.

MR. SCOTT: And so based on the old Levy guidelines before Attorney General Ashcroft got hold of them, you couldn't infiltrate Mr. Hersh's organization, but now with the new interpretation that came out a couple of years ago--nobody was watching, they just kind of changed it, and we knew it but nobody paid any attention to it--now

that is exactly what they are doing and exactly what they had anticipated doing.

MR. FEIN: But I want to be clear on it because this is--you know, we don't want to overstate things. I think the use of infiltration when someone is entering a place that's open to the public may be a little bit inaccurate and inexact. It may be something that we don't like, but that's different from infiltration--

MR. SCOTT: The chilling effort of your public meeting, of your little meeting now attracting FBI agents to listen in is something new that hadn't been done--Ms. Martin, did you want to comment?

MS. MARTIN: I want to agree that allowing undercover FBI agents into religious meetings is seriously troublesome. But I want to also point out that we've seen in the last six months is that the Defense Department, which is not subject to even the Ashcroft guidelines, appears to be sending people into religious meetings. And NSA, of course, is part of the Defense Department. I suspect that if we could get the facts, we would discover that they have changed all of the rules and regulations about Defense

Department surveillance of Americans, and that the NSA program is only one aspect of it, and the infiltration of groups like Mr. Hersh by Defense Department elements is another aspect of it.

MR. TURLEY: May I comment?

MR. CONYERS: Mr. Turley.

MR. TURLEY: Part of the problem, in terms of your question, when you ask is there any way that this can be limited so that people like Mr. Hersh are not targeted, is that the President's argument doesn't lend itself to any moderate alternative position. That is, he has mapped out an extreme position that doesn't really have an alternative, that his position is [technical interruption], and that where Mr. Hersh is protected is in the discretion of the President. The important thing to remember is that once you say that something is committed to the inherent authority of the President, like something like national security, courts do not question that judgment as a general matter. Courts don't come in and say, "I think you were wrong that this person was a risk and not that person." If it's committed to the discretion of the executive branch, it goes into a

realm of total discretion, because courts really don't exercise much of a role in questioning national security judgment.

So part of the answer to your question, I think what the President would say is that, you know, "We exercise this discretion. We have this internal review process," and I note that the Attorney General said that every 45 days or so they review this program. But the important thing to remember is that all of these reviews, all these procedures, are all self-contained within the executive branch. And the President's people around him are strong believers in the sort of unitary executive theory, so that whenever you hear about these procedures, they lack one notable characteristic, and that is that they are outside of the President's control.

MR. SCOTT: Better known as a check and balance.

I want to ask Mr. Bamford one question, and that is that we are talking about whether or not he has to stop by to get a warrant before he does legitimate wiretaps. Is there information that is unavailable to the President if he would bother to get a wiretap and subject himself to some

check and balance? Because people want to suggest that we ought to be scared to death of a battle like this, prohibiting the President from protecting the public. We are not asking the President to stop protecting the public. We are just asking him to get a warrant on the way.

MR. BAMFORD: Well, not to my knowledge. There are allegations by NSA and the administration that there are technical means, which is one of the reasons that they want to avoid the warrant procedure. But over the first 30 years, the FISA Act has been tweaked a number of times, whenever there has been a change in technology or a change in technique. The proper procedure would be to go to the intelligence committees and so forth and work out a way to rework it. They moved it from 24 hours to 72 hours, for example, the amount of time.

MR. SCOTT: For a delayed warrant.

MR. BAMFORD: That's right.

MR. SCOTT: You go start wiretapping, and you had 72 hours to get back to the Court.

MR. BAMFORD: Yes. It started out with 24, and then they gradually moved it to 72. But the point is that

that is a possible. They could simply go and change it. But as far as I know, and the people I've talked to, there has been no effort made whatsoever to at least legislatively change the FISA Act to accommodated any new technology, and if there is a new technology, that's something that I think should be considered because it's an advance on what we already have, and what we already have is very frightening in terms of the capabilities.

