HEARING OF THE SENATE SELECT COMMITTEE ON INTELLIGENCE
PROPOSED FISA MODERNIZATION LEGISLATION

WITNESSES:

MR. MIKE McCONNELL, DIRECTOR OF NATIONAL INTELLIGENCE;

LTG KEITH ALEXANDER, DIRECTOR, NATIONAL SECURITY AGENCY;

MR. KENNETH WAINSTEIN, ASSISTANT ATTORNEY GENERAL FOR NATIONAL SECURITY, DEPARTMENT OF JUSTICE;

MR. BENJAMIN POWELL, GENERAL COUNSEL, OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE;

MR. VITO POTENZA, GENERAL COUNSEL, NATIONAL SECURITY AGENCY

CHAIRED BY: SENATOR JOHN D. ROCKEFELLER IV (D-WV)

LOCATION: 106 DIRKSEN SENATE OFFICE BUILDING, WASHINGTON, D.C.

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SEN. ROCKEFELLER: This hearing has begun, and I welcome all of our testifiers. And other members of the committee will be coming in. I know some of the caucuses just broke up.

The Select Committee on Intelligence meets today in open session, something we don't ought to do, to consider whether the scope and application regarding the Surveillance Act needs to changed to reflect the evolving needs for the timely collection of foreign intelligence. An extraordinarily complicated subject, this is. At the committee's request, the administration has undertaken a comprehensive review of the Foreign Intelligence Surveillance Act, commonly referred to as FISA. Out of this review, the administration proposed -- it believes would modernize the laws governing the way in which we gather foreign intelligence with the use of electronic surveillance.

Consideration of the administration's proposal and alternatives will be rooted in the Intelligence Committee's 30-year experience with our nation's long and delicate effort to strike that elusive right balance between effective intelligence collection for our national security and the constitutional rights and privacy interests of Americans.

The Intelligence Committee's existence came out of the work of the Church Committee and others in the mid-'70s to bring to light abuses in the electronic surveillance of Americans. One of the committee's first tasks was to work with the Senate Judiciary Committee and with the Ford and Carter administrations from 1976 to 1978 to enact the Foreign Intelligence Surveillance Act. As we take a fresh look at the current law, we will again be working with our colleagues in the Senate Judiciary Committee.

FISA involves both the judicial process on the one hand and the collection of intelligence. Our committee's contribution to this process

will be our ability to assess the relationship between the public realm of legislative reforms and the classified realm of intelligence collection. By necessity, much of the committee's assessment must occur in a classified setting; yet most of what we do, in contrast to the Judiciary Committee, will occur in closed session, I believe it is important to hold our hearing today in open session.

The purpose of today's hearing is to enable the administration to explain to the Senate and to the American people as openly as possible the reasons why public law on these vital matters should be changed.

I would like to make a few observations about the administration's legislative proposal before us.

One part of the administration's bill proposes to terminate controversies now in litigation in various courts arising from the warrantless surveillance program that the president has labeled "the Terrorist Surveillance Program." It would bar any lawsuit against any person for the alleged provision to any element of the intelligence community's information or assistance for any alleged communications intelligence activity.

Under the administration's proposal, this immunity provision would be limited to alleged assistance from September 11th, 2001, to 90 days after enactment of any change in the law, were there to be one. We will carefully examine this immunity process and proposal and possible alternatives to it -- it is not without controversy -- as we will all sections of the administration bill. But I do believe that the administration is going to have to do its part, too.

The vice chairman and I have stressed to the administration repeatedly that the committee must receive complete information about the president's surveillance program in order to consider legislation in this area. This is a matter of common sense -- cannot legislate in the blind. We have made some progress towards that end, but there are key pieces of requested information that the committee needs and has not yet received.

These include the president's authorizations for the program, and the Department of Justice's opinion on the legality of the program. My request for these documents is over a year in length, and Vice Chairman Bond and I restated the importance of receiving these documents in our March letter, that in fact called this hearing. The administration's delay in providing these basic documents is incomprehensible, I think, inexcusable, and serves only to hamper the committee's ability to consider the liability of the Defense proposal before it -- inadequate information.

Congress is being asked to enact legislation that brings to end lawsuits that allege violations of the rights of Americans. In considering that request, it is essential that the committee know whether all involved, government officials and anyone else, relied on sound, legal conclusions of the government's highest law officer. The opinions of the attorney general are not just private advice. They are an authoritative statement of law within the executive branch.

From our government's beginning in 1789 until 1982, there had been 43 published volumes of opinions of attorney generals. Since then there have been 24 published volumes of the opinions of DOJ's Office of Legal Counsel.

From time to time, of necessity, a few will be classified. While those cannot be published, they can and should be provided to the congressional intelligence committees. We're in the classified business too, and we stick to it. There is simply no excuse for not providing to this committee all of the legal opinions on the president's program.

The administration's proposal to modernize FISA, if enacted, would be the most significant change to the statute since its enactment in 1978. It will be our duty to carefully scrutinize these proposed changes and ask many questions. And let me identify three.

First, from the beginning, FISA has required the approval of the FISA Court for the conduct of electronic surveillance done by wiretapping, quote, "in," end quote, the United States of America of communications, quote, "to or from," end quote, a person in the United States. The Judiciary Committee explained in its 1977 report to the Senate that this covers the wiretapping in the United States of the international communications of persons in the United States. The administration would eliminate that requirement from the definition of electronic surveillance. An important question is whether that change will give the attorney general authority, without a court warrant, to wiretap in the United States international communications that are to or from a person in the United States, most of whom will be United States citizens.

If so, what are the reasons for changing the judgment of the Congress in 1978 that a FISA order should be required for such wiretapping in the United States? How will that protect the private interests of U.S. citizens and permanent residents in their international communications?

Second, the administration proposal would expand the power of the attorney general to order the assistance of private parties, without first obtaining a judicial FISA warrant that is based on the probable cause requirements in the present law. A limited form of judicial review will be available after those orders are issues. Although there are exceptions, our American legal tradition does not generally give our attorney general the power to give such orders. Instead, it gives the attorney general the power to go to the courts and ask for such orders. If the administration's proposal necessarily -- I mean, is it necessary, period? And does it take a step further down a path that we will regret as a nation?

Thirdly, the attorney general announced in January that the administration had replaced the president's surveillance program with the orders of the FISA court. While many of my colleagues believe that the president's program should have been placed under court review and authorization much earlier, it was nonetheless good news. The question that we must now ask is whether just months after that important development, any part of the administration's bill will enable the president to resume warrantless collection with this legislation as the statutory basis for so doing.

Before turning to the vice chairman for his opening statement, I make a concluding remark or so. The administration proposal was submitted to us by the director of National Intelligence, director Mike McConnell, who will take the lead in presenting it to us today. The leadership of the DNI in this matter is a positive example of reform at work, and we welcome it.

General Keith Alexander, the director of the National Security Agency, is representing the National Security Agency here today. The NSA, people should know, has a limited ability to speak for itself in public, but we can, the rest of us, and so I'd like to share this thought with my colleagues and with the American public.

NSA does not make the rules. It has no wish to do so. Congress sets policy for the NSA in law, and the president issues directives that the NSA must follow. Every American should have confidence, as we do from our close observation of this important truth, that the ranks of the NSA are filled with dedicated and honorable people who are committed to protecting this nation while scrupulously following the laws and procedures designed to protect the rights and liberties of Americans.

Also on our panel is Keith Wainstein, the assistant attorney general for national security. He is the first to hold that newly created position. He has that for the first time. In our preparation for our hearing and other matters in recent months, we have been aided enormously by key personnel in his division as well as the Office of Legal Counsel.

Finally, the main purpose of today's hearing is to give the administration a chance to place on the public record its proposal for change in public law. We also have invited interested members of the public, particularly individuals or organizations who have assisted the Congress from time to time with their views on FISA matters, to submit statements for our record about these legislative proposals.

I now turn to our distinguished vice chairman, Senator Bond.

SEN. CHRISTOPHER BOND (R-MO): Thank you very much, Mr. Chairman. I join with you in welcoming the panelists and to say how gratifying it is to see the intelligence community coming together working in a much more collaborative mood, an attitude that is very helpful.

We wish only that we could have the legislative structure that would facilitate such a cooperative working, and I join with you, having visited NSA, in paying the highest respect and regards to the work of the people at the NSA.

Since September 11th, we've fought a myriad of enemies united in their ideological hatred of America -- agile, widespread, technologically advanced. To prevail against them, our intelligence community needs tools that are flexible and can meet changing threats and circumstances. The purpose of today's hearing is to discuss whether the current statute provides enough flexibility, and if not, how do we update it.

Before I address serious aspects of the administration's proposal, let me share some concerns about holding this particular hearing in a public setting before this committee covers this issue behind closed doors.

The issue of FISA Modernization has come to the fore because of the very unfortunate public disclosure of the president's highly classified Terrorist Surveillance Program. Our committee has been engaged in the oversight of the president's program since its inception, and now every member of this committee, as I think they should, and an increased number of staff are read into the program, and we appreciate the clearance that has been expanded.

But as I've said before, the early warning system that is now under FISA is essential to defeating our enemies who are determined to inflict grave harm upon our citizens and upon the infrastructure of this nation. I believe that having an open hearing before a closed hearing is not advisable, and I've given the chairman recommendations in this regard.

Other committees, like the Senate Judiciary Committee, have already considered aspects of this issue in open session because they were looking at it from a judicial point of view. Those members were not read in, for the most part, to the president's program. Our committee looks at the issue from an intelligence and operational point of view, and are members therefore are read into the program.

There are several key reasons why I believe that proceeding first in open session is inadvisable. First, this is an area where there is a very fine line between what is classified, sensitive or just shouldn't be highlighted in public.

Second, we've put witnesses before us in a bad position when they may be unable to respond to our question because the best responses are classified, including the best reasons to justify the new legislation they are proposing.

Third, although members of this committee will go to a closed session and likely be satisfied with classified answers, the public may be left with the false impression that either the witnesses are not forthcoming or not fully answering our questions or even have good arguments. Worse yet, and with this topic in particular, if one of us were to make an honest mistake in wandering into sensitive territory, we could risk public exposure of vital intelligence collection methods that would significantly harm our intelligence capabilities.

Please don't understand (sic) me, Mr. Chairman. I have confidence in our membership. However, I believe one of the reasons our committee was created was to explore sensitive areas of national intelligence, to hash them out behind closed doors and to determine the best way to discuss them publicly, and then proceed with the public statements and report of -- on them responsibly to the Senate with unclassified legislation.

And as the chairman said, I believe that it is very important that there be a public discussion, and I agree with the chairman that that is a significant element. But I am troubled by proceeding first in public with a very sensitive national intelligence matter. I think we could serve our constituents and our national interests and the witnesses before us, ourselves and the American people if we had first proceeded in closed session. But that issue has been resolved.

I would caution, however, that all of us, members and witnesses, will have to be especially diligent to ensure that questions and responses do not reveal any classified or sensitive information. And we all share that responsibility. And I would encourage the witnesses that we understand you're not trying to be less than forthcoming if you reserve answers to a later closed session.

Turning now to the subject at hand, to examine the FISA statute, the administration has offered some important suggestions. And I expect that our witnesses will tell us why the changes are necessary and answer questions.

For instance, the administration proposed to update the definition for the term "electronic surveillance" that will make it technology-neutral, unlike the current definition, which makes distinctions between wire, radio and other communications. The administration proposal would modify the time period for emergency authorizations from 72 to 168 hours, to ease the strain on vital resources within the Department of Justice and the FBI.

