

Question and Answer Session:

SEN. SPECTER: Judge Keenan, you've sounded a similar note, talking about technology and the Foreign Intelligence Surveillance Act, as you testify, should accommodate those changes which we'll find today contrasted with 1978 when FISA was enacted. Do you think that the legislation which I have proposed will appropriately take into account those changes in technology and provide the kind of judicial review which would establish constitutionality and at the same time give appropriate balance to law enforcement?

MR. KEENAN: Yes, I do. Do you?

MR. BROTMAN: Yes.

MR. KEENAN: I'm sorry.

SEN. SPECTER: That's all right, we'll get double answer.

MR. : I agree with Judge Brotman.

MR. KEENAN: No, I certainly do --

SEN. SPECTER: Well, before you answer I want to be sure we have Judge Brotman on the record. I thought I heard you say, "Yes, I do."

MR. BROTMAN: Yes. I was going to say something else but I'll let him answer first.

SEN. SPECTER: Okay.

MR. KEENAN: I certainly do agree that the legislation serves the purpose that you suggest. And if I may, most respectfully I'd like to repeat my suggestion that the 72 hour provision be extended to 168 hours. In other words, 72 days -- from 72 hours to seven days, I'm sorry. The point being that emergencies sometimes arise.

You heard from Judge Kornblum I think, the number of steps and hurdles in a sense that the FISA application has to go through before it ever gets to the court, and you heard it from Judge Brotman, a judge of the court, emergencies do arise in life, and particularly with the type of communications we're talking about, which were never envisioned in 1978.

When you were district attorney of Philadelphia and there was a wire tap, or when Senator Kennedy was an assistant up in Massachusetts and there was a wire tap, there were two people on the wire. That's not the way it is now, and that's what has to be -- that's what has to be covered and you're covering it.

SEN. SPECTER: Thank you, Judge Keenan.

Judge Brotman, the red light went on and I like to observe the red light so everybody else does. The chairman has to be the leader on that. We'll come back to you on my next round. I want to observe the time.

Senator Leahy.

SEN. LEAHY: Judge Keenan, you bring back some memories for a number of us on this panel who were prosecutors. I won't go into telling war stories.

I do have a question. It's been reported the current presiding judge of the FISA Court, Judge Kollar-Kotelly, and her predecessor, Judge Lamberth, expressed doubts about the legality of the president's warrantless wire tapping program. Both insisted that information obtained through NSA surveillance not be used to gain warrants for the FISA Court. Do you agree with the decision of the presiding judges to bar the Justice Department from using information obtained from this program and the FISA applications, Judge Baker?

MR. BAKER: I'm not familiar with their decision on that, and I'd like you to excuse me from interfering in the proceedings of the existing court. I don't know what's been presented to them. I'm really in the dark with that, and for me to give an answer on it would be speculation.

SEN. LEAHY: Judge Brotman, do you have a different answer?

MR. BROTMAN: No, I'd give the same answer.

SEN. LEAHY: Judge Keenan?

MR. KEENAN: I'm afraid, senator, I would give the same answer. I don't know what the program is and I have never been briefed. MR. : I agree with my colleagues, Senator Leahy.

SEN. LEAHY: Okay. Well, let me ask you this then. Suppose the Justice Department wanted to test the legality of the NSA program, and let's assume for the moment that the facts are as I've described them by the chief judges. If they want to test the legality

couldn't they do that any time by applying for a FISA warrant, based expressly on evidence obtained through the program? That is, evidence obtained through a warrantless wire tap of an American inside the United States?

If you have a case where evidence is obtained through a warrantless wire tap of an American inside the United States, the Justice Department now comes forward and asks for a FISA warrant based on that, on those facts would that not put the judge in a position to consider whether the evidence was obtained lawfully?

MR. BAKER: The judge would consider --

SEN. LEAHY: Take it as a hypothetical.

MR. BAKER: Well, the judge would have to consider whether there was probable cause to believe that a foreign power was involved and that the communication was between a foreign power, and there's probable cause to believe that the recipient is an agent. That would fall within the statute, if that was present.

SEN. LEAHY: And that would be --

MR. BAKER: But I don't know that that would be present.

SEN. LEAHY: And that would be -- in doing that would be making the determination whether it was lawfully obtained and asking the questions you've just referred to.

MR. BAKER: (Laughing.) No, because it goes beyond the question of foreign power and the agent of the foreign power, and it's raising the question of whether the president has the authority to do such a thing. And, again, I end up saying I can't answer it because it would amount to speculation.

SEN. LEAHY: You can't answer the question whether some -- the Justice Department came in applying for a FISA warrant based expressly on evidence obtained through a warrantless wire tap of an American inside the United States, you couldn't make -- you couldn't ask a question whether the evidence was obtained lawfully under FISA? It doesn't seem to make a lot of sense.

I mean, put it another way. Suppose they came in for -- a court came in for a warrant to search a safe deposit box and said, we're developing our probable cause based on an earlier warrantless search of the suspect's home. Wouldn't -- before you issue that search warrant for the safe deposit box, wouldn't you have to at least reach a question of the legality of the search of the home?

MR. BAKER: I might come to the conclusion that there was insufficient information because the information wasn't reliable to find probable cause. But I don't know that I have to go back and decide what the executive is doing is legal or illegal. And --

SEN. LEAHY: Well, then, let me fire with this. Mr. Halperin, who's going to testify in the next panel, he said: "Should Congress seek to legislate based on the record currently before it such legislation should respond to the specific needs that have been asserted by the government rather than to conjectures as to what additional needs may exist." Do you disagree with that? Well, you're saying you want to have the facts. Isn't Mr. Halperin saying the same thing?

