

Center for American Progress



AND



AMERICAN
CONSTITUTION
SOCIETY FOR
LAW AND POLICY

PRESENT:

**“WARRANTLESS DOMESTIC SURVEILLANCE: ITS
ROOTS AND WHERE WE GO FROM HERE”**

MODERATOR:

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FEATURING:

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MR. MICHAEL GREENBERGER: Welcome to this very interesting discussion done by this very interesting and distinguished panel. I think we are all indebted to the American Constitution Society and the Center for American Progress for bringing us together today to discuss this issue. One of our panelists, Bruce Fein, yesterday testified in a very important hearing before the Senate Judiciary Committee and he is quoted in today's paper as saying, "This is the defining issue in the constitutional history of the United States." And I think while we might be inclined to think about that, I think on reflection I think he is exactly right. The same article that quotes Bruce Fein says, "The outcome of this issue will affect the balance of power in government for decades to come."

This is a very sophisticated audience, so I won't take a lot of time in the introduction. I think it was a universal feeling in mid-December when we opened our *New York Times* to read much to, I think, many people's dismay including, I would venture, many people within the executive branch that the United States government was conducting warrantless surveillance on U.S. citizens outside of the Foreign Intelligence Surveillance Act. This seemed to be a bad dream come back to us.

Gary Hart to my left was a young senator on the Church Committee in the mid-'70s that in hundreds of pages of reports revealed the dangers of warrantless wiretaps judged only by the executive branch as to their appropriateness – many, many abuses around the world took place at the hands of executive warrantless wiretaps by the United States government. And, ironically, one of the poster children of the abuses is also represented on our panel today by Morton Halperin, who, at the instigation and collaboration of Henry Kissinger and J. Edgar Hoover, was the subject of warrantless wiretaps both when he was on the National Security Council as a staff member and after he left and he received some vindication – some decent vindication in that regard in a lawsuit that followed.

Senator Hart, of course, was in the Senate during the Church Committee hearings and the passage of FISA. He is now just assumed the Wirth Chair at the graduate school of public affairs at the University of Colorado in Denver. He was the founder of a very far-seeing institution – the Hart-Rudman Commission – that prior to 9/11 predicted the calamity that we find ourselves in today. He will this afternoon, if you want to continue discussion with him, be at Politics and Prose where he'll be speaking about his new book, *The Shield and the Cloak: The Security of the Commons* from Oxford University Press.

Mort Halperin is the senior fellow at the Center for American Progress and director of the Security and Peace Initiative. He's also the executive director of the Open Society Policy Center among his many distinguished positions that he holds. He has a Ph.D. in international affairs and really needs no more introduction to this knowledgeable group.

Bruce Fein is a constitutional lawyer and international consultant. He was many years a career lawyer in the Department of Justice starting in the Nixon administration, but he certainly became quite a prominent member of the Reagan Justice Department when he served as associate deputy general and then later as general counsel to the FCC. He is a frequent writer on important constitutional issues and writes a weekly column for the *Washington Times* among other issues.

We've agreed to have very brief introductory presentations because the panelists believe with the energy and intelligence of this group assembled here today that they're very interested in discussing these issues collaboratively both among themselves and with the audience members. We will start with Senator Hart, who will hopefully give us somewhat of a history from the Church Committee and FISA days and put the issue in context. He will be followed by Bruce Fein, who will talk about legislative endeavors to cabin the executive branch's efforts in this regard. And finally, Morton Halperin will make his presentation including a focus on the importance of the communications industry in facilitating these warrantless wiretaps.

Senator Hart?

SENATOR GARY HART: Professor Greenberger, thank you very much and thanks to the host and sponsoring organizations here for this opportunity. Now that I'm a professor, I approach the table wondering if I'm no longer honorable, but that's – so we can have a separate discussion about that. (Laughter.) I thought when I was in the Senate years ago and saw older, retired colleagues what it must be like to be kind of a walking institutional memory and then, before I realized it, I was a walking institutional memory.

Let me give a bit of background to the Senate Select Committee on the Investigation of the Intelligence Services of the United States, often called the Church Committee after its chairman, the late Senator Frank Church of Idaho. In the Congress of '73-'74, there were sufficient rumors of abuses of constitutional rights to cause both houses of Congress to begin to institute proceedings to find out what, if anything, was behind this. In the Senate, the majority leader of the time, the late Mike Mansfield introduced Senate Resolution, I think it was 400 – I can't remember exactly – at the end of that Congress and it was passed, if not unanimously, close to that by that Congress and it was to authorize the appointment of a Select Committee to look into these alleged abuses. And the Committee was to be empanelled at the beginning of the next Congress, namely in January, 1975.

Coming into the Senate that January, I was unaware of this resolution or the Committee until the majority leader took me aside, I think on the third week that I was there, and said that he was appointing me to the Committee. And I ended up being, I think, the youngest and certainly the newest. The Committee was composed of six Democrats and five Republicans including on the Republican side, Senator Barry

Goldwater, Howard Baker, the late John Tower, Mac Matthias of Maryland; on our side, Frank Church, Walter Mondale, Philip Hart, and I was at the end of the table.

We began our work shortly thereafter, I think in February and since up to that point neither house of the Congress had exercised its constitutional responsibilities to oversee the intelligence operations of the United States, no one quite knew what to do. And to illustrate the point, I'll tell an anecdote. In our first two or three organizational meetings, we all went around the table saying, "How do you think we should get started?" We didn't even know if we requested testimony or documents from the CIA and the FBI and the rest, whether they would even comply. It was that uncertain. So after a bit of fumbling and bumbling, I had the temerity to raise my hand and said, "Mr. Chairman, maybe the way to start this off is for each of us to ask for our own personal files from the CIA and the FBI." And there was dead silence in the room while 11, 10 other senators contemplated the implications of this. And the silence was finally broken by Barry Goldwater who said, "God damn it. I don't want to know what they've got on me." (Laughter.) So some of us requested our files and some did not.

We started our proceedings. It turned out that the director of the CIA of that time, Bill Colby, was cooperative – cooperative to the point where by that Spring of '75, we had a terribly top secret hearing in which all of our staff except for our staff director and I think general counsel, and Director Colby and one assistant were barred and the director took about three hours to reveal what was then called the "family jewels." And the family jewels had been a compilation of the inspector general of the CIA as I recall – and Mort may have to verify my fading memory on this – but they included starting with attempted assassination of at least six foreign leaders. In the case of Fidel Castro with almost demented insistence, and others as well. There was consternation or at least surprise among the Committee members because this was really not known by anyone. And the agency itself had, I think, prayed that Director Colby would not reveal some of these things.

He also insinuated or maybe stated that there had been massive surveillance of American citizens. This was later confirmed reluctantly by representatives of the FBI. And that was all headed under, as I recall, a program called COINTELPRO, and COINTELPRO involved electronic surveillance – principally wiretaps, mail surveillance and physical surveillance – of a variety of people involved in the antiwar movement.

So the only thing when the story broke in the *New York Times* recently on this – roughly the same equivalent, the only surprise was how soon thereafter the same set of coincidences or policies had occurred. And it is a kind of testimony to the failure of any kind of collective memory in our society that people were surprised by this. If you compare the two eras – the Vietnam era, which by the way, featured not only Vietnam but a social – a cultural revolution roughly summarized in the press as "sex, drugs and rock and roll," but civil rights movement, beginning of the environmental movement, beginning of the women's rights movement. So these were yeasty times to say the least, and the president in power at that time, Richard Nixon, didn't have any use for any of it

and therefore had come to believe that there were enemies in our midst and we had to find them, including if they happened to be American citizens.

