

Center for American Progress



SPECIAL PRESENTATION

“FISA: SAFEGUARDING BOTH SECURITY AND FREEDOM”

RESTORING CHECKS AND BALANCES

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MR. MARK AGRAS: My name is Mark Agrast and I'm a senior fellow here at the Center for American Progress. I'm pleased to welcome you to this discussion of the "Foreign Intelligence Surveillance Act and Our System of Checks and Balances." For the benefit of those present and our C-Span audience, let me please remind you to turn off all cell phones – thank you – pagers, intelligence-gathering equipment and so forth.

Nearly 30 years ago, Congress enacted the Foreign Intelligence Surveillance Act to strike a balance between the government's need for foreign intelligence information and the constitutional requirement that Americans not be subject to electronic eavesdropping without a court order. The statute has been updated nearly 50 times to ensure that our intelligence capabilities keep pace with changing needs and advances in technology. But for three decades, the core requirement that the government must get a warrant to spy on Americans in the United States remained intact. That changed on August 5th when the president signed legislation S.927, the Protect America Act, which permits the government to eavesdrop on Americans and others in the United States without a warrant if the surveillance is directed at a person reasonably believed to be outside of the United States.

Now, before the enactment of the new law, FISA required the government to obtain a warrant from the FISA court to conduct surveillance of a person in the United States based on a showing of probable cause that the target of the surveillance was a foreign power or an agent of a foreign power, in effect, a terrorist or a spy. Under the new law, the power to authorize such surveillance has been transferred from the court to the director of National Intelligence and the attorney general, and the government no longer needs to show any connection between the surveillance and a suspected terrorist or spy. All that is required is that there are reasonable procedures in place for determining that the information acquired concerns persons reasonably believed to be located outside the United States.

This and other sweeping changes to FISA were hastily enacted, with no hearings and virtually no public debate as Congress prepared to leave for the August recess. The bill was approved under withering pressure from administration officials who warned of "potential attacks and mass casualties" – that's a quote – if Congress left town without giving the president the new powers he demanded. This new law will expire six months from now unless renewed by Congress, and congressional leaders have vowed to revisit the issue once Congress reconvenes after Labor Day.

Here at the Center for American Progress, we've been giving thought to what Congress needs to do to provide the government with the tools it legitimately needs to conduct surveillance of foreign intelligence and terrorist targets while ensuring that these activities comport with the Constitution and are subject to appropriate safeguards to prevent abuse. Now, few responsible people would argue that no further changes should ever be made to FISA, that this or any other statute is perfect just as it is. In fact, when

the administration took the view that it shouldn't have to get a warrant to listen in on purely foreign communications that happened to pass through the United States, most people readily agreed. FISA was never intended to require a warrant in such circumstances and an amendment to clarify this would have probably passed with little controversy, but the Protect America Act has little to do with this problem.

So before Congress enacts permanent changes to the law, it should insist first and foremost on a robust public debate just as there was when FISA was originally enacted in 1978. The administration must explain what problem it seeks to remedy and Congress must be convinced that the concerns are legitimate, that the changes proposed are appropriately tailored to address those concerns that these changes will not have unintended and undesirable consequences and that proper care is taken to preserve effective oversight by the other two branches of government.

We've invited this very distinguished group of experts to consider whether the new legislation, the Protect America Act meets those tests and if not, how Congress should go about the task of remedying its deficiencies.

Let me introduce our guests. Beginning at my far right, your far left, Mary DeRosa is chief counsel for national security at the Senate Judiciary Committee. She previously was a senior fellow at the Center and Strategic and International Studies where she focused on intelligence information and privacy policy and other national security issues. She has served in government as special assistant to the president and legal advisor, deputy legal advisor on the National Security Council Staff and special counsel in the office of the general counsel at the Department of Defense. She's been a lawyer on the staff of an advisory board on investigations on the Department of Defense and as a lawyer in private practice.

To her left is Kate Martin, the director of the Center for National Security Studies, a nonprofit human rights and civil liberties organization based in Washington D.C. She has taught strategic intelligence and public policy at Georgetown University Law School and was general counsel to the National Security Archive at George Washington University. She's testified frequently before Congress and has litigated numerous national security cases including as lead counsel in a suit brought by more than 20 organizations, challenging the secret arrests of 1,200 people in the wake of September 11th. She was co-director of a project on security services and the constitution of democracy in 12 former Communist countries in Europe, and participated in the drafting of the Johannesburg Principles on National Security and Freedom of Expression.

Next is Mort Halperin, a senior fellow at the Center for American Progress. He's also the executive director of the Open Society Policy Center and the director of the U.S. Advocacy program for the Open Society Institute. He held senior positions in the Clinton, Nixon and Johnson administrations, most recently as director of the policy planning staff at the Department of State, as a consultant to the secretary of defense, and as a special assistant to the president and senior director for democracy on the National Security Council. He also has deep experience with the history of the Foreign

Intelligence Surveillance Act having participated in the negotiations that led to its enactment.

And finally, Congressman Mickey Edwards was a member of Congress for 16 years and a senior member of the House Republican Leadership. He served as a member of the Appropriations and Budget Committees, was ranking member of the Subcommittee on Foreign Operations and chairman of the Policy Committee. Congressman Edwards was one of the three founding trustees of the Heritage Foundation and national chairman of the American Conservative Union, and served for five years as chairman of the annual Conservative Political Action Conference. He has served on the faculty of Harvard's Kennedy School of Government, and now teaches at Princeton's Woodrow Wilson School of Public and International Affairs. He also directs a political leadership program for the Aspen Institute, and is a director of the Constitution Project. His new book, *Reclaiming Conservatism*, will be published in March by Oxford University Press.

Well, Mary, let me start with you if I may and ask you to give us a very brief account of the key provisions of the Protect America Act and how they changed the law as we knew it.

MS. MARY DEROSA: Okay. I will – I'll try to be brief. I guess I'll start first with just – if it's okay – kind of ticking through what the issues were that the administration presented as the need for some legislation and then go through a little bit about the act and the Democratic alternatives, how they would have addressed those issues.

The most – the first and probably most important – I guess I shouldn't characterize what the administration's concerns were – but the first concern that we often heard was that there was – they wanted to not have to make individual probable cause applications to the FISA Court when they were really going after foreign to foreign communications, or foreign communications, but principally, they talked about foreign to foreign, and so they talked a lot about how cumbersome it is to apply for a FISA order with the court, a probable cause order, and wanted something more flexible upfront so that they could conduct that kind of surveillance overseas.