MR. BAKER: I guess -- you know, I came to talk about the proposed legislation and how it would assist and reinforce the FISA Court, and whether -- what the existing situation is now with whether some thing is legal or illegal goes beyond that, and that's why I'm shying away from answering that.

SEN. LEAHY: Well, with the head shaking I have a feeling I would get the same answer from Judge Brotman and Judge Keenan and Judge Stafford.

MR. BROTMAN: I would say this, senator, that any application made to FISA Court would have to be considered by the judge who receives that application. And in the course of reviewing that application if it doesn't meet with the statute, then the application is not granted. We have to use the information in the application and the information we have learned, and all of us become briefed on new programs, we become briefed on new equipment, we see how things operate, we have to in order to do our job. But if an application comes in and it doesn't meet what it should meet, it goes back.

MR. BAKER: Judge Kornblum reminds me, Senator Leahy, that in the Ames case that warrantless searches were disclosed to the court and the court did proceed on the basis of those warrantless searches and further FISA surveillance.

SEN. LEAHY: And didn't we amend FISA after that at the request of the administration to take care of cases like Ames?

MR. BAKER: Yes, it was amended.

SEN. SPECTER: Thank you, Senator Leahy.

Senator Hatch.

SEN. ORRIN G. HATCH (R-UT): Well, I want to personally thank all of you for your service to our country and we appreciate what you folks in the federal judiciary are doing for all of us. And we thank you for being here today and appreciate all the testimony we've had.

I'm going to direct my questions to you, Judge Kornblum, if I can, and anybody else who would care to respond, if would be fine with me. When the accusations against the president's authorization of the NSA terrorist surveillance program were put together the picture looks something like this.

The president is given a mandate from the constitution as commander-in-chief. The Congress in response to domestic spying by certain administrations in the 1960s devised a legal avenue by which the administration can conduct surveillance on Americans and thus FISA -- the FISA Court was born.

Therefore goes the argument, if the administration is to engage in any kind of surveillance it must go through the FISA Court. One senator described FISA like a trap with two escape hatches. Another senator says: "The FISA Court is not a tool but the prescribed avenue which Congress has given for conducting surveillance."

Now, if this line of reasoning is true then the authority of the president has truly been diminished through the creation of FISA, the very thing FISA was not supposed to do. On top of that the leak of this classified program has been hailed as, quote: "A good thing," unquote, by some senators. Other senators have said publicly that they would be willing to give the president the explicit authority to conduct this program if the president had just asked.

Now, I submit that when we sought to give law enforcement officers authority to use time tested tools from years of investigating health care fraud or mal-fraud, just to mention a couple of matters, under the Patriot Act -- and under the Patriot Act use those same tools in terrorism investigations, the same senators supported a filibuster of the Patriot Act.

Now, this is not an administration spying on political enemies, this is a well regulated, carefully targeted, effort to stop terrorists. The administration discussed this program with several congressional members and apparently none of them raised issues that so many are now trying to make political hay out of today. And to my knowledge, no member has publicly requested the administration to stop the program or even -- they haven't even suggested that funding for NSA should be curtailed.

Now, Senator Specter has this bill, which is a good effort in my view, that addresses the issue of the FISA Court and the power of the president to conduct surveillance on suspected terrorists.

One of the criticisms circulating regarding this bill is the constitutionality of the proposed bill, and we're all concerned about that, so my question to you, judge, and any of the other judges who care to comment, is this. If the administration files a request with the FISA Court for permission to conduct something like the current terrorist surveillance program and the request is denied and subsequent revised requests are denied, does the administration still have the options to pursue in the effort to foil the terrorists or should the FISA Court's decision be a constitutionally affirmed advisory opinion?

MR. KORNBLUM: Well, you've overlooked the easy answer. There is a court of review, and just as back in 2001 when the administration objected to the court's decision in all foreign intelligence matters they appealed to the court of review and that's the purpose, specific purpose, for the court of review, so they would have a legitimate legal outlet to pursue --

SEN. HATCH: Except this may be a crucial time constraining situation where lives of Americans may be -- millions of lives of Americans may be at stake. So, again, would it be an advisory opinion, in your opinion, or would it not be? Assuming that that situation is the situation. And I can tell you personally, that very well may be the situation.

MR. KORNBLUM: If the facts were presented in the form prescribed in the FISA statute and contained specific information regarding the foreign power, the agent of a foreign power, and explained how the surveillance was going to be conducted, and then all the requirements of the FISA statute, I wouldn't think it's an advisory opinion. It would be a case of controversy for them to decide.

SEN. HATCH: Even if it meant -- even if it involved very, very serious potential harm to millions of Americans?

MR. KORNBLUM: Yes, I'm not sure I understand your question because it seemed to me almost all the FISA --

SEN. HATCH: Well, let's say that there's -- that we have some evidence that there is a widespread conspiracy to bring a nuclear device into America, and that the FISA Court decides that they haven't met the requisites a couple of times. Is the president -- is the president bound not to do anything? Or is it the limitation to appeal the FISA Court's decision to a court of review that might take a tremendous amount of time and might result in the loss of millions of lives?

MR. KORNBLUM: Well, of course, the president would be relying on the attorney-general and now the new national director of foreign intelligence for their recommendations, and I certainly don't consider myself an expert on presidential authority, but I could see the president deciding that using what I call his necessary and proper authority he would assume the risk and order the executive action necessary, such as electronic surveillance, despite the court's approval or disapproval. And I gather that's the premise you wanted me to address.

The court would disapprove the application and there would be insufficient time to call in a court of review, what should the president do? Well, just as the president is now acting unilaterally he might choose to do that. If he --

SEN. HATCH: And he might be right.

MR. KORNBLUM: He might be right, yes.

SEN. SPECTER: Thank you, Senator Hatch.