So what we are seeing now, in my judgment, is a kind of rerun of that period of the '60s and '70s: another war, another time, not the same cultural and social background going on as a drumbeat in effect behind this war, but obviously increasing American dissatisfaction. A highly secretive administration once again repeating the Nixon pattern, and the sense of that paranoia including against our own citizens: anyone who dissents is therefore unpatriotic and potentially a member of al Qaeda and therefore we can justify anything. The really chilling, but not surprising, story is in the *New York Times* this morning and that is to the effect that Attorney General Gonzales has now hinted in a letter to the Congress that the NSA surveillance was not all of it.

Now, two final observations: it is total nonsense – and I hope my fellow panelists will verify this – to say that the FISA Courts cannot be used. This is just total nonsense. I was involved – (unlike?) my former colleague, Joe Biden, I will not take credit for writing the bill, but I was involved in its drafting and passage, and it was established to protect the Fourth Amendment rights of the American people and to establish the standard legal requirement of probable cause before you violate or potentially violate the constitutional rights of American citizens. And those courts in my understanding, and others can verify this, in the past one, two, three, four years have authorized 1,700 surveillances and denied only four and they've in almost every case done so with great speed. This administration simply didn't want to be bothered and it wanted to arrogate to itself all powers and to do so in secret. And you don't have to be in Washington very long to know there are no secrets: ultimately, everything will come out. And as in the Nixon years, the predictable – when information was leaked, the predictable reaction was let's go after the leaker rather than let's try to fix the problem. That's basically my – those are my observations.

MR. GREENBERGER: Bruce Fein?

MR. BRUCE FEIN: Testifying yesterday, Joe Biden volunteered that he agreed with my remarks and sort of laughed and whether I was worried by that. (Laughter.) I said, "No, because this issue is one – we're all Republicans, we're all Democrats, we're all Americans because what's at stake is our separation of powers, checks and balances, the equivalent of the procedural Bill of Rights for ourselves and those yet to be born." This is not to be taken lightly and the response of the administration has been at the urging of some Republican senators to seek a grand jury indictment of the *New York Times*, which is responsible for whatever little congressional oversight has ensued rather than going after the culprits who initiated a blatantly unconstitutional program.

Now there are a couple of features that make, I think, this problem more worrisome than the Nixon abuses. Perhaps, the clearest is that we are in a permanent war against terrorism. This has no ending point. The attorney general himself volunteered in his testimony on February 6th that, no, the administration had no idea as to what benchmarks would signal an end to the war. So this isn't emergency powers in the

customary way we think about them. This is permanent change of the political landscape forever.

If the president can run the country in secret, in violation of federal statutes now, that means any future president can pick and choose what other statutes he may wish to disobey and we will not even know about them. And that's not a constitutional dispensation. It's certainly not why we fought to overthrow King George III and a tyrannical parliament.

A couple of other observations I'd like to make about the theory that the president has employed to justify the program that is chilling. He asserts that the commander-in-chief authority empowers him to gather anything he assigns as foreign intelligence in any way he wishes to defeat the enemy, meaning mail openings; breaking and enterings; torture; cruel, degrading treatment; internment camps; and even assassinations. I was stunned at yesterday's hearing when one of the president's defenders, Douglas Kmiec, who served four years as Office of Legal Counsel head, was confronted with a question from I believe Senator Feingold whether or not the theory of the president's Article II power would justify assassinating Americans on the sidewalk or a pizza parlor on the suspicion that they were al Qaeda. And his retort was, "Well, there's an executive order against it." What if there is no executive order against it? Hemmed and hawed and said, "Well, that's a hard question." I mean, that's a hard question? (Laughter.)

The theory also is what makes this worrisome from a constitutional sense, is all of the world is a battlefield – you know, like all the world's a stage – and therefore anybody's home is a battlefield because al Qaeda might crash an airplane into it, and therefore we can intercept any conversation on the theory that it is battlefield intelligence, which would destroy any distinction between battlefield and non-battlefield communications for purposes of assigning what's sensible to endow the commander-in-chief to intercept and what is not.

Lastly, with regard to this claim of necessity – and of course there is always some force to that. The Constitution is not a suicide pact, whatever else it means, and self-preservation, of course, is a standard for all countries at all times, but the claim of necessity is exceptionally feeble in this instance. Number one, the Supreme Court has held for long years the Fourth Amendment has no application outside the United States. We can intercept every single al Qaeda call or other alien call into the United States before it starts to transit from the continent of the United States without any cause at all. We can vacuum-clean all of that. This hypothetical that, "Well, if al Qaeda calls in to the United States and an American picks up the phone, we don't want to have to hang up," as the problem that the administration confronted is totally bogus. No one has ever had to hang up if that ensued because there wasn't any Fourth Amendment right of privacy that protected targeting the al Qaeda individual in the first instance.

I would wager that at least 90 to 95 percent of all communications pertinent to fighting the war against terrorism isn't governed by the Constitution at all or FISA. We're talking about a very narrow slice of communications that might be helpful, that

target American citizens on American soil. If the American citizen is not the target, the Fourth Amendment and FISA doesn't come into play.

The attorney general has conceded that with regard to domestic al Qaeda calls, FISA is employed. He was asked rather astonishingly by Senator Herbert Kohl, "Well, if that's true, why are you trying to intercept those calls under your warrantless program? You're trying to create a base of knowledge that will be most effective at forestalling another 9/11. Wouldn't the domestic calls be the most sensitive?" Well, the president decided that he didn't want to do it. He was asked why. Well, he said, "Well, look at how much uproar there's been when we intercept international calls and domestic would be worst," indicating, well, I guess he'd sacrifice our safety on the altar of political popularity. This is the president who says, "I'll do anything to save your lives."

Moreover, the attorney general did not say when he was going to the FISA Court to get warrants to intercept domestic-domestic calls it was unworkable. Indeed, in 2002, the Department of Justice testified to the Senate Intelligence Committee the Patriot Act reforms were working beautifully. It made the administration able to act nimbly and quickly and they didn't even want to amend FISA to reduce the probable cause standard to reasonable suspicion. That was the Department of Justice viewpoint under then not libertarian John Ashcroft. We don't know why anything's ensued since 2002 that would require bypassing FISA in order to intercept these communications that are said to be so indispensable to thwarting 9/11.

Moreover, when you ask, "Well, please tell us what is the utility of this warrantless program in thwarting terrorism?" what did they come up with? It's zero. Said, "We can't tell you." "Well, why is that?" "Well, it's classified." "We're not asking for operational details or intelligence identities, just the number of incidences." "Well, we can't tell you. We can't tell you anything." In fact, it was the attorney general didn't just hint at what Senator Hart said of undisclosed NSA programs, it was authoritative. The attorney general in February 6th, and I was within five feet of him, said, "Mr. Chairman, we're telling you only about the programs President Bush has stated that we can tell you about and that the *New York Times* has published; others we have to keep secret. We are not telling them because if we did then it would give a clue to the enemy."

The last element before I go to the statutory questions I think has to be underscored is to examine clearly this theory of justified secrecy in order to prevent the enemy from evasive action. What the president is saying is that he has to run a secret government and not tell us ever what he's doing to collect information because if we write it down someplace, like in FISA, maybe an enemy that was like Ichabod Crane and hadn't been around for the last century and doesn't know that you actually undertake electronic surveillance would start to change their communications habits because they would say, "Well, gee, maybe the United States is trying to intercept our communications," (though?) a fatuous idea in the first place. These people have had communication intercepts after them for long, long years. And if you accept what the president is saying that on his say so alone, he can say, "I have to operate these

programs.” Never tell Congress. Never ask for statutory authorization ever. He can run a private government and say, “I’m keeping everything secret because anything I tell you might aid the enemy, including how many dollars I want to spend on the program, including how many people I want involved in the intercept.” It’d be like saying he’d have to keep the national security secret as to how many men we actually have in the armed forces.