A long-overdue change is to update the FISA definition of the term "contents" to make it consistent with the definition used by the FISA pen register provision and the criminal wiretap statute. It simply makes no sense to have two different definitions for the same term in the same statute.

An important -- another important improvement is to streamline FISA applications and orders. This streamlining would be consistent with one of the recommendations this committee's staff audit made on the FISA project in 2005.

In summary, these are just some of the important issues we're going to discuss today. And we must remember that change simply for change's sake is not the goal. Ensuring the collection capabilities of our intelligence community now and in the future should be the goal.

As we learned from the events of September 11th, what we do here will have lasting effects not just on our intelligence sources and methods, but on our country's security.

Mr. Chairman, I'm sure that all of us look forward to a full and frank discussion about FISA modernization, the administration's proposal, and the impact on our sources and methods. Our witnesses have considerable experience and credibility in matters of national security and intelligence, and I look forward to hearing their opinions.

I do understand the public interest in this subject, and I'll have some questions for the administration during open session. However, as any full discussion will involve classified intelligence sources and methods, I would urge all my colleagues to exercise extra care in their questions and comments this afternoon.

With that, Mr. Chairman, I thank you for holding the hearing, and I look forward to hearing from our witnesses.

SEN. ROCKEFELLER: Thank you. I appreciate your comments very much, and I join you in always the concern of crossing the line. I do think it's important, however, that assuming that we can discipline ourselves not to cross the line, which I fully believe, I certainly know that you all can, and I certainly think that we can, that having this put before the American public in broad terms is useful, and then we go after it in a more vigorous way in closed session.

Having said that, Director McConnell, please proceed.

MR. MIKE McCONNELL: Good afternoon, Chairman Rockefeller, Vice Chairman Bond, members of the committee. Thank you for inviting us to come today to engage with the Congress on legislation that will modernize the Foreign Intelligence Surveillance Act, as you mentioned, FISA -- I'll refer to it as FISA from this point on -- which was passed in 1978.

In response to your guidance from last year on the need to revise FISA, the administration has worked for over the past year, with many of you and your staff experts, to craft the proposed legislative draft. It will help our intelligence professionals, if passed, protect the nation by preventing terrorist acts inside the United States. Since 1978, FISA has served as the foundation to conduct electronic surveillance of foreign powers or agents of foreign powers inside the United States. We are here today to share with you the criticality -- critical important role that FISA plays in protecting the nation's security, and how I believe the proposed legislation will improve that role, while continuing to protect the civil and the privacy rights of all Americans.

The proposed legislation to amend FISA has four key characteristics. First, it makes the statute technology-neutral. It seeks to bring FISA up to date with the changes in communications technology that have taken place since 1978. Second, it seeks to restore FISA to its original focus on protecting the privacy interests of persons inside the United States. Third, it enhances the government's authority to secure assistance by private entities, which is vital for the intelligence community to be successful. And fourth, it makes changes that will streamline FISA administrative processes so that the intelligence community can use FISA as a tool to gather foreign intelligence information more quickly and more effectively.

The four critical questions, four critical questions that we must address in collection against foreign powers or agents of foreign powers are the following. First, who is the target of the communications? Second, where is the target located? Third, how do we intercept the communications? And fourth, where do we intercept the communications? Where we intercept the communications has become a very important part of the determination that must be considered in updating FISA.

As the committee is aware, I've spent the majority of my professional life in or serving the intelligence community. In that capacity, I've been both a collector of information and a consumer of intelligence information. I had the honor of serving as the director of the National Security Agency from 1992 to 1996. In that position, I was fully aware of how FISA serves a critical function enabling the collection of foreign intelligence information.

In my first 10 weeks on the job as the new director of National Intelligence, I immediately can see the results of FISA-authorized collection activity. The threats faced by our nation, as I have previously testified to this committee, are very complex and there are very many. I cannot overstate how instrumental FISA has been in helping the intelligence community protect the nation from terrorist attacks since September 11th, 2001.

Some of the specifics that support my testimony, as has been mentioned, cannot be discussed in open session. This is because certain information about our capabilities could cause us to lose the capability if known to the terrorists. I look forward to elaborating further on aspects of the issues in a closed session that is scheduled to follow.

I can, however, make the following summary-level comment about the current FISA legislation. Since the law was drafted in a period preceding today's global information technology transformation and does not address today's global systems in today's terms, the intelligence community is significantly burdened in capturing overseas communications of foreign terrorists planning to conduct attacks inside the United States.

Let me repeat that for emphasis. We are significantly burdened in capturing overseas communications of foreign terrorists planning to conduct attacks inside the United States. We must make the requested changes to protect our citizens and the nation. In today's threat environment, the FISA legislation is not agile enough to handle the community's and the country's intelligence needs. Enacted nearly 30 years ago, it has not kept pace with 21st century developments in communications technology. As a result, FISA frequently requires judicial authorization to collect the communications of non-U.S. -- that is, foreign -- persons located outside the United States.

Let me repeat again for emphasis. As a result, today's FISA requires judicial authorization to collect communications of non-U.S. persons -- i.e., foreigners -- located outside the United States. This clogs the FISA process with matters that have little to do with protecting civil liberties or privacy of persons in the United States. Modernizing FISA would greatly improve that process and relieve the massive amounts of analytic resources currently being used to craft FISA applications.

FISA was enacted before cell phones, before e-mail and before the internet was a tool used by hundreds of millions of people worldwide every day.

There are two kinds of communications. It's important to just recapture the fact, two kinds of communications: wire and wireless. It's either on a wire -- could be a copper wire, a fiber wire -- it's on a wire or it's wireless, meaning it's transmitted through the atmosphere.

When the law was passed in 1978, almost all local calls were on a wire. Almost all local calls, meaning in the United States, were on a wire, and almost all long-haul communications were in the air, were known as wireless communications. Therefore, FISA in 1978 was written to distinguish between collection on a wire and collection out of the air or against wireless.

Now in the age of modern communications today, the situation is completely reversed. It's completely reversed. Most long-haul communications -- think overseas -- are on a wire -- think fiberoptic pipe. And local calls are in the air. Think of using your cell phone for mobile communications.

Communications technology has evolved in ways that have had unforeseen consequences under FISA, passed in 1978. Technological changes have brought within FISA's scope communications that we believe the 1978 Congress did not intend to be covered. In short, communications currently fall under FISA that were originally excluded from the act. And that is foreign-to-foreign communications by parties located overseas.

The solution is to make FISA technology-neutral. Just as the Congress in 1978 could not anticipate today's technology, we cannot know what technology may bring in the next thirty years. Our job is to make the country as safe as possible by providing the highest quality intelligence available. There is no reason to tie the nation's security to a snapshot of outdated technology.

Additionally, FISA places a premium on the location of the collection. Legislators in 1978 could not have been expected to predict an integrated global communications grid that makes geography an increasingly irrelevant factor. Today, a single communication can transit the world even if the two people communicating are only located a few miles apart. And yet simply because our law has not kept pace with technology, communications intended to be excluded from FISA are in fact included. There is no real consequence -- this has real consequence on the intelligence community working to protect the nation.

Today intelligence agencies may apply, with the approval of the attorney general and the certification of other high level officials, for court orders to collect foreign intelligence information under FISA. Under the existing FISA statute, the intelligence community is often required to make a showing of probable cause.

Frequently, although not always, that person's communications are with another foreign person overseas. In such cases, the statutory requirement is to obtain a court order, based on a showing of probable cause, that slows, and in some cases prevents altogether, the government's effort to conduct surveillance of communications it believes are significant to national security, such as a terrorist coordinating attacks against the nation located overseas.

This is a point worth emphasizing, because I think many Americans would be surprised at what the current law requires. To state the case plainly: when seeking to monitor foreign persons suspected of involvement in terrorist activity who are physically located in foreign countries, the intelligence community is required under today's FISA to obtain a court order to conduct surveillance. We find ourselves in a position, because of the language in the 1978 FISA statute, simply -- we have not kept pace with the revolution in communications technology that allows the flexibility we need.

As stated earlier, this committee and the American people should know that the information we are seeking is foreign intelligence information. Specifically, this includes information relating to the capabilities, intentions and activities of foreign powers or agents of foreign powers, including information on international terrorist activities. FISA was intended to permit the surveillance of foreign intelligence targets while providing appropriate protection through court supervision to U.S. citizens and other persons located inside the United States.

Debates concerning the extent of the president's constitutional powers were heated in the mid-'70s, as indeed they are today. We believe that the judgment of the Congress at that time was that the FISA regime of court supervision was focused on situations where Fourth Amendment interests of persons in the United States were implicated. Nothing -- and I would repeat -- nothing in the proposed legislation changes this basic premise in the law.

Additionally, this proposed legislation does not change the law or procedures governing how NSA or any other government agency treats information concerning U.S. or United States persons. For example, during the course of normal business under current law, NSA will sometimes -- and I repeat -- sometimes encounter information to, from or about a U.S. person; yet this fact does not in itself cause FISA to apply to NSA's overseas surveillance activities.

Instead, at all times, NSA applies procedures approved by the attorney general to minimize the acquisition, retention and dissemination of information concerning U.S. persons. These procedures have worked well for decades to ensure constitutional reasonableness of NSA's surveillance activities.

They eliminate from intelligence reports incidentally acquired information concerning U.S. persons that does not constitute foreign intelligence. The information is not targeted, stored, retained or used by the intelligence community.

Some observers may be concerned about reverse targeting. This could occur when a target of electronic surveillance is really a person inside the United States who is in communication with the nominal foreign intelligence target overseas. In such cases, if the real target is in the United States, the intelligence community would and should be required to seek approval from the FISA Court in order undertake such electronic surveillance.

It is vitally important, as the proposed legislation reflects, that the government retain a means to secure the assistance of communications providers. As director of NSA, a private-sector consultant both to government and to industry, and as now the director of National Intelligence, I understand that it is in our interest and our job to provide the necessary support. To do that, we frequently need the sustained assistance of those outside the government to accomplish our mission.

Presently, FISA establishes a mechanism for obtaining a court order directing a communications carrier to assist the government to exercise electronic surveillance that is subject to court approval under FISA. However, the current FISA does not provide a comparable mechanism with respect to authorized communications intelligence activity. I'm differentiating between electronic surveillance and communications intelligence. The new legislative proposal would fill these gaps by providing the government with means to obtain the aid of a court to ensure private-sector cooperation with lawful intelligence activities and ensure protection of the private sector.

This is a critical provision that works in concert with the proposed change to the definition of "electronic surveillance." It is crucial that the government retain the ability to ensure private- sector cooperation with the activities that are "electronic surveillance" under the current FISA but that would no longer be if the definition were changed. It is equally critical that private entities that are alleged to have assisted the intelligence community in preventing future attacks on the United States be insulated from liability for doing so. The draft FISA modernization proposal contains a provision that would accomplish this objective. When discussing whether significant changes to FISA are appropriate, it is useful to consider FISA's long history. Indeed, the catalysts of FISA's enactment were abuses of electronic surveillance that were brought to light in the mid-'70s.

The revelations of the Church and Pike committees resulted in new rules for United States intelligence agencies, rules meant to inhibit abuses while providing and protecting and allowing our intelligence capabilities to protect the nation.

I want to emphasize to this committee and to the American public that none of these changes, none of those being proposed, are intended to nor will they have the effect of disrupting the foundation of credibility and legitimacy of the FISA court, as established in 1978. Indeed, we will continue to conduct our foreign intelligence collection activities under robust oversight that arose out of the 1978 Church-Pike investigations and the enactment of the original FISA act.