We'll pursue that question of whether he might be right when my turn comes.

Senator Feinstein was here under the early bird rule.

SEN. DIANNE FEINSTEIN (D-CA): Thank you very much, Mr. Chairman.

I think four of us on this committee are also members of intelligence, and two of us are part of the subcommittee that has been briefed on the program and has been out to the NSA and seen it. It was very interesting. What you said this morning was of great help to me. Two of you have said that the probable standard cause is not a bar but it's really lower than a title three probable cause, it's really reasonable suspicion. Do all of you agree with that? Does anybody not agreed with that, that for the collection of intelligence the probable cause standard is really reasonable suspicion?

MR. KEENAN: I'm just not comfortable with those words. The reason that I say that is the cases we all talk about quote probable cause. As I think we all tried to articulate, in my view, FISA probable cause is different than criminal probable cause. All you need with FISA is to prove -- well, not prove -- to establish probable cause --

SEN. FEINSTEIN: I'm sorry, I can't hear you.

MR. KEENAN: I'm sorry. Excuse me. All you have to do with FISA, senator, is establish that the target is an agent of a foreign power or a foreign power, and the purpose of it is to gain foreign intelligence. Once you've done that you've cleared the probable cause hurdle for the FISA Act.

SEN. FEINSTEIN: Well, let me --

MR. KEENAN: If you want to call that --

SEN. FEINSTEIN: All right, let me -- there are a couple of other things here that were very useful. I think the extension of the 72 hours to seven days is very helpful.

I think reviewing a program en banc is very helpful. There are a lot of contrasts that we have to deal with, and not the least of which is if you take something off a satellite it's legal. If you take it off a wire it isn't without a warrant.

And as you have adequately pointed out, the technology has changed so much that a law passed in 1978 really needs to be changed for a program as opposed to an individual warrant. I think there's justification for a program. The question now comes on what should the probable cause or reasonable suspicion standard be exercised. It certainly seems to me that a FISA Court sitting en banc is one appropriate standard.

The other one comes down to probable cause or reasonable suspicion of what? Now, you have said agent of a foreign power or a foreign power. But it's also threat, it's also affiliation. I don't know that you would have the instant probable cause in a program if it's just limited to an agent of a foreign power or a foreign power because you are trying to develop connections and you are trying to evaluate threats as well. Could you comment on that?

MR. BAKER: I think that all you have to do is look at Pringle, the most recent Supreme Court case where they hark all the way back to Chief Justice Marshall and say: "A seizure under circumstances which warrant suspicion." And being the agent of a foreign power would be involved in these activities that you describe. So it seems perfectly clear to me that probable cause in such a situation is a very low bar, a very low hurdle to get over to make a warranted surveillance.

SEN. FEINSTEIN: Of one -- in other words, the foreign power is outside the country, the target is in the country. You'd also want to know, it seemed to me, who that target called.

MR. BAKER: Precisely.

SEN. FEINSTEIN: Out there --

MR. BAKER: No, you would go after the target too.

SEN. FEINSTEIN: Right. And so there you're still agent of a foreign power, a foreign power, rather than a threat or a conspiracy.

MR. BAKER: It would be the agent of the foreign power engaged in clandestine activities which are a threat to the United States. I mean, that -- that -- it's what that agent is doing that you'd be looking at.

SEN. FEINSTEIN: All right.

MR. BAKER: Or we suspect that he's doing, or she.

SEN. FEINSTEIN: Thank you very much. Now, I want to clear something up. Judge Kornblum spoke about Congress's power to pass laws to allow the president to carry out domestic electronic surveillance, and we know that FISA is the exclusive means of so

doing. Is such a law that provides both the authority and the rules for carrying out those authority -- that authority, are those rules then binding on the president?

MR. KORNBLUM: No president has ever agreed to that. When the FISA statute was passed in 1978 it was not perfect harmony. The intelligence agencies were very reluctant to get involved, go into court. That reluctance changed over a short period of time, two or three years, when they realized they could do so much more than they'd ever done before without going on --

SEN. FEINSTEIN: What do you think as a judge?

MR. KORNBLUM: I think, as a magistrate judge, not a district judge, that a president would be remiss in exercising his constitutional authority to say that I surrender all of my power to a statute. And, frankly, I doubt that Congress in a statute can take away the president's authority. Not his inherent authority, but his necessary and -- his necessary and -- I forget the statute -- necessary and proper authority.

SEN. FEINSTEIN: I'd like to go down the line, if I could, judge, please. Judge Baker?

MR. BAKER: Well, I'm going to pass to my colleague since I answered before. I don't believe a president would surrender his power either. I don't believe that a president would surrender his power.

SEN. FEINSTEIN: So you don't believe a president would be bound by the rules and regulations of a statute? Is that what you're saying?

MR. BAKER: No, I don't believe that. If a president --

SEN. FEINSTEIN: That's my question.

MR. BAKER: But, no, I thought you were talking about the decision.

SEN. FEINSTEIN: No, I'm talking about FISA, and is a president bound by the rules and regulations of FISA?

MR. BAKER: If it's held constitutionally and it's passed I suppose he is like everyone else, he's under the law too.

SEN. FEINSTEIN: Judge?

MR. : I would feel the same thing. I would feel the same way.

SEN. FEINSTEIN: Judge Keenan?

MR. KEENAN: Certainly the president is subject to the law, but by the same token in emergency situations as happened in the spring of 1861, if you remember, and we all do, President Lincoln suspended the writ of habeas corpus and got in a big argument with Chief Justice Taney but the writ was suspended. And some of you probably have read the book late Chief Justice Rehnquist wrote, "All the laws but one," because in his inaugural speech -- not his inaugural speech, but his speech on July 4th, 1861, President Lincoln said essentially, should we follow all the laws and have them all broken because of one?