MR. SCOTT: Thank you, Mr. Chairman.

MR. CONYERS: Thank you so much.

Mr. Wexler.

MR. WEXLER: Thank you, Congressman.

Given the failure of this Congress to exercise its responsibility of oversight, and I think the fairly reasonable expectation that the leadership of this Congress will continue to stubbornly refuse to exercise our constitutional oversight, it seems to me that the only venue or vehicle in which to successfully force the leadership of this Congress to act is in fact in the court of public opinion.

Yesterday Americans received the latest chilling

threat from Osama bin Laden. I think most Americans, particularly after September 11th, presume that the President of the United States will act in the best interest of America in terms of our security interests. They want to give the President of the United States a benefit of the doubt. I think Congressman Van Hollen hit it on the head. I think most Americans, when they hear descriptions of surveillance and wiretaps say, "Well, that can't happen to me. I'm just going to work. I'm just driving my kids to school. I'm just a retiree. I just go to church or I just go to synagogue. I just go and exercise my religious rights the way I wish."

Ms. Martin talked about what I think is the administration's presentation of the exercise of their discretion as always couched in terms of a connection and link to terror. Professor Turley, I think, rightfully pointed out that in essence the President claims the exercise of discretion.

So in that regard I would like to ask Mr. Hersh, if I could, the President has exercised his discretion. The Secretary of Defense, Mr. Rumsfeld, has exercised his

discretion. The Commanders at the NSA have exercised their discretion. The enlisted people, who were ordered, I presume, to go and sit in the Quaker Church in Palm Beach County, they followed their orders. Could you describe for us--and you have to some degree--but I think it is important for Americans to understand in the context of that question "it can't happen to me"--who was sitting in that Quaker Church in Palm Beach County? Were these people that had traveled to Afghanistan in the 1990s? Were these people who had taken plane trips to Pakistan, people who had ongoing dealings with Iraqi agents? My understanding is a bunch of grandmothers were there. Can you describe for us, so America understands, the answer to the question "could it happen to me," who was in that church when the Department of Defense ordered enlisted people to go spy on Americans?

MR. HERSH: Yes, I can. There was me, disabled, 59, father of two daughters. There was Evelyn Grachow (ph), 79-years-old, grandmother and an activist, former union member. There was Deborah Smith, an Asian-American housewife. There was Javier del Sol, a Native American and a student. There was Marie Slicker (ph), mother of Native

American children, and a nurse. There was Alvin Taylor, a pharmacist, a retired pharmacist and retired attorney. There was James venable, an African-American, a Web designer, a marketing person, a businessman. There was his wife, Bonnie Reading, a European-American like myself, who is a legal attorney, a real estate agent, and a direct marketing person. I hope I haven't left anyone out, and if I have, I hope they can forgive me.

There were a number of other Quakers there as well. I can't name them all, but I do know that none of us had traveled outside the country. None of us had, to my knowledge, made any phone calls outside of the country. We were just people interested in getting at some truth, and educating our children, teaching them how to think, and giving them the facts so that they could make informed decisions.

MR. WEXLER: The fact is, Mr. Hersh, as I see it--and you haven't said it--but there isn't the slightest bit of connection between you or anybody in that church and anything to do with terrorism or the security of the United States. The fact is, what the Truth Project is, is a group

that may have a philosophy that is adverse to the political philosophy and the political goals of the President of the United States, and as a result of that differing philosophy and the exercise of your political rights as Americans, the President of the United States, the Secretary of Defense of the United States, ordered that your group be spied on. And it doesn't have the slightest bit to do with Iraq, not the slightest bit to do with Afghanistan, not the slightest bit to do with al Qaeda or the SOB who threatened America yesterday. And the President of the United States and Americans need to understand what this President is all about in engaging in the NSA program that he has unfortunately engaged in.