Following the adoption of FISA, a wide-ranging new oversight structure was built into U.S. law. A series of laws and executive office orders established oversight procedures and substantive limitations on intelligence activities, appropriately so.

After FISA, this committee and its House counterpart were created. Oversight mechanisms were established within the Department of Justice and with each intelligence agency, including a system of inspectors general. More recently, additional protections have been implemented community-wide.

The Privacy and Civil Liberties Oversight Board was established by the Intelligence Reform and Terrorism Prevention Act of 2004. This board advises the president and other senior executive branch officials to ensure that concerns with respect to privacy and civil liberties are appropriately considered in the implementation of all laws, regulations and executive branch policies related to efforts to protect the nation against terrorism.

Unlike in the 1970s, the intelligence community today operates with detailed, constitutionally-based, substantive and procedural limits under the watchful eyes of this Congress, numerous institutions within the executive branch and, through FISA, the judiciary.

The Judicial Joint Inquiry Commission into Intelligence Activities Before and After the Terrorist Attacks of September 11, 2001, recognized that there were systematic problems with FISA implementation. For example, the commission noted that "there were gaps in NSA's coverage of foreign communications and in FBI's coverage of domestic communications." As a result of these and other reviews of the FISA process, the Department of Justice and the intelligence community have continually sought ways to improve. The proposed changes to FISA address the problems noted by that commission.

Mr. Chairman, we understand that amending FISA is a major proposal. We must get it right. This proposal is being made thoughtfully and after extensive coordination for over a year. But for this work to succeed, this must be -- there must be bipartisan support for bringing FISA into the 21st century.

Over the course of the last year, those working on this proposal have appeared at hearings before Congress, and have consulted with congressional staff regarding provisions of this bill. This consultation will continue. We look to the Congress to partner in protecting the nation.

I ask for your support in modernizing FISA so that we may continue to serve the nation for years to come.

As I stated before this committee in my confirmation hearing earlier this year, the first responsibility of intelligence is to achieve understanding and to provide warning. As the new head of the nation's intelligence community, it is not only my desire but my duty to encourage changes to policies and procedures and, where needed, legislation to improve our ability to provide warning of terrorist activity and other threats to the nation. I look forward to answering the committee's questions regarding this important proposal to bring FISA into the 21st century.

SEN. ROCKEFELLER: Thank you, Mr. Director. That was forthright and informative, and we appreciate it.

Mr. Wainstein.

MR. KENNETH WAINSTEIN: Thank you. Chairman Rockefeller, Vice Chairman Bond and members of the committee, I want to thank you for this opportunity to testify about our proposal to modernize FISA. My colleagues and I have been working closely with this committee and your staff on this and several other FISA-related issues. And I want to express my appreciation on the part of all of us up here for your cooperative approach on these complicated and very important matters.

While the proposal before you today contains a number of important and needed improvements to the FISA process, I'd like to focus my opening statement on laying out the merits of one particular improvement that we're advocating, which is our proposal to revise the definition of electronic surveillance in the FISA statute. To do that I'll begin with a brief discussion of Congress's intent when it drafted FISA almost 30 years ago. I'll then address the sweeping changes in telecommunications technology that have caused the statute to deviate from its original purpose, so that it now covers many intelligence activities that Congress intended not to cover.

I will discuss how this unintended consequence has impaired our intelligence capabilities, and I'll urge you to modernize FISA to bring it back in line with its original purpose.

In enacting FISA back in 1978, Congress established a regime of judicial review and approval, and applied that regime to the government's foreign intelligence surveillance activities. But Congress applied that regime not as to all such activities, but only as to those that most substantially implicated the privacy interests of people in the United States. In defining the scope of the statute, Congress was sensitive to the importance of striking an appropriate balance between the protection of privacy on one hand and the collection of critical foreign intelligence information on the other. Congress struck that balance by designing a process that focused primarily on intelligence collection activities within the United States, where privacy interests are the most pronounced, and not on intelligence collection activities outside the United States, where cognizable privacy interests are minimal or non-existent.

Congress gave effect to this purpose through its careful definition of the statutory term "electronic surveillance," which is the term that identifies those collection activities that fall within the scope of the statute, and by implication, those that fall outside of it. Congress

established this dichotomy by defining electronic surveillance by reference to the manner of the communication under surveillance, by distinguishing between wire communications, which, as the director said, were primarily the local and domestic traffic in 1978, and radio communications, which were primarily the international traffic of that era. Based on the communications reality of that time, that dichotomy more or less accomplished the congressional purpose of distinguishing between domestic communications which fell within FISA, and communications targeted at persons overseas which did not.

That reality has changed, however. It has changed with the enormous changes in communications technology over the past 30 years. With the development of new communications over cellular telephones, the Internet, and other technologies that Congress did not anticipate and could not have anticipated back in 1978, the foreign domestic dichotomy that Congress built into the statute has broken down. As a result of that, FISA now covers a wide range of foreign activities that it did not cover back in 1978, and as a result of that, the executive branch and the FISA Court are now required to spend a substantial share of their resources every year to apply for and process court orders for surveillance activities against terror suspects and terrorist associates who are located overseas -- resources that would be far better spent protecting the privacy interests of persons here in the United States.

We believe this problem needs to be fixed, and we submit that we can best fix it by restoring FISA to its original purpose. And to do that, we propose redefining the term "electronic surveillance" in a technology-neutral manner. Rather than focusing, as FISA does today, on how a communication travels or where it is intercepted, we should define FISA's scope by who is the subject of the surveillance, which really is the critical issue for civil liberties purposes. If the surveillance is directed at a person in the United States, FISA generally should apply. If the surveillance is directed at a person outside the United States, it should not.

This would be a simple change, but it would be a critically important one. It would refocus FISA's primary protections right where they belong, which is on persons within the United States.

It would realign FISA and our FISA Court practice with the core purpose of the statute, which is the protection of the privacy interests of Americans inside America. And it would provide the men and women of the intelligence community with the legal clarity and the operational agility that we need to surveil potential terrorists who are overseas. Such a change would be a very significant step forward both for our national security and for our civil liberties.

I want to thank you, all the members of the committee, for your willingness to consider this legislative proposal as well as the other proposals in the package that we submitted to Congress, and I stand ready to answer any questions that you might have.

Thank you.

SEN. ROCKEFELLER: Thank you, sir, very much. We appreciate that.

And as I understand it, Director McConnell, all the other members of the panel are available also to answer questions.

MR. McCONNELL: Yes, sir, that's correct.

SEN. ROCKEFELLER: If I might start, the administration's proposed change to FISA would exempt any international communications in and out of the United States from requiring the review and approval of a FISA judge before the surveillance took place unless a U.S. person was the specific target of the surveillance. In other words, phone calls between foreign targets and Americans located in the U.S. could be intercepted without regard to whether a probable cause standard was demonstrated to the court. This change in law, if enacted, would increase the number of communications involving U.S. persons being intercepted without a court warrant, which would be -- and that would be at unprecedented levels.

So my question, in a sense, is a little bit like what Mr. Wainstein was talking about; that if you're targeting a foreign person -- and I stay within bounds here, but if you're targeting a foreign person, you're also at the same time picking up a United States citizen. You're not just sort of picking up one and not the other. So I'm not sure how that protects the United States citizen, number one. I need to know that.

Secondly, what private safeguards are there in the administration's bill for the communications of Americans who are not a target but whose communications would be otherwise legally intercepted under a bill, which is sort of the same question that I just asked. If the court does not play a role in reviewing the appropriateness of surveillance that may ensnare the international phone calls of Americans, who -- under the administration's proposal -- would oversee those exempt communications to ensure that U.S. persons were not being targeted?

MR. McCONNELL: Sir, I have to --

SEN. ROCKEFELLER: Who watches?

MR. McCONNELL: Let me be careful in how I frame my answer, because I will quickly get into sources and methods that we would not desire those plotting against us, terrorists, to understand or know about.

But in the lead to your statement, where you said a person inside the United States calling out, in all cases that would be subject to a FISA authorization. In the context of intelligence, it would be a foreign power or an agent of foreign power, calling out.

Now, if a known terrorist called in and we're targeting the known terrorist, and someone answers the telephone in the United States, we have to deal with that information.

SEN. ROCKEFELLER: And I understand that and don't disagree with that, in fact support that. But my question is, in the process of carrying that out, properly, because you're -- you have reason to believe, so to speak -- nevertheless the U.S. citizen is being recorded and is a part of the record. And therefore is that person's privacy targeted or not, even if that person is not the purpose of the action?

MR. McCONNELL: The key is "target" and would not be a target of something we were attempting to do. And since FISA was enacted in 1978, we've had the situation to deal with on a regular basis.

Recall in my statement I said in those days most overseas communications were wireless. Americans can be using that overseas communications. So as a matter of due course, if you're targeting something foreign, you could inadvertently intercept an American.

The procedures that were established following FISA in 1978 are called minimize. There is a(n) established rigorous process --

SEN. ROCKEFELLER: I understand.

MR. McCONNELL: And so that was how -- that is how you would protect it.

Let me turn it over to General Alexander, who have a -- more current than I am on specific detail.

LTG KEITH ALEXANDER: Sir, if I might, if you look at where on the network you intercept that call, if we were allowed to intercept that overseas without a warrant, we'd pick up the same call talking to a person in the U.S. In doing that, we have rules upon which we have to abide to minimize the U.S. person's data that's handed down to us from the attorney general. Everyone at NSA is trained on how to do that.

It would apply the same if that were done in the United States under the changes that we have proposed. So we have today a discrepancy on where we collect it.

And the second -- as Director McConnell pointed out, the minimization procedures would be standard throughout the world on how we do it. If a U.S. person was intercepted, if it was overseas or in the States, in both cases we'd minimize it.

SEN. ROCKEFELLER: I will come back to that. My time is up, and I call on the distinguished vice chairman.

SEN. BOND: I thank the distinguished chairman.

And I think that -- Mr. Chairman, that answer is one which we should fully develop in a closed session, because I think that we're -- we -- there's lots more to be said about that. And I think that question would be -- will be a very interesting one to explore later.

I'd ask Admiral McConnell or General Alexander, without getting in any classified measures, can you give us some insight maybe, General, or a specific example how important FISA is to defending ourselves against those who have vowed to conduct terrorist attacks on us?

MR. McCONNELL: Sir, let me start for a general observation, and I want to compare when I left and when I came back. And then I'll turn it to General Alexander for specifics.

The way you've just framed your question -- when I left in 1996, retired, it was not significant. It was almost insignificant. And today it is probably THE most significant ability we have to target and be successful in preventing attacks.

LTG ALEXANDER: Sir, as Director McConnell said, it is the key on the war on terrorism. FISA is the key that helps us get there.

Having said that, there's a lot more that we could and should be doing to help protect and defend the nation.

MR. McCONNELL: Senator, I just might add -- since I'm coming back to speed and learning the issues and so on -- what I'm amazed with is under the construct today, the way the definitions have played out and applied because technology changes, we're actually missing a significant portion of what we should be gathering.

SEN. BOND: I think probably we want to get into that later, but I would, I guess, in summary, you would say that this -- you said this is the most important tool, and the information that you've gained there has allowed us on a number of occasions to disrupt activities that would be very harmful abroad and here.

Is that a fair statement?

MR. McCONNELL: Inside and outside the United States.