They talked – there's an issue that now Director McConnell has talked about in an interview about a particular FISA Court order. I won't go into any of the details on that, but he has talked about that there was a problem with a particular FISA Court order that pertained specifically to terrorism information and that that caused an immediate problem that needed fixing in this foreign surveillance. Now – but that was just about terrorism. They also talked about how they needed not – needed this kind of flexibility not just for terrorism, but for all foreign intelligence, and when I say this is the argument they were making, these arguments were made at different times and in different places, but to try to summarize what we heard about the problems that the administration wanted to solve with the bill.

And although they talked about foreign to foreign communications, as I'm sure everybody knows, the solutions – the difficulty with separating out just foreign to

foreign, it is difficult at least if not impossible to know when you're targeting a foreign call, whether the calls that you're targeting are going to be foreign to foreign, or foreign to U.S., and that is the sort of basis with the major problems with the legislative efforts.

Another thing that we heard a lot about was an analogy to the early days of FISA and how – it used to be because overseas calls are mostly – I'm not going to get this right, probably – but mostly by radio rather than a – by wire, that they were able to do these things before, and now, they're just trying to – they want to get their ability to intercept back to the way it was in the early days of FISA, and I'd love to hear if there's some expertise about that because that's an analogy I've heard a lot and I want to understand it better.

In any event, it's important to understand in the way this issue moved in the Congress that basically everybody agreed that these problems that were identified needed to be solved. I shouldn't say that about the analogy because I'm not sure everybody understood and agreed with the analogy, but the other problems that the administration said needed to be solved, the Democratic alternatives also were designed to solve those problems, and then that I think it's not clear from the arguments you heard in the debates in Congress and in some of the Op-Eds, you would think that the differences were: Do you think there's a problem that needs to be solved or do you not think there's a problem that needs to be solved? That was not the way the discussion was among Democrats. I think everybody – and everybody here might not agree – but everybody that I know of believed there was a problem that needed to be solved, but many Democrats believed that the Democratic alternative, especially in the House and Senate, were the way to solve the problem.

So very quickly what the – I hope very quickly – what the legislation does. First, it does eliminate the need for an upfront probable cause determination when foreign targets – when the NSA – the surveillance is directed at foreign targets. The bill that passed does this by taking foreign targets, taking interceptions of foreign targets out of the definition of electronic surveillance. The other bills, the Democratic bills would not have made that change to the definition of electronic surveillance and instead would have set up an alternative procedure that did not require – that had a programmatic upfront approval by the court of procedures, so it would not have required the probable cause determinations that we understood were so – are difficult and requiring enormous resources. But it would have – those would have continued to be part of the definition of electronic – under the definition of electronic surveillance.

I think some of the issues that the legislation that passed raises is by taking these foreign targets out of the definition of electronic surveillance, it takes the role of the court really out of the process, and changing this definition can have very significant consequences with other parts of legislation and probably even other legislation that I think it's safe to say were not examined thoroughly in the debate. Sets up a separate set of procedures for getting carrier compliance with the desire to – with the surveillance, so – but what the bill that passed does very significantly is it does not require a court order to carrier – the attorney general with the DNI can order carriers to comply with their direction to conduct interceptions. The carrier can challenge to the court, but the process

or the standard for challenging is really extraordinarily deferential and in a way it's really an enforcement mechanism. In this – this raises concerns also for – possible concerns for carriers because of possible lack of specificity and clarity in the orders, and there is no real judicial review.

One other issue in the procedures is that to issue an order, the AG and the DNI need to make a determination and the certification of a number of things, one of which is that what their procedures are reasonably designed to determining the interceptions are about – are concerning persons overseas, not directed at persons overseas, but concerning persons overseas, obviously a much broader standard. It's not clear. There was no discussion of this language – and you will hear that as a recurring theme. There was no discussion of a lot of things, but – and it's really very unclear what that is intended to address and what its consequences are. It does address foreign intelligence broadly, not just terrorism, and I will say both Democratic alternatives did that as well.

One thing that this legislation doesn't have that both Democratic alternatives – and these are the alternatives that were in the House and the Senate, I don't know whether I said that – what this legislation that passed does not have that those did have was some mechanism for protecting or guidelines or procedures for determining when these foreign targets interceptions are actually picking up a significant number or U.S. – it's U.S. to foreign calls, or U.S. person calls. The Democratic alternatives broadly would have required that the administration have procedures designed to determine when this is happening and that the language was different, but determining when it was happening and how they would kick out U.S. calls and bring them back under the normal FISA procedures when appropriate. Nothing like that, no requirement like that exists in the bill that passed and I think that's a very significant – something that's very significant to the Judiciary Committee.

Judicial review in the bill that passed, the court has to approve only reviews after 120 days. They get to review the procedures that the administration has for determining that the targets are overseas and that the standard is that the guidelines have to be reasonably designed to make that determination and that and the court has to determine that it's not clearly erroneous. So it's a very, very deferential standard and one that comes quite long after the interceptions have begun, the application of the procedures submitted after 120 days and the court has 180 days to decide from time of passage which takes you up to the time of the sunset.

Congressional reporting, barely worth talking about. There is very little congressional reporting. There is a report that's due – the first one would be due on the date that the – at sunsets, and it's directed at – it is requiring to report on incidents of noncompliance with the bill or carrier noncompliance with the orders. So I guess I'll stop there. That's a summary of what was passed.

MR. AGRAS: Well, thank you. That's a wonderfully compressed summary of a lot of material. You managed also to talk in your remarks about the contrast between the bill that became law and the Democratic alternative. I assume that that's various

permutations of what is generally known as the Rockefeller, Reyes Bill, named for the chairman of the two committees.

MS. DEROSA: Well, you know – and that's a sad tale, so – (laughter) – because there was – that much of the work that was done in the weeks before the vote was in developing an alternative that would have set up this alternative procedure, addressed these questions. It ended up – the two bills, there was one Reyes-Conyers that was introduced in the House and one Rockefeller-Levin that was introduced in the Senate, both of them basically designed to do the same thing. I mean, the particulars in some cases were different, but they came from the same – the purpose was to set up an alternative procedure to address the concerns that the administration had raised, but do it with – while retaining court oversight and protections for the – backend protections for when U.S. calls were being intercepted.

MR. AGRAS: And did the administration ever explain what it objected to in that approach? Was it ever clear?

MS. DEROSA: Well, you know, I don't want to be unfair. I mean, the discussions were difficult. They probably – you know – and short, and I think there were concerns about the court and when you – when – and how cumbersome it is to go to the court, and how the court have difficulty with some of the kinds of material that they have to review in these applications, but I mean, I wouldn't want to say that is the fault. They probably would explain their problems better than we would. I don't feel like I have a full understanding of what the problems were with the Democratic alternatives.

