SPECIAL PRESENTATION

“GETTING SURVEILLANCE RIGHT: ANOTHER LOOK AT FISA”

MODERATED BY:

MORTON H. HALPERIN, SENIOR FELLOW, CENTER FOR AMERICAN PROGRESS ACTION FUND

FEATURED PANELISTS:

REP. JANE HARMAN (D-CA)

BRUCE FEIN, PRINCIPAL OF THE LICHFIELD GROUP AND FORMER SENIOR OFFICIAL IN THE REAGAN JUSTICE DEPARTMENT

GREG NOJEIM, SENIOR COUNSEL AND DIRECTOR OF THE CENTER FOR DEMOCRACY & TECHNOLOGY'S PROJECT ON FREEDOM, SECURITY, AND TECHNOLOGY

9:00 AM – 10:30 AM
TUESDAY, SEPTEMBER 18, 2007

TRANSCRIPT PROVIDED BY DC TRANSCRIPTION & MEDIA REPURPOSING
MR. MORTON HALPERIN: We’re going to look at the question of “Getting Surveillance Right: Another Look at FISA.” When FISA was first enacted, it only covered NSA partially, but it did that not as the government suggests because the Congress did not want to limit NSA’s ability to do this, but because NSA had assured the Congress that it did not target Americans, and Senator Church wonders then that if NSA is ever turned on Americans, we would lose all the privacy that we have.

And what we confronted with now is a situation where finally NSA has admitted that what they really want to do is hear the conversations of Americans. They say by targeting people abroad, but that their goal was to hear the conversations of Americans, and so we are confronted with what Senator Church wonders about, which is an agency whose powers to intercept are extraordinarily greater even then they were when Senator Church wonders about this, now openly saying that its job is to gather the conversations of Americans and to listen to them and to report that information to the rest of the government. And so the task of figuring out how to control that is an extraordinary one and we have today a panel of a three people who have spent considerable amount of time worrying about these issues and who have lately been speaking out against the current dangers.

Congresswoman Harman is a leader in the Congress and has been for many years on these issues, explaining to her colleagues that you need to take national security seriously, but that you can do that and still protect civil liberties if you take the right approach.

Bruce Fein has been a leader among those who call themselves conservatives, but who understand that the Constitution is a conservative document and needs to be protected. He has been an outspoken advocate on these issues.

And Greg Nojeim, now with the Center for Democracy and Technology, for many years with the American Civil Liberties Union, has been a leading expert from the civil liberties community who has demonstrated that if you have technical expertise as well as a commitment to civil liberties, you can make an important contribution to these issues.

So we’re very pleased and honored to have these three speakers, and I’ll ask Congresswoman Harman to begin. Do you speak there or here?

REPRESENTATIVE JANE HARMAN (D-CA): Oh, what does everyone want to do? You want to get up? Why don’t get up. Up.

MR. BRUCE FEIN: It’s early in the morning.

REP. HARMAN: It is not early in the morning. Your conversations have been listened to all night, Bruce.
Good morning everybody. Let me commend the Center for American Progress for its work in a variety of areas, but especially here, and let me commend the title of this panel because it is sensitive to the reality. It is, to repeat “Getting Surveillance Right: Another Look at FISA.” It’s not stopping surveillance. It’s not changing totally the current legal framework that we have. It’s getting surveillance right, and I would put paren in an area – in an era of increased threat and another look at FISA, paren, a carefully balanced, even elegant law. Elegant is a word that DNI, the Director of National Intelligence, Mike McConnell used yesterday in testimony. It’s an elegant law passed in 1978 by large bipartisan majorities in the Congress and signed into law by President Carter. So a very good title, very important topic, and let me also commend our moderator. He is very shy, but Mort Halperin has been on these issues absolutely forever. He’s even older than I am.

So let me make a few comments and obviously this will become most interesting when we do the Q&A. I have been outspoken and my basic view, as someone who served on the House Intelligence Committee for eight years, the last four until this term as ranking member, senior Democrat, someone who was in the so called “Gang of Eight,” the people briefed on our Terrorist Surveillance Program starting in 2002 when I became ranking member. That is not when the program started, but that’s when I started being briefed through 2006, and someone who has said for years that there could and should be some technical fixes to FISA to make sure it is the most modern tool we can possibly have, but that any form of terrorist surveillance has to comport with the careful framework of FISA. Those would be my credentials. And so let me put these remarks in that context.

I think that instead of coming up with bipartisan solutions for securing the homeland, something that is urgent, this administration is pursuing the Karl Rovean strategy of using terrorism as a wedge political issue, and no better place to illustrate this than the FISA debate. In a well orchestrated campaign as Congress was pressing to recess for August, Republicans began talking about increased chatter concerning an August attack on the capital and why that made it necessary to scrap the careful checks and balances in FISA which they claimed had created huge gap in our ability to intercept foreign-to-foreign communications. That increased chatter or that specific intelligence claim, it turned out was bogus. The intelligence agencies knew that, apparently had communicated to Congress, or to relevant people that it was bogus. The source was unreliable. But that communication wasn’t in any published form until the day that the Senate passed the amendments to FISA.

The DNI Mike McConnell visited key committee members and the leadership in Congress. The drumbeat reached a crescendo the week before recess. And McConnell’s claim that almost two thirds of the foreign-to-foreign communications could not be intercepted because of FISA’s restrictions went essentially unchallenged. I still personally have no proof that that was true and/or that that has been fixed. His proposal to Congress was overbroad. It undid the checks and balances in FISA and, as we all know, he won. But fortunately, what we were able to do, those of us who strongly disagreed with the final product, was to secure a sunset in six months. And so now we have a second crack at this.
You should know that no moss is growing under McConnell’s feet. He was in Congress yesterday, testifying before the House Judiciary Committee. He will testify tomorrow before the House Intelligence Committee. The House Intelligence Committee intends to mark up some amendments to FISA on October 4th. This is a fast timeframe. McConnell’s testimony and the fact sheet – I have it here – distributed by the White House called “Myth and Fact” is once again making the case that these changes to FISA are fine, that he’s a trustworthy person. I have no reason to believe he’s not, but the “trust me” theory does not move this particular member of Congress. I remember what Ronald Reagan said. He said, “Trust, but verify,” and I do believe that the framework of FISA is a “trust, but verify” framework and we cannot scrap it. We scrap it at our peril.