And the question in my mind that comes, if what the President is doing is entirely legal, then why wouldn't he have just gone through the accepted legal process to begin with? If he had gone through that process, we are told that on 13,000 occasions he could have legally possibly done what he did in that Quaker Church. But apparently, the President of the United States and the Secretary of Defense have chosen a different path with no court approval to spy

on people like you and the 79-year-old grandmother, and these other patriotic Americans. And there shouldn't be a single American that today remains confident that it couldn't happen to them, because it happened to them in Palm Beach County.

Thank you very much, Mr. Hersh.

MR. HERSH: Thank you, Congressman Wexler. I'd like to point out that I don't think that we are, as we've been painted in the press, completely harmless.

[Laughter.]

MR. HERSH: I mean the Department of Defense has labeled us a credible threat. And I think the truth is all of us are a credible threat to illegitimate and unjust power.

MR. CONYERS: Thank you.

[Applause.]

MR. FEIN: Could I just add an observation? And that is, the President has said that the surveillance is targeted only upon those who are known members of al Qaeda or affiliated organizations. Now, if he already has that evidence, why didn't he just go into court and get it rubber

stamped?

MR. BAMFORD: If I could just add one thing also. From looking at what's been reported on NSA, what it appears to be is that it is expanding concentric circles around people who were probably legitimately targeted in the first place, and then the people who have become targeted after that are people who happened to call that person, and then people who happened to call that person. So you happen to get a baby-sitter who calls the Pizza Hut, who calls whatever, and that's how you get this expanding circle, and that's why I think the comments were made earlier by some people in the administration that this was more of a brief look at people's communications rather than the long FISA look, when they would go get a warrant.

I think that's one of the ways they're trying to justify this, is this is sort of a--and I think they've used the term "early warning approach." So they go out there and they listen to a lot of people for less than the full time of a FISA Court warrant, and then they go and use that information and go back to a FISA Court, and say, "We've found that these people here are needing some FISA

warrants."

And that's the problem I think that the FISA Court was faced with, was that the presiding justice of the FISA Court was beginning to get applications for FISA warrants based on information that she had no idea where it was coming from, and it appeared obvious to her that this was information that was being illegally picked up by NSA without a warrant. And that was precisely the reason why she insisted that from then on, any officials from the Justice Department coming in there seeking a warrant, also bring with them an affidavit signed under penalty of perjury, that none of that information is the product of illegal warrant-less wiretapping.

MR. CONYERS: Congresswoman Watson.

MS. WATSON: Thank you so much. I am sitting here in a high state of frustration. As you heard when I was introduced, I was a former ambassador to the Federated States of Micronesia, and it was my responsibility in that country, that island nation, to preach democracy and the rule of law. I sit here now feeling that I could be branded a hypocrite.

I have in front of me--and I would you on the panel to pull this up, it's from the Los Angeles Times today--my Deputy Chief of Mission on the front page of the LA Times, and it's titled "She's on Activist Duty Now." And "As an Army colonel and diplomat, Mary Ann Wright served her country for more than 30 years in some of the most isolated and dangerous parts of the world -- then quit" when "she felt she could not defend this war." The war of choice that this President says was to fight terrorism, al Qaeda, Osama bin Laden, and he goes after Saddam Hussein. Think about that.

And so, as Barbara Jordan used to say, "Everyone ought to have their friendly Constitution in their purses and pockets." So I asked someone to let me see the Fourth Amendment. And it says, the right of the people to be secure in their own homes and on their persons, their houses, their papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall be issued but upon probable cause. And it goes on.

So what is troubling me now as a former representative of this country abroad is the words

"reasonable" and "probable cause." I feel that I have betrayed the principles of America abroad. Madeline Albright would cable us, almost on an hourly basis, and she would say, "Remember the rule of law." And I would go to the islands within this nation and talk about the rule of law and the Constitution, under which they have signed a compact. Now I am feeling that I have betrayed them, because the country that I represented is not following the rule of law.

So unreasonable searches, "unreasonable" and "probable." To the attorneys sitting in front of us, Mr. Fein and Mr. Turley, the rest of you, can you respond as to how they can use the words in the Fourth Amendment, "unreasonable" and "probable" to justify what the President is doing?