Now, I understand as a hypothetical matter it is conceivable that if you took someone who had a very, very, low IQ, then may be they would be alerted to something that their common sense wouldn’t tell them to otherwise by this publicity, but the cost and danger to a democratic dispensation and accountability of the president is so acute, we have to take that risk. We take risks all the time of having a free country. We don’t have a Gestapo, even though if there was a policeman on every corner maybe there’ll be fewer crimes.

What’s to be done by statute? I’ve been talking to members on the Senate and the House side, and what I have suggested is as follows. It is foolhardy to craft a legislative remedy that addresses a problem whose scope we don’t know exists because it’s concealed from us, so that the Congress should utilize what they call the power of the purse. They enact a law that says to the president, you have no funds to survey outside of FISA unless in 30 days you come to us and explain what the problems of FISA are and we will put it on fast track – you already have fast-track authority to consider trade agreements – and agree to vote up or down. And if you don’t come forward in the 30 days or 60 days, the program is shut down and you’ve conceded then FISA is a workable proposition.

There’s another way in which you can approach this issue and that is, have the same appropriations measure prohibiting any electronic surveillance outside FISA unless within 30 or 60 days, the attorney general goes to the FISA Court, seeks a warrant under FISA, and says to the judge, “I want to use information in support of the warrant that we’ve gathered under the NSA’s warrantless program.” Then the FISA Court can determine whether that kind of information is admissible in considering whether the probable cause has been met or whether it’s unconstitutional and therefore it’s tainted information and has to be excluded. That decision then can be taken to the FISA Court of Appeals or to the United States Supreme Court.

The additional issues that have been raised is what would happen to those programs that have occurred before the FISA regime reentered the picture? Would that enable those who are suspects to escape prosecution because of a suppression remedy? And what I’ve suggested is that what you can do – Congress I think would have authority to decide what should be the remedy for the unconstitutional action that has ensued for the last four plus years by having the NSA conduct the warrantless surveillance program outside of FISA. And I believe it has authority to say suppression doesn’t have to be a remedy that’s obligated on the Constitution. You can provide a Bivens constitutional damage action with the customary good faith defense, which would probably prevail given some grayness in the law that could be argued with regard to the NSA folks who

are conducting the surveillances. And in that way, you would allay the fears that, oh, if you retroactively looked at the program and said it's bad, then we'd have al Qaeda on the streets and shooting us. You could provide an alternate remedy.

Is this going to take hold? I don't know. There are four or five different competing statutory proposals out there. The most encouraging sign is there does seem to be (finally gelling?) a consensus on the Senate side and I think on the House side that there has to be some statutory response to the president. We simply can't concede all powers to one branch of government and return to King George III except with the crown that sparkles even brighter.

Thank you.

MR. GREENBERGER: Thank you, Bruce.

Mort Halperin?

MR. MORTON HALPERIN: Thanks. I do think we're going to have to get to a legislative remedy, but I do think Congress needs to insist that it first get the facts so that you don't try to legislate in the dark. Second, I think Congress has to insist that if it provides additional power to the president that he agrees that he will conduct electronic surveillance through those procedures, otherwise it's a total waste of time. The Congress gives him more authority and he still goes off on his own and conducts surveillances outside of that range of authority. I think the place to start with legislation is to take the attorney general's description of the program that he has described and the shortcoming he's described in that program in terms of the flexibility of the emergency surveillance process and I think one could craft legislation that was very narrow that gave him the additional authority to deal with emergency situations; again, providing that the president then agrees that he now has sufficient authority to operate within FISA.

I wanted to take a minute to talk about the government statutory claim because it's a real puzzle and I think it provides a clue to what I think may be the only effective way we have to stop this program. Here you have an administration that claims inherent presidential power to do anything, which ignores legislation, has told Senator McCain that it'll torture as many people that you want to notwithstanding it's legislation, and continues to do so, and yet it has made a great claim here in the electronic surveillance that it is relying primarily on the statutory claim that the authorization to use military force authorizes this FISA program. And indeed the attorney general has said, and one doesn't know which of the things he said one should do him the respect of assuming he does not believe and which ones you should think he does believe, but he has said that they have not really done a serious analysis of if they were in Jackson's third category – that is, where the Congress has taken the authority away – whether they would really have the authority to do this.

Now, in fact, every person I know but the attorney general believes we are in Jackson's third category, but yet they claim they are in category one because they claim

the authorization to use military force is somehow a statute that authorizes surveillance and that FISA has (their place?) for such a statute. Now, both of those claims are absurd. If you look at the FISA structure, it says very clearly that FISA and Title III, the criminal wiretap statute, are the sole means to conduct electronic surveillance. The only reference to pursuant to statute is in the criminal penalty where Congress says that it's a crime unless you conduct the surveillance pursuant to statute. Any fair reading of the statute shows that Congress meant pursuant to the statute meaning FISA or Title III.

Then you have the equally absurd argument that the authorization to use military force was, in fact, an authorization to conduct electronics surveillance outside of FISA. Every senator has said, including Senator Graham and Senator Brownback and many others, that they have no idea that they were doing that. They certainly did not intend to do that. At that very moment Congress was seeking amendments to FISA under the Patriot Act when it had just gotten in its view authority to ignore completely the limits of FISA in the authorization to use military force. Moreover, that statute simply does not provide an alternate statutory scheme. So this leaves the dilemma why does the administration not simply rely on the claim of inherent presidential power, which while I think is wrong and very dangerous, nevertheless is not implausible and there is no clear court decision holding either way on the question.

And I think the answer lies in another provision of the statute. Senator Hart will remember one of the reasons that the administration wanted a statute and one of the reasons Congress wanted to legislate was to deal with the ambiguity then facing AT&T, which was our sole telecommunications company. It was getting phone calls from the FBI with phone numbers saying put a tap on this phone, and that was the sole justification given to the phone company as to why a phone should be tapped. And the phone companies were starting to be sued, among other people by me, and was getting nervous about whether they had a sufficient rationale to cooperate with the FBI getting a phone number in a phone call.

And so Congress when it legislated FISA dealt very carefully with the phone companies. It said that they would be committing a crime and be subject to criminal and civil liability if they conducted electronic surveillance outside the scope of Title III and FISA. And it said the only circumstances under which they should cooperate with the government is if they got the notices required by Title III or if they got the warrant required by FISA or the certification provided under FISA for those few situations under FISA where a warrant was not required. And the statute says that the phone companies need to get from the attorney general a certification that the statutory requirements had been met. And I believe that the attorney general of the United States has given those certifications to the phone company. I believe that those certifications are unlawful, that they're a violation of the statute because the statute meant the lawful requirements of FISA had been met; that is, that this is a circumstance in which FISA does not require a warrant. It did not mean that they follow the non-existent requirements of the authorization to use military force. But I believe that that is the basis under which the phone companies have been cooperating. I believe there's now enough information

public that they should stop cooperating. I believe that, in fact, at least going forward in the future, the phone companies are subject to criminal and civil penalties.

But this would become even clearer if Congress would simply to legislate to say that the authorization to use military force was not a statute which superceded FISA. That would leave the government to be able to rely solely on its constitutional claim. It would then have to go to the telephone companies and say, "Cooperate with us because the president has inherent power to do this." To which I think every prudent privately held company would say, "But the Congress has created civil and criminal penalties and we are now too exposed to continue to cooperate." I would like to see the Congress cut off the funds. I think that's clearly the cleanest way to do this, but until it's ready to do that it should at least make it clear that it has not provided statutory authority for this program.

