MR. JOHN F. KEENAN: As the other judges have said, it is an honor for me to have been asked by Senator Specter to appear before your committee and testify concerning Senator Specter's proposed draft bill entitled the National Security Surveillance Act of 2006.

As you heard, I served as a member of the United States Foreign Intelligence Surveillance Court from May of 1994 until May of 2001. While I was in the Army I served in the Far East in military intelligence in the Army security agency, which, as Judge Brotman said, was the precursor to the National Security Agency.

During my tenure on the FISA court, the court consisted of seven district judges, no two of whom could be from the same circuit.

We each served for seven-year terms that were staggered terms, in the sense that one new judge would come on each year and one judge would go off. And those seven-year terms could not be extended.

I know the Title 50, sections 1801 and those sections that follow, the Foreign Intelligence Surveillance Act, or FISA, was amended after September 11, and that the court now consists of 11 district judges. FISA was originally enacted in 1978, and it is what I will call a Fourth Amendment statute.

This is because in order to secure a FISA warrant, the attorney general must establish probable cause. However, FISA probable cause is different than probable cause in the criminal context. In a FISA application, all the government must show is that there is probable cause to believe that the target is a foreign power or the agent of a foreign power. In the case of a FISA warrant, the seizure is of foreign intelligence information.

At present, as we have all heard here this morning, this whole area is one where there is considerable controversy and disagreement. It is not my purpose, nor do I think it appropriate, for me to allude to the politics of the subject. I respectfully suggest to you that FISA has been a valuable tool for the nation in the collection of foreign intelligence.

FISA can be improved, and it should be improved to accommodate more modern technology which was not contemplated in 1978 when the original law was enacted. I believe your legislation, Senator Specter, with certain modifications, would improve FISA very much.

Contrary, I should say, to an editorial that appeared in the February 9, 2006, Wall Street Journal, FISA and the Foreign Intelligence Surveillance Court should not be abolished. Under Article 2, Section 2 of the constitution, the executive has great power and authority in this area, as you've already heard and as you know. So too does the legislature, under Article 1, Section 8. As is recognized in your bill and as is set forth in your bill.

Whatever legislation is enacted should accord these two principles sufficient and significant recognition. It is my understanding that the legislation before you proposes to supplement the present law, not to overrule, repeal or supplant it. I am aware that Section 1805F of FISA was amended to authorize the attorney general to employ electronic surveillance to obtain foreign intelligence without a court order for 72 hours in emergency situations.

It is my understanding, based on an article in the March 9 New York Times that there is a bill in the Senate Foreign Intelligence Committee seeking to allow warrants without court orders for up to 45 days. The National Security Surveillance Act of 2006 which is before you makes no reference to the 72 hour period, and thus presumably leaves it in place.

I would respectfully suggest that the period be increased to 7 days or 168 hours in emergency cases. This should be more than ample time to address any unforeseen emergencies if FISA was amended and extended to 168 hours. The legislation before you presumably leaves in place Section 1803B, which establishes a three judge court of review over the FISA Court.

In 2002, the review court sat for the first time and ruled at 310 Federal Report 3rd, page 717, that, quote, "FISA does not contemplate," close quote, an en banc proceeding wherein all the judges sit contemporaneously. The legislation here makes no reference to en banc proceedings, and if there is a desire on the part of your committee -- and it seems to me that in certain cases it might well be valuable to be able to have en banc proceedings, and since they are now outlawed, that might be a helpful addition to the legislation.

The legislation before you in proposed Section 701 defines several terms. Among them is the term, quote, "electronic surveillance," close quote. I respectfully point out that this term is already defined in present Section 1801F, and that there are differences in the definitions which probably should be harmonized in the new legislation. Because of modern technology, United States persons may well be in the network or the chain of communication of known terrorists.

Concerning those terrorists, there may well be ample probable cause but little or nothing may be known, other than that he is receiving communications from the terrorists. I believe in the context of intelligence gathering that the Fourth Amendment allows Congress to empower the president to seek warrants targeting networks of communication

used by people including United States persons, where the network is engaged in terrorism or activities related thereto, without having specific probable cause for all people in the network.

I believe that your legislation, sir, accomplishes this important purpose and takes into account the sophisticated modern technology employed in present day electronic communications while recognizing the need for minimization procedures.

Thank you very much.