SEN. FEINSTEIN: Judge?

MR. STAFFORD: Senator, everyone, including the president, are bound by the laws that Congress passes. But -- excuse me. Everyone is bound by the law, but I don't believe, with all due respect, that even an act of Congress can limit the president's power under the necessary and proper clause under the constitution. And it's hard for me to go further on the question that you pose, but I would think that the president's power is defined in the constitution, and while he's bound to obey the law I don't believe that the law can change that.

SEN. FEINSTEIN: So then you all believe that FISA is essentially advisory when it comes to the president?

MR. STAFFORD: No.

SEN. FEINSTEIN: But that's what you're saying. I don't -- my time is up, but this is an important point.

SEN. SPECTER: It was four and a half minutes --

SEN. FEINSTEIN: The president isn't bound by it --

SEN. SPECTER: Excuse me. It was four and a half minutes ago, but pursue the line to finish this question, Senator Feinstein.

SEN. FEINSTEIN: I don't understand how a president cannot be bound by a law.

MR. BAKER: I could amend my answer, saying that --

SEN. FEINSTEIN: But if he is, then the law is advisory, it seems to me.

MR. BAKER: No, if there's enactment, statutory enactment, and it's constitutional enactment, the president ignores it at the president's peril.

SEN. FEINSTEIN: Thank you, Mr. Chairman.

SEN. SPECTER: Let me interpose for just a moment here. I think the thrust of what you're saying is the president is bound by a statute like everyone else unless it impinges on his constitutional authority, and a statute cannot take away the president's constitutional authority. Isn't that -- anybody disagree with that? Everybody agrees with that.

And the question, whether he has constitutional authority depends upon what he is doing, and that's why you have judicial review and have to know what the program is to make an evaluation, as the courts have done consistently, with the president's authority, once you know what a program is.

And that's the thrust of what you have testified to in-chief when you have given your five minutes opening and the response to my questions, that the FISA Court would have the authority to evaluate the specifics of the program and determine whether it is within the president's constitutional authority. Anybody disagree with that?

MR. KORNBLUM: Senator, I would also reiterate that the president doesn't have a carte blanche, that the courts are the arm of government that determines what the president's constitutional authority is. And over these past 25 years in addition to the FISA statute the president has continued to exercise his constitutional authority to authorize intelligence activities --

SEN. SPECTER: I'll come back to this when my turn comes. But in light of Senator Feinstein's questions I just thought that little bit of clarification might be in order.

Senator Kennedy?

SEN. EDWARD M. KENNEDY (D-MA): Thank you very much, Mr. Chairman.

I thank all of you. This has been enormously helpful, and I think all Americans ought to have a sense of competence in those that are serving on the FISA Court. I certainly have been impressed by all of your presentations here, and reassured.

Just to go back very briefly, the time that we passed that Act we had President Ford, Attorney General Levy. He brought the members of this committee down to the Justice Department, we worked it out in a common and bipartisan way. The FISA Act was passed 95 to one in 1978. Many of us believe that it was enormously important, and I think history will show it.

Now many of us wonder why we're not having a similar kind of a situation, why we can't -- with the new kinds of challenges that we're facing here in the country with 9/11 -- why we cannot work in a common bipartisan way. We did at that time, we had the threats of the Soviet Union, there were provisions that were put in there as a result of secret information, all of which worked out and worked out very well.

Now we have situations where we're having electronic surveillance on a number of individuals. Let me come before that. This hearing initially -- well, first of all, has the comments on the chairman's proposal, has that -- have we all got the copies from your proposal? Has that been made available to all of us, Mr. Chairman, do you know? Their comments that they -- on your proposal, has that been -- we all have those?

SEN. SPECTER: I will make a part of the record Judge Baker's comments which are in writing, but those are the only comments which have -- I will put on the record whatever comments have been made.

SEN. KENNEDY: Whatever we -- good. I thank you.

Secondly, this was originally going to be a hearing that was going to be a secret hearing. My question is, are we missing anything here that you would have told us? I mean, obviously, it's a "yes, a lot" and then everybody's going to want to know what. And then my question is, what is it? We can't tell you.

But I'm just wondering -- and I don't want to use up a lot of time on this -- but are we getting the central thrust? Are we missing out on something here that we ought to sort of know about? Just very quickly because I've got a short time, please, Judge Keenan, or --

MR. KEENAN: I don't know anything more than what I had to say. I've been off the court since May of 2001 so I don't know anything about the present situation other than what I've read in the paper.

SEN. KENNEDY: Okay. So I just note that heads are going up and down, that we're really not missing out on a great deal. Let me ask you if you have concerns about the potential impact on criminal prosecutions when evidence was obtained from surveillance programs not approved by the FISA Court? Judge Baker?

MR. BAKER: Certainly. When you get to the district court I think that the prosecutor would have a real problem in trying to put forward evidence that hadn't been obtained with a judicial imprimatur first. I would be very worried about that.

But I think in the *In re: Sealed Case* it really went up originally because the attorney-general took the position you could use FISA for law enforcement purposes, and I'm the guy who has the singular notoriety of being the only FISA judge in history who's ever been reversed because I signed that order. And it went up, and, you know, we never said that you couldn't down the line use it,

or you couldn't initiate and control it by the criminal division. I would be very concerned when I got to the district court if I was a prosecutor with that kind of evidence.

SEN. KENNEDY: Would the rest -- Judge Keenan and Judge Stafford have similar concerns?

MR. KEENAN: I agree with Judge Baker.