MR. GREENBERGER: Thank you very much, Morton.

I want to thank the panel for being succinct and informative at the same time, and we are even a little bit ahead of schedule which is very rare, especially when such good thoughts are adduced. And so now if there are people who are among the attendees who would like to ask this distinguished panel follow-up questions on their presentations, we would very much like for you to do so. There is going to be a microphone and the American Constitution Society and Center for American Progress would appreciate it if you identified yourself for us.

MR. FEIN: Michael, could I make one –

MR. GREENBERGER: Oh, sure, Bruce.

MR. FEIN: I just wanted to comment on I think Mort's brilliant insight here, but I think he's wrong not because of his logic but the reason is this idea that the authorization to use military force trumps FISA only appeared like a surprise O. Henry ending more than four years after its enactment. It's what the attorney general described as a non-static evolving interpretation. It is absolutely clear that this idea had not passed anyone's mind at the time of AUMF, not at the first year, the second year – forever, until the *New York Times* published. Then they scampered around and said, "Jesus! What can we do now to justify this?" And the attorney general himself, despite repeated questioning, has always evaded a direct answer to the question "When was the first date when the president was told AUMF trumps FISA?" He refuses to answer. The reason why that's very telling is that the Supreme Court has always said a contemporaneous interpretation of a statute is entitled to some deference. One that looks like an afterthought for expedience purpose is entitled to nothing. So there would be an enormous incentive, if it were true, for the president or the attorney general say, "Oh. We came up with this AUMF authority right after it was enacted." But, of course, it didn't happen then.

The second observation is to make is that the president has not been reticent about putting in these presidential signings statement and saying, “Ah. Now I’m endowed with the king to do X, Y, and Z.” You’ll notice with the AUMF, he doesn’t give even a clue that he thinks this trumps FISA and now he can undertake surveillance without warrants. That’s why although, Mort, I can give credit for creativity, I think the administration is less logical than you are insinuating. (Laughter.)

MR. GREENBERGER: Senator Hart?

SEN. HART: I’m unclear – there’s a general assumption in this debate not just today, but throughout the city that new legislation is required. I’m unclear as to why that’s the case. If Congress did its job of oversight and the administration obeyed the law, I don’t know why we need additional legislation.

MR. FEIN: I think that’s right. I think the idea, Senator, is to at least permit the administration an opportunity to come forth and say this is why FISA doesn’t work. Something that –

SEN. HART: You can do that without new legislation.

MR. FEIN: Yes, but they are not and will not do this until Congress forces them, otherwise they will continue this warrantless surveillance as they are doing this very moment. And as long as they are able to evade a constitutional challenge by not seeking FISA warrants based upon the warrantless program, you’re going to be around for years before there would be any final check by any court or otherwise.

SEN. HART: Well, let’s get to the chase here. The problem is the Congress belongs to the president’s party and it’s not doing its job. You don’t have to introduce legislation to hold the administration to account. It’s called oversight.

MR. FEIN: But they aren’t doing that.

SEN. HART: Precisely. So why do we need new legislation? (Laughter, applause.)

MR. FEIN: Because my view is a matter of tactic here, not disagreeing that if we lived in a perfect world we wouldn’t have this crisis. That as a matter of tactics it gives Congress an opportunity to put the burden on the president of coming forth and killing his own program by not providing the information, as opposed to having an executive privilege squabble that will be in the Supreme Court for five years to move forward by using the ability to control the purse.

MR. GREENBERGER: Okay. Why don’t we give the audience some chance to ask their questions. Are there people – I see there are people right there. Are you going to hand the microphone –

Q: Paul Friedman. I'm the senior vice president for the American Jewish Congress of the National Capital Region. And I agree with Senator Hart on what he just said and I have a question with regard to impeachment, obviously, if we had a Democratic Congress we might have a different thinking process along those lines. And I'm wondering if we did have a Democratic Congress would you be calling for that, and moreover, do you think the president has somehow insulated himself from that by trying to suggest that he had informed the leaders of Congress, in particular some Democrats, about this early on, therefore if he should go down everybody in the leadership should go down and somehow this insulates him? So that's essentially the question.

SEN. HART: Well, I can only respond by reminding people of the way the Vietnam War was brought to an end, and it was done so by a Democratic Congress holding hearings on the conduct of that war under first a Democratic president, then a Republican president. I think if there is a central truth that's come out of the remarks here today already from Professor Greenberg, Mr. Fein, and others, it is that the issues we now confront rise above partisan politics, and I think the clash that's going on in the city right now is this holding to support the president, mindless, tiny-minded, partisan, ideological system that now occupies the city versus the more transcendent issues of the rights of the American people under the Constitution of the United States. And I agree completely with the high-flown remarks that this is bigger than politics. This is the core of who we are and what we believe in. And I guess it still amazes me that more members of Congress haven't figured that out yet. They didn't take an oath to support the president, and yet that's all they talk about is, I support the president – mindlessly, mindlessly. They didn't take an oath to support the president.

MR. FEIN: But what's equally disturbing to me is executive branch officers – I served in the Reagan administration and others and I took an oath to support and defend the Constitution of the United States. My baptism in Washington was coming to the Department of Justice and soon thereafter watching Elliot Richardson resign and William French Smith resign. Judge Bork would have resigned except he was implored to stay to keep the special prosecutor's office open. But they resigned and said they weren't going to be implicated in this. What's happened since that time? I mean, we're told that there are persons in the Department of Justice who disbelieve what was done was right. They left, and where are they? And I think that what Senator Hart has observed with regard to the congressional branch is equally applicable to executive officials.

I'm reminded – and I was in a debate several weeks ago concerning Francis Biddle, the attorney general under Franklin Roosevelt when the Japanese-Americans were interned, and he believed it was unconstitutional, but he went along and said, "I have to clap for the president." This is a situation where he was told that the evidence showing that the Japanese needed to be interned was that their unwavering loyalty since Pearl Harbor showed that treason was afoot. (Laughter.) This was truly Alice in Wonderland, and yet he didn't resign.

MR. GREENBERGER: Yes?

Q: I'm Ed Spanis from *Executive Intelligence Review*. I also think the question of impeachment has to be addressed, and the biggest problem is not the president, the biggest problem is the vice president, who everyone acknowledges I think is the driving force behind this. Getting Bush a lot of the way and leaving Cheney there solves absolutely nothing – makes the situation worse.

MR. HART(?): No one wants to get near Cheney these days. (Laughter.)

Q: Well, that's the problem. (Laughter.) That's the problem. People are going to have to have the guts to do that. Because passing another law, anything of the sort, Cheney's position is – which he will get the administration to follow – is that they can ignore it. They don't have to pay attention to it. Look at the defense appropriations bill with the anti-torture provision on that. They just said, "I'll do what I want." The same thing with the TIA program, right, of Poindexter. Congress shut that down, and it continued. And in fact, Poindexter acknowledge two years ago that the thing just went black; that it's still there. So passing a law I think will not do any good as long as you have Cheney and Addington and this crew in there. So my question is, does anyone honestly think that there's another remedy short of that?

MR. GREENBERGER: Mort?