MR. AGRAS: Okay. Then we'll come back to that point a little bit later. Thank you.

Kate Martin, one of the reasons the government insisted that it needed this legislation, as Mary was mentioning, was to ensure that the NSA could conduct electronic surveillance of foreign communications that passed through U.S. wires or switches or cables or servers, but are essentially incidental to the United States, and most people thought it was clear that that kind of foreign to foreign communication was already exempt from FISA and that a warrant was not necessary. But a few weeks ago, we learned about a secret decision that had been issued by the Foreign Intelligence Surveillance Court, the FISA court that seems to have called this into question. The ruling is still classified so we can only speculate as to what the court said, but I wonder what do you think the court's concerns were, and how should they have been addressed?

MS. KATE MARTIN: Well, my assumption about the problems that the court decisions raised were that the court pointed out to the NSA that if it was intercepting communications by foreigners overseas with individuals in the United States and those interceptions were taking place in the United States that it was required – then NSA or the government's required to get a warrant under the FISA. That's you know, a kind of basic principle if you're intercepting conversations of Americans in this side of the United States generally, you need a warrant with some exceptions.

The problem with this, of course, is that the debate proceeded without the FISA Court opinions, and not only do we not know what the (core?) problem was that the government had, but in my view, the administration quite disingenuously selectively disclosed information about those decisions in an effort to skew the debate so that they had some information – and who knows if it was correct or not – which was available to a very limited number of people on the Hill, I believe, cleared staff. It was not available for the public debate at all, and so while it may be that in some very generalized way, it's known that there are problems with the way FISA may work at the moment, I don't think that most members of Congress had adequate information about what those problems were, and certainly there was no public understanding of what those problems were, and in some ways, while the – I don't mean to criticize the Democrats and I appreciate the hard work that was done – but it is also true that the, quote, “Democratic alternative” that were proposed as solutions to these problems were introduced and made public literally minutes before they were voted upon. And so I think most everyone would agree that's not the way to come up with a reasonable solution.

MR. AGRAS: Let me just press you on this point a little bit further. Again, we can only speculate, but there's been a fair amount of speculation that what the court was thinking is that it is difficult, if not impossible, to ascertain who's on the other end of that phone line, whether it is in fact someone in the U.S., in which case a warrant would be required, or whether it is a truly international foreign to foreign call, in which case a warrant ought not to be required, and that the court may have been unwilling to say that it would approve warrantless surveillance that would allow a warrantless surveillance to go forward under those circumstances, given the likelihood that the surveillance would acquire communications of a person in the United States. Let's assume that that was what the court was doing, how does one fix that problem?

MS. MARTIN: Well, one proposal about fixing that problem is an idea that wasn't fully set out in the Democratic bills that were voted on, but I believe was talked about, which is to put the initial surveillance under the court so that the court has to issue an initial authorization for the government to intercept foreign communications inside the United States and then if it turns out that the foreigner they're directing their surveillance against has communications with people in the United States, they have to go back and get a warrant.

And one key difference between the situation now and the history that Admiral McConnell invoked incorrectly, I believe, is that the purpose of the surveillance that NSA is undertaking right now is in part to find Americans in the United States and target Americans in the United States who are suspected of talking to foreigners abroad. So it is not – and that is, of course, the classic concern of the Fourth Amendment. So we don't have the situation where in 1980, that NSA is focused on communications between the Soviet Union and Great Britain and incidentally may come up with communications involving Americans and has strict rules about when those communications can be disclosed to any other part of the government. To the contrary, one of the chief purposes of the interceptions these days is to find people in the United States, and yet, their claim is they should be completely outside the oversight of the court, or any Fourth Amendment considerations in doing that.

MR. AGRAST: Thank you.

Let me turn to Mort Halperin. Mort, let me ask, if all Congress had wanted to do was to fix the foreign to foreign problem, it could have written legislation that did that, and obviously that's not the bill, as Mary has explained, that Congress enacted. In fact, it appears to authorize the NSA to listen to virtually any communications of an international character, in which an American in the United States is participating as long as the surveillance is directed at the foreign party. Now, is there a legitimate need for the government to have this kind of broad authority? You worked in the National Security Council, in the State Department, in the Defense Department, can you think of a reason why this is an authority that the government should have and if not, where would you draw the line?

MR. MORTON HALPERIN: I don't think it's an authority the government had, and I think the basic problem with what went on in the last month is that it ended the period since FISA was first conceived in the Ford administration that when you're talking about electronic surveillance involving Americans, it needs to be done on a bipartisan basis and it needs to be done with a public explanation of what is going on and it needs to follow certain principles including the principle that the court needs to authorize the surveillance.

My sense of what was going on here was that the administration took advantage of an adverse court decision and an NIE that said that al Qaeda was getting stronger rather than weaker to create a political problem for the Democratic Party and one that they hoped to exploit in the election process. My sense is there was not a legitimate negotiation, that if there was a legitimate negotiation, if the director of National Intelligence had been free to sit down with the leadership of the House and Senate Intelligence Committee, that you could have solved this problem in a way that was consistent with the Constitution, which would have left the court deeply involved, which would have left the Congress deeply involved and which would not have involved destroying the structure of FISA by changing the definition of foreign intelligence by using "directed" rather than "targeted" with nobody having any idea why, what the administration thinks is the difference between directed and targeted, and using this new phrase, "concerning a person overseas," as long as the surveillance is not foreign intelligence surveillance as defined in the Act.

You get a headache very quickly trying to understand what the words mean, and I think the reason is that the purpose was to enact something over the objection of the Democrats and to try to create a situation in which the Republicans – the president could complain that the Democrats don't care about national security. And so I think there was never any possibility of arriving at a solution because I think, as we saw, everyday the Democrats offered more and everyday the president asked for more, and I think that would have gone on infinitely, until the Congress had to go home. I think there is a real problem. I think the real problem can easily be solved within the structure of FISA, if the president wanted that. I don't think that what's the president wants.

MR. AGRAST: Well, speaking of the real problems, I think again Mary raised this issue. One of the things that the administration often says is that it is too time-consuming and too labor-intensive to get a warrant under these circumstances. How do you respond?

MR. HALPERIN: I had an offer out for anybody who can find me a policeman who thinks getting a warrant before he has to do a search is something he likes to do. Everybody who has to get a warrant thinks it's too time-consuming, it gets in the way. What I think it reflects is that the vice president in particular doesn't believe in the Constitution. He has a different Constitution, and in his Constitution, the president can do whatever he wants and anything that stands in the way is unconstitutional. So to say to a law enforcement officer or an intelligence officer, you need to get a warrant, is to say you need to observe the Constitution. To the attorney general, it is you're wasting time of somebody who's engaged in important business, and the Constitution should be read as enabling the president to waive all constitutional requirements.