SEN. KENNEDY: So here we have a situation under the current Justice Department. I think most of us have at least drawn the conclusion that some of these leaks in the NSA, it's because people are wondering about its constitutionality. We're going to find out in these courts whether the individuals if they eventually get the al Qaeda and they're holding them, are generally thinking if you have a case that's just absolutely a closed case, that you might be able to get more information out of it, it enhances the government's ability to get more information out of those individuals, whether they think they might get off and beat the rap on this. And what I think I'm hearing from you is that there is at least some concern about the question about the evidence that's obtained.

Let me ask you this. What about the information? Is the government required to get a court order or some other written certification before the government can listen to telephone calls or read through emails? What's your understanding of the current law, the requirements you think that must be met before the federal can obtain information from telephone companies that are current?

MR. BAKER: We're kind of -- for instance, we issue orders for --

SEN. KENNEDY: Do they have to get some written kind of authority to turn these matters over under the -- your understanding, under the FISA?

MR. BAKER: That's the way its been happening, absolutely.

SEN. KENNEDY: And would you think that they'd have to do it if they're doing some other kind of process of some other procedure the likes of which has not been described in detail to us? But would you assume that they have to have the same kind of --

MR. BAKER: I can only look in history when the carriers refused to cooperate until they had a court order.

SEN. KENNEDY: Others would believe that to be so as well? Just a final point. There's a point has been made about FISA being a rubber stamp. I think to the contrary. If you could outline just quickly, because my time is up, about the kinds of negotiations that have taken place? I understand there have been re-reviews of some of the requests, 93 or 4, different instances where you've perfected these kinds of requests.

Just a last point, in response to the earlier kinds of questions with Senator Feinstein, we provide -- if the president had a real issue on an emergency we have in the FISA have the 72 hours in any event, so if they didn't get to court the president could move ahead in the 72 hours, I imagine.

And as we remember, when President Carter signed that he effectively said he was going to be bound by the law. President Jimmy Carter said, we're going to be bound. That was in his statement at the time.

But would you just -- I'm exceeding my time -- come back, any of the panel, talk just about these modifications. Can you describe about that process? What can you tell us about -- or how you've altered or changed? Is it something that you've done sometimes infrequently, frequently? What can you tell us about it?

MR. KORNBLUM: Senator, in supervising the submission of the applications to the court, from time to time members of the court would express concern regarding certain aspects of an application, such as conflicting information and the probable cause, or greater specificity on the means for the surveillance. And we simply ask the court for an opportunity to conduct further investigation or gather additional information and file an amended application, and virtually every time that request was granted by the court and amended applications were filed and approved.

SEN. KENNEDY: So it's more than a rubber stamp? This is the point I'm trying to find out.

MR. KORNBLUM: Yes.

SEN. KENNEDY: Thank you. Thank you, sir.

SEN. SPECTER: Senator Durbin.

SEN. RICHARD J. DURBIN (D-IL): Thank you very much, Mr. Chairman. Thanks to all the panel, and especially my friend, Judge Harold Baker. I'm glad you're with us today.

I'm trying to follow the statement made by my colleague, Senator Hatch, in describing the FISA law, and he said at one point that it wasn't the intention to diminish the power of the president. FISA was not supposed to do that. But I can't read that law without concluding that's exactly what Congress set out to do. By a vote of 95 to one they said that this was the exclusive, the exclusive means by which electronic surveillance and the interception of domestic, wire, oral and electronic communications, may be conducted.

Now, there's been a larger question raised by the chairman and by the members of the panel as to whether the president has constitutional authority which supersedes any statute. It seems to me at this moment in time that the president with his new wire tap program had three options. He could follow the FISA law, he could ignore or violate the FISA law, or he could seek to change the law.

We know for certain he didn't take option number one or number three. He didn't follow the FISA law, nor did he seek to change it. Members of the senate judiciary committee have been given proposals by the administration, the Patriot Act and its revisions, after 9/11 to give new authority to the administration. Those provisions passed on a strong bipartisan vote.

So my question is very straightforward, is there anyone on the panel here who believes that the president did not violate the FISA law with the new wire tap program as he has described it?

MR. KEENAN: I don't know what the new program is, senator, and that's the reason --

SEN. SPECTER: If you could lean over a little closer to the mike?

MR. KEENAN: I'm sorry. I don't know what the new program is, senator, and that's why I -- in my prepared remarks and in my answers to other questions, I'm not in a position to offer any opinion about that. My understanding -- and this is from what I've read in the lay press now -- I understand having read this, I believe in the Wall Street Journal, that some judges of the foreign intelligence who are present judges, not any of us because we're not on it any more, and certainly not me because I've been off it for -- since 2001 -- some of the judges have been briefed on the program.

I also understand from what I've read in the lay press, and what I heard from Senator Feinstein a few moments ago, that some senators have been briefed. So -- but I don't know what the program is so I'm not in a position to offer any comment at all about what the president is doing.

SEN. DURBIN: Well, as we've heard it described, and I've not been briefed either, there are only a few senators who have, it is the interception of domestic communications between people in the United States and those in foreign lands, and that strikes me as falling within the four corners of the FISA law as written.

MR. KEENAN: But you used the word in your introductory question, and in that question, "domestic." And as I understand from the lay press again, this is international, it's not domestic. So that's why I'm not in a position to answer, sir.

SEN. DURBIN: You know that -- Senator, did the statute limit the president? It created a balance between them and I don't think it took away the inherent authority that Judge Kornblum talked about. He didn't call it inherent, he doesn't like that. But the whole thing is that if in the course of collecting the foreign stuff you're also picking up domestic stuff, which apparently is happening, I don't know that that's -- it becomes a real question. You know, is he under his inherent power, or is he running around the statute?