SEN. BOND: All right. Mr. Wainstein, the proposal includes a new definition for an agent of a foreign power who possesses foreign intelligence information.

Can you give us an example of the type of person this provision is intended to target, and how that meets the particularity and reasonableness requirement of the Fourth Amendment?

MR. WAINSTEIN: Thank you, Senator. Speaking within the parameters of what we can talk about here in open session -- and I think that's a particular concern in this particular case, where identifying any example with great particularity could actually really tip off our adversaries.

Let me just sort of keep in general terms, that this new definition of an agent of foreign power would fill a gap in our coverage right now, which is that there are situations where a person, a non-U.S. person -- this is only non-U.S. person -- is here in the United States. That person possesses significant foreign intelligence information that we would want to get that could relate to the intent of foreign powers who might want to do us harm. But because we cannot connect that person to a particular foreign power -- under the current formulation of agent of foreign power, we're not able to go to the FISA Court and get approval, get an order allowing us to surveil that person.

So, you know, keep in mind, this is a FISA Court order. We'd do this pursuant to the FISA Court's approval. This is intended to provide that -- fill that gap, similar to what Congress did when it gave us the lone wolf provision a couple years ago, allowing us to target some terrorists whom we could not connect to a particular foreign power.

That's critically important, and I would ask if I could defer to a closed session --

SEN. BOND: We'll finish that up.

Another broader question. The recent inspector general's report detailed too many errors in the FBI's accounting for and issuing national security letters. As a result, there -- some have suggested that the national security letter authorities should be changed or limited. What impact would changing the standard from -- relevance to a higher standard have on FBI operations, particularly in obtaining FISA surveillance and search authorities?

MR. WAINSTEIN: Well, the --

SEN. BOND: Or is that Mr. Powell -- is that Mr. Wainstein or Mr. Powell --

MR. BENJAMIN POWELL: I don't know what numbers what would be cut out if the standard were changed. I think it is important to note -- and this committee has available to it the classified inspector general report that goes into great detail of where NSLs have been used in specific cases to obtain very critical information to enable foreign intelligence investigations to go forward, so I think if the standard were changed, that would lead to a real impact on those investigations. But Mr. Wainstein is closer to those and may want to comment.

MR. WAINSTEIN: I'll just -- I'll echo what Mr. Powell said. And I believe that the remedy or the way of addressing the failings -- which were failings; it's been acknowledged as serious failings by the director of the FBI and the attorney general -- is not to scale back on the authority but to make sure that that authority is well-applied. And there are many things in process right now to make sure that'll happen.

SEN. BOND: Just follow the rules.

Thank you very much, Mr. Chairman.

SEN. ROCKEFELLER: Thank you, Vice Chairman Bond.

Senator Wyden.

SEN. RON WYDEN (D-OR): Thank you, Mr. Chairman.

Admiral, I very much appreciated our private conversations and discussion about how we balance this efforts in terms of fighting terrorism ferociously and protecting privacy. And what I want to examine with you is, what's really going to change on the privacy side?

For example, in the debate about national security letters, when Congress expanded the authority to issue these letters to thousands of Americans, most of the very same terms were used then that have been used this afternoon, efforts, for example, such as minimizing the consequences of the law. But recently the director of the FBI has admitted that there was widespread abuse of the national security letter authority, that there were instances when agents claimed emergency powers despite the lack of an actual emergency.

What is going to change now with this new effort, so that we don't have administration officials coming, as the attorney general recently did, to say, made a mistake -- widespread abuse?

MR. McCONNELL: First of all, the proposal is privacy-neutral. It doesn't change anything. NSLs are not a part of FISA.

SEN. WYDEN: I understand that. But what concerns me, Admiral, is, we were told exactly the same thing with national security letters. We asked the same questions. We were told that there would be efforts to minimize the consequences. And I want to know, what's going to be different now than when we were told there wouldn't be abuses in the national security letters?

MR. McCONNELL: Sir, let me separate the two, if I could, to comment on -- FISA grew out of abuses that occurred in the '70s, as I mentioned in my opening statement. As a result of that, the hearings that were held by this body with regard to how we administer it going forward, the intelligence community was given very strict guidance with regard to the law and the implementing instructions and so on. There are instructions, and I think if you check back in time, the signature on the -- the instruction that NSA lives by still has my name on it. It's called USID (sp) 18.

Now what I'm setting up for you is a community whose job is surveillance, whose very existence is for surveillance, and that community was taught daily, regularly, signed a note each year, retrained. And we focused on it in a way to carry out exactly the specifics of law. Let me contrast that with the FBI. FBI has a new mission. It's a new focus. And think of it as the -- in the previous time as, arrest and convict criminals. Now it's to protect against terrorism, so it's a new culture adopting to a new set of authorities.

Now they were admitted by the director of FBI and the attorney general. Mistakes were made and they're cleaning that up. But it was done in a time when it was different in change, and that culture is evolving to do it --

SEN. WYDEN: So you're saying that those who will handle the new FISA statute are more expert and will want to inquire in secret session about that.

Now another section of the bill would grant immunity from liability to any person who provided support to the warrantless wiretapping program or similar activities. Would this immunity apply even to those who knowingly broke the law?

MR. McCONNELL: Of course not, Senator. It would never apply to anybody who knowingly broke the law.

SEN. WYDEN: How is the bill going to distinguish between intentional lawbreakers from unintentional lawbreakers? One of the things that I've been trying to sort out, and we've -- strange discussion about some of the classified materials -- is, how are you going to make these distinctions? I mean, if we find out later that some government official did knowingly break the law in order to support the warrantless wiretapping program, could that then be used to grant them immunity? We need some way to make these distinctions.

MR. McCONNELL: Well, first of all, Senator, you're using the phrase "warrantless surveillance." Part of the objective in this proposal is to put all of the surveillance under appropriate authority, to include warrants

where appropriate. Now if someone has violated the law, and it's a violation of the law, there could be no immunity.

SEN. WYDEN: In January of this year, Attorney General Gonzales wrote to the Judiciary Committee and stated that any electronic surveillance that was being committed as part of the warrantless wiretapping program would, and I quote, "now be conducted subject to the approval of the Foreign Intelligence Surveillance Court."

Does this mean that the federal government is now obtaining warrants before listening to Americans' phone calls?

MR. McCONNELL: Sir, the way you're framing your question, as if the intent was to listen to Americans' phone calls, that's totally incorrect. The --

SEN. WYDEN: Well, simply --

MR. McCONNELL: The purpose is to listen to foreign phone calls. Foreign. Foreign intelligence. That's the purpose of the whole -- think of the name of the act: Foreign Intelligence Surveillance Act -- not domestic, not U.S.

SEN. WYDEN: But is the federal government getting warrants?

MR. McCONNELL: For?

SEN. WYDEN: Before it's listening to a call that involves Americans?

MR. McCONNELL: If there is a U.S. person, meaning foreigner in the United States, a warrant is required, yes.

SEN. WYDEN: The government is now, then, completely complying with the warrant requirement?

MR. McCONNELL: That is correct.

SEN. WYDEN: Okay.

Thank you, Mr. Chairman.

SEN. ROCKEFELLER: Thank you, Senator Wyden.

And we now go to Senator Feingold.

SEN. RUSSELL FEINGOLD (D-WI): Thank you very much, Mr. Chairman, for holding this hearing. And I have a longer statement I'd like to place in the record. And I'd ask the chairman if I could do that.

SEN. ROCKEFELLER: Without objection.

SEN. FEINGOLD: I thank the witnesses for testifying today. Can each of you assure the American people that there is not -- and this relates to what -- the subject Senator Wyden was just discussing -- that there is not and will not be any more surveillance in which the FISA process is side-

stepped based on arguments that the president has independent authority under Article II or the authorization of the use of military force?

MR. McCONNELL: Sir, the president's authority under Article II is -- are in the Constitution. So if the president chose to exercise Article II authority, that would be the president's call.

What we're attempting to do here with this legislation is to put the process under appropriate law so that it's conducted appropriately to do two things -- protect privacy of Americans on one hand, and conduct foreign surveillance on the other.

SEN. FEINGOLD: My understanding of your answer to Senator Wyden's last question was that there is no such activity going on at this point. In other words, whatever is happening is being done within the context of the FISA statute.

MR. McCONNELL: That's correct.

SEN. FEINGOLD: Are there any plans to do any surveillance independent of the FISA statute relating to this subject?

MR. McCONNELL: None that -- none that we are formulating or thinking about currently.

But I'd just highlight, Article II is Article II, so in a different circumstance, I can't speak for the president what he might decide.

SEN. FEINGOLD: Well, Mr. Director, Article II is Article II, and that's all it is.

In the past you have spoken eloquently about the need for openness with the American people about the laws that govern intelligence activity. Just last summer, you spoke about what you saw as the role of the United States stating that, quote, "Because of who we are and where we came from and how we lived by law," unquote, it was necessary to regain, quote, "the moral high ground."

Can you understand why the American people might question the value of new statutory authorities when you can't reassure them that you consider current law to be binding? And here, of course, you sound like you're disagreeing with my fundamental assumption, which is that Article II does not allow an independent program outside of the FISA statute, as long as the FISA statute continues to read as it does now that it is the exclusive authority for this kind of activity.

MR. McCONNELL: Sir, I made those statements because I believe those statements with regard to moral high ground, and so on. I live by them.

And what I'm attempting to do today is to explain what it is that is necessary for us to accomplish to be able to conduct the appropriate surveillance to make -- to protect the American people, consistent with the law.

SEN. FEINGOLD: Let me ask the other two gentlemen.

General Alexander, on this point with regard to Article II, I've been told that there are no plans to take warrantless wiretapping in this context, but I don't feel reassured that that couldn't reemerge.

LTG ALEXANDER: Well, I agree with the way Director McConnell laid it out.

I would also point out two things, sir. The program is completely auditable and transparent to you so that you and the others -- and Senator Rockefeller, I was remiss in (not) saying to you and Senator Bonn thank you for statements about NSA. They are truly appreciated.

Sir, that program is auditable and transparent to you so that you as the oversight can see what we're doing. We need that transparency and we are collectively moving forward to ensure you get that. And I think that's the right thing for the country.

But we can't change the Constitution. We're doing right now everything that Director McConnell said is exactly correct for us to.

SEN. FEINGOLD: Well, here's the problem. If we're going to pass this statute, whether it's a good idea or a bad idea, it sounds like it won't be the only basis on which the administration thinks it can operate. So in other words, if they don't like what we come up with, they can just go back to Article II. That obviously troubles me.

Mr. Wainstein?

MR. WAINSTEIN: Well, Senator, as the other witnesses have pointed out, the Article II authority exists independent of this legislation and independent of the FISA statute. But to answer your question, the surveillance that was conducted, as the attorney general announced, that was conducted pursuant to the president's terrorist surveillance program, is now under FISA Court order.

SEN. FEINGOLD: Another topic. It would be highly irresponsible to legislate without an understanding of how the FISA Court has interpreted the existing statute. Mr. Wainstein, will the Department of Justice immediately provide the committee with all legal interpretations of the FISA statute by the FISA Court along with the accompanying pleadings?

MR. WAINSTEIN: I'm sorry, Senator; all FISA Court interpretations of the statute?

SEN. FEINGOLD: All legal interpretations of the FISA statute by the FISA Court, along with the accompanying pleadings.

MR. WAINSTEIN: In relation to all FISA Court orders ever --

SEN. FEINGOLD: In relation to relevant orders to this statutory activity.

MR. WAINSTEIN: Well, I'll take that request back, Senator. That's the first time I've heard that particular request, but I'll take it back.