There is the issue – remember, a few months ago we were told that the FISA problem was a very different one, that the attorney general described to us about not having time to get the warrants to deal with particular problems. There is always an issue of how much flexibility the government needs in emergencies to start a surveillance without getting to the court before you can begin it. That came up when FISA was drafted and we negotiated a provision which the attorney general said was fully sufficient to enable the government to start a surveillance and then get to the court in a certain period. When the former – I guess still the current attorney general explained the problem, which now mysteriously has gone away, they don't seem anymore to be worried about the problem that he described at some length. The answer to that was, we can give you more flexibility in emergency situations, and again, that was offered here in at least some of the Democratic (unintelligible).

The basic principle is to say you need to set out in the law and in guidelines the circumstances under which the government can act in an emergency without a warrant and then to require the government within an agreed period of time to go to the attorney general and the attorney general in turn to go to the court to make the case that from the start they had the basis to initiate the surveillance and to require them to destroy everything unless they ultimately get the warrant. That process – you can argue about how many days, you can argue about who can start it – that process takes care of this notion of sudden emergencies, and I think everybody is prepared in principle to work that out if that's what the issue is. But again, I think all of these problems were raised rhetorically to try to force the enactment of legislation which would reconfirm that the president could do whatever he wanted, or to be able to blame the Democrats, if there was a terrorist act, not to reach an agreement.

MR. AGRAST: Well, speaking of the president doing what he wants, as we all know and as *The New York Times* revealed, the president was doing pretty much what he wanted and engaging in warrantless surveillance for a number of years before this program, now known as the Terrorist Surveillance Program, the TSP was revealed.

And so Kate, I just wanted to ask you, that program permitted the NSA to monitor communications between a foreign target and a person in the United States if either of them was suspected of being an al Qaeda operative. Now, Congress has passed this new law which would appear not only to validate the warrantless surveillance, but perhaps to take it a step further. And I wanted to ask you how do the powers given to the government by the Protect America Act compare to the powers that the president exercised under the TSP?

MS. MARTIN: The Congress has given the president much broader power than he admitted to exercising under the TSP, because all the president ever admitted to was that the NSA was listening to conversations between suspected al Qaeda on one end, and one end of which was overseas and one end of which was in the United States. Now, what the Congress has authorized is that the president and the NSA can listen to virtually any conversations between someone overseas and someone in the United States without any kind of warrant and without any kind of even suspicion that one end of the communication is a suspected terrorist, and it is – one that, you know, from our view – in our view, that's unconstitutional.

The other thing that's buried in this law is that it will make it even more difficult for anyone to ever challenge in court such surveillance, or even to find out that they were overheard, or their conversation's intercepted under such surveillance.

MR. AGRAS: And Mary, is it the case that this applies only in the case of terrorism investigations, or is it in fact broader than that?

MS. DEROSA: The law that passed? No, it is broader. It is for all foreign intelligence collection. So it is beyond what – as Kate said, beyond what – the way that the Terrorist Surveillance Program was described, and addresses – well, just you know, the sort of gamut of other foreign threats or foreign policy or intelligence interests.

MS. MARTIN: And I might just add, it's interesting because – of course, as Mort said their rationales for what they wanted changed overtime, because in January you we call, the attorney general announced that they had been able to get a FISA court order, a warrant for the interceptions taking place under the Terrorist Surveillance Program. So they'd figured out how to make those within the law, but then they went back to Congress and got the law changed to basically exclude much broader category of Americans' communications from the court oversight.

MR. AGRAS: Well, let's try to posit what the other side might say. The other side might very well say that having this kind of broad surveillance authority enhances our security, that it will enable the government to collect actionable intelligence that it would not otherwise be able to obtain. What's the answer to that? Is that – first of all, is that true? Do we have any reason to believe that that's the case? Whoever would like to take that question.

MS. DEROSA: I think – you know, I think that obviously foreign intelligence – we collect foreign intelligence because it is important to our security. The issue with –

the broader scope which I should say was in both of the Democratic alternatives, but the issue is really not – again, if it's – if we're talking about foreign to foreign communications overseas not involving U.S. persons, then I can't think of a reason why it wouldn't be a good idea, but when you are talking about something that impacts on communications of U.S. persons, then – and you're going significantly broader in that impact, that's what raises the difficult issues. It's the protection issues.

MS. MARTIN: And I want to say I don't think the case has been made that this broad authority is necessary, or even potentially useful to our national security. I mean, I find it troubling that six years after 9/11, you have the director of National Intelligence coming to the Congress and saying, unless we have the authority to do completely broad, unfocused, untargeted surveillance of billions of communications in and out of the United States and around, we're going to be helpless and subject to attack. If that's the level at which they're still operating in trying to find the suspected terrorists and the people who are trying to get into this country to plant the next bomb, I think we're in trouble.

And I think that one of the things that the Congress hasn't done and needs to do is look at not just what their legal issues are, but at some basic issues about the competency and the activities of our intelligence community. It's been reorganized. Everyone has said, well, we need new laws, but no committees in the Congress have looked at whether or not what the intelligence community is now doing six years after 9/11 is in fact going to be useful in identifying, locating and stopping the next terrorists, and instead, they're doing what Mort describes, you know, this kind of political gamesmanship over eliminating restrictions on presidential power.

MR. AGRAS: Well, that's a nice segue to the question I'd like now to put to Mickey Edwards. Mickey, I wonder if you can help put this discussion into a broader context for us of the system of checks and balances and how it's supposed to work. This new law, as we've heard, greatly enhances the power of the executive at the expense of the other two branches of government. What's wrong with a scheme like that, particularly in this area, and what needs to be done to restore real oversight?

REP. MICKEY EDWARDS (R-OK): Well, let me start then with the premise of the panel. The constitutional protections of the American people did not arise with the passage of the Foreign Intelligence Surveillance Act. We're focused on what FISA as it was originally passed permitted and required and then what the changes to FISA additionally permit. The requirement for a warrant is in the Constitution. It's not in the FISA Act. And one of the things that has to happen is for the members of Congress to begin to say, Mr. President, you may make a persuasive case. You may, in fact, convince us that something should be done. This, under the Constitution, is all we are permitted to do and to operate within those constraints. So that's the starting point of what's wrong with the problem.