And, you know, I had a great thought later when you asked the hypothetical about some FISA judge turning down the application on one of these warrantless programs, that could happen, but not if the court is allowed to sit en banc. My experience and knowledge of those judges, that's just not going to happen, but if they sit en banc where there's real problem or peril.

May I ask one last question? In the proposal by Senator Specter under section 702A, it states: "The FISA Court shall have jurisdiction to issue an order under this title lasting not longer than 45 days that authorizes an electronic surveillance program." By passing this would we be ceding our -- ceding authority to this court to authorize programs, electronic surveillance programs, currently not authorized under law?

MR. : It would be a different approach, certainly, wouldn't it, you know.

MR. : The programs that are being used, which I don't have any specific knowledge, are key to today's technology and to the terrorist organizations, wherever they may be. It's obvious just as the years unfolded after 1978 that the intelligence threat changed. When we first started using FISA 1978 the overwhelming number of targets were foreign governments, hypothetically, you know, say, the evil empire and eastern European bloc.

However, as the world changed and the threat changed, so did the use of FISA. And by the time I left the FISA program, the balance between international terrorism and clandestine intelligence gathering as the basis for the surveillances had shifted dramatically to international terrorism. For example, the FBI has made international terrorism its number one priority, its number one objective.

So if you authorize programs as opposed to surveillances of specific individuals or specific countries, it's undoubtedly true that over time the programs will have to change to meet whatever the intelligence needs of the country are.

SEN. DURBIN: I would just add that I think it goes without saying that every member of the Senate, both sides of the table, would agree that we want to give this administration the authority it needs to keep America safe and intercept all communications necessary for that to happen.

But we thought that we had established a legal process by which any president could use that authority with at least some court approval, carrying on a grand tradition in our country that no executive could act unilaterally. But I'm concerned even in passing the

Specter law, as to whether this president or future presidents would just ignore it and go back to a point made earlier, that a president, as you said earlier, would be remiss in surrendering his constitutional authority to a statute.

If that is the case, then I wonder if, all of our efforts notwithstanding, the president can claim necessary and proper authority or whatever it might be and simply ignore what we've done.

Thank you, Mr. Chairman.

SEN. SPECTER: Thank you very much, Senator Durbin.

Pardon the interruptions from time to time, we're negotiating the immigration bill while this is in process, and we're concerned about a substitute being offered and initiation of -- initiating the order for a vote on cloture and we have a lot of transactions we have to handle. So sometimes we're distracted a little bit.

But I want to come back. But Senator Hatch has another commitment, so I'm going to yield to him at this point.

SEN. HATCH: Well, thank you, Mr. Chairman. I appreciate that courtesy.

I want to personally thank you all for being here. I think you've done a very good job of trying to explain to us these principles that you all deal with or have dealt with in the past. I am familiar with the program, and I have to say that I certainly agree with your proposition that the Congress cannot take away the president's power under Section 2 of the constitution.

And I would even make the argument that the president's program meets the Fourth Amendment requirements of reasonable cause. But to make a long story short, I think you've been very helpful to the committee here today, and it's meant a lot to me. As you know, I have a tremendous regard for the federal courts and for each of you.

And I appreciate all the work you're doing. And I do think it's a good thing if we can comply with the FISA statute. But this current statute is not adequate to take care of the problems that currently exist. I appreciate the distinguished chairman and his efforts to try and come up with a statute that presidents will comply with or can comply with, without taking away inherent powers, to use that term, that the president has under Article 2 or otherwise.

Now, let me just ask one more question. And I appreciate the distinguished chairman giving this opportunity.

And again, I'll direct it to you, Judge Kornblum, and I would appreciate anything any of the rest of you tremendous judges would care to add. I'd just like some clarification on a few points. Based on your understanding of the law, if the government obtains information through the NSA program, do you believe as a matter of law that this information can be used in support of applications for a court order under the FISA statute?

And do you believe that any fruit of the poisonous tree arguments are valid? In other words, if they actually obtain information that would support applications for a court order under the FISA statute, would the fruit of the poisonous tree arguments be valid against that information?

MR. KORNBLUM: I think the answer to both questions is yes. As we did in the Ames (ph) case, we explained to the FISA Court that Attorney General Reno had approved six warrantless searches of Ames' home and office at the CIA, and we did that in conjunction with the applications for continued electronic surveillance of Ames, because the FISA statute at that time didn't permit surreptitious searches.

The court considered it and approved the electronic surveillances. Ames never went to trial. He decided to plead guilty rather than have his wife face imprisonment. If he had gone to trial his attorney, Plato Kucheros (ph), would undoubtedly have challenged all of the evidence obtained in the warrantless searches.

My personal belief is that when I persuaded Attorney General Reno to authorize the warrantless searches, she was doing so lawfully under the Truong-Humphrey line of cases in the Fourth Circuit. And of course, Ames lived in northern Virginia, which was in the Fourth Circuit.

So you had a situation where, in the Ames case, you had warrantless electronic -- I'm sorry, warrantless physical searches approved by the attorney general in full conformity with the law in the eastern district of Virginia. And at the same time, you had FISA surveillances authorized by the FISA Court.

I think both would have been sustained, but there's an important difference between them. During the course of the trial, the FISA information and FISA applications would have been protected from discovery, because FISA has that protective mechanism in it. Defense lawyers never get to see FISA applications.

On the other hand, the warrantless searches authorized by Attorney General Reno would have been subject to full discovery and whatever paperwork Attorney General Reno saw. What I had submitted to her would have been subject to disclosure and used by the District Court in the Eastern District of Virginia to determine whether the surveillances were lawfully authorized and conducted pursuant to the pre-FISA standard, even though it was conducted after FISA came into law, because the warrantless search was not available to the government in the FISA statute.