Let me just mention a couple of things about FISA that I think permit us to make a good deal on some changes. Let’s remember that the fight in late July, early August was over whether we needed a legal framework around the administration’s program. The administration basically said, no. Trust us. After the fact we’ll permit some audits of what we did. You’ll be fine. We will for sure get individualized warrants when an American is a target. Remember what I’ve just said: is a target of our surveillance. But otherwise, we’re not doing anything wrong. This is a program necessary in an age of terror. That fight has to be renewed. There has to be a legal framework around the administration’s program. It is not adequate to give one more blank check to this White House. If anyone is reading the latest books from Jack Goldsmith or Fred Schwartz you will fully understand how this administration has used the Office of Legal Counsel to justify whatever it wants to do, including to make bold statements that say the president as commander in chief can operate outside the laws when he deems it necessary. So no, thank you. There must be a legal framework around the operation of a Terrorist Surveillance Program. And that was what the Democratic leadership in Congress tried to achieve and we lost. That has to come back.

The second issue that is out there, that they want is they want retroactive immunity for telecom companies that have provided information upon request by the executive branch for this Terrorist Surveillance Program. I’m not certain that’s bad. I think some of my panelists may disagree with me. I’m not certain it’s bad if it is very narrowly targeted and it only can be granted in the event that a company truly believed in good faith that it was complying with the law. It did get a request from the executive branch. But I think we have to very carefully visit that issue. But what I would insist on and trade for that is prospectively no, zero, none, none of the telecom companies or any private businesses can supply any records to this administration or a future administration for a program like this, unless pursuant to a court order. That’s what should have happened retroactively. Obviously, it did not, but prospectively that’s something we can insist on and that trade may be worth making.

So let me basically conclude there with a little poetry, but my view is there is a deal to be made if this administration is serious. If it just wants this as a wedge issue, then I hope that Congress will fight this with every breath we have and will build the bipartisan majorities to fight this. Now, the wrong thing to do is to extend the FISA law as amended in August after it expires in six months. That is the wrong thing to do and let
me – my poetry really relates to something that Ben Franklin said over 200 years ago. He said, to paraphrase it, that a country that would give up liberty to get a little more security deserves neither security, nor liberty. This is not a zero-sum game. These are reinforcing values. The framers of the Constitution knew it. The framers of FISA knew it. And in my view, we’ll either get more of both, security and liberty, or less of both. And I think this is the time, right now, where we have to insist. And it is a test of Congress as well. And it is a test Congress’s ability to operate in our very small Democratic majorities whether we’ll insist on more or we won’t.

Thank you.

MR. HALPERIN: Thank you very much. Bruce, let me make one comment before we go on. The – I started working on this issue in the Ford administration, and as I always explained to them, I fully trusted Republicans not to violate the constitutional rights of Americans, but we needed FISA for when the Democrats got in, and I think we’re in the same situation – same situation now. And I think not only if we – will we not succeed if we give up our liberty to get security, but we also won’t get our security. And it is worth noting that there were many leaks about electronic surveillance before FISA was enacted, and there were many leaks when the administration started acting outside of FISA. But there was not a single leak between the enactment of FISA and the institution of the Terrorist Surveillance Program, and that is not an accident. When the program is being conducted legally, nobody has any reason to leak. People leak when they think things are being done that are unconstitutional and illegal.

And with that, I give you Bruce Fein.

MR. FEIN: Thank you, Mort. I’d like to begin also with a quotation from Benjamin Franklin. He’s popular this morning. Early to bed and early to rise makes a man healthy, wealthy, and wise. But on emerging from the constitutional convention about 220 years ago, he was confronted with an elderly lady who asked him of the product of their deliberations. She said, what do we have, Dr., a monarchy or a republic? And he retorted, a republic, if we can keep it. That in some sense, I think, explains the larger issue raised by the FISA statute in its various amendments.

This president has claimed authority to flout any law that governs national security, including the gathering of foreign intelligence. His claim is not limited to intercepting your conversations. He has said quite clearly that if he wishes, he can break and enter your homes, open your mail, commit torture. If he says he’s gathering foreign intelligence, there is nothing – and I think Jane could corroborate that with reading Jack Goldsmith’s book – that he’s insisted as off-limits, that basically he has far more powers than King George III did, and those indictments in the Declaration of Independence are puny, like depriving people of jury trial compared to the president’s powers. He doesn’t even need to give you a trial if you’re an enemy combatant at Guantanamo Bay.

But getting to the specifics of FISA, the question we always have to ask is who cares? Why do we care whether we have a law that regulates what the president can do in gathering information? Would we live any differently? Would there be any different
dangers? And to answer the question, we have to ask why did we end up with FISA in the first place? What was going on that caused Congress to enact the law? Because we had 40 years of experience without any check on the president’s gathering of intelligence, certainly from the time of Franklin Roosevelt through Richard Nixon. And it began in a rather modest way when President Roosevelt insisted he wanted J. Edgar Hoover to spy on those who were aliens in the prewar days to determine whether they could be engaged in sabotage, and it quickly went beyond aliens to all citizens, and then it wasn’t just sabotage. It was anything that could undermine the security of the United States. And the intelligence gathering process then mushroomed without any checks.

And I often use the analogy that to a hammer, everything is a nail; to a spy, everything is a traitor. That’s what the intelligence community is trained to think about. And I can recall an instance, I think, related to our moderator here, Mort Halperin when there was a leak to the New York Times under Nixon, the secret bombing of Cambodia, J. Edgar Hoover was summoned by Nixon and Kissinger. He’s had to implement wiretaps to discover who was the leaker, and after many months the FBI reported back to Dr. Kissinger, we can’t find anything, no incriminating evidence. And Kissinger retorted, well, continue to spy, so that the targets can establish a pattern of innocence – to coin “a pattern of innocence” – because they all should be presumed guilty so they should be joyful that we continue to spy on them without any warrants.

So unchecked – unchecked spying invariably leads to abuses and collection of information for political purposes, not national security purposes. That’s why it is dangerous to have unchecked surveillance because it will be hijacked to advance a political agenda, not the national security of the United States and the American people. And when you discuss FISA, we are not, in my judgment, questioning the need, as Jane said, to gather foreign intelligence. It’s certainly that al Qaeda are not our friends and would like to kill us. The question is not whether we must get an approach, but whether we must get with checks and balances that preserve our liberties, or we abandon the whole reason for being, namely, a country dedicated to the rule of law and where the right of privacy is cherished.