SEN. FEINGOLD: Well, I'm pleased to hear that, because I don't see how the Congress can begin to amend the FISA statute if it doesn't have a

complete understanding of how the statute has been interpreted and how it's being currently used. I don't know how you legislate that way. MR. WAINSTEIN: Well, I understand, but obviously, every time they issue an order, that is -- that can be an interpretation of how the FISA statute is -- interpretation of the FISA statute. And as you know from the numbers that we issue, we have a couple thousand FISAs a year. So that would be quite a few documents.

SEN. FEINGOLD: This is an important matter. If that's the number of items we need to look at, that's the number we will look at.

Thank you, Mr. Chairman.

SEN. ROCKEFELLER: Thank you, Senator Feingold.

Senator Nelson.

SEN. BILL NELSON (D-FL): Mr. Chairman, most of my questions I'm going to save for the closed session, but I would like to ascertain the administration's state of mind with regard to the current law. In the case where there is a foreign national in a foreign land calling into the United States, if you do not know the recipient's nationality and therefore it is possible it is a U.S. citizen, do you have to, in your interpretation of the current law, go and get a FISA order?

MR. McCONNELL: No, sir, not if it -- if the target is in a foreign country and our objective is to collect against the foreign target, and they call into the United States, currently it would not require a FISA. And let me double-check that. I may be -- I'm dated.

LTG ALEXANDER: If it's collected in the United States, it would require a FISA if we do not know who the end is to, or under the program it would have to be collected. If it were known, both ends foreign, known a priori, which is hard to do in this case, you would not. If it was collected overseas, you would not.

SEN. BILL NELSON: Let's go back to your second -- General, your second answer.

LTG ALEXANDER: If you know both ends -- where the call is going to go to before he makes the call, then you know that both ends were foreign; if you knew that ahead of time, you would not need a warrant.

SEN. NELSON: If you knew that.

LTG ALEXANDER: If you knew that.

SEN. NELSON: If you did not know that the recipient of the call in the U.S. is foreign, then you would have to have a FISA order.

LTG ALEXANDER: If you collected it in the United States. If you collected it overseas, you would not.

SEN. NELSON: Well, since in digital communications, if these things -- little packets of information are going all over the globe, you might be collecting it outside the United States, you might be collecting it inside the United States.

MR. McCONNELL: And Senator, that's our dilemma. In the time in 1978 when it was passed, almost everything in the United States was wire, and it was called electronic surveillance. Everything external in the United States was in the air, and it was called communications intelligence.

So what changed is now things in the United States are in the air, and things outside are on wire. That's the --

SEN. NELSON: I understand that, but -- now, I got two different answers to the same question from you, Mr. Director, and from you, General.

MR. McCONNELL: It depends on where the target is and where you collect it. That's why you heard different answers.

SEN. NELSON: So if you're collecting the information in the United States --

MR. McCONNELL: It requires a FISA.

SEN. NELSON: Okay. Under the current law, the president is allowed 72 hours in which he can go ahead and collect information and, after the fact, go back and get the FISA order.

Why was that suspended before in the collection of information?

LTG ALEXANDER: Sir, I think that would best be answered in closed session to give you exactly the correct answer, and I think I can do that.

SEN. NELSON: And -- well, then, you can acknowledge here that is -- it was in fact suspended.

SEN. ROCKEFELLER: I would hope that that would be -- we would leave this where it is.

SEN. NELSON: All right. I'll just stop there.

SEN. ROCKEFELLER: Thank you, Senator Nelson.

Senator Feinstein.

SEN. DIANNE FEINSTEIN (D-CA): Thank you very much, Mr. Chairman. The administration's proposal, Admiral, doesn't address the authority that the president and attorney general have claimed in conducting electronic surveillance outside of FISA. While the FISA Court issued a ruling that authorized the surveillance ongoing under the so-called TSP, Terrorist Surveillance Program, the White House has never acknowledged that it needs court approval. In fact, the president, under this reasoning, could restart the TSP tomorrow without court supervision if he so desired.

Now, Senator Specter and I have introduced legislation which very clearly establishes that FISA is the exclusive authority for conducting intelligence in the United States.

Here's the question: Does the administration still believe that it has the inherent authority to conduct electronic surveillance of the type done under the TSP without a warrant?

MR. McCONNELL: Ma'am, the effort to modernize would prevent an operational necessity to do it a different way. So let me -- I'm trying to choose my words carefully.

SEN. FEINSTEIN: Yes, but my question is very specific. Does the president still believe he has the inherent authority to wiretap outside of FISA? It's really a yes or no question.

MR. McCONNELL: No, ma'am, it's not a yes or no question.

SEN. FEINSTEIN: Oh --

MR. McCONNELL: Sorry -- I'm sorry to differ with you. But if you're asking me if the president is abrogating his Article II responsibilities, the answer is no. What we're trying to frame is -- there was an operational necessary for TSP that existed in a critical period in our history, and he chose to exercise that through his Article II responsibility.

We're now on the other side of that crisis, and we're attempting to put it consistent with law, so it's appropriately managed and subjected to the appropriate oversight.

SEN. FEINSTEIN: Well, the way I read the bill, very specifically, the president reserves his authority to operate outside of FISA. That's how I read this bill. I think that's the defining point of this bill.

Not only that; in Section 402, Section 102(a), notwithstanding any other law, the president, acting through the attorney general, may authorize electronic surveillance without a court order under this title, to inquire (sic) foreign intelligence information for periods of up to one year. And then it goes on to say if the attorney general does certain things.

MR. McCONNELL: Yeah.

SEN. FEINSTEIN: I mean, clearly this carves out another space. That's the question.

MR. McCONNELL: That same situation existed in 1978, when the original FISA law was passed. What we're attempting to balance is emergency response to a threat to the nation, consistent with our values and our laws. So the way this operated for 30 years, almost 30 years -- we operated day to day, and it was appropriately managed and appropriate oversight. We had a crisis. The president responded to the crisis, and we're now attempting to accommodate new threats that we didn't understand in 2002, to be able to respond to protect the nation, to protect the nation and its citizens today, consistent with the appropriate oversight.

Does that mean the president would not exercise Article II in a crisis? I don't think that's true. I think he would use his Title II responsibilities -- (inaudible) -- Article II.

MR. POWELL: And Senator, if I may add, Section 402 is not meant to carve out in any way or speak to what the scope of the president's power is. That is meant to speak to Title III and criminal warrants and making clear what the certification procedure was. I was a part of this working group for over a year and a half, and the decision was specifically taken not to speak

to, one way or the other, the scope of the president's constitutional power under Article II or to address this -- that in this proposal in any way, whether to expand it or contract it; it was simply meant to be silent on what the president's Article II powers are.

I would also note, in the idea that the president can sidestep FISA or use Article II authority to simply place the statute aside, that is not my understanding of the Department of Justice position or the president's position. When you look at the legal analysis that has been released by the Department of Justice on the Terrorist Surveillance Program, that speaks to a very limited set, speaking to al Qaeda and its affiliates, in which we are placed in a state of armed conflict with, and speaking to the authorization of the use of military force passed by the -- by this Congress.

It does not speak to any kind of broad Article II authority of the president to simply decide to set FISA aside in toto and conduct electronic surveillance in a broad manner, unconnected to things like the authorization for the use of military force or the state of armed conflict that we entered into with al Qaeda.

So I have not seen anything from the Department of Justice or the president that would suggest that he would simply set aside FISA or has the authority to simply conduct electronic surveillance under Article II essentially unconnected to events in the world.

SEN. FEINSTEIN: I can see that my time is up. But there is nothing in this bill which reinforces the exclusive authority of FISA? There is nothing in this bill that confines the president to work within FISA?

MR. POWELL: This bill does nothing to change what FISA currently says, which is electronic surveillance shall be -- FISA shall be the exclusive means for conducting electronic surveillance unless otherwise authorized by statute. This bill simply leaves that statement as is. It does not strike it, it does not change it. It leaves it unchanged.

SEN. FEINSTEIN: My time is up, but this is a good issue to pursue.

Thank you, Mr. Chairman.

SEN. ROCKEFELLER: Thank you, Senator Feinstein.

Senator Whitehouse.

SEN. SHELDON WHITEHOUSE (D-RI): Thank you, Chairman.

We'll talk more about this obviously in the closed session, but I wanted to make a couple of points. And before I do, Director, let me say that I'm going to be speaking rather generally. As between you and I, I believe you to be an honorable and trustworthy man. I think that you are here with a view to be professional; that is your motivation. You are not an ideologue or a partisan in your desire to help prepare the intelligence function of the United States, and I applaud you for that.

But that said, you are still asking for substantial changes in your authority. And as an aside, I think the new technologies that have emerged do suggest some adjustment to FISA. It may be over or underinclusive in certain areas. But as we look through the lens of the past in terms of

evaluating how much we can trust you with institutionally -- you know, these are tough times. As you said, we had FISA -- the reason we have FISA in the first place is because of past abuses. We've just found out about the litany of national security letter abuses within the Department of Justice. The attorney general has thoroughly and utterly lost my confidence, and at this stage, any element of the FISA legislation that depends on the attorney general will need some other backstop in order to have my confidence.

We are coming out of this Article II regime of the TSP Program of warrantless wiretapping, and to this day, we have never been provided the presidential authorization that cleared that program to go or the attorney general-Department of Justice opinions that declared it to be lawful.

Now, if this program is truly concluded, the TSP program, and if this is the new day in which everything is truly going to be under FISA, I can't imagine for the life of me why those documents that pertain to a past and closed program should not be made available to the committee and to us. And so, to me, it's very concerning as we take these next steps for you to be saying impliedly, "Trust us, we need this authority, we'll use it well," when we're coming off the record of the national security letters; we're coming off terrible damage done to the Department of Justice by this attorney general; we're coming off a continuing stone-wall from the White House on documents that I cannot for the life of me imagine merit confidentiality at this stage.

And in the context of all of that -- you got some up-hill sledding with me, and I want to work with you and I want to do this, but it would be a big step in the right direction, in terms of building the trust. Mr. Powell, I heard you just talk about how important it was that to the extent we've been disclosed, these opinions, that there was not transparency. We've been talking a lot about transparency and all that kind of stuff.

Where's the transparency as to the presidential authorizations for this closed program? Where is the transparency as to the attorney general opinions as to this closed program? That's a pretty big "We're not going to tell you" in this new atmosphere of trust we're trying to build.

If you have a response, sir, you'd like to make to that --

MR. McCONNELL: I do, sir.

SEN. WHITEHOUSE: -- I'd be delighted to hear it. I know it was not framed as a question.

MR. McCONNELL: I do have a response. I think the appropriate processes were created as a result of abuses of the `70s. They were inappropriate. We've got oversight committees in both the Senate and the House. We're subjected to the appropriate oversight, rigorous, as it should be. Laws were passed to govern our activities. Those were inspected. We have inspector's general, and the process has worked well.

I've made a recommendation based on just coming back to the administration with what we should do with regard to disclosing additional information to this committee, and that recommendation is being considered as we speak. Certainly, it's easier for me to share that information with you and to have a dialogue about what is said, and how it worked, and did it work well, and should we change it.

But until I get working through the process, I don't have an answer for you yet. But oversight is the appropriate way to conduct our activities going forward consistent with the law.

SEN. WHITEHOUSE: It's wonderful to hear you say that.

MR. WAINSTEIN: If I may, Senator -- may I just respond to that very briefly, Mr. Chairman?