The – I'm been very critical of the Republicans who ran the Congress for the first six years of the Bush administration who seem not to understand that they were both a separate and an independent branch of the United States government. But in fairness, let me also then criticize the Democrats who seem not to recognize that they're an equal

branch of government and who are all too willing to be fearful of partisan consequences if they do what their oath of office requires them to do in upholding the Constitution.

What's happened – it's not sufficient, Mark, for the president to come in and make a case that for a variety of different reasons, it would be good and helpful to his administration in doing its job of defending the country – which, by the way, is not only the president's job but the Congress' job as well – that it would make is easier to do it, if we were to set aside some of the requirements of the Constitution.

The Congress needs to be willing to stand up and say, we understand that the powers that reside in the Congress were not given to us because the founders believed that members of Congress were somehow special and ought to be given certain authorities. The powers that were given to Congress were not for the benefit of Congress. They were for the benefit of the American people. They were for the benefit of the protection of the rights of all citizens, and when the Democrats now follow what the Republicans did in beginning to say, let us look at how this is going to play politically. Let us decide whether we're going to be in trouble politically for looking as though we are not sufficiently attentive to security concerns, then they have fallen down as dramatically as the Republicans did. And it's not a problem of the Democrats or Republicans. It's a problem of members of Congress taking an oath of office and determining that there are certain things they are required and bound to do.

Part of it requires not just – and Mary, I mean, I know there are great decisions made in deliberations with the executive branch and so forth – but when the Congress determines – (laughter) – when the Congress determines that this is the path that should be followed, there needs to be a willingness in the Congress to enforce those decisions. The Congress is good at rhetoric. Arlen Specter said all of the right things repeatedly and did nothing when members of the executive branch were called to testify and then they walked out without answering questions because they had other things to do. You know, this has been a constant thing with members of Congress not understanding the strength they have, the power of the purse, the power of subpoena, the willingness to say to the president that, you know, that you may be Mr. President, the head of state. We understand that. You go overseas, you represent the United States, you get the 21-gun salute, but you're not the head of government. You're only the head of state. It's different. And there's no solution to this, until you get members of Congress who take seriously what it means to be a member of Congress.

MR. AGRAS: Thank you. Let me ask you – I know Mort's got some things he wants to say about what Congress can do to enforce – and I'd like to ask all of the panelists to think about that question while I ask you one other different question, Mickey. In fact, it's two questions about congressional access to information.

You've laid out very well what Congress' responsibilities are, but I think the corollary to that is that Congress has to have the information that it needs in order to carry out those responsibilities. So the first question is this: Congressional leaders have complained that they can't validate the administration's claims when the White House

refuses to turn over the information requested by congressional committees, so what should Congress do if the administration continues to withhold this information?

Second question is really a systemic problem, and that is that only a small number of members of the House and Senate, chiefly the bipartisan leadership and the intelligence committees, have access to classified briefings on these matters, and so that puts most members of Congress and Congress as a whole at a very severe disadvantage in those negotiations with the administration. If members don't have the facts, how can they do their jobs, and again, what can be done about this? Two connected questions.

REP. EDWARDS: Has it ever occurred to you – I'm sure it has, Mort, to you – that while the 435 elected members of the House and the 100 elected members of the Senate chosen by the American people to represent them and having taken an oath of office to uphold the Constitution are not able to get this information, the information that they are denied is known to perhaps thousands of people who work in the various agencies of the federal government of the executive branch. So you know, these are the closely held secrets that people all through the defense, intelligence agencies, the Defense Department, you know, the White House have. For the Congress to put up with that absolute nonsense is annoying as hell. (Laughter.)

Now, what do you do about it? I mean, first of all, I don't have a problem if the decision is made to share only with certain members of the legislative branch. That's a decision that Congress can make. But look, if you ask the executive branch for information and they don't give it, then they don't get what they want. I mean, it's that simple. (Laughter.) How is that complicated? You say, we want this information. They say, we won't give it to you. Say, okay, we won't appropriate the money for X and we won't then appropriate the money for Y. If that didn't get your attention, we won't appropriate the money for Z and we're going to issue subpoenas and we're going to require you to – you know, we'll send this – if you can't get the FBI to enforce our subpoenas, we'll send the sergeant at arms of the House to enforce our subpoenas. I mean, this isn't the equal branch of government. The executive branch has no authority to say, we will not give you the information you need, you know, and for the Congress to say, okay, well, gosh, we can't do anything. Would you please give it to us? I mean, you know, it's absurd. (Laughter.)

MR. HALPERIN: It's even worse than that. Members of Congress seem to think that there is some rule somewhere which binds them to accept the president saying, this information can only go to these eight people. There is no such thing. The Constitution may provide a very limited right of the president to withhold advice that he gets from subordinate officials from the Congress, the so called executive privilege. There is no privilege to withhold information from the Congress on grounds of national security. There is nothing in the Constitution that provides that, there is nothing in the statutes that provides that, and there is nothing in the procedures of the Congress that provides that.

Indeed, the procedures establishing the Senate and House Intelligence Committees made it clear that the information provided to those two committees would be available to other members of the Congress based on procedures that the Congress

would set up for that purpose. It also made it clear that information to which other committees had previously been entitled, that is for example, the Judiciary Committee on Foreign Intelligence Surveillance or intelligence collection by the FBI, that that information needed to be continued to be made available to those committees, that the existence of the Intelligence Committee except for information in the CIA did not change the jurisdiction of any other committee, that those committees of substance continue to have authority and the government oversight committees in both the House and the Senate are entitled to that information.

And Congress also has the power asserted by the Congress in the legislation establishing the two Intelligence Committees to make its own decisions about what information should be made public. There is nothing in the Constitution, there is nothing in the statutes, there is nothing in congressional procedures that stands in the way of those congressional actions. It simply requires the Congress to assert the authorities it has and to act on those authorities, and if the president gives them information, they have the right to make it public and should do so when they think it should not be kept secret.

And if the president refuses to give them information, they should do what Mickey Edwards says, it says, we will not provide money to agencies that fail to provide the information to the Congress that the Congress is entitled to. And when the president says, I'm only prepared to tell it to these eight people and only in the White House and with no staff and they can't go back and talk to anybody about it, the proper response to that on the part of the congressional leadership is, Mr. President, you can decide who you tell in the executive branch. You don't consult us about which executive branch officials to share this information with and we do not intend to accept your definition of who we can share this information with in our own staff and among our own members.

MR. AGRAS: Let's stay with this question, because I suspect all of you have other thoughts about what Congress can do to try to shift the balance if the balance is askew, and Mort, let me start with you on the question of let's call it the exclusive means question.