As Justice Brandeis said, the most cherished right among civilized people: the right to be left alone. And this administration basically has said, no, we need to give the president unlimited authority to spy, to intercept conversations in order to defeat his claim that we’re in a war with international terrorism. Now, what is the evidence that’s been advanced to support that proposition? Remember when the Terrorist Surveillance Program began, shortly after 9/11. FISA had been in operation 23 years, and did not evoke a single complaint from a president that he was being compromised in gathering foreign intelligence, and these were the years that included the Soviet invasion of Afghanistan; we had the Iran contra; and the overthrow of the Shah in Iran; the Cold War was still at its zenith where the absence of intelligence might have enabled a launch of an ICBM with a nuclear warhead. All these crises, the 1993 World Trade Center bombings, and yet FISA operated without a single complaint from the president, including President Bush until 9/11 came.
Now, remember, after 9/11 the method of communications, the network that was utilized either by satellite or cable to communicate did not change. What is it that 9/11 caused to require an abandonment if they weren’t a requirement? Surely, it wasn’t that FISA judges were reluctant to grant warrants. The record shows of about 20,000 applications, virtually everyone was granted. And the record also shows it wasn’t because FISA judges were slow. Judge Royce Lambert, who was a FISA judge, recounted on the day of 9/11 he’s on the George Washington Parkway and he’s – when he sees what’s happened, he comes into the office and he granted scores of warrants in a few hours.

What is the difficulty of obtaining a warrant? If there is insufficient manpower, you provide more resources. On July 31st 2002, as the Department of Justice testified at the Senate Intelligence Committee, opposing a relaxation over the threshold needed to get a warrant, they said FISA works nimbly and flexibly, especially with the increase for the emergency period from 24 to 72 hours to begin surveillance without a warrant. There’s no need for change. That statement has never been repudiated. That was the Justice Department under John Ashcroft and President Bush. What has changed? Nothing other than the need to create a political optic, as Jane said, for a wedge issue between Democrats and Republicans. It says, if you don’t believe an unlimited presidential power, you’re weak on terrorism. If you don’t believe you should violate the law to fight terrorism, you must be weak. You oppose it. Why do you think the Constitution should be superior to the president when he’s fighting a war? We can’t afford that.

And history teaches volumes the same thing was said, and we had the same supine defenders of the Constitution during World War II when the FBI and the military was unable to obtain a crumb of evidence that any Japanese-Americans where threatening the United States, and yet 120,000 were hurtled in the concentration camps. Then, Attorney General Francis Biddle said, this is ridiculous. This is racism. But then he said, I decided to stop opposing the president. Why? You know, a very bleak mark on the stature of attorneys general. And we cannot – we cannot rely upon “trust me.” That’s certainly a theme that the founding fathers thoroughly repudiated. They would trust King George III or even George Washington, who was a virtual saint, because they relied upon the universals of human nature: Absolute power corrupts absolutely. People who are attracted to the presidency are gratified by the idea that they can dominate and manipulate. That’s why they’re there. They don’t come there because they’re benevolent. And that’s why the founding fathers put in checks and balances.

What has happened, for example, in the Terrorist Surveillance Program? We don’t even know. It is outrageous in my judgment. After all the months that have elapsed since the New York Times published the program, we don’t know what’s going on with the information that’s gathered. How many Americans have been targeted? How can you assess your government if you don’t know what it’s doing? And that doesn’t mean we have to know exactly which cable is being tapped under the Atlantic Ocean, or which satellite is being intercepted, but we have to know the nature of the program. After all, it’s our tax money. It’s our liberties that are at stake. We ought to be able to decide that through the legislative process, and we still don’t know to this very
day. What’s going on? State secrets, executive privilege, we can’t tell you and if we do we put an embargo so you can’t talk to anybody else.

That’s the idea that the executive is infallible. Vetting is no good. It’s of no consequence because Congress and other outsiders have nothing to contribute. You know, that’s President Bush. I’ve never made a mistake. And that’s exactly what what the founding fathers feared. Hubris, a goal to dominate and manipulate the political process, and that’s what people in political power crave intelligence for. They are the ones who decide what the intelligence is used for, not Mr. McConnell, or anyone in the CIA, or the National Intelligence director. That’s why we have to be very concerned and precise in what we enact to regulate this gathering of intelligence.

And just one final comment to show, in my judgment, the duplicity of the president. In the latest round, which culminated in the Protect America Act, it was said, we need these new powers to fight what? International terrorism. Is the new statute limited to fighting international terrorism? No. It covers the gathering of any foreign intelligence, including the dollar reserves of the Hong Kong Bank, or whether or not the rainforests in Brazil are being depleted and creating global warming problems. That is the scope is about 100 million fold larger than the purported justification for the new law.

James Madison said, popular government without popular information is a tragedy or a farce, and that’s what we’re encountering at present. We should not permit, in my judgment, the executive branch to undertake any foreign intelligence surveillance outside a warrant unless they shoulder the burden of showing why that’s necessary. And it’s a shoudering of the burden that isn’t trust me, we’re infallible. We’re just telling you. No, you’re vassals; we’re the lords. It means real serious information that’s concrete and can be verified. Otherwise, they say, we are going to be resigned to one branch government because power ultimately in democracy is access to information. Those who have the information can say that’s what the public record demonstrates with regard to X, Y, or Z. They are the ones who control ultimate decision-making. No one is going to oppose something that said, it’s needed to prevent the deaths of Americans tomorrow. And if you can’t challenge statements like that, you’ve yielded all the power to the president.

Thank you.

MR. GREG NOJEIM: Good morning. Again, my name is Greg Nojeim. I’m with the Center for Democracy and Technology. We put some testimony in the back from yesterday’s hearings from my colleague Jim Dempsey.

I want to thank CAP, as the other speakers have done, for holding this forum and for inviting me. I’m really privileged to be here with real giants in the field, and I also want to give compliments to CAP for itself, being one of the leaders in the debates about national security and civil liberties and in particular its able Senior Fellow Mark Agrast who couldn’t be here today.
This debate is about the privacy of the international communications of Americans. That’s what it’s about. That’s the bottom line. It’s whether an American can communicate privately with a person abroad and whether the government can intercept that communication with no limits. The debate is not about what the administration initially used to start the process, the notion that foreign-to-foreign communications over a wire intercepted in the United States were requiring a warrant.

Everyone, who is deeply engaged in the debate, has reached the conclusion that for foreign-to-foreign communications, it doesn’t matter whether they’re intercepted in the United States. If it’s a foreigner in Pakistan talking to a foreigner in Afghanistan and the communication travels into the United States and it’s intercepted here, a warrant is not required. There’s a virtual consensus about that. Take it off the table. That’s not what the debate is about. It’s about the communications of Americans when they speak to people who are abroad.