SEN. WHITEHOUSE: Please.

MR. WAINSTEIN: Senator, to the extent that you've voiced some concern about lack of confidence in the Department of Justice and our role in FISA --

SEN. WHITEHOUSE: No. Just to be clear -- lack of confidence in the attorney general.

MR. WAINSTEIN: Well, if I may just say that I'm the head of a brand-new division that's focused on national security matters, and a large part of our operation is making sure that we play within the lines. We got a lot of people dedicated to that, and I can tell you that our deputy attorney general and our attorney general are very conscientious about handling all FISA matters, get reported to regularly, handle -- their responsibilities are to sign off on those packages very carefully and conscientiously.

And as far as the NSL matter goes, both the director of the FBI and the attorney general were quite concerned about that and have put in place a very strong set of measures to respond to it. So I think if you look at their response to that problem, which was a very serious problem, I would hope that that would give you some more confidence.

SEN. WHITEHOUSE: Thanks.

SEN. ROCKEFELLER: Thank you, Senator Whitehouse.

Senator Snowe.

SEN. OLYMPIA J. SNOWE (R-ME): Thank you, Mr. Chairman.

Director McConnell, obviously this is creating this delicate balance. And I know in your testimony, you indicated, as we redefine the electronic surveillance and obviously amend the Foreign Intelligence Surveillance Act, that to provide the greater, you know, flexibility in terms of communication, that we don't upset the delicate balance with respect to privacy questions.

Last September, Kate Martin, the director of the Center for National Security Studies, testified before the Crime, Terrorism and Homeland Security Subcommittee of the House Judiciary Committee and indicated that this bill would radically amend the FISA Act and eliminate the basic framework of the statute and create such large loopholes in the current warrant requirement that judicial warrants for secret surveillance of Americans' conversations and e-mails would be the exception rather than the rule. How would you respond to such a characterization? And could you also explain to the

committee how exactly the framework has been preserved through this renewed version of FISA?

MR. McCONNELL: Well, first of all, I characterize the statements you just read as uninformed, because the way it was framed -- it's as if we were targeting without any justification communications of U.S. citizens, which is not the case, simply not the case. If there is a reason to target any communications and it's inside the United States, it would require a FISA warrant in the current law and in the future law.

So the only thing we're doing with the bill, the proposal, is just to update it to make it technology neutral. All things regarding privacy stay the same.

SEN. SNOWE: And so there's no -- in your estimation, then, there aren't any provisions in this proposal that would create such large loopholes.

MR. McCONNELL: Indeed not. No.

SEN. SNOWE: No deviation, other than to make it technology neutral.

MR. McCONNELL: Zero. None.

SEN. SNOWE: I noted in your statement that you mentioned additional protections besides obviously, submitting -- coming before the respective intelligence committees and also to the leadership regarding the Privacy and Civil Liberties Oversight Board that was established by the legislation that created the department in 2004. Exactly what has that board accomplished to this date? As I understand, it was just constituted last year in terms of all the appointments being completed. So exactly what has this board done in the interim that would suggest that they will provide additional oversight?

MR. McCONNELL: I've only met them recently and engaged with them and we have a regular cycle for meeting and discussing their activities, but it is oversight of the process to look at activities, to see what's being conducted, and they have a responsibility to report on it to the president and to others of us. They work in my organization to carry out their duties, which is to ensure that all of our activities are consistent with civil liberties and the appropriate protection of privacy.

MR. POWELL: Senator, there’s also –- they've just released their first report. It's a detailed report, talks about the numbers of programs that they have reviewed, including an in-depth review of what was formerly the terrorist surveillance program before being placed under FISA. I think you'll find that report informative about what their findings were about the program. They've done some in- depth reviews of various programs both inside and outside the intelligence community, including they've attended NSA's training that is provided to its operators, and that is a public report.

Vito, I don't know if you want -- you've interacted with them more. They've spent a lot of time in different programs across this government, and that report lays it out, and it's up on the Web.

MR. VITO POTENZA: No, Senator, there's not much more to add to that. They did come out to NSA. They -- as Mr. Powell said, they sat in on training, they reviewed the -- specifically the Terrorist Surveillance

Program. They came out at least twice and spent a considerable amount of time with us.

SEN. SNOWE: And when were they fully constituted as a board?

MR. McCONNELL: We have the head of the board here in the audience somewhere. Let me -- get him to -- he was here. Still with us?

Senator, I'll get back to you on it. I don't know the exact time, but we'll provide it to you.

SEN. SNOWE: And certainly would they be giving I think reasonable assurances to the American people that they will be overseeing and protecting their privacy --

MR. McCONNELL: That's their purpose.

SEN. SNOWE: -- consistent with the law?

MR. McCONNELL: That is their purpose, and as just mentioned, the first report is posted on the website. I didn't know it was actually already on the website.

SEN. SNOWE: Thank you.

SEN. ROCKEFELLER: Thank you, Senator Snowe.

Senator Levin.

SEN. CARL LEVIN (D-MI): Thank you, Mr. Chairman.

The FISA Court interpreted -- or issued some orders in January. These are the orders which were the subject of some discussion here today. Do we have copies of all those orders, the January orders of the FISA Court?

MR. WAINSTEIN: Yes. And the -- all members of the committee I think have been briefed in on them or --

SEN. LEVIN: But do we have copies of the orders?

MR. WAINSTEIN: I believe you all have copies, yes.

SEN. LEVIN: How many are there?

MR. WAINSTEIN: How many copies?

SEN. LEVIN: How many orders?

MR. WAINSTEIN: I cannot get into how many orders there are.

SEN. LEVIN: You can't get into the number?

MR. WAINSTEIN: Not in open session.

SEN. LEVIN: Into the number of orders?

MR. WAINSTEIN: Yeah, not in open session, Senator.

SEN. LEVIN: Okay. Have those orders been followed?

MR. WAINSTEIN: Yes, sir.

SEN. LEVIN: And have you been able to carry out the new approach that those orders laid out so far?

MR. WAINSTEIN: I'd prefer to, if we could, defer any questions about the operation of the orders to closed session.

SEN. LEVIN: No, I'm not getting into the operations. I want to know, have you been able to implement those orders?

MR. WAINSTEIN: We have followed the orders, yes, sir.

SEN. LEVIN: Without any amendments to the statute?

MR. WAINSTEIN: There have been no amendments to the statute since the orders were signed in January.

SEN. LEVIN: And you've been able to follow the new orders without our amending the statute?

MR. WAINSTEIN: We have --

LTG ALEXANDER: Sir, could I answer?

SEN. LEVIN: Just kind of briefly, I mean let me ask the question a different ways. Are the orders dependent upon our amending the statute?

LTG ALEXANDER: No, the current orders are not.

SEN. LEVIN: Okay.

LTG ALEXANDER: Nor are the current orders sufficient for us to do what you need us to do.

SEN. LEVIN: I understand that. But in terms of the orders being implementable, they do not depend upon our amending the statute.

Is that correct?

LTG ALEXANDER: That's correct. The current state that we're in does not require that.

SEN. LEVIN: Good.

LTG ALEXANDER: But I would also say, that's not satisfactory to where you want us to be.

MR. McCONNELL: Senator, what you need to capture is, we were missing things that --

SEN. LEVIN: I understand. I understand that we're not deterring the implementation of the orders.

Now the -- back in January, the -- there was an article that says that the administration continues to maintain that it is free to operate without court approval. There seemed to be some question about that here today. Is that not the administration's position?

MR. McCONNELL: That is not the administration's position that I understand, sir.

SEN. LEVIN: Okay.

Back in January on the 17th, the attorney general wrote to Senators Leahy and Specter the following, that a judge of the Foreign Intelligence Surveillance Court issued orders authorizing the government to target for collection international communications into or out of the United States, where there is probable cause to believe that one of the communicants is a member or agent of al Qaeda or an associated terrorist organization. Has that remained the test for when you want to be able to target a communication that is -- where the target is in the United States? Is that, there must be probable cause to believe that one of the communicants is a member or agent of al Qaeda or an associated terrorist organization?

MR. POWELL: Senator, I think it would be best if we get into that in closed session.

SEN. LEVIN: Well, is there any change in that? This to me is the key issue, the probable cause issue --

MR. POWELL: Senator, you have copies of those orders that lay out very specifically what those tests are. What the attorney general's letter did was speak to what the president had laid out in his December 17th, 2005 radio address as the Terrorist Surveillance Program.

SEN. LEVIN: I understand.

MR. POWELL: And that is what that letter is addressed to, Senator --

SEN. LEVIN: My question is, is there any change, that that is what you are limiting yourselves to, situations where, if the target is in the -- if the eavesdropping takes place in the United States, that there must be probable cause to believe that one of the communicants is a member or agent of al Qaeda or an associated terrorist organization? Is there any change from that? This is what the attorney general wrote us. Is there any change from that since January 17th?

LTG ALEXANDER: Sir, we can't answer that in open session.

SEN. LEVIN: Well, he wrote it in open session. It's an open letter.

SEN. BOND: Mr. Chairman, I would suggest to the chairman that this question we can explore fully in the closed session.

SEN. LEVIN: Well --

SEN. ROCKEFELLER: I would leave that --

SEN. LEVIN: This is a letter --

(Cross talk.)

SEN. ROCKEFELLER: If that presents a problem say so --

MR. McCONNELL: It presents a problem for us, sir.

SEN. ROCKEFELLER: It is not --

MR. McCONNELL: It presents a problem for us. The way it was framed and the way it was written at the time is absolutely correct. That -- and the way the senator's framing his question that -- it pushes it over the edge for how we can respond to it, because there's been some additional information.

SEN. LEVIN: Could the attorney general write that letter today?

MR. McCONNELL: We can discuss it in closed session, sir.

MR. POWELL: Senator, the point of the attorney general's letter, as I understood it, was to address those things that the president -- had been discussed, that were being done under the Terrorist Surveillance Program. And what his letter addresses is to say that those things that the president had discussed under the program were now being done under orders of the FISA court. And today, as we sit here, the attorney general's letter remains the same: that those things that the president had discussed are -- continue to be done under the orders of the FISA court. So to that extent, there's no change to the attorney general's letter.

LTG ALEXANDER: Sir, if I could, to just clarify this one step further, there are other things that the FISA court authorizes day in and day out that may be included in that order, that go beyond what the attorney general has written there. Every day we have new FISA applications submitted.

MR. McCONNELL: What you were tying this to, Senator, was al Qaeda.

SEN. LEVIN: Mr. Chairman, I think what -- if the chair and vice chair are willing, I think we ought to ask the attorney general then if this letter still stands. In terms of the test which is being applied for these targeted communications, it's a very critical issue. The president of the United States made a representation to the people of the United States as to what these intercepts were limited to. And the question is, is that still true? And it's a very simple, direct question, and we ought to ask the attorney general, since he wrote, made a representation in public; the president has made a representation in public. If that's no longer true, we ought to know it. If it is still true, we ought to know it. So I would ask the chairman and vice --

SEN. ROCKEFELLER: The senator is correct, and that will happen and that will be discussed in the closed session.

SEN. LEVIN: Thank you. My time is up. Thank you.

SEN. ROCKEFELLER: No, thank you, Senator Levin. I'm -- after Vice Chairman Bond has asked his question, I'm yielding my time to the senator

from Florida, and I guess then to the senator from Oregon, and then eventually I'll get to ask a question, too.

Senator Bond.