In the context of the present situation, the warrantless collections now being done by the president would be subject to the same discovery. That is, whatever legal mechanism was being authorized or was being followed to authorize the collection, if the president wanted to go forward with prosecution and use that evidence at trial, it'd be subject to the federal rules of criminal procedure to the normal discovery.

If the president --

SEN. HATCH: So there would be definitely be protections for individuals?

MR. KORNBLUM: Well, you have the Classified Information Procedures Act to deal with that. And if the situation became unbearable, the president can always withdraw prosecution or exert the state secrets privilege to protect military --

SEN. HATCH: But in either event, that would be a protection of the person accused.

MR. KORNBLUM: Yes. Well, the State Secrets Act would in effect end the prosecution.

SEN. HATCH: Sure.

MR. KORNBLUM: But the federal rules of criminal procedure would protect any defendant charged with evidence collected in the program.

SEN. HATCH: Do you mind, Mr. Chairman, if I ask just two more questions?

SEN. SPECTER: Do I mind if you ask two more questions?

SEN. HATCH: If you do, I won't.

SEN. SPECTER: I've already opened the door. Ask all the questions you want, Senator Hatch.

SEN. HATCH: Oh, I'm just beginning then. No, I'm just kidding, I have two more.

And please, any of the judges, the other judges who care to comment, I'm not meaning to just make this a dialogue between the two of us --

SEN. SPECTER: You want two more questions, and how many more answers?

(Laughter.

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SEN. HATCH: Well, anybody who feels like they should, I'd be happy to listen to, and I'm sure you would too.

Judge, do you believe that information obtained under the NSA program may be legally used in support of an application for a Title 18 warrant, where you believe one of the parties has been determined to be an al-Qaeda affiliate, but is a suspected common -- has not been determined to be an al-Qaeda affiliate, but is a suspected common criminal, say, such as a drug dealer?

MR. KORNBLUM: Well, any determination like that that is faced by a district judge in trial is going to be decided under the federal rules of criminal procedure and the protective mechanisms of the Classified Information Procedures Act. There's no way to predict what the facts are, and a district judge would be faced with making that decision.

SEN. SPECTER: Well, under Senator Hatch's hypothetical, if one of the parties to the conversation is not al-Qaeda, that's outside of the president's purview. The attorney general hasn't told us much, but he has told us that one of the persons, U.S. persons - one party to the conversation is in the United States and one is overseas, but at least one is al-Qaeda.

So when Senator Hatch poses a hypothetical that neither is al-Qaeda, how could that be justified under the president's program?

SEN. HATCH: Well, even if one is al-Qaeda, the foreigner calling into the country, but talks to a common criminal, can that be used against the common criminal?

SEN. SPECTER: Well, you've changed the hypothetical now to make one al-Qaeda.

SEN. HATCH: Okay, okay. I kind of thought that was implied.

MR. KORNBLUM: Well, whatever the facts are, the standard followed by the district judge is going to be that enunciated in the pre-FISA decisions. That is --

SEN. HATCH: In other words, the criminal will have some element of protection from a civil liberties standpoint.

MR. KORNBLUM: I would think the answer is yes, that a district --

SEN. HATCH: The answer is yes.

MR. KORNBLUM: That a district judge would protect his liberties, and he's going to be bound by the judicial decisions which define the president's power.

SEN. SPECTER: Well, how can the criminal have protection when the wall is down, and the law's established that if you have a foreign intelligence warrant and incidental to that there is evidence of a crime, that it's useable? That's the current status of all.

SEN. HATCH: No, but I'm talking about using the current warrantless surveillance.

SEN. SPECTER: You're talking about what, Senator Hatch?

SEN. HATCH: Warrantless surveillance. The warrantless surveillance.

MR. KORNBLUM: Well, to be admissible --

SEN. SPECTER: Let's see if we can bring this to a close, Judge Kornblum. If you'll answer this question.

MR. KORNBLUM: To be admissible, the evidence would have had to have been lawfully seized or lawfully obtained, and the standard that the district judge would use is that, depending upon where this is, is the law in his circuit. In most of the circuits, the law is clear that the president has the authority to do warrantless surveillance if it's to collect foreign intelligence and it's targeting foreign powers or agents.

If the facts support that, then the district judge could make that finding and admit the evidence, just as they did in *Truong-Humphrey*.

SEN. SPECTER: Senator Hatch, I'm delighted to have a few comments, but we're now over 10 minutes and we have another panel.

SEN. HATCH: I'm happy to discontinue any further questions.

SEN. SPECTER: Before you leave, Senator Hatch, I want to cover one point in your presence. And that is, you have been privileged to have been briefed, because you're on the subcommittee, and when you say that you believe it's constitutional under the Fourth Amendment. I have a lot of respect for your legal judgment, and I was once an advocate for you for the Supreme Court.

But under the doctrine of separation of powers, you are not a judge.

SEN. HATCH: That's true. And I may very well be wrong.

SEN. SPECTER: Well, you may be right or you may be wrong, judges are sometimes right and sometimes they're wrong. But our system is that the judges make determination of constitutionality, senators don't. Even super lawyer senators like you, Senator Hatch. You don't make decisions on constitutionality.

SEN. HATCH: Well, we make them every day. The problem is that they may not be worth the decision making paper that we write them on.

SEN. SPECTER: Well, I think they're very valuable, but it violates the principle of separation of powers. Senators are not judges, and to submit the program to the Intelligence Subcommittee and in the context of the statute proposed, to have 45 days of free reign for the administration, then at the end of 45 days if there is sufficient probable cause going to the FISA Court, but if there's not, to go to the subcommittee.

I don't know exactly what the subcommittee does at that point.