The government’s position is that when it’s targeting a person who is abroad, who is not an American – they have no reason to believe that the person is American – it can do what it wants. That’s the end of the debate. There doesn’t need to be more intervention from any of the other branches of government, that the key is whether it is targeting a person abroad. But that doesn’t solve the big issue, the elephant in the room, if you will. What happens when that person abroad is talking to a person in the United States? What do you do with those communications?

Well, the administration’s solution for that very fundamental problem is that we minimize those out. We minimize them out. And that all sounds well and good, but remember this is the world of FISA and words don’t have their normal meaning. Up is down; right sounds left. John Ashcroft is a civil libertarian. This is the world of FISA, and to minimize out does not mean to separate out those communications of Americans and throw them away. It means separate out those communications of Americans, retain them, analyze them, and disseminate them unless – and you can mask the identity of the American, but only if it’s not foreign intelligence information. In other words, the communication is irrelevant anyway and the identity is necessary to understand it.

So minimization is not what it sounds like. Minimization is not a solution to the problem. And even if minimization meant discard the communication, it still wouldn’t solve the problem. It would be like saying that the police could break into your home, copy your documents, download the contents of your computer, and that would be all okay provided that when they got back to the station, they threw it out. No, there has to be something at the front-end that prevents the unlawful surveillance of Americans’ communications.

The administration’s approach is that the executive goes it alone, the FISA Court is a rubber stamp, and Congress should be kept in the dark. A more effective a balanced approach would utilize all three branches of government and the structure of communications today, which involve communication service providers in playing a role in turning over proper surveillance product to the Unites States government.
Now, we believe that a more effective and balanced approach has four features. First, there’s judicial review at the front-end and it’s very basic judicial review. It doesn’t have – it’s not a probing judicial review. Rather, we believe that at the front-end, the FISA Court could be employed to approve what we call basket orders for surveillance. They could last for a year. There’d be no need for the government to specify targets, and the court would not be finding that a target is an agent of a foreign power, which is what it finds in a regular FISA surveillance, but rather that the purpose of the surveillance is to intercept foreign intelligence information about terrorism or espionage or sabotage, and that the court could find that the targeting method that the government is using is really focused on people who are abroad talking to people who are abroad.

The second feature of an effective and balanced approach would be a look-back at whether the surveillance that’s being engaged in is working the way it was supposed to. Is it intercepting a lot of communications of Americans or not? And the look-back would include an inspector general audit, reports to the FISA Court about who is being surveilled, and reports to Congress. No Congress in the dark.

The third feature of this approach would be a remedial court order when the process is not working like it was supposed to. If it turns out that a significant number of Americans’ communications are being intercepted, it’s time to go to the FISA Court for a full FISA Court order, targeting that person abroad. That person would have to be an agent of a foreign power and the court would have to issue an order, and if it did, then that American’s communications with that person could be lawfully intercepted.

And fourth, the final feature of this proposed model is to deal with the government’s argument that the president has independent authority, authority independent of the law to engage in surveillance – to engage in surveillance of people in the United States. And the way that we suggest that that ought to be done is to make it clear that telecommunications providers will get immunity if in facilitating surveillance they are relying on a court order or they’re relying on an attorney general’s certification issued under a specific provision of the law, not issued under the president’s inherent authority as the government would argue.

This kind of reform, what I’ve proposed, is practical, effective, and it’s protective of civil liberties and security. It employs all the resources of the three – it employs resources of all three branches of government and it enlists the telecommunication carriers in a scheme designed to both facilitate surveillance and protect privacy from unlawful surveillance. And we would suggest that this is a good way forward, a good way for Congress to think about those things.

Thank you very much.

MR. HALPERIN: Let me try to press the panel a little bit on what I think is the hard question here at the end. I think we all agree that the administration is exploiting this issue for political purposes and that that is not only unacceptable, but dangerous to the security of the country. And we all agree – and the administration now seems to
agree that if it’s actually targeting an American, it needs a warrant. Under the Terrorist Surveillance Program, it was arguing it did not. It’s not clear to me whether it reserves its right to change its mind again, but I think there seems to be a consensus growing that if they’re going to actually target a person in the United States, you need a warrant. And we all agree, as Greg said, that if your real purpose is to gather conversations between two people overseas, you should need a court order because we want the telephone companies not to cooperate unless there’s an order, but that the government really is entitled to those conversations.

But the hard issue is the one in between that all the speakers have alluded to, but I want to press you a little more about how actually you would deal with this. That is where the government is targeting people overseas, but wants to hear their conversations into the United States. Remember when the president started, if al Qaeda calls America, should we not be listening to the calls? And the question is how do we treat those calls where the call isn’t to the United States, but where the government intends to get calls into the United States? You know, the bills that Democrats in the Congress were supporting talked about if there’s a significant number of calls, then you need to do something different, and I guess I would ask how do we make that really work and by what theory do we argue that the government should be required to get these warrants and how do you make that system work?

MR. FEIN: Mort, I first have to voice some skepticism about your statement that there’s a consensus within the administration that the president has renounced his article to inherent authority –

MR. HALPERIN: No, no, I –

MR. FEIN: – because I was there on August 13th and there’re some in the audience with me when we raised that specific issue with regard to implementing the Protect America Act, and their statement was no, the president still has authority.

MR. FEIN: – because I was there on August 13th and there’re some in the audience with me when we raised that specific issue with regard to implementing the Protect America Act, and their statement was no, the president still has authority.

MR. HALPERIN: No, I understand.

MR. FEIN: That’s a very, very important question because otherwise all this is a charade and means nothing. And I want to say one of the ways in which you can directly challenge that authority is to have a congressional appropriations that says no moneys of the United States shall be expanded to gather foreign intelligence in contravention of whatever statute is enacted. And that, in my judgment, is very critical. Not only did they assert the power to flout the law, but to keep that secret, so you don’t even know whether they –

MR. HALPERIN: Bruce, I agree with you. I want to come back to how we make that work, but let me –

MR. FEIN: But the other thing of issue briefly if –

MR. HALPERIN: Well, let me let Congresswoman Harman do it –
REP. HARMAN: No, that’s all right.

MR. FEIN: I would just say it seems to me the issue was whether or not in the Supreme Court’s interpretation of the Fourth Amendment the target becomes indirectly in the United States rather than abroad. So how do you – how you’d ascertain the mental impression or intent of the executive branch? Well, there are other areas of law where that’s important as well, and you could have something like a presumption that if the same person in the United States is at the end of a call three, four, five times, then there’s a presumption that the intent now has moved to the intercepting the conversations of the American. Now, you need a warrant, but you could provide some standards that would enable after thresholds are met a requirement of a warrant to kick in.