MR. HALPERIN: Yeah. Well, I mean, we're dealing here with a paradox. If Congress had the will to do something, there's enough provocation that – there's a variety of different things it can do. It shows no inclination to do any of them and so we're each trying to guess what is the most likely of all the unlikely ways in which Congress will in fact stand up to face this constitutional crisis. The sort of simple first step I think is an investigation and we did do that under Watergate, we did do that under the intelligence abuses. Before you decide whether you need a legislative remedy or an impeachment remedy, you need to know what happened. And there is still pending before the Senate Intelligence Committee a motion to conduct an inquiry which still seems to have a majority of the members of the committee ready to support it if it comes to a vote. I think that's the place where we have to try to start. And the House Intelligence Committee – some of them say they've already started an investigation, or it isn't clear how serious it is.

We need to – Congress needs to know what happened, needs to know what is happening now. It needs to know how many other programs there are and what form they take. And then one can hopefully decide how do we stop that which is unconstitutional, how do we authorize that which would be legal if Congress authorized it but is not now, and are there people who need to be impeached because they deliberately violated the laws and their oath to take care that the laws be faithfully executed? But I do think the logical place to start is with an inquiry by the Congress, which the administration has been desperately working to head off.

MR. GREENBERGER: Senator Hart?

MR. HART: Well, it's broader than that. I mentioned the Vietnam War and the televised Senate hearings that had much of the country glued to television sets. I'm told, and I think I have no reason not to believe it, that in the three years of the Iraq war there have not been one minute of congressional hearings on the conduct of the war – not one minute. Now, if somebody said to me in response to that, "Well, Congress has sent questions to the Defense Department," that's not the same thing. How can you conduct a war that's costing us hundreds of billions of dollars, 25,000 American casualties, countless tens of thousands of Iraqi casualties, we're on the brink of civil war not only in the country but in the region, and the Congress does not require the secretary of defense to come up and testify as to what's going on? This is beyond dereliction of duty. No one is being held accountable for anything.

I'm still stunned by the fact that an administration warned by a committee that had sat for two-and-a-half years and studied the future security of this country that terrorists were going to strike us, and 3,000 Americans lost their lives and no one lost his job? That's astounding to me. And we're not that much safer than we were September the 10th, '01.

MR. GREENBERGER: Peter?

Q: Peter Coppelman. I'm general counsel of the National Abortion Federation. We keep talking about the president. He's not my president. He's not the president of hardly anybody in this room. Bruce, he's your president. (Laughter.) And my question for you is, are you sorry now? (Laughter.)

MR. FEIN: I voted for President Bush twice. I don't view voting for president means like voting in a plebiscite; that it ends your duty as a citizen to reevaluate and to participate and criticize someone you voted for. And I believe that's not being disloyal, it's not being contrary to what our democratic dispensation reflects and understands. I think any president would appreciate constructive criticism in the belief that they aren't infallible. This president, much to my regret, I think has concluded that any criticism is an indication of treason or a belief that the next step is the guillotine, which is quite fallacious and foolish. But no, this system works and I voted the way I voted.

MR. GREENBERGER: This gentleman in the front row.

Q: My name is Adnel Katba (ph), freelance journalist. Senator Hart, it's a pleasure to see you again. You stated that this issue rises above politics. And Mr. Halperin, you describe this as a political – as a constitutional crisis. So many believe that this is actually a legitimate political indictment of President Bush. How much do you think of this issue will go away by a change in the administration in a couple of years?

SEN. HART: Well, it depends on if the administration changes the policies, and I would imagine any subsequent administration would, hopefully. The greatest nightmare is if this president is replaced by another one like him who does believe in the so-called unitary – I still don't understand what that means, unitary presidency, but that's the buzz

word of the week anyway – that all power resides in the Constitution. I think Mr. Fein is absolutely right, this is pre-constitutional behavior. It is autocratic, it is oligarchical, it is everything you can think of except democratic and I've never seen anything like it in my lifetime, including in the Nixon years.

MR. FEIN: And the problem is that whether or not the personality goes away, if the precedent is set said that a president with impunity can ignore a federal statute during terrorism, and that's a permanent feature of our landscape, and say it lies around like a loaded weapon, any future incumbent at any time will pick it up and say, "Fine, I'll choose this law to disobey. I won't tell you about it." So the crisis is not going to disappear with personalities. It has to be resolved on its constitutional merits.

SEN. HART: Exactly. And back to the previous question. I keep wanting – I want Tim Russert or someone, for God's sake, to say to Alberto Gonzales or any – Donald Rumsfeld or any of them, "Would you agree with these policies if Bill Clinton were president?" And of course they wouldn't. (Laughter.) So it's not about the power of the presidency; it's about the power of the Bush presidency. Now, let's be honest about this. They don't want a Democrat to have these powers or to exercise these powers; only the presidents that they like. That's so far beyond the Constitution, I can't even contemplate it.

MR. GREENBERGER: There are people in the back of the room who have questions.

Q: Alan (Bjerga?), Knight Ridder Newspapers, *Wichita Eagle*. You made reference to the possibility of a Senate probe. I think they're having a vote on that on March 7th. Senator Pat Roberts is leading the committee. He's in negotiations right now with the Bush administration possibly over adjusting of the FISA statute, et cetera, et cetera. At this point what confidence do you have in Pat Roberts as the point person for Senate intel, and how do you feel the congressional intel committees have contributed to the situation we're in today with NSA?

MR. HALPERIN: It's hard to have much confidence in the chairman of the Senate Intelligence Committee. He has been trying to block a vote on an investigation. One could only hope that he will come to see his constitutional responsibilities and his institutional responsibilities as the chairman of that committee to allow the committee to go forward with this.

The members of the so-called "gang of eight" who allowed themselves to be briefed on this I think violated their constitutional responsibilities. The statute does not provide for a briefing of the gang of eight for intelligence-gathering activities. Moreover, the notion that a United States senator allows an executive branch official, even one higher than the president, like the vice president (laughter), to tell them that they can't consult with their colleagues I find absolutely astonishing. I do not believe that any member of the executive branch, including the president, can tell a senator what his constitutional responsibilities are. And when a senator is informed, or a member of the

House, that the president is doing something that violates the statutes of the land and the Constitution, I think that member of Congress has a duty to consult with other members of the Congress and to take appropriate action, including secret hearings or a secret meeting of the full House or the Senate or the institution of impeachment proceedings.

And to say there was nothing they could do because the president or the vice president having told them they were breaking the law had told them they could not tell anybody about it – an ordinary citizen would know that if somebody tells you they're breaking the law and then tells you that you can't anybody about it, that you've become complicit in the crime and that they have no constitutional authority to order you to do that.

MR. FEIN: In fact, it's a misprision of felony. It's Section 4 of Title 18, U.S. Code if you did that. (Laughter.) But I'd like to make an observation why I think that the kind of oversight that Senator Hart and Mort have championed here is doomed in my judgment to fail, because the executive branch will be very cherry as to what they say and they'll invoke executive privilege and if you go to court and you issue a subpoena you'll be tied up for years and years of litigation. That's why I keep coming by the power of the purse: you say, "All right, if you don't want to give us the information, you can't run the program," and it confronts them with that choice.

But I've been involved in these subpoena issues in the executive branch with the House and the Senate and they're just endless. And if you think that's expeditious, then you're clearly misled.

MR. HALPERIN: But there's no – I mean, there is some question about advice to the president and whether the Congress can get access to that, but about the facts of a program run by congressional authorization and appropriation, I do not believe there's any doubt. If the Congress issued a subpoena to the NSA for the records of this program, I don't think there's any doubt –

MR. FEIN: Mort, a privilege over that kind of information is precisely what the administration invoked with regard to Hurricane Katrina: factual information as to who knew what when. It wasn't any advice. Now, I'm not saying they would prevail in court, but –

SEN. HART: No, they wouldn't prevail.