SEN. BOND: Thank you, Mr. Chairman. I think maybe to clear up some of the confusion -- and some of the questions couldn't be answered -- it's my understanding you're before us today asking for FISA updates to enable NSA to obtain under that statute vital intelligence that NSA is currently missing.

And secondly, when we talk about Article II and the power of the president under Article II, presidents from George Washington to George Bush have intercepted communications to determine the plans and intentions of the enemy under the Foreign Intelligence Surveillance authority in that. And prior to the TSP, as I understand it, the most recent example was when the Clinton administration used Article II to authorize a warrantless physical search in the Aldrich Ames espionage investigation.

The Supreme Court in the Keith case in `72 said that the warrant requirement of the Fourth Amendment applies to domestic security surveillance, but it specifically refused to address whether the rule applied with respect to activities of foreign powers or their agents. And then in the Truong case in 1980, the Fourth Circuit noted the constitutional responsibility of the president for the conduct of the foreign policy of the United States in times of war and peace in the context of warrantless electronic surveillance. And it did say that it limited the president's power with a primary purpose test and the requirement that the object be -- the search be a foreign power, its agent or collaborator.

Finally, despite Congress' attempts to make FISA the exclusive means of conducting electronic surveillance for national security purposes, my recollection from law school is that the Constitution is the supreme law of the land. It is a law.

Congress cannot change that law in the Constitution without amending the Constitution. And the Foreign Intelligence Court of Review, in In re Sealed Case, in 2002, Judge Silverman wrote, "We take for granted that the president does have the authority" -- that's the authority to issue warrantless surveillance orders -- "and assuming that is so, FISA could not encroach on the president's constitutional power. We should remember that Congress has absolutely no power or authority or means of intercepting communications of foreign enemies. But -- so even at his lowest ebb, the president still exercises sufficient significant constitutional authority to engage in warrantless surveillance of our enemies."

And I know that there are two admitted lawyers on the panel. Are you a lawyer also? Three. Is that right? Is that correct? Mr. Powell, Mr. Wainstein, Mr. Potenza? Thank you.

SEN. ROCKEFELLER: Just for the record, they nodded "yes." (Laughter.)

SEN. BOND: But we didn't want to disclose all the lawyers on there. I have that problem myself.

I wanted to ask, since we're asking kind of unrelated questions, Mr. Wainstein, the 9/11 commission and this committee tried to get a look at all

the intelligence and the policy decisions leading up to 9/11. And I'm beginning to hear that we did not -- maybe the 9/11 commission did not get all the information.

For example, in the case of Mr. Sandy Berger, he admitted removing five copies of the same classified document from the National Archives; destroyed three copies. We know that he was there on two other occasions; we don't know whether he removed other original documents. He removed classified notes without authorization. What we don't know is what was actually in the PDBs that were stuffed in his BVDs. In his plea agreement, he agreed to take a polygraph at the request of the government, and for some reason, the Department of Justice has not gotten around to polygraphing him to ascertain what was in the documents and why he removed them.

Are you going to try to find out that information, and when can you let us know, Mr. Wainstein?

MR. WAINSTEIN: Senator Bond, I know that that is an area of inquiry from other members of Congress, and there's been a good bit of traffic back and forth on that particular issue. I have to admit that right now I'm not up on exactly where that is. So if it's okay with you, I will submit a response in writing.

SEN. BOND: We'd like to find out.

Thank you, Mr. Chairman.

MR. WAINSTEIN: Thank you, sir.

SEN. ROCKEFELLER: Thank you, Mr. Vice Chairman.

And now Senator Nelson, to be followed by Senator Wyden, to be followed by myself.

SEN. BILL NELSON (D-FL): Thank you, Mr. Chairman.

I want to go back to the line of questioning before. You already said that under current law, if there is someone who is deemed to be of interest outside of the United States that's calling in, even though we may not know that the person in the United States is a U.S. citizen, that that -- under current law, that would require a FISA order?

MR. McCONNELL: Depends on where the intercept takes place.

SEN. NELSON: Okay. And so if the intercept takes place in the United States --

MR. McCONNELL: It requires an order.

SEN. NELSON: Okay. Now --

MR. POTENZA: Senator, if I may, I would just add to that -- if it's on a wire in the United States, it requires a FISA order.

SEN. NELSON: So if it's a cell phone, it doesn't require -- if it --

MR. POTENZA: A separate section of FISA would cover that. But the particular situation you were talking about is the wire section.

MR. McCONNELL: In '78, they separated it between "wire" and "wireless." And so if a wireless call was made from overseas into the United States via satellite, it's -- would be available for collection.

SEN. NELSON: Right. Is it the case under current law where all parties to a communication are reasonably believed to be in the United States, that the government would need to go to a FISA court to obtain an order authorizing the collection?

MR. McCONNELL: Yes, sir, that's correct.

SEN. NELSON: Under your new proposal, is that the case?

MR. McCONNELL: That's correct. Yes, sir, it is correct.

SEN. NELSON: The proposed definition of electronic surveillance depends on whether a person is reasonably believed to be in the United States. What kind, Mr. Wainstein, of guidance would the Justice Department give when someone is reasonably believed to be in the United States?

MR. WAINSTEIN: Sir, I can't give you specific indicia that we would use. We might be able to elaborate more in closed session as to what NSA, what kind of indicia NSA actually uses right now. But it's exactly that -- it's -- in telecommunications, it's not always with certainty these days exactly where a communicant is.

SEN. NELSON: But --

MR. WAINSTEIN: And we have to use the information we have to make a reasonable determination as to where that person is.

MR. McCONNELL: But if we know, we -- if the collector knows you're in the United States, it requires FISA.

SEN. NELSON: Okay. Now, if you know that two people are in the United States, and you are collecting that information in the United States, normally that would require a FISA order.

MR. McCONNELL: Yes, sir.

SEN. NELSON: Does that include if you know one of those people on the communication in the United States is a member of al Qaeda?

MR. McCONNELL: Yes, sir.

SEN. NELSON: It still does. Okay.

Mr. Chairman, I want to turn back to the question that I asked before. And you stop me, as you did before, if you don't want me to proceed. But it was openly discussed in all of the public media that the 72-hour rule under current law was not obeyed with regard to the intercepts that have occurred. And my question was -- well, I first asked why, but then I asked did it in the administration. I would like an administration witness to answer if what we read in the New York Times and the Washington Post and the

L.A. Times and the Miami Herald about the 72-hour requirement not being complied with, is that true that it wasn't complied with, the law, the current law?

MR. POWELL: Senator, when you're referring to the 72-hour rule, I think you're referring to the emergency authorization provisions by which the attorney general, if all of the statutory requirements are met to the attorney general's satisfaction, he may authorize surveillance to begin and then has 72 hours after that to go to the FISA Court. If that is what you're referring to, Senator --

SEN. NELSON: Well, that's what I stated in my previous question --

MR. POWELL: Yes, Senator.

SEN. NELSON: -- when the chairman stopped me.

MR. POWELL: Senator, what the president discussed in his radio address, I believe, of December 17th, talking about one-end communications involving al Qaeda or an affiliate, those were done under the president's authorization and the president's authority were not done pursuant to FISA or attorney general emergency authorizations by which after 72 hours you would go to the FISA Court, to that extent the emergency authorizations provision of FISA was not a part of that terrorist surveillance program.

SEN. NELSON: Well, here's the trick, and I'll conclude. The trick is we want to go after the bad guys, we want to get the information that we need, but we're a nation of laws and we want to prevent the buildup of a dictator who takes the law into his own hands, saying, "I don't like that."

So now we have to find the balance. And that's what we need to craft, because there is legitimate disagreement of opinion on the interpretation that the president broke the law the last time. Senator Bond would say, no, he didn't, because he had an Article 2 constitutional right to do that.

Well, this is what the American people are scared about, that their civil rights and civil liberties are going to be invaded upon because somebody determines, outside of what the law says in black and white, that they think better than what it says. And so we've got to craft a new law that will clearly make that understandable.

Thank you, Mr. Chairman.

SEN. ROCKEFELLER: Thank you, Senator Nelson. Senator Wyden, I'll get you in just a second.

The chairman would say very strongly here at this point that this in fact a creative process, and that those who watch or listen or whatever -- it's okay that we do this. What it does say is that what we were discussing is incredibly important for the national security, as is what we're talking about, incredibly important for individual liberties. It is wholly understandable, and it is wholly predictable in this senator's view, that there would be areas where we would come to kind of a DMZ zone, unhostile, and where one side or another would get nervous.

It is the judgment of this chairman that in a situation like that, when you're dealing with people who run the intelligence, that you respect their worry, because you do not have to worry about the fact that the information will come out. Because we do have a closed hearing, and all members will be at that closed hearing. And they will hear the answers to the questions that have been asked.

So that -- I don't have a hesitation if I feel, and the vice chairman on his part has that same right. If there's a feeling that we're getting too close to the line, let's not worry too much about that. We have not crossed that line. The senator from Florida extended my cutoff, as he said, a little bit further. There was not particular objection on your part, and so the situation has been resolved.

But I just wanted to make that clear. If -- when we're in open session, this is the only committee on this side of the Capitol Building which runs into conflicts of this sort, potential conflicts of this sort. And we darn well better be very, very careful in the way that we resolve them and err in my -- and from my point of view, on the sense of caution.

Because if we're going to craft something, and Senator Bond and I have been talking about this a little bit during the hearing. If we're going to craft something which can get bipartisan support, which is what we need, we need to have not only trust but also the integrity of discourse.

Words can do great damage. They can do great good. Silence can do great damage. Silence can do great good.

So I consider all of this useful, and I now turn to Senator Wyden.

SEN. RON WYDEN (D-OR): Thank you, Mr. Chairman. I happen to agree that both you and Senator Bond have made valid points on this. And what concerns me is, too much of this is still simply too murky.

And I think, with your leave, Admiral McConnell, let me just kind of wide through a couple of the other sections that still concern me.

Section 409 on physical searches creates a new reason to hold Americans' personal information obtained in a physical search, even when a warrant is denied. And I want to kind of walk you through kind of existing law and then the change and get your reaction.

Current law allows the attorney general to authorize a secret emergency search of an American's home, provided that the government gets a warrant within three days of the search. If the arrant is denied, then information gathered in the search may not be used unless it indicates a threat of death or harm to any person. I think virtually nobody would consider that out of bounds. That's a sensible standard in current law.

But the bill would permit the government to retain information gathered in the secret search of an American's home, even if the warrant is later denied, if the government believes there is something called significant foreign intelligence information. How is that definition arrived at? What is the process for that additional rationale for keeping information on hand after a warrant is denied?

MR. McCONNELL: Sir, I'll turn to the lawyers for a more official definition of that. But the way I would interpret it as an operator is, it would be threat information, something of a planning nature that had intelligence value, that would allow us to prevent some horrendous act. So it would be something in the context of threat.

SEN. WYDEN: What amounts of an imminent act.

MR. McCONNELL: Imminent or a plan for, you know blowing -- a bridge or something of that nature.

SEN. WYDEN: I was searching for the word "imminent," and I appreciate it.

The lawyers -- I'll move on, unless you all want to add to it. But I was searching for the word "imminent." Do y'all want to that? Because I want to ask one other question.

MR. POWELL: Well, I just want to make it clear, Senator, that you did represent the proposal correctly, that the words "significant foreign intelligence information" would go broader, to just something that is imminent or a terrorist event. So the proposal is broader there, to allow the government -- retain and act upon valuable foreign intelligence information that's collected unintentionally, rather than being required to destroy it if it doesn't fall in the current exception. But you represented the proposal correctly, Senator.