REP. HARMAN: I just wanted to add a couple of things. It is critical, and you’ve said – we’ve all said this, to join this argument about whether the administration has to follow the law. You have an administration that basically says it can operate outside the law. You have a vice president who says he’s a different branch of government from the rest of the White House. I won’t say what I – what comes to mind.

But when FISA was passed in 1978 to correct the abuses of the Nixon administration, as Mort has mentioned, as several have mentioned, it was designed to be the exclusive means to conduct foreign surveillance, not an optional means. The exclusive means, and it operated that way until basically by fiat, this White House decided after 9/11 that it was going to ignore FISA. By the way, as a member of the Gang of Eight, I was never told that. We went to briefings that are highly classified and I still respect that where we learned the operational details of the program. There was no conversation of the legal underpinnings of the program until the New York Times published the fact that it existed and the president confirmed it and that allowed some of us to do some research we were not able to do until then. But nonetheless, I was flabbergasted to learn that the administration had decided on its own to ignore FISA, and that’s basically what it did until earlier this year, and I’m not positive that it’s following FISA even now. I don’t know what proof we really have other than what it says.

But what Mort’s asking about, I think, is what’s called reversed targeting where you really have in mind an American in America, but you say you’re targeting someone abroad who’s talking to that American and you thereby avoid, evade whatever the legal requirements. The administration published a fact sheet yesterday to go along with McConnell’s testimony and I just would like to read this to you. I don’t think it’s credible until we can insist that they follow the law, but they say, reversed targeting was and remains prohibited by law, the provisions of FISA that protect against this practice remain unchanged. Reverse targeting constitutes electronic surveillance and that generally requires a court order, and it makes little sense – this is key – as a matter of intelligence trade craft if the government believes a person in the United States is a terrorist, it is more useful to obtain a court order to collect all of the person’s communications than to conduct surveillance on that person by listening only to a fragment of the person’s calls.
Well, I actually agree with the last point, but my bottom-line here is this is Congress’ chance with your support to insist that the administration follow a carefully crafted law which should deal with reverse targeting, should deal with this issue of recurrent conversation – that’s something that Jim Dempsey has been very clear about in testimony that he’s given – and should have consequences in terms of a vice president and his chief counsel deciding that they’re outside of the law.

MR. NOJEIM: Reverse targeting is actually the easier question, that it’s actually easier, I think, to make a rule that says that when the focus of surveillance becomes an American you have to go to the FISA Court and get a court order covering that American. They might not always be able to do that, remember, because now all of a sudden, they have to show that the American is an agent of a foreign power, presumably, they wouldn’t be going to the court unless they could show that, but it’s not the same showing that they had to use – they didn’t have to make any showing to target the person abroad.

I think the harder question though is when you’re shy of that, when what’s happening is that you’re listening to the person abroad and they start making a number of calls into the United States and they’re calling different people in the United States and there starts to be a lot of those communications. What do you do with that? What do you do with those communications? You can’t say, turn off the tap. You can’t say that just when it starts getting interesting, just when al Qaeda is activating the sleeper cell, stop listening. That’s not going to be a solution. But what do you when there’s a lot of calls to Americans in the United States?

And what I think ought to happen is that there ought to be a trigger. After those calls become significant, when there’s a significant number of those calls – and remember, the way this intelligence surveillance is done, it’s not necessarily the case that there’s an analyst listening in on it live. More often it’s the case that the communications are recorded and then going back to it a day or week later, so you don’t know right away that the significant number of communications in the United States is actually happening. You might learn that later.

So what seems to make sense from our perspective is that when you get those significant numbers, then you got to the FISA Court and say, we want to keep listening in on this person who’s abroad. They’re talking to a lot of Americans. The Americans’ privacy right – the Americans have privacy rights, we recognize them, but they have to yield like they do in other intelligence surveillance to this overriding need to listen in on an agent of a foreign power, to listen in on a terrorist group. And that’s the theory and that’s how we think –

MR. HALPERIN: And then you get a warrant –

MR. NOJEIM: That covers that person.

MR. HALPERIN: By the current FISA standard, a probable cause to believe they’re an agent of a foreign –
MR. NOJEIM: Well, yeah. I think that that’s what you do.

REP. HARMAN: Yeah, yeah.

MR. HALPERIN: All right. What is significant – I mean, we say, you know, the legislation that was kicked about said a significant number and you’ve repeated, several of you repeated it, but if I’m a government official in NSA and I’m running one of these surveillances, what guidance do I have as to what’s significant?

REP. HARMAN: Go head.

MR. FEIN: Well, it seems to me, Mort, you come down to the intent again. When in your mind that your target, the reason, the significant purpose for monitoring is the United States citizen. And that is a distinction that the U.S. Court has also drawn when you have IRS investigations that shift from a civil to a criminal focus and what new protections come in. Now, it can be very elusive at times, and that’s why I suggested you could have a numerical number that created presumptions for the individual, but ultimately, it’s got to be as it is now, who is the target of the investigation. That also is a mental impression. That’s why you need clear oversight to make certain they’re being careful in making these distinctions.

REP. HARMAN: Let me just add though, let’s go back to why we’re doing this. Remember, the title of this panel is “Getting Surveillance Right.” I want to know if Bruce Fein is talking to Osama about making some terrorist cell in Washington operational. I think we all want to know that. I don’t think it’s that very likely that he would be doing that, but there is a possibility, and my point is that we want a framework that lets us know in real-time if an American is actively plotting to harm us in America. Of course, we want to know that. So we don’t want so many bells and whistles that we never find that out.

On the other hand, as everyone has said and I strongly agree, the Fourth Amendment guarantees people freedom from search and seizure – and that’s what we’re really talking about – without probable cause, and that is the right – I see little nodding heads in the audience – that is the right each of us has to be protected, and one would think that conservatives, and I actually think some conservatives in Congress want that right to be in place big time. They don’t want Big Brother with unlimited unfettered power able to spy on them.

So how do we balance this? And my answer to that is we, number one, insist that any administration, including, imagine this, one headed by a Democratic president who might be female, follow the law, the carefully crafted law that builds in checks and balances, then in this case, since we all know this is a huge issue – and Mort, you’re right to go directly to this – we craft a careful amendment here because it isn’t clear enough I believe in the FISA law exactly what’s supposed to happen that spells this out, and I think we can do it with care, and I think we can also communicate that the purpose of this is reinforcing values: more security and more liberty.
MR. FEIN: Mort, could I make a general observation about in Jane’s hypothetical which implicated me, but I’m not making this observation for that purpose, because it raises the really very difficult question of how you answer the charge that don’t you want us to do everything to reduce the risk of another 9/11, everything? We don’t want to create any risk whatsoever. And the answer is no. We don’t want you to do everything. We’d be all in prison if that were true. We’d have a police state if your sole objective was to try to minimize another 9/11. And we have to be careful about that, say no, you stand up, we don’t want to be risk-free, because that means we have no freedom and we’ve destroyed the whole purpose of having the United States of America.