MR. FEIN: – but they would assert it and it'd be litigated and we wouldn't have an oversight hearings for three or four years.

MR. HALPERIN: It took the Supreme Court, what was it, three weeks to hear the Nixon tapes case.

MR. FEIN: Yeah, but they're not going to hear –

(Cross talk.)

MR. GREENBERGER: Let me – we have some questioners up front, so if you could – and here, but while we’re waiting for the microphone to move, we’ve talked a lot here about high principle. Is there not a political environment here that is working in a way that could be helpful? Today’s *Washington Post* has a front-page story that the Republicans are distancing themselves from the president over these security issues. The president’s most recent poll is 34 percent. Heather Wilson, a congresswoman from southern New Mexico, is facing a very tough race from the attorney general of New Mexico and she has been pushing, as an incumbent Republican and chair of the relevant subcommittee, very hard for these hearings. And I’m reminded also that some of the movement in Congress in the Watergate/Church area was driven by politics. Is it possible that politics will make it necessary for cooperation by the executive branch here so that you don’t put yourself in a position where you’re fighting subpoenas because that kind of fight is so unpopular?

SEN. HART: Well, Jefferson didn’t say politics. He said ultimately this system will work if it depends on the common sense and good judgment of the American people, and I think that’s what’s at work. It’s not just – I mean in Washington you would call it politics. In Kittredge, Colorado we call it common sense, and I think that’s what’s beginning to happen.

Now, when those of us say, why didn’t it happen three years ago or why didn’t some Democrat stand up and say, “How long are we going to be in Iraq and what’s it going to cost and what are the casualty estimates?” instead of compliantly going along, a climate of fear has dominated and it is in that climate that a lot of this stuff has gone on. And I think maybe we’re beginning to see the pendulum pushed to its farthest extent. Politically it does make itself known in Republicans separating themselves, but it really is about the American people saying, wait a minute, what’s going on here, and asking questions in public forums.

MR. FEIN: Well, they’re very (settled and?) single motivations behind conduct. I think certainly the fact that you identified a plunging popularity makes the Republicans a little more emboldened, but they have many, many other things to consider that have been elaborated by Senator Hart, including public opinion and the general sense that something is wrong that’s going here. I remember reading in a rather stunned fashion of how quickly Roosevelt’s victory in 1936 – 46 states to two over Alf Landon – turned to ashes when he sought to pack the Supreme Court by changing the statutory number from nine to 15. And the Democrats in the Senate I believe had something like 80 to ten advantage over the Republicans, turned against Roosevelt because the institution of the Supreme Court was at work. And I think once it seeps in that we’re talking about institutional attack on Congress, attempting to reduce it to an inkblot, then to finally get around and say, yeah, if we want to have any meaningful role in government and to preserve our system, they can balk even if a president is popular. And certainly Roosevelt was less vulnerable by far than George W. Bush is at present.

MR. GREENBERGER: Yes?

Q: I'm Sarah Stoud (ph). I work for a federal labor union. My question is, I'm wondering what you think the chances are that this Congress will try to enact a law that retroactively authorize or excuse what the president has been doing, and secondly, whether you think that would be – there's any constitutional way to do that – whether such a law would be constitutional?

MR. FEIN: I think that Congress would have authority to determine that FISA retroactively lapsed during that period. Remember, during the Civil War President Lincoln unilaterally revoked the writ of habeas corpus.

SEN. HART: Congress authorized that, by the way.

MR. FEIN: Yeah, but then he went to Congress the immediate following reconvening of the legislative branch, and then the Congress ratified that retroactively.

I think Congress probably could do something equivalent with regard to violating FISA. However, Congress can't exempt the Fourth Amendment application to the people that the issue would remain open – is this consistent with the Fourth Amendment. That's something we can't opine on with certainty because we still don't know what's going on. (Laughter.) But Congress could not exempt that aspect of constitutional dimension retroactively.

MR. GREENBERGER: Yeah.

MR. HALPERIN: But I do – I'm sorry. I do think there's a real danger that Congress will just end up passing a very broad authorization for the executive branch to conduct electronic surveillance as long as it's part of a, quote, "legitimate national security investigation," and seek to provide a cover, at least going forward, for all of this activity without ever finding out what it is and without trying to put limits on it, and really destroying all the specific procedural protections in FISA. I think there's a real danger still that that will happen. The tide on the Hill goes back and forth as to where the politics are, but the administration has pulled these out before and I think there's a real risk that it'll happen again.

SEN. HART: That's why I question the need for legislation. I mean, you open this Pandora's box. They could cancel FISA for all that matters. They could over – they could repeal FISA, so let's just obey the law. I think it's the simplest way.

MR. FEIN: Yeah. I mean, I think that's where most of us have been. The problem is that Republicans are now starting to draft this kind of legislation, and the question is whether you can stop it in the Congress by saying just obey the law, because it asks the Democrats as well as some Republicans – because remember there is a Republican majority who have not been very willing to stand up to anything – to just –

SEN. HART: You've noticed.

MR. FEIN: – vote – yeah – to just vote against this legislation and not to have something different to vote for. And as you know, members of Congress are much more comfortable if you give them something to vote for as well as something to vote against. So it's just a tactical judgment about whether that's what's needed.

MR. GREENBERGER: Yes? Yes?

Q: Shawn Woods (ph), University of Maryland Law School. To what extent does challenging the executive branch unilateralism involve or require challenging the Orwellian paradigm of permanent war and universal battlefield?

SEN. HART: Well, I think those of us who are kind of children of the – if not veterans of the Cold War, know a simple truth, and that is it's easier to unify a mass democracy of 300 million people against something than it is for something. I'm fond of the true story actually at the end of the Cold War, in the Gorbachev years somebody asked Georgi Arbatov, who as the head of the U.S.-Canada Institute and kind of a interlocutor between the two systems, what did perestroika mean, and he said – to an American journalist he said, "We're about to do the worst possible thing we can to you." The journalist got a head snap and said, "You mean nuclear war?" And he said, "No, we're about to take away your enemy." (Laughter.)

And I thought about that very often – that it is Orwellian, you're absolutely right, that fear is a basic human motivator. Three thousand Americans were killed. Again, I keep coming back to the fact that how could the people who ignored the warnings now have credibility with the American public to protect them? They didn't protect us at 9/11 and they were warned, and no one has held them to account. So where did they get the credibility to protect America when they didn't do it when they should have? That's my question.

But basically, you're right. It's easier to unite Americans when they're afraid and when they have a common enemy. I know at the beginning of our commission, the U.S. Commission on National Security, in the fall of '98 and early '99 we'd go around the table saying, what's the next threat? Not only – we broadened the definition of security, which I also try to do in this book, but beyond the threat-based Cold War mentality, what are threats and what are opportunities, and how do you use the opportunities to reduce threats? That was our definition of our mandate.

But we went around the table and we were seeking out the threats, and people were scratching their heads and one member of the commission who ultimately resigned said China – China is the next Soviet Union and we have to rearm because China is coming and they're – you know, the Chinese are 30 feet tall. Well, it ignored the fact that they were already financing our deficit, but that's beside the point I guess. You can rearm against – trying to rearm against your creditor is a little hard. (Laughter.) It's like saying that my bank just loaned me \$1,000 and I'm going to defend myself against them

with a gun. Anyway, the China threat kind of collapsed, but I still see books on the bookstand saying China is the next great enemy.