FISA includes a provision as many know that says it is the exclusive means by which the government may conduct foreign intelligence surveillance, but as we've discussed for several years after 9/11, the president authorized the NSA to operate a secret, warrantless eavesdropping program outside of FISA, and he claimed that he had the inherent power to do so, power which Congress could not take away, and in fact, he continues to make that claim. There was a meeting at the Justice Department just a week or two ago at which administration officials refused to commit that the administration would adhere to these new limits that the president had just signed. So if the president reserves the right to violate the law, are there other things that Congress can do perhaps as part of the statute to hold him to it?

MR. HALPERIN: I think there is, and I think we need to go back and look at the history of FISA to see this. We have FISA only because of the response of the telephone companies. The world was much simpler then. There was only one telephone company. It was AT&T. And the reason we got FISA is that AT&T went to the Justice Department

and said, we are not going to continue to provide you with the content of phone conversations of any person in the United States that you ask us about. That's the way it worked until then. It was a wonderful system. There was one man in the Justice Department, he called one man in the AT&T and he would give him a phone number, literally. That was the exchange. Here's another phone number, and the telephone company would provide the content of all of those communications, as I should say, they did of 21 months of my home phone conversations to the FBI just based on this one phone call. And the phone company started getting sued, courts started questioning this, and the phone company basically came to the FBI and the Justice Department and said, no more. We're not going to be subject ourselves to libel here. We want a congressionally authorized system.

And so Congress thought and, I think, did create a system which was very simple. It said to the phone companies, if you get a warrant from the government, you must cooperate. If you do not get a warrant from the government, from the court, the government giving you the warrant from the court, then you must not cooperate under civil and criminal penalties as well as civil and criminal penalties from the states, and the statute clearly provided that state laws against illegal surveillance would apply as well.

Now, the Congress was persuaded I think properly that there were three or four circumstances, emergencies, testing of equipment, leased lines, in which a warrant should not be required. So it added a provision that said, or you get a certification from the attorney general that the statutory requirements have been met. Now, it didn't say the statutory requirements of this statute, and so I suspect that the telephone companies got such a certification from the attorney general based on their reading that the authorization to use military force, somehow authorized this.

But what I think Congress needs to do is to go back to that scheme, the way to enforce exclusivity is not to try to get a president to accept it. No president will formally accept it, and even if one did, the next one should – could ignore it, but to impose the exclusivity on the phone companies and the telecommunication providers and the internet providers, make it even more explicit and you can write the language even more explicitly to say to the phone company, you have to go back and fix the problem that they now don't need a warrant, and I think that's the change the Congress needs to make even if it leaves the standard the same to say, you need a FISA warrant and you got to bring that to the phone companies, and then to say to the phone companies in the clearest possible language, unless they bring you a warrant from the FISA Court or a certification from the attorney general spelling out in detail they they're within one of the statutorily created exceptions to the warrant requirement, and they certify those specific conditions, unless you have that certification or a copy of the warrant, you may not cooperate, and if you do cooperate, you will be subject to criminal and civil penalties. And the great tragedy of giving them retroactive immunity would be to say, when Congress enacted FISA, it didn't mean it when it said, you cooperate without that order and you're subject to penalties. I think that line has to be held and has to be reinforced.

MR. AGRAS: Mickey, did you want to add –

REP. EDWARDS: I wanted to add one thing apropos of what Mort just said and I agree with everything he said, but one thing that Congress could do is to get itself some allies and it could do that by changing the laws about standing, the rules of standing to allow American citizens to have a better opportunity to go to court when they believe that they have been subject to some of this surveillance on behalf of the government.

MR. AGRAST: Kate?

MS. MARTIN: I just want to underscore something Mort pointed out which is that instead of strengthening this power and this means of enforcing the telephone companies to comply with the law, what the new law does is say to the telephone companies, if you have a letter from the attorney general or the director of National Intelligence, help them out and you're obliged to help them out. It takes away the entire enforcement mechanism that Mort was just describing that was included in the original FISA. So there's no issue now of the president – he didn't issue a signing statement because the bill gives him unlimited carte blanche.

And the other thing that the bill does by doing this is that it permits the NSA to sit on the wire, which is one of those – which is a phrase that I use to describe the idea that instead of the government going to the phone companies and saying, here's a warrant to listen to these telephone numbers or read these e-mail addresses, instead, what this bill allows is for the government to go to the telephone companies or the e-mail – the service providers and say, we want to put our equipment on your lines and we will intercept what we're entitled to intercept from the telecommunications cables.

And so you've taken out the basic – you've fundamentally undone the protections that were written into the structure of FISA, and the structure of FISA was that the court issued a warrant saying these numbers and these people can be intercepted and that was given to the telephone companies and they sorted the communications that were covered by the warrants. Now, if we permit the NSA to sit on the wire and have the – and the wherewithal for them to sort, we're back to a system of "trust us." There's no way to know whether or not what the NSA is taking or not taking is actually what they're legally entitled to take. That's why the telephone company framework is so crucial to the entire statute.

MR. AGRAST: Mary, did you have anything you wanted to say about enforcement of Congress' will?

MS. DEROSA: Well, I guess I'll go back – I mean, there's been a lot of discussion that's much of it very helpful to me in thinking through what we need to do, but I'll go back just a couple of discussions ago to what's wrong with Congress and not really weigh in on what's wrong with Congress as much, but on one issue in particular, the lack of information to – in the very limited numbers of people in the Congress that have been – that are given information on some of these issues. One thing that I think is very important and it's not just because I'm on the Judiciary Committee staff, but is that there has been a tendency, I think, over the years to just default to classified stuff goes to the Intelligence Committees, intelligence matters goes to the Intelligence Committees,

and I think in part is because for many, many years in the Cold War there weren't that many issues that – domestic intelligence issues, and so all of the foreign stuff does naturally go to the Intelligence Committees' covert actions and other issues like that and maybe some other committees would have a role on that, but the Judiciary Committee wouldn't.

The Judiciary Committee's role though is really growing in these areas because now, we're dealing more and more with the core function of the Judiciary Committee, which is the rights of U.S. persons, the liberties, constitutional rights and privacy issues, and I don't think that Congress has yet quite come to the realization that – and certainly, the administration hasn't – that the Judiciary Committee has got to be a full player. Now, you've got a situation where there really aren't that many staff on the Judiciary Committee who have SCI clearances.

You know, so there are some real difficulties with just sort of bureaucratically with some of these issues, but I think that that recognition in this debate, I think we do have – now, I know the leadership of the Senate very much of the view and I assume the House as well, but I'll speak for the Senate, very much of the view that the Judiciary Committee has got to play an equal role in the development of whatever legislation comes next, and that we need to be – have as much access to the information underlying it. But that's, I think – you know, that is sort of something that the Congress allowed to happen probably for legitimate reasons, but has to be pushed back quite a bit.