And I know often times when you have five seconds to speak and you’re on Fox TV, it’s hard to get in that idea, but I think that is a critical element of this discourse. You know, the president – I’m doing everything I can to try to make you safer. People are, well, I’m a little bit worried about that, because maybe the way you do that is to put everybody in prison.

MR. HALPERIN: Yeah. See, except I would – I agree with that – but I would argue that the (unintelligible) FISA is that the way we make ourselves as safe as we can be is to have a law that everybody believes is constitutional and both protects our liberties and protects – you know, when FISA was on the floor of the Senate, a rightwing Republican congressman got up and said, this was okay with the FBI and the ACLU and that’s good enough for me. And that – and then they all testified, as several of you said, for years. The amount of interception vastly increased after FISA was enacted because FBI agents and telephone company officials knew that what they were doing was legal and constitutional. And so I – I mean, I think you’re right. If somebody came up with a way to increase our security that took away our liberty, I’d say we wouldn’t do it, but in this area, the evidence is to the contrary. You maximize both.

REP. HARMAN: Well, I think that’s what I started with. It’s not a zero-sum game. But I would just add to that that having a clear law is empowering in terms of helping us find, discover, prevent whatever it is that that law is about. When you talk to most hardworking CIA types, I’m not talking about the leadership, I’m talking about the followership, they want a clear law, they want to know what the lines are. Absent a clear law, they are risk-adverse. I don’t think having them be risk-adverse is helpful. I think having them carefully understand what the limits are and carefully follow that is probably the best way to get us accurate and actionable intelligence, which we do want in order to protect Americans against harm.

MR. HALPERIN: And let me ask the other two of you about the proposal that’s been made about the telecoms and their immunity. Are you willing to consider immunity, one, if they come forward with a good faith defense, and I assume that means that we’ve got to make it possible for them –

REP. HARMAN: You mean retroactively.
MR. HALPERIN: Retroactive – for the – we have to find a way to let them make the documents public that –

MR. FEIN: You can’t invoke state secrets, so they can’t have a defense. No. I’m certainly – I agree with Jane. It seems to me that prospectively, it’s one thing to make it very clear in the law that without a court order you’re not supposed to be cooperating, but retroactively –

MR. HALPERIN: I tell you, we sure thought we did that. That’s the FISA. (Laughs.)

MR. FEIN: But it’s customary in the law that there be good faith defenses for any infraction when you’re seeking damages, and I don’t see why that should be withdrawn from the phone companies. You know, they are as loyal as everybody else. They approached right after 9/11 when we were all in a fog, and this seems not to be a constructive way to proceed and to respect the patriotism of our citizens out there, and I would concur with Jane’s idea on the retroactive backward looking approach.

MR. HALPERIN: Greg?

MR. NOJEIM: The problem with giving them immunity for their – we believe it was a transgression that they facilitated unlawful surveillance. The problem with doing that is that it creates this element of uncertainty about what happens the next time around. You could have a future administration, even one headed by a Democrat who is a woman, going to the telecoms and saying, I know that the statute doesn’t exactly say that we can do what we wanted to, but remember, last time when you did it, you got immunity, and we’ll get to that this time. Let’s go for it. We need to do it to protect the country.

MR. FEIN: Well, that’s something that can always exist. You know, Congress can always enact a law. The president can always issue pardons or commutations. It’s like saying you should never have a pardon power or commutation power because then it undermines the law, and the question is can you write a statute that prevents, that’s making it clear, and this is what Congress should do. Any presidential order based upon inherent authority, as what you are suggesting, Jane, it’s not good enough. You need a piece of paper out there and that’s the clear safe harbor that you get.

REP. HARMAN: A piece of court paper. And I think the leverage comes here. I mean, we’re – let’s be practical. Are we going to stay in this paradigm where we’re all being accused of being soft on terror because we don’t like the unfettered exercise of executive power, or are we going to try, especially as a member of the legislative branch, to cut a deal here that does respect the careful checks and balances that FISA has inherent in it or has had since 1978, and I think cutting the right deal is the way to go. I think it’s the more responsible way to go, and I’m not going to cut the wrong deal. I opposed the deal at the beginning of August. Congress was jammed, some Democrats voted for it. I voted against it and I’m trying to work on those 41 Democrats who voted for it to try to get them to a place where they will be part of this group that will resist the wrong deal.
But I also think that it is conservative, with a little C, to protect the rule of law and protect the privacy of law abiding Americans. So I really do think there’s a deal here that can be cut, and retroactive immunity is a piece of leverage in that deal.

MR. NOJEIM: What I would suggest just to finish up that thought is that rather than immunize them, that a better approach might be to cap damages, to make sure that whatever happened isn’t ruinous to telecoms, that should certainly be the case, and I would also suggest that it’s a little early to be talking about what the deal ought to be in terms of immunity because the litigation that is the driver for the immunity debate is many years away from reaching the substantive questions. I mean, the state’s secrets issue is the one that’s being debated right now at the Ninth Circuit. In all likelihood, that’s going to up to the Supreme Court and then come back down, you still have to get a resolution on the merits so –

MR. HALPERIN: Well, unless Congress – see, my view is that part of the deal is that Congress should take away the state secret’s privilege for document and information communicated to the telephone companies, not the technical detail of what’s – which they wanted, but the legal justification for it. It boggles my mind that one could think that a legal justification given to a phone company asking them to cooperate could be secret. But I think Congress clearly has the power for the purpose of litigation to take away that and to say these documents must be made public because we are giving the phone companies a good faith defense, and the only way they can express that is by revealing these documents and they have to be public.

MR. FEIN: Mort, your description of what the executive branch’s conception of state secrets is shows your lack of imagination. They’ve also said that any legal advice the president received at the NSC as to the legality of relying on inherent authority is operational detail, and therefore, Osama is craving to know whether it was inherent Article II authority or the AUMF that authorized the spying.

MR. HALPERIN: Okay. Let me throw it open to the audience. Would you identify yourself and wait for the microphone, and a question, not a speech, not directed at the first speaker. (Laughter.)