MR. FEIN: Well, I think that there is something unique about the war against international terrorists that we haven't thought through yet. It isn't war in the customary way we've thought about war. We don't have an enemy nation that's going to surrender at any particular time. There isn't Geneva Conventions that are followed or anything of that sort. And in that sense, we do need to think about how to craft special measures to address this unconventional way of fighting permanent conflict that isn't as drastic as is perhaps needed after Pearl Harbor, yet takes account of the increased risk level. That's what needs to be addressed.

This is different than all previous kinds of wars. It doesn't mean we need to throw out the system, but we shouldn't pretend that it is the way it was before. And the problem we have now, in my judgment, is we're trying to pigeonhole this and saying, oh, this is just like other wars, we need more powers to do X, Y, and Z. No, this is not like other wars. And when you tell us it has no ending point and no one at present has been able to come up with a benchmark that when the terrorist incidents plummet globally from 473 to 122 then you don't need special powers anymore. Then we need serious thinking as to whether or not some of the privacy protections or whatever can be recalibrated in a different way than is customary with a probable cause warrant.

SEN. HART: I agree completely. And the major error was to call it war. Terrorism is a criminal activity, and we should have categorized it as a criminal activity. And the approach we would have used had we done so would have been much, much different. You're not going to defeat terrorism with the 101st Airborne or 82nd Airborne or First Marine Division. You are not going to defeat terrorism that way. The new paradigm of war is not World War II or even Korea or Vietnam – armies facing each other in the field. It is low-intensity urban conflict involving tribes, clans, and gangs – stateless nations.

For that you need, as I advocate in the book, a new human intelligence corps within the CIA largely recruited from the Arab American community – not being done. Second, you need an international peacemaking force – not being done. Third, you need a fifth branch of the military that consolidates the Rangers, the Delta Force, and the Seals because they – I mean, the paradigm of the new warrior isn't the guy with the goggles and all the 80 pounds of equipment. The paradigm of the new warrior is a Delta Force guy on a mule in Afghanistan pointed a laser at a cave. That's the warrior of the future – or kicking down doors in Fallujah or Mogadishu. That's the warfare of the future. It is somewhere between war and crime, but it certainly isn't war in the traditional sense and it certainly doesn't justify the abuses that have occurred in this country in its name.

MR. GREENBERGER: I've been asked by some of the organizers to give members of the press a chance to ask questions if we have overlooked them. Yes, someone in the back of the room appears to have been overlooked.

Q: Hi. Spencer Ackerman with the *New Republic*. Attorney General Gonzales' indication that there may be other surveillance – I'm sorry – with Attorney General Gonzales' indication yesterday that there may be other surveillance programs ongoing besides what's called the Terrorist Surveillance Program, are there any indications you can see about what those might be?

MR. GREENBERGER: Well, just, I'll throw this out for discussion. The *National Journal* broke the story that the Total Information Awareness Program, which was thought to have been killed, migrated secretly from the Defense Department to the National Security Agency. Now, that is a data-mining program where everybody's credit card records, telephone records, et cetera, are going to be mined using an algorithm to find things out. It's my own personal view – I think Bruce Fein mentioned this. Gonzales was very careful when he testified in January to say, I'm only speaking about the president's program that he has authorized. Yesterday in his letter, as I read the newspaper reports, and they're confusing, and maybe Bruce can help us with this, he's now saying that he was not saying that what they call the Terrorist Surveillance Program is the only program.

The *National Journal* has broken the story that data mining is now alive and well and my own intuition tells me that the reason they can't use FISA is FISA would not accommodate data mining. It certainly would accommodate international phone calls from known al Qaeda operatives to U.S. citizens. That's why everybody is mystified as to why FISA couldn't be used. But if they actually have a program that's aggressively going through everybody's private records to come up with what they view as key words and then use that to pinpoint their enforcement or intelligence processes, that is a real problem.

I don't know if Bruce or –

MR. FEIN: Well, I read the letter, and the letter is quite definitive: there are surveillance programs underway outside what we've been told. General Hayden publicly has stated that the programs – and this is probably the ones that aren't alerted to us – that are underway are not indiscriminate vacuum cleaner type programs, that they're targeted programs, which at least is in tension with the idea that this is just data mining because the Fourth Amendment comes into play when you have a reasonable expectation of privacy and not being targeted to having your conversations or other information intercepted. If they're just doing data mining and not looking at the contents of something, you're (not?) running into a problem anyway. Again, the whole thing in my judgment is very, very puzzling. Why, for example, if what they're doing is so sensitive that they can't even explain to Congress we're doing data mining, what would that clue the enemy into which they wouldn't already know about in having read the newspapers concerning Poindexter's earlier program? What they're suggesting is it's so sensitive that it's probably beyond that. But that's the reason why it's foolhardy, as Mort says, to enact legislation. We don't even know what the alleged problem is.

MR. GREENBERGER: I just think that data mining has – when it came up in the Poindexter mode had bipartisan serious and legislative response to stop it. I think it is viewed as a serious problem.

MR. GREENBERGER: Mort?

MR. HALPERIN: Yeah. I think the only training that's relevant here is what criminologists used to do. You have to read the statements of the administration with infinite care looking for hints and clues because I think that Hayden's remark that this was only targeted communication was also about the president's program –

MR. FEIN: Not about the – (inaudible).

MR. HALPERIN: – that he had described, not about the other programs. In fact, I think they went back and added a footnote to the Hayden/Gonzales press conference that said, by the way, everything here was only about the president's program, because they realized that he had said some things which would be wrong if you didn't have that limitation on him.

I've always believed that the other program is a program of sweeping interception of vast quantities and materials; that is, that they've gotten the phone companies in effect just to open the spigot and take all the communications that are moving through it maybe that they know are headed overseas, or maybe even more than that, and that that material is then reviewed by computers looking for key words and patterns, and based on that they narrow it down to a small number of phone calls or messages which they then may actually – they may actually read. And they're doing something like that.

Hayden said in his testimony that after 9/11 they began doing things which they thought were not prohibited by FISA, but which they had never done on their own. Whether the other program is that, and therefore they have an argument that it isn't covered by FISA – like data mining – I mean, it's very serious and people are very upset about it, but as I understand what it is, it's not a violation of FISA. It may be a bad thing to do. It may be intruding on privacy.

So I think it's clear there's some other program. Whether that other program is clearly a violation of FISA or just something – remember Frank Church's warning: he said we've got to basically prohibit NSA from spying on Americans at all because their capacity is so great that once you let them do any spying on Americans, we will all be in very deep trouble. Well, that was – NSA's capability to spy on us is a lot better than it was 30 years ago. And I think that's the warning we really have to worry –

SEN. HART: Well, better in a strange sense. The president and his spokespersons give the impression that, as Mort said earlier, they submit 100 phone numbers to NSA and say tap these lines. It doesn't work that way. It's a big vacuum sweeper even under sophisticated present technology, and it's exactly what Mort has said: they vacuum up a lot of stuff. Maybe they say, we want all the phone calls from

this neighborhood in Hoboken, New Jersey. You still get thousands of phone calls, and then they run them through the computer. And they're saying, well, the only people we're targeting are the ones who use the word Abdullah, and those are the ones we follow through on. But in the meantime they've got everybody's phone message from that neighborhood in Hoboken. So are you protected from this surveillance by the fact that you didn't say Abdullah? I don't know. I don't want them vacuuming up my phone calls.

MR. FEIN: Well, the attorney general has said in his attempts to defend the legality of the program that it does fall within FISA, at least for purposes of argument. So that they have not denied that they are actually targeting American citizens on American soil. Indeed, they've conceded that. But again, it just leaves a mystery as to what's out there.

(Cross talk.)

MR. FEIN: In the program that they've described.