MR. FEIN: Well, Congresswoman, I think the ostensible response by the President, "We're only spying on those who really are complicit with al Qaeda and terrorists, and you just need to trust me," and therefore--

MS. WATSON: In this country.

MR. FEIN: Yes, in this country, because they

have, he says, they have an association. Moreover, the reason why he knows is he asked his friend, you know, down the White House corridor and he says, "Yeah, they really are the bad guys."

MS. WATSON: Let me ask you this. Could I respond to a student by saying that the interpretation of "unreasonable" and "probable cause" is left up to the President at the time?

MR. FEIN: Well, that's what he is asserting. Of course, that's contrary to our entire--separation of powers is the contrary. The whole reason why we have different branches is to check an abuse of that kind of characterization of a suspect. That's why we customarily have judicial warrants, but in any event, even in the exceptions to warrants, there has to be a standard that's subject to some outside review in determining whether or not the President simply is styling an elephant to a mouse with a glandular condition, and saying, "Aha, I can go after this elephant."

And that's what's so troublesome here. The Constitution was based on the principle of "trust me" is not

good enough. Men aren't angels. We need ambition to counteract ambition, and those are truisms for the ages. And if we let this principle of violating that norm--remember President Reagan, "Trust but verify." Then we have laid a weapon around for any future President to abuse any of our liberties, not just communications.

MR. TURLEY: I would echo what Bruce has said. I would add probably two things, and that is, first of all, one of the reasons we're at this point is that the language of the Fourth Amendment has been ignored. All these people that say they're into strict construction and textualism, there's no part of the Constitution that is clearer than the Fourth Amendment. It says "probable cause." It talks about warrants. But what we have seen over the last two decades is a series of exceptions to that amendment, which, frankly, I found troubling.

And also in response to--unfortunately, you know, the Framers created a three-branch system in the hopes that they would check and balance each other, and we're sort of down to our last branch, the judicial branch. I suppose it's not so bad, we got one fully operative. But the

judges, Federal judges, including a lot of Republican appointees, have been remarkably courageous. I mean, even though much of this is left to the discretion of the President, there is an ability of judicial review. We saw that with Hamdi. We've seen that where judges have tried. We even see that with the FISA Court where judges have taken very courageous stands to try to get some balance.

But what's troublesome is when you look at white paper, some of the cases that they rely on most heavily are sole search cases. You know, they don't talk about like Earls and Vernonia. Those are cases that reaffirm the ability of a high school principal to search the locker of a kid, looking for a joint. I don't think the Supreme Court was intending to create a national security legal apparatus on that case.

[Laughter.]

MR. TURLEY: But what happened is that they said because of the unique context of the high school, that these are reasonable. But when you read those cases you realize how far afield we have gone to avoid what the Constitution says. So I would just echo your response.

I have to tell you, I'm the eternal optimist when it comes to this country. I mean I think we have weathered incredible things. We have weathered good and bad, but we've always seemed to survive. I mean, the Framers developed the Constitution as sort of the all-terrain vehicles of constitutions. It's really designed for bad weather. And, boy, we're in a bad weather pattern right now. But I think we'll come out of it, but hopefully it will be with the assistance of your institution.

MR. CONYERS: I want to thank, again, on behalf of we, the committee, and for all of the members of Congress that support what we are doing, the millions of Americans who are expressing, we hope, their gratitude, so that this will continue to encourage us all to take the necessary steps of the responsible branch of Government as American citizens, who are determined to continue with the kind of optimism that will make democracy succeed in the end, and that we all move forward as a people, and that we will turn this bit of troubled passage into an even stronger constitutional democracy.

On that note, I declare these hearings concluded,

but we leave the record open for five days for members of Congress who would like to send you questions that we could include in the record. Again, our thanks.

[Whereupon, at 1:44 p.m., the briefing was adjourned.]