

MR. HAROLD A. BAKER: Thank you, Mr. Chairman. And I want to express my appreciation for the privilege of being asked to come here and speak to the committee.

Like the other judges, I'm only speaking individually. I'm not expressing opinions on behalf of the FISA Court or its members as are presently constituted. And what I hope to comment on is in a constructive manner to strengthen Senator Specter's bill and the functions of the FISA Court, to strengthen the FISA Court. What Judge Kornblum said about the FISA Court being an invaluable tool to the intelligence community bears emphasis.

The FISA statute -- I suppose I only tell you what you know -- is the compromise that was worked out between the congressional right of oversight and the powers of the executive in gathering foreign intelligence, and it ends up being a balance between the constitutional construction and pragmatic necessities. It ended up that the intelligence community needed court orders in order to gain access to the carriers -- the communications carriers.

One of the problems that seems to arise, and I mentioned this to Senator Specter, is the lack of understanding. It's amazing to me, on the part of the Justice Department and the intelligence community, as to what probable cause has to be. They have some idea that probable cause is a high bar that they have to cross. And in foreign intelligence matters, it is not. And if they go and read *Illinois v. Gates* and *Maryland v. Pringle*, where first Justice Rehnquist, and finally, in the *Pringle* case, Chief Justice Rehnquist, elaborates further, it comes down to a very practical, commonsense decision which, in the case of foreign intelligence, boils down to just a reasonable suspicion.

The other aspect in the statute that bears discussing is minimization, and that also, like the determination of probable cause, minimization should be a judicial decision, an oversight by the judiciary of what the executive is doing.

I should call attention of the committee to the *in re Sealed* (ph) decision that was decided by the FISA court of review, which put two limitations on the FISA Court that exist now, first in determining probable cause, saying that except for clear error, the court should not look past the determination by the executive of the existence of probable cause to think that communications would contain foreign intelligence. And the other was that minimization is not, or should not be, solely a function for the executive and that it is subject to review that the minimization standards established by the attorney general are reasonable and intended to protect Fourth Amendment rights of United States' persons.

The point I wanted to stress, and I did with Senator Specter in my letter to him, was that the Congress should tell what its intention is, specially what its intention is, with regard to who has the right to decide probable cause, who has the right of oversight of minimization. And I see the clock ticking away. I think I'm in an appellate court again. And I'd be delighted to answer questions that may be put to me by members of the committee.

Thank you, sir.