Mort?

MR. AGRAS: I think Mort wants to add to that.

MR. HALPERIN: It isn't what that – it isn't what Congress initially allowed to happen.

MS. DEROSA: Right.

MR. HALPERIN: When the debate was on about the creation of the Senate Intelligence Committee, the original draft excluded the Judiciary Committee from oversight of the intelligence activities of the FBI, and Senator Kennedy, who was about to become the chairman of the Judiciary Committee, said he had not waited 20 years to become the chairman of that committee to lose the jurisdiction over this problem that was central to the rights of Americans, and he insisted and this legislation was changed to make it absolutely clear that none of the jurisdiction of the Judiciary Committee would change because the Intelligence Committee was created.

When Congress enacted the Intelligence Oversight Act, which regulated the flow of information to the Congress, there was that same debate, and this time, it was Senator Javits who insisted that the legislation needed to make it absolutely clear that the jurisdiction of the Foreign Relations Committee and of the Judiciary Committee could get information from the Congress did not change because the Intelligence Committee was created. What happened was that over the years of practice, the Congress allowed this

flow to take place, but it is not reflected at all in the legislation and not reflected at all in the Constitution.

MR. AGRAS: But fortunately, Mary DeRosa is there now, and so that's not going to happen anymore.

MR. HALPERIN: Right.

MR. AGRAS: Mary, I wonder if – before we turn to our audience, which I'm about to do and get their questions – we could just ask you to give us your sense of what's going to happen when Congress comes back on Tuesday and takes up this question.

MS. DEROSA: Well, we now have – in the Senate, we'll have also an attorney general nominee to consider so that will be an interesting twist. First, I want to say –

MR. AGRAS: Or if Mickey has his way, not to consider. (Laughter.)

MS. DEROSA: Not to – sorry. They – just to – first, a sort of background, I want to say that I don't think there is anybody that I know of in the Congress that would defend the process that led to the legislation we're here talking about today. It was way too rushed, way too – it was flawed. It was – you know, I could go on at length about why I believe that happened, but I won't, but just to say I'm certainly not and I don't think anybody would defend – it really is a case that people who were voting on bills had not – you know, in the Senate, one of the bills weren't able to see it until about three minutes before they had to vote on it, and so one thing that I hope I can say will happen is it will not be that process again.

I'm reluctant to do a lot of predicting because the Senate and the House voted on this bill and then left and have been gone on recess. Much of the staff that deals with it have had vacations and overlapping. So there hasn't been a whole lot of the kind of strategic discussion that we will certainly have, but I can say that there is great enthusiasm for correcting some of what we perceive to be – what the leadership perceives to be problems with the legislation that passed. There's a six-month sunset. I think there's also a lot of interest in here, who knows, but there's a lot of interest in not waiting six months, because then we have a – February in the middle of a presidential election, not a great time, and you certainly don't want to have again, backing up against a deadline in the situation that we had last month.

In addition to addressing the problems with the legislation that passed, which is the major issue, there are some issues, other areas that I think not all but some members of Congress and committees in Congress will be interested in raising. One is sort of some broader issues of FISA reform. The administration's modernization bill that is sent up to Congress March or April is still out there. Now, I'm not saying that that bill or most of what's in that bill will be considered or voted on, but there is some interest in some broad reforms that are broader than – and I'm speaking now of the entire Congress, not just the Democrats – broader than fixing the particular issues. Will it come to vote? I

don't know, but we might see some provisions. Some might not be that controversial, streamlining types of issues, issues with how to get things to the FISA Court.

Exclusivity, there's a great deal of interest on the part of many Democrats and a provision that addresses exclusivity; technology, neutrality is an issue, this modernization neutrality, there might be provisions, not necessarily coming from the administration's bill, but – so that is an area that will be part of the debate. How much and whether those types of issues will come to the floor, in either the House and Senate, I don't know, but it will be.

Third, a great deal of interest in addressing carrier liability issues, and –

MR. AGRAST: Prospective or –

MS. DEROSA: Retrospective.

MR. AGRAST: Retrospective.

MS. DEROSA: Carrier liability issues. Again, I'm not speaking just of Democrats, but even on the part of some Democrats, I would say there is interest in addressing those issues. That is not a subject that will be – you know, it will be part of the debate. How it ends up, don't know, but – and whether it will be immunity, substitution, indemnification, some sort of damage cap kind of things, what kinds of issues have we floated around, still all up in the air, but that is going to be part of the debate over the next few months, and though – a couple of other issues.

One is – well, I mentioned the timing. There's a lot of desire, and I think probably would be more likely to – this would be more likely to happen in the House, but moving things a lot more quickly so that we don't bump up against the sunset. The other is the subpoenas, for the Senate Judiciary Committee subpoenas for the documents relating to legal justification, the Terrorist Surveillance Program or the warrantless wiretapping program. Senator Leahy, Senator Rockefeller, the leadership in the Senate and I believe all of the chairmen and the leadership in the House, but I again won't speak for them, but have been very clear that FISA legislation carrier liability, any broader FISA legislation, reforms of carrier liability, we cannot act on those until there is production of documents in the subpoenas. So far, there has been – we've not gotten any – there's not a lot of reason for hope, but you know, that is something that continues to be a pre-requirement before moving forward on some of these issues.

MR. AGRAST: Well, thank you for that, and let me now turn to our audience. If you –

(Audio break.)

MS. MARTIN: – is inside the United States, I think that's quite possible without a warrant. But the question about data-mining is something that we haven't had a chance to talk about, but which is very important aspect of the bill, and the FISA regulates the

government's access to two different types of information: the contents of communications and the metadata, or the information about who's calling whom, when and for how long. That's the information that a traditional pen-register and trap-and-trace device obtains.

And there was literally, I think no conversation or discussion about what the administration thinks it's getting in the bill with regard to the ability to get the metadata. My concern is that the bill does allow them to get metadata on virtually all international communications by Americans, meaning that they could get a record of all communications inside – into and out of the United States, and then they do traffic analysis on that so that they construct a map that shows your associations with other people, and that they do that on the theory that as long as they're not listening to the contents of the communications, they're not in violation of the Fourth Amendment. That's their theory.

But those are all questions that the Congress needs to ask this administration, what their interpretation is of this statute, what their theory is about what they're entitled to do under the Constitution, and what they're doing, and we've had none of those questions asked or answered yet.