Q: Yes. I’ll try to follow those directions. I’m Kate Martin from the Center for National Security Studies. It’s not a speech, but I would like to thank Representative Harman for all of her work in defending civil liberties in the last few years. And I have a couple of questions. First, on the issue of what do we do? I guess I have some questions about a rule that depends on the administration’s purpose or intent, and that given McConnell’s statement yesterday that they want to get phone calls with Americans in the United States, and given the fact that they admit that they can know as to some number of communications that they are seizing at the time that they seize them that they are with Americans in the U.S. does it make sense to have the rule, which we did have, that when the government has some reason to know that one end of the communication is with someone in the United States, in order to seize the contents of that communication, it needs a warrant? That would not prevent the government from knowing that it had called Bruce Fein, because it can still have pen register information.
And my second question is are you concerned at all that if the Congress were to do something again without having a complete sense – a complete information from the administration about what’s happened, that the public will not have trust that Congress has done what it needs to do to enact the FISA, and in particular, I’m concerned that the secret OLC opinions claim the right to conduct surveillance outside of FISA and that’s why they’re not turning them over?

MR. HALPERIN: One or both? Then we go down the line.

REP. HARMAN: Well, let’s – Kate, thank you for all your hard work. You’re everywhere and you and your office have just appeared as witnesses in a Homeland Security Committee hearing on a new plan, just so all of you can know and absorb this, by the Department of Homeland Security to use satellite feed and focus it on America, which they claim is within the contours of existing law. It’s a different program from what we’re talking about and it’s not subject to FISA. So I mean, we have a lot of other issues to look at. My view is that absent a careful review of the legal underpinnings of that program that should not be permitted. Period. Back to this.

I don’t have confidence that this administration necessarily will follow any law that Congress crafts given the statements of the vice president, given the information that’s in some of these books like the Jack Goldsmith book which I’m about half way through with. You need a large glass of wine when you’re reading that book, or whatever else it is that you enjoy drinking. But no, I’m not confident and I am concerned about that, but I still think – and I don’t think Congress should legislate absent a review of documents.

Having said all of that, this FISA amendment, which is terrible, expires in six months, six months from when it was enacted – so I haven’t even counted the months – but early next year, and this is the window we have to act. Perfection is not an option, so I’m looking for the best tools we have to try to make the case to members of Congress. Let’s start with that about what was wrong with what we did, and then to make the case to the American public and use – make our best effort. That’s what I would – that’s what I think is in the realm of the doable. We may have to wait until we have another president and different folks in the administration to be absolutely sure we’ve tied down all the corners. But I think we have to make a better deal right now.

MR. FEIN: Kate, I think we need to go back to the Church Committee hearings to try to ascertain what is an effective mechanism on the abuse that would be risked by entrusting anything to the discretion of the executive branch, and during the Church Committee hearings it was repeatedly said by the president and the Republicans, oh, if you have any oversight, it will compromise national security, it will be damaged irreparably, all of which allegations proved false.

But the real check in my judgment really lies in the hand of Congress and getting everybody like Jane Harman elected, because they have the power, if they want, to call those people there and say, you know, if you don’t tell us that you’ve got no money in
your agency, we’ll hold you in contempt of court, and it’s really the – I can expect the executive branch to overreach, but it’s part of the responsibility of Congress to react. They have the power there. They have the power of subpoena, the information and the purse to tell the executive branch, if you don’t hand over that information, we’re shutting you down and we’re going to tell the American people it’s your refusal to operate in the sunshine that’s causing danger to the United States. That is the way in which you check. You have to have some discretion in the executive branch. You can’t write a law without writing a code that’s 1,000 pages long looking like the IRS that can pin down every sense of judgment.

And the description you provide of a situation when someone is – maybe it’s a terrorist calling in into the United States, it may well be that he’s calling for a reason that has nothing to do that would incriminate the U.S. American. You couldn’t get probable cause if you required that to gather the information on the recipient of the call. So that seems to me – and that’s what I think you were suggesting that if you have knowledge that someone is in the United States who were receiving the call, you automatically need to get a warrant. That may not be feasible because there may not be any evidence that this individual is an agent of foreign power.

MR. HALPERIN: Did you want to – Greg?

MR. NOJEIM: I think that Bruce is right that Congress has to play the key role. The problem is that it’s hard for Congress to play the role that it’s supposed to play in this context. I mean, it’s just very politically dangerous. So I think that we need to beef up the tools that Congress would have to play the role that we want it to play. One way to do that is to require reports to Congress when this warrantless surveillance is picking up the communications of Americans. Another way would be to have an inspector general audit that looks at whether this warrantless surveillance is picking up communications to Americans, and also reports to the court with that same information and power in the court to step in and say, wait a minute, wait a minute, this is surveillance of Americans’ phone calls. We need you to stop the warrantless and we need you to apply for a warrant, and if you don’t have the – you can’t make the requisite showing to get the warrant, you’re going to have to stop.

MR. HALPERIN: Yes, in the back.

Q: I’m Gerald Epstein. I’m with the Center for Strategic and International Studies. I’d like to get back to Mr. Halperin’s question on when does a connection with a potential terrorist overseas to an American become significant enough to mobilize action here. That’s a hard question because we have a pretty high threshold. You’ve got some status of probable cause that then triggers something on the end over here, some significant investigation or listening or whatever mobilizes. It is possible to make this problem easier by having smaller thresholds and smaller consequences? Can we imagine some kind of warrant-light that triggers an investigation-light just for the purpose of seeing is there enough there to kick it up one more notch?
As the example, if my phone rings and it’s al Qaeda and they’ve got wrong number, one phone call, isn’t it worth something to figure out whether that was really the wrong number without me never being able to fly, without my security clearances being yanked, without all my friends from overseas never (unintelligible)? Isn’t there something that could be done to check out that phone call that doesn’t rise to the level that makes this a hard question?

MR. FEIN: I think that’s a very insightful question. Maybe the answer can be gotten by looking at two levels of minimization under the current FISA statute, where if there is an interception without any warrant, then there’s a requirement to destroy certain information within 72 hours, unless it’s needed to prevent imminent danger to someone’s life or limb. And it may well be you could – then the minimization if it’s – of information gathered pursuant to a warrant is toothless and of very little protection, but it does seem to me if asked the question that could justify a much stricter minimization requirement, something like destruction in 72 hours, if you had lowered the barrier from in between a warrant and no warrant at all to one that is a warrant justified on reasonable suspicion, that’s a standard in law that the Supreme Court has charted in between probable cause and nothing. But that seems to me at least an approach that could be considered that would help then to destroy the information quickly if it was gathered pursuant to the lower standard so it prevent the mountain of database that you suggest.