MR. GREENBERGER: I think that's the problem. In the program they've described they're not targeting. If there's something else, he's not defending it or talking about it.

MR. HALPERIN: No, they are targeting.

SEN. HART: Yeah, well the same thing happened with assassinations, I think, as I recall. There were rumors that we had tried to kill a man called Lumumba in the Congo in the '50s. And so we asked the CIA about this and they said, yeah, one of our guys got off the reservation and he got excited and so on and so forth. That was it. Colby did eventually reveal all the other stuff, but if you didn't say, "Were there any others?" they didn't say. So you always have to say, "Is there anything else?" (Laughter.)

MR. GREENBERGER: Yes, in the back of the room.

Q: Al Millikan, Washington Independent Writers. With the various political affiliations and philosophies represented in the coalition of the Constitution project, has this improved dialogue and interaction amongst the signers, or has this defense of checks and balances been an extraordinary, not-to-be-duplicated reason to come together?

MR. HALPERIN: Well, I think, unless you mean – I know there's a statement out in the back for you that people can pick up called the "Statement of the Coalition to Defend Checks and Balances" that both Bruce and I have signed and which does bring together people from the right and the left. And I hope that we still stay together and fight to persuade the Congress and the public and the courts that they need to reign in what is an extraordinary assertion of power by the president, and as we've all said, a very serious threat to the Constitution.

MR. FEIN: And both Senator Specter and Senator Leahy submitted that for the record in yesterday's hearing, so that's some element of bipartisanship.

MR. GREENBERGER: Okay. We seem to be sort of winding down. Is there one last question we can –

(Cross talk.)

MR. GREENBERGER: Oh, so you've got somebody back there. Why don't we do that one and then this one up here.

Q: Peter Frommeth (ph), Maryland attorney. I want to revert to something Bruce Fein said very early. I believe you said that the attorney general noted a number of flaws in the Emergency Surveillance Authority, which you could imagine – under FISA – which you could imagine might be usefully corrected. I must have missed that. I was wondering whether you could just note a few of those and what you had in mind. Thanks.

MR. HALPERIN: Yeah. I actually said that.

MR. FEIN: Yeah, I think it was Mort there. He can go ahead and explain what he means.

MR. HALPERIN: As I say, I've done this exercise of taking the attorney general seriously at his word. (Laughter.) And if you do that, this is what he says. He says the – remember, this is all about the program the president has publicly described. What he says about that program is that we actually use the same probable cause standard as we use in FISA. He says, we previously misspoke, but he wants to correct the record: we use the same probable cause standard and we use the same minimization procedures.

MR. FEIN: He doesn't say the same. He just said they use some.

MR. HALPERIN: But then when he's asked the question, "Well, then why can't you use FISA?" he says, "Because the FISA emergency procedures are not flexible enough," and that – and he states correctly that under FISA in order to begin an emergency surveillance without a warrant from the FISA Court, it is the attorney general who has to make a finding that the material facts are in hand to justify getting a warrant and to make a decision that within three days he will get a warrant from the FISA Court.

And what the attorney general said was, sometimes we learn of the information that enables us to establish this reasonable basis to believe that the call we're about to intercept involved an al Qaeda person in too short a period of time to have the – to get to the attorney general to have him make that decision – that those submissions to the attorney general have to be in writing, they have to go through three or four layers of review, and that it works for everything else, and therefore, he was saying, again I think appropriately, we don't want to change the whole procedure just for this particular case.

So I think one could draft legislation that says the attorney general can specify procedures and the needed factual predicate under which he authorizes a senior official of NSA to begin a surveillance upon the sudden acquisition of this information, provided that within three days it's presented to the attorney general and he then decides that the factual basis did exist, in which case he would have an additional three days to get a warrant from the FISA Court. That legislation or something like that would satisfy the one specific indication that the administration has given as to why it could not use FISA to do what it is doing.

And what I've suggested is that the Congress ought to come forward and say, "We need an investigation. The president has to agree he will use FISA, but if we're persuaded there's a need to expand it that's constitution we'll give it to him." For example, as we understand what the attorney general was saying, here's the problem he's identified, here's a legislative fix for it which we think would be constitutional and appropriate if that is the problem and if the administration will then agree to use FISA. And that at least – it's a tactical judgment. It establishes that Congress is willing to listen to proposals and try to work out solutions, but it's not prepared, as some Republicans are now proposing, to just give the president a blank check by doing exactly what the Fourth Amendment was designed to avoid, which is to give him the right for a general warrant to seek anything that he's interested in from anybody.

MR. FEIN: But Mort, the reason why you shouldn't have paid serious attention to what the attorney general said (laughter) was because in 2002, a year after this program had begun, the same Department of Justice went to the Senate Intelligence Committee and said, "Everything is working beautifully, 72 hours is sufficient." This is a year after the same warrantless surveillance program that then four years later the Attorney General Gonzales now says, "Oh, it's unworkable." He never explained why there was a difference between 2002 and 2005, but that's why you shouldn't pay serious attention to what he said.

MR. HALPERIN: I don't believe him. (Laughter.) I'm just saying the Congress I think can proceed by saying, assuming the attorney general has told us the truth, this satisfies the problem.

MR. GREENBERGER: Okay. Our last question. I'm sure the panelists will stay around to deal with people individually. And of course remember that Senator Hart will be at Politics and Prose to carry on this conversation at 4:00 p.m. You already put your book away. (Laughter.)

Q: Richard Wetzell from the German Historical Institute here in Washington. There have been some lawsuits filed challenging the legality of warrantless surveillance by individuals and organizations who claim they have reason to believe that they were targeted. I'm just wondering if the panelists would care to comment on the chances that these lawsuits may eventually clarify some of the issues you've talked about here.

Thank you.

MR. HALPERIN: Well, there are actually three sets of legal challenges apart from Freedom of Information Act cases, which I think will produce some data. There are the challenges by people who say that their constitutional rights have been violated. I believe that the case law, which I think is wrong, but nevertheless is very clear, establishes that they simply do not have standing. The cases basically say, you have to know you've been wiretapped. When I filed my lawsuit, I had 21 months of the logs of the phone conversations and so it was pretty clear that I had been wiretapped. And you need really something close to that to have standing.

People have sued the phone company, and I think that there may be standing there by shareholders and by subscribers on the grounds that the phone companies, contrary to (law?), is violating their rights. There's been I think now two cases filed: one against AT&T I think and one against Verizon.

Then the third thing, in at least one criminal case a defendant has asked the court to find out from the government whether they used evidence from one of these surveillances. If they did, you will then get a legal challenge to it, but in the worst possible context because there's not really an adversary proceeding. The court will decide ex parte whether it determines that the surveillance was in fact constitutional or not. So none of those I think are very optimistic.

MR. FEIN: Well, there's one – there's a third case that tries to establish standing on the theory that communications that journalists have had with sources abroad are drying up because people are fearful that without any warrant requirement their conversations will be intercepted. I think that's not going to prevail on the ground of standing for a different reason.

The criminal case concerned an individual who's already plead guilty, and he is claiming that at least for purposes of sentencing you need to know – I want to have access to the warrantless surveillance documents produced by the NSA. The judge has ordered the Department of Justice to respond, to ask whether or not anything involved in this individual's case came from the NSA warrantless surveillance program. He's not said what he would do with that if it in fact proved true, so we're just waiting to see what the department does at this stage.

MR. GREENBERGER: Well, with that, I would like to thank the panel, who was very, very informative and interesting.

(Applause.)

MR. GREENBERGER: And also once again to thank the Center for American Progress and the American Constitution Society for putting such a great panel together. Thank you very much.

(Applause.)

(END)