SEN. HATCH: Well, let me just say this much. The administration, rightly or wrongly -- and that may have to be determined by the courts in the final analysis -- decided -- the president decided that this program had to be reauthorized every 45 days, that the chief judge of the FISA Court was informed, the next chief judge of the FISA Court was informed, eight top members of the Congress were informed on the program.

And the question is, is that enough information to be able to resolve the conflict in favor of the president's argument? It may take the courts to decide that, but I see plenty of concern here on the panel that you may not yourselves how that should be decided at this particular point.

The fact of the matter is that we've had people who have been hotly criticizing the president for doing what the president feels he had to do to protect our nation and protect our people from terrorism that could amount to very serious consequences, even worse than 9/11.

And these are very important issues. The distinguished chairman, of course, is trying to come up with a statute that the president will be happy to comply with, that will solve the problems and the deficiencies of the current 1978 FISA statute. I commend the chairman for that, and I'm certainly going to try and help him on that.

And I commend all of you for being as cautious as you are on just how all of this is going to come down in the end.

So, Mr. Chairman, I just want to thank you for allowing me to have this little extra time, I know I've taken more than I should have, but I just want to again express my respect for all of you and what you've had to say here.

SEN. SPECTER: Well, let me make one more comment, Senator Hatch, before you go.

SEN. HATCH: Sure.

SEN. SPECTER: And that is that if there is an order by the FISA Court that the president feels is wrong and needs to act against, he can get a supersedeas until there is an appeal.

It's discretionary with the FISA court, but you would expect in an emergency situation there'd be a supersedeas. And then you'd have an appellat court for FISA. And then if you don't like what the appellat court does, you can get another supersedeas and go to the Supreme Court.

But when the court has ruled, if I understand Judge Kornblum correctly, the president can't disregard it. When the court makes a determination on constitutionality and you go up the line and you get to the Supreme Court, that's that.

Don't you agree, Judge Kornblum?

MR. KORNBLUM: Yes, I do.

SEN. SPECTER: That's Marbury v. Madison, 1803. Been followed once or twice.

Well, I'm going to go onto some other lines of questioning, Senator Hatch.

SEN. HATCH: Well, just one last point on that.

SEN. SPECTER: I doubt it, but go ahead.

(Laughter.)

SEN. HATCH: Judge Kornblum also indicated that the president may be faced with a situation because of time constraints and so forth that isn't just a yes here. Where he may have to just act in the best interests of the country, that may be upheld by the courts or may not be. I don't know. And neither does anybody else here today.

But I'll tell you one thing, I want my president acting -- as long as it's clear that they've done everything they can to comply with the law, and where they feel that they have this obligation under Article 2 of the obligation, I would want my president to protect us.

SEN. SPECTER: Well, let's --

SEN. HATCH: I think that's the position they've taken down there, rightly or wrongly -- I personally believe rightly.

SEN. SPECTER: Well, when you say act, do you customarily mean some response if the country's in jeopardy, then of course the president should act. If you're talking about gathering additional intelligence, the president can do that too. And he has 72 hours to go to the court. And if he has acted in a way that the court later says is illegal, he's gotten the information, he's acted. And he has that authority under an emergency situation.

SEN. HATCH: All I can say is it's a little bit different in this situation, from what I know about it.

SEN. SPECTER: Well, Senator Hatch, would you be willing to be a witness, so we can really find out what's going on here?

(Laughter.)

SEN. HATCH: I think that's what I've been maybe doing. I don't know. I apologize to the chairman.

SEN. SPECTER: Judge Brotman, we ended up on my first round with your being interrupted on responding to the question as to Judge Keenan. And to reconstruct the question, it's, in a context of the modern technology and the changes since 1978, when the Foreign Intelligence Surveillance Act was passed, do you think that the legislation which I've proposed will be a good balance to protect civil liberties and give the executive sufficient authority to protect the country?

MR. BROTMAN: Well, I do, because if you look back over the years, the court has reacted to these changes. And we have met, we've discussed new methods, new equipment, we've seen them, they've talked to us about them, we've been able to have a colloquy going back and forth and, in instances, we have agreed on a methodology of presenting the application within the language that was currently in the FISA statute.

SEN. SPECTER: When --

MR. BROTMAN: I mean, everything you can't keep from going, coming back and forth all the time, but in the course of drafting something -- and this is the Congress' function.

SEN. SPECTER: When --

MR. BROTMAN: In the course of drafting something, the language has to be sufficient to cover.

SEN. SPECTER: When Senator Hatch was asking questions, hypothetical questions about obtaining information from the administration's program and then using it in the context of an application for a warrant from the FISA Court, there's an issue as to whether the judge to whom the application goes knows what the program is. We know that President Judge Lambert -- or we hear

that President Judge Lambert was briefed on the program, we hear that President Judge Kollar-Kotelly has been briefed on the program.

But we don't know about the other judges. We know that Judge Robertson resigned. And the inference is because he didn't know about the program and wasn't going to be a party to being on the court when there was a program in effect that he didn't know about. It's really very regrettable that we have to speculate about anything.

And that's why it seems to me that when you have a court where you have expertise and you have the ability to keep a secret, that the program ought to be submitted to the court. Senator Hatch's right, that it's constitutional, and there ought not to be any hesitancy.

And when the court makes a ruling and the appellate court makes a ruling and then the Supreme Court makes a ruling, that's that, under our society. That's how we decide that we're a nation of laws. And we do need to protect the country, and the president has very vast authority under Article 2, there's no doubt about that, but as you've all testified to, that's ultimately a judicial determination. It's rock bed Americana, it's *Marbury v. Madison*.

We're going to take a very short break before the next panel, which will be heard more quickly, since there won't be too many rounds of questioning.

But I want to thank the judges for being here. We'll take just a recess for a minute or two.

The committee will resume.