MS. DEROSA: And I'll just – on that last point. I think that's absolutely right, and one of the big questions is with this bill that was passed, you know, clearly they got what they were saying they wanted, but they probably got a lot of other things that they weren't saying they wanted and we need to understand what those are, and I think that it's one of the many areas that whether – and to what extent data-mining and sort of these broad kinds of analysis are permitted under this Act is one of the areas we really need to examine.

MR. AGRAS: Yes. I'm sorry, actually the gentleman in the back has been waiting, and then you.

Q: Hi. Radcliff Louis (sp), (unintelligible).org. Let me start by making a disclaimer that I'm no supporter of the Bush-Cheney doctrine. That said, Mr. Halperin suggested that members of Congress appear not to understand the power of Congress as an independent body. That said, my question is in three parts. They're very short. It appearing that Congress still depends on the administration for security clearance, and the question becomes does Congress have oversight powers? Do the oversight powers include field investigative capacity? If Congress engages autonomy in its field investigative capacity as well as information clearance, it being that the Supreme Court issues mandates in the name of the president of the United States, why shouldn't the executive branch then consider such actions of Congress an encouragement on the executive privilege? Is this – and I direct this portion to Ms. DeRosa – will the Judiciary Committee consider that kind of question and issue?

MR. HALPERIN: Members of Congress do not need clearances. The clearance process is an invention of the executive branch and has to do with the president's exercise of his power to determine who in the executive branch he will give access to certain kinds

of information. All members of Congress are deemed to have clearances and I think constitutionally there is no alternative to that. The president cannot refuse information to a member of Congress on the grounds that he or she is, quote, “not cleared for it.”

Congress needs to have a procedure to clear its own staff and for that purpose it can and should use the facilities of the executive branch to do the field investigations, but the way it works in the executive branch is that the head of each agency, independently besides, based on the field investigation whether to give a clearance to somebody, and you have situations where the secretary of defense gives somebody a clearance and the director of Central Intelligence says, sorry, I’m not giving that person a clearance based on the same information because he is or she is responsible for the people under them and what they do with the information.

Congress should proceed in the same way. It should rely on field investigations, but then members of Congress should make the determinations of which members of their staff are trustworthy and have a need to know and therefore should be given access to this information and should inform the executive branch that it plans to give the information to those staff members. The notion that it allows the other branch to say, you can give it to that staff member but not that staff member, or no staff members at all, makes it impossible for Congress to do its job.

REP. EDWARDS: Yeah, let me just underscore that. The Congress does not need the permission of the executive branch to do anything. Period. (Laughter and applause.)

MR. AGRAS: Mary, did you want to take that last question?

MS. DEROSA: Well, I – the issue of security clearances, it’s sort of – there is not a problem with actually getting staffers cleared, except for that it’s incredibly time-consuming, cumbersome, in a way it is for anyone who is getting clearance, and as Mort said the members don’t need to get a clearance, but staffers do. But getting the clearance is only the first step, and what the real problem is that – is that then the administration says, do you have an SCI clearance? Good for you, but that doesn’t work for this. You know, I’m going to – you know, and they have different compartments and different – now, that is true in the executive branch too, but it has gotten to the point in the Congress that there’re just extraordinary limits put on what types of information different staffers with the appropriate clearance can see or even senators who all have the appropriate clearance.

And that is part of – I mean, will – I don’t know that the Judiciary Committee is considering looking at that issue in isolation, but certainly, in the context of how the senators on the Judiciary Committee need to see more information about, for example, the warrantless wiretapping program and other issues related to FISA. I think it’s a big part of the discussions about the subpoenas and it is something that I know Senator Leahy is really pushing back on, the limitation of information that staffers and senators are permitted to see.

MR. AGRAST: Last question, and the gentleman in the middle.

Q: My name is Corey Owens. I'm with The Constitution Project. The two panels have effectively revealed that this issue has riled both the left and the right, which I think it's interesting given the ever fluctuating primary calendar. And so my question then, especially for Ms. DeRosa, is how the presidential election – how the panelists might anticipate the upcoming election, especially the ever fluctuating primary calendar is going to impact the debate about FISA, wiretapping and the state's secrets privilege that's being used to fend off judicial action against it?

MS. DEROSA: I would say that presidential elections almost never have a good effect on the debate – (laughter) – in the Congress. I'm new to the Congress, but having even from outside I've been able to tell that, and I think that there's – and that's why there is a good deal of interest in trying to move whatever legislation we're going to do up so that it's less likely to really bump up against the presidential campaigns, even though, I mean, obviously, the presidential campaigns are going on right now, but the later we wait to resolve the issues, the less likelihood there is of having a debate that isn't sort of infected by it.

REP. EDWARDS: You know, I think the presidential campaigns give a marvelous opportunity for the press, for activists, for citizens to challenge the candidates about these various issues. The Democratic side, and the Republican side is talking about whether or not you believe in reincarnation, or whatever they talk about – (laughter) – but the Democratic side is still talking about who voted to authorize a war five years ago. I mean, the question – you know, we've had unpopular wars that we should not have been in the past. We'll have them in the future. This is a big issue.

But the real, more important issue here is civil liberties. It's about national security, rights of privacy, all that combined, and that's really not part of the debate. It's not part of what the journalists are asking. It's not part of what the moderators and the debates are asking, and this is the time to put people on record as they're running for the office about how they feel about signing statements, about how they feel about sharing information with Congress and so forth, and I think the presidential election season is a great time for those who want to take these issues on.

MR. AGRAST: Mort, last word.

MR. HALPERIN: I agree with that. I think part of what we have to take on is the threat to national security which comes from the politicization of this issue by the president of the United States, because what he has done is to destroy a bipartisan consensus on these issues, to turn these issues into political issues, and that is irresponsible and dangerous and a threat to the national security, and if I didn't (unintelligible) the phrase it was never appropriate, I would say it was unAmerican, and I think we have to take it on at that level. And the public needs to understand that the president is jeopardizing our security by destroying a bipartisan consensus, by destroying the sense of trust that people had when the administration said it needed something and really meant it if it was for national security, and that it would work for the Congress to

get it in a way that protected civil liberties. That's how we dealt with these issues under the Democratic and Republican presidents up till now. That is, in my view, the most dangerous change and that is the change that I think needs to be taken on in the political campaign.

MR. AGRAS: Well, and that's a suitable challenge to leave us with. Before we close, I'd like to note that a video and transcript of this program will be available on our website at www.americanprogress.org. I'd like to thank our wonderful staff who worked so hard on this event. Thank you all for joining us, and please now join me in thanking our excellent panelists.

(Applause.)

(END)