SEN. WYDEN: All right. Let me ask a question now about 408, and this goes back to the point that I asked you, Admiral, earlier about -- that a section of the bill grants immunity from liability to any person who provided support to the warrantless wiretapping program or similar activities. I asked whether the immunity would apply even to persons who knowingly broke the law, and I asked what is in Section 408 that distinguishes intentional lawbreakers from unintentional ones. And I still can't find it after we've gone back and reviewed it. Can you and the lawyers point to something there -- it's at page 35, Section 408 -- that allows me to figure out how we make that distinction?

MR. POWELL: Right, Senator. 408, the liability defense -- what it would do is say that the attorney general or a designee of the attorney general would have to certify that the activity would have been intended to protect the United States from a terrorist attack.

The attorney general would actually have to enter a certification for anybody to be entitled to this defense. I don't believe the attorney general or the designee would issue such a certification for somebody who was acting in the manner that you've described.

SEN. WYDEN: So that essentially is how you would define the last seven or eight lines of page 35 is that the attorney general would have to make that certification.

MR. POWELL: That's correct, Senator. It's not a defense that somebody could just put forth without having the attorney general involved in a certification process.

SEN. WYDEN: Gentlemen, I think you've gotten the sense from the committee that one of the reasons that the bar is high now is that the American people have been told repeatedly -- both with respect to the national security letters and, I touched on earlier, the Patriot Act and other instances -- we've been told in language similar to that used today that steps were being taken to assure that we're striking the right balance between fighting terrorism and protecting people's privacy. And that is why we're asking these questions. That's why we're going to spend time wading through text.

Admiral, you've heard me say both publicly and privately, you've been reaching out to many of us on the committee to go through these specific sections. You've got a lot of reaching out to do based on what I've heard this afternoon and, I think, what I've heard colleagues say today.

But we're interested in working with you on a bipartisan basis, and I look forward to it.

Thank you, Mr. Chairman.

MR. McCONNELL: Thank you, Senator.

SEN. ROCKEFELLER: Thank you, Senator Wyden.

I'll conclude with three questions, unless the vice chairman has further questions. (Short pause.)

This would -- this is listed as all witnesses. I'd like to minimize -- a little minimization there. A criticism of the administration's bill is that while the reasons given for the bill are focused on the need to respond to the threat of international terrorism, the administration's bill would authorize warrantless surveillance of all international calls for any foreign intelligence purpose.

How would you respond to a suggestion that a more narrow approach be considered that would specifically address communications associated with terrorism, as opposed to the blanket foreign intelligence purposes in the administration's proposal?

MR. McCONNELL: Sir, if it's inside the United States, regardless, it would require a warrant, as it does today. So if it were -- if the foreign intelligence originated in a foreign location and it has to do with intelligence of interest to the United States, such as weapons of mass destruction shipment or something to do with a nation state not necessarily associated with terrorism, that would still be a legitimate foreign intelligence collection target. So something inside the United States requires a warrant. External United States, what we're arguing is it should not require a warrant, as we have done surveillance for 50 years.

SEN. ROCKEFELLER: Thank you.

Mr. Wainstein, the administration's bill would expand the power of the attorney general to order the assistance of private parties without first obtaining a judicial FISA warrant that is based on the probable cause requirements in the present law. A limited form of judicial review would be available under the administration's bill after those orders are issued.

Why is this change necessary? Has the FISA Court's review of requested warrants been a problem in the past?

MR. WAINSTEIN: Mr. Chairman, I believe what you're referring to is Section 102, large A. And what that does is it says that for those communication interceptions that no longer fall under FISA with a redefinition of electronic surveillance, that there's a mechanism in place for the attorney general to get a directive that directs a communications company to assist in that surveillance, because there's no longer a FISA Court order that can be used to -- that can be served on that company. So this way the attorney general has a mechanism to get a directive to ask a company to provide the assistance that's necessary.

If that company disagrees with that and wants to challenge that order, this proposal also sets up a mechanism by which that company can challenge that order to the FISA Court. So there is judicial review of any compulsion of a communications provider to provide communications assistance to the government.

SEN. ROCKEFELLER: And there are precedents in American law for such?

MR. WAINSTEIN: Yes, in a variety of different ways, both in the criminal side and in the national security side, yes, sir.

SEN. ROCKEFELLER: Okay. My final question is also to you, sir. The administration argues that if these FISA amendments were enacted, there could be greater attention paid to the privacy protections of persons in the United States. Among these amendments, however, are previous -- are provisions that would presumably limit the amount of information being provided to the Foreign Intelligence Surveillance Court.

The proposed amendments, for example -- and here we get back to what has already been discussed -- provide for the use of, quote, "summary description," unquote, rather than "detailed description," quote, unquote in FISA application when it comes to, quote, "the type of communications or activities to be subjected to surveillance."

Is the Department of Justice seeking to limit the information a judge of the FISA Court has available upon which to base a decision and issue and order for electronic surveillance? And if that be the case, why?

MR. WAINSTEIN: Mr. Chairman, I appreciate the question. And those specific proposed revisions essentially say that instead of providing very detailed explication of those points that you just cited, the government can provide summary information. And that's a recognition of the fact that right now the typical FISA Court package that goes to the court is, you know, 50-60 pages, something in that range. It's a huge document. And a lot of that information is completely -- or more or less irrelevant to the ultimate determination of probable cause. It needs to be there in summary fashion, but not in detailed fashion.

So that's all those streamlining provisions are doing. They're not in any way denying the FISA court the critical information they need to make the findings that are required under the statute.

And in terms of our statements that this overall bill will protect the privacy rights of Americans, frankly, it's a very practical point, which is that right now we spend a lot of time -- in the Department of Justice, NSA and the FISA Court -- focusing on FISA packages that really don't relate to the core privacy interests of Americans. They relate to these FISA intercepts, which really weren't intended to be covered by FISA. If those are taken out of FISA so that we're focusing back on privacy interests of Americans, then all that personnel, all that attention will be focused where it should be, on Americans and all Fourth Amendment interests here in the United States.

MR. POWELL: And, Senator, if I could add -- because there's a lot of attention to Department of Justice and attorney resources -- a critical piece on this is that these applications in some -- in many cases resembled finished intelligence products. The burden is on the analysts and the operators, so it's not a matter of more resources for the Department of Justice that we could bring lawyers on board and bring them in, and they would somehow magically understand the cases and be able to produce what are essentially finished intelligence products, in some cases, for the court; we think that goes where we've gotten to, and the place with the statute has gone beyond what anybody ever intended.

The burden of that falls on the analysts and operators at the -- of the intelligence community, not the lawyers, Senator. We ask the questions and we write them down and we put the packages together, but it's a huge burden to put this type of product together with people who are very limited, whose time is very limited, and they need to spend time sitting with me and Ken's staff to produce these products. So it's not just a question of Department of Justice resources -- I think that would be a solvable problem -- the issue really becomes kind of the limited analysts and operators that are working these cases in real time.

SEN. ROCKEFELLER: If the -- what you suggest is -- and I'm actually growing a little weary of this term, the "burden" -- the "burden" -- there are a lot of burdens in government, there's a lot of paperwork in government. Go work for CMS someday and you'll get a real lesson in burden. Is that what -- is the burden that you're referring to -- too much paperwork, don't have time, can't respond in time -- is that what the courts are saying or is that what you are saying?

MR. POWELL: Yeah, I think the issue is not the -- it's the issue of -- it's not the burden to focus on what the balance was struck in 1978, to focus on U.S. persons in the United States. What we have done is taken a framework that was designed to prevent domestic abuses that threatened our democratic institution. That was meant to protect against that and the abuses that happened -- and we can talk about those -- and we've just simply, because of the way technology has developed, transferred that framework to people who were never intended to be a part of that, and where that danger, frankly, is not -- does not exist.

So it's taken a framework designed to prevent domestic abuses, and because -- simply because of technological changes, transferred this to foreign entities, and I don't think anybody -- any -- I have not heard any reasonable argument that those activities directed at foreign entities not in the United States somehow present the same threats that we were concerned about domestically. So we've shifted the entire framework -- simply because of technology, we've shifted a good portion of that framework to a situation

that is completely different, and we are put back in place that original balance that we believe was struck in 1978, Senator.

SEN. ROCKEFELLER: Well, it occurs to me -- and these are my closing remarks -- is that changing technology is a part of every aspect of all of our lives.

And so we all live with it every day in many ways -- some catch up, some don't. You have to be ahead of the curve, and you have to be able to respond very rapidly.

I think it's going to be very important -- and Senator Bond and I have discussed this during this hearing and before -- that we come out with a solution that works on this. I think it would be very damaging if we did not. I think it would be very damaging if we came out with a solution which went along purely partisan lines and was based upon arguments from one end to another.

Having said that, I'm not sure it's going to be easy, and what I want to -- and that's why the intelligence, the orders, the -- that we have not received chafe at the vice chairman and myself. When you're not completed -- when you're not given complete information on something which is so fundamental and where the line between privacy and security has to be so exact, then there can be a real sense of frustration if only because you fear you're not acting on complete information. It has nothing to do with our trusting of all of you. It has to do with the process which is meant to inform the intelligence committees in the Senate and the House of what the legal underpinning is.

So I would repeat my request, particularly to the director of National Intelligence, that this is a matter not just of letters that have been written and requests which have been made, but a matter of really important fundamental ability of us to work together as a committee to produce a good product. I want a product that works for America. Senator Bond wants a product that works for America. There are going to have to be some adjustments made, as there inevitably will, or else we just go on in some kind of a food fight which is no good for anybody at all.

So I would ask that cooperation, and I would renew my request for the information that I asked for in my opening statement.

SEN. BOND: Mr. Chairman, I join with you in asking for the legal justifications. Now I recognize in some attorney-client relationships the opinions reflect the negative side rather than the positive side, and I don't know what would be in those -- in that information.

But suffice it to say that we need specifically, succinctly the legal justifications and a copy of the kind of orders that went out, so we can see what went on.

On the other hand, when we're on another issue, when we're talking about FISA applications, Mr. Powell, how many FISA applications are made a year?

MR. POWELL: I think Mr. Wainstein will have the numbers. I have them in my bag, Senator. They're in a report that is publicly filed each year. I -- Ken may now have the --

MR. WAINSTEIN: I think the most recent number was 2,183 for 2006.

SEN. BOND: 2,183, and they average about 50 pages?

MR. WAINSTEIN: About that, yes, sir.

SEN. BOND: So 50 pages times that. My math is a little slow. But each year that would be over -- roughly 110,000 pages. And to go back -- each year we go back would be another 100,000. I think we ought to -- there was a question about having all FISA orders.

I think we need to come to a reasonable agreement on maybe -- I don't know where we would put 100,000 pages of orders. And I think that we need to look at that and find a way to issue a request that can be responded to and that we can handle. But I do believe very strongly that clear, succinct legal justification will -- should be shared with us when we're in the closed hearings.

And we got into the fringe areas of a lot of things that the chairman and I know why it could not be answered. And while it may appear that there was a lack of forthcoming by our witnesses, we knew -- know full well what it is that prevents your answering it. And we will look forward to getting all those answers.

And I think it will become clear to all of us, the chairman and the vice chairman and the members, when we -- when you can lay out the specific reasons that we danced around today as to why and what and where FISA needs to be changed. And I thank you, Mr. Chairman, and I thank our witnesses.

SEN. ROCKEFELLER: And the hearing is adjourned. (Sounds gavel.)

(END OF OPEN SESSION)