REP. HARMAN: I like the idea about maybe two tiers of minimization, but I do not like the idea about lowering the standard. I think that is in legal jargon a slippery slope, and pretty soon we won’t have a Fourth Amendment. The standard in the Fourth Amendment is probable cause and the expectation is individualized warrants, and I don’t want to make that easier. The other way I would go is actually something the administration has asked for, imagine that, which is having more people in the Justice Department beyond the attorney general – and in fact, there are now two more people – be able to sign off on requests for warrants making the warrant process electronic.

It doesn’t have to be old manila folders with dog-eared pages, that’s not how we do business or should do business anymore, anywhere, and also having perhaps a system of magistrates inside the FISA Court that could review some of these requests, but I don’t want to lose probable cause and I don’t want to lose the actual name of the American person attached to the request for the warrant, because I think once we lose that, we lose the protections that come with our Constitution.

MR. NOJEIM: I agree with Mrs. Harman. First of all, it’s a very, very hard question and a very good question. But once you start eroding the probable cause standard, the likely thing that you go to is reasonable suspicion, and then all of a sudden, you’re justifying full searches based on reasonable suspicion, and I think also, Bruce, that was the issue that came up in that hearing and that the administration said ultimately it wouldn’t support a bill that required only reasonable suspicion for FISA surveillance because it would be unconstitutional.

MR. FEIN: Well, but that was because there wasn’t this extra protection through stricter minimization, because certainly, the Fourth Amendment law does recognize that
distinction, that’s the Terry v. Ohio, I mean, it’s 30-some years old. And the way in which – you’re right. If there wasn’t anything backend that limited the intrusion on your privacy that are requiring destruction, it clearly wouldn’t satisfy the Fourth Amendment. It would be just like saying, well, you can choose between probable cause and reasonable suspicion, but that’s not the choice in at least the suggested criteria that this individual recommends.

MR. HALPERIN: Yeah, but the problem is that – it’s – the administration’s position is this is when it’s still targeting the foreigner, and as they point out correctly, if they have a tap on a Mafia person and you call that person, they can listen to the Mafia conversations, your conversations with the Mafia person endlessly without ever needing a warrant. So the question is is the original surveillance standard appropriate and do we – we’re in effect giving them something in advance of saying, you can do these surveillances without a probable cause warrant if you’re only getting foreign conversations, but if you get Americans, you need to have a different trigger.

I think we may need a minimization standard between the two existing ones, because the problem is the one for proper surveillance now is, as people said, toothless, the other standard that’s in the bill is too, I think, draconian for a situation where we’re agreeing part of the purpose is to listen to some Americans, and I think you need a third trigger, both a minimization requirement and a trigger for a warrant and that seems to me, if we got into a good faith negotiation with the administration, is still the hard question.

Yes?

Q: Thanks. Chris Strohm, with Congress Daily. The other side of this argument is that the administration claims that going through FISA is too cumbersome. DNI McConnell has turned up the figure that it takes 200 man hours per warrant. Can you kind of deconstruct that, and I mean, do you feel that there is a bottleneck going through FISA and what’s the solution to that?

REP. HARMAN: Well, I was just trying to address that. I think it’s their bottleneck; it’s not a bottleneck caused by FISA. Their interpretation of FISA, and I’ve often wondered whether they’re trying to set it up as a straw man so they can then, with impunity, ignore it, but their interpretation is that you need warrants. This is what’s been in the press every time some kind of U.S. switch is involved for a foreign-to-foreign communication. It’s their interpretation. They’re now claiming – I’m just repeating what the press has reported that the FISA court is now insisting on this, but anyway, let me just leave that there.

But the way they do this is they start with a manila folder and a lot of dead trees and they prepare this dog-eared submission. I know this because I was at NSA and I asked to see one of these things, and there is no need to do it that way. Most submissions for government writs can be done electronically and the whole system should be standardized, simplified, more personnel should be added. They have augmented the workforce at the Justice Department. More people should be able to sign off on the request in the Justice Department, and there should be a magistrate system in the FISA
Court. And oh, by the way, all nine Democrats on the House Intelligence Committee a
couple of years ago, introduced what we called the LISTEN Act – marvelous acronym,
I’m sure you’re impressed – and what it was was to provide all these resources. We
thought this was a problem and we thought it should be corrected and it should be
corrected.

MR. FEIN: One of things that, I think, justifies some skepticism about the claim
is that the administration, when it initially explained the justification for the Terrorist
Surveillance Program, spoke of technological problems, not an overflow of information
that couldn’t be gotten to the FISA Courts rapidly enough. And then, we got this
Orwellian statement from our good friend Alberto Gonzales that the government’s
reasons were dynamic, not static, so that we got this sense of infusions each day of new
ideas to justify what had been done right after 9/11, and therefore the idea that the real
problem is lack of manpower, the burden of the time needed to present the application
seems to me probably bogus. Remember as well that if there’s some emergency, the
statute already provides authority to begin and utilize the tap for 72 hours, and there has
been willingness in Congress to extend the 72 hours to maybe five days or whatever. So
if that was the scope of the problem you wouldn’t get the Protect America Act. You’d
have one sentence that says, 72 hours is now 108 hours, easily done.

MR. HALPERIN: Yeah, but I’m going to go – okay, go ahead.

MR. NOJEIM: To underline that, at yesterday’s hearing, the former head of the
OIPR, that’s the entity that actually presents the FISA applications to the FISA Court,
said that in the case of emergency surveillance, that if they have their ducks in a row, it’s
a matter of minutes, that they can do it in a matter of minutes.

MR. HALPERIN: Because we now know, as hard as it is to believe, that the
government was lying to us, that is what they were doing was talking about the Terrorist
Surveillance Program in order to hide what the director of DNI finally admitted the other
day is the second program and it’s the one that they’re now trying to justify of getting all
the conversations that are on the wire, and that’s the – the clear, I think it’s clear now
from the evidence that they started that program right after 9/11 along with the Terrorist
Surveillance Program, and as the attorney general explained, all his answers were only
about the Terrorist Surveillance Program and therefore were all wrong, irrelevant and
misleading, and I think we need to get at least the legal justifications as well as some
admission of what the two programs were before we really can understand what we’re
legislating.

Let me give each member of the panel a chance to say a final word before we
adjourn. I’ll start down at the end.

MR. NOJEIM: I would just say that it’s a good debate. It’s a debate that’s
happening in Congress at a very deep level. I think that there are some myths that are out
there and that the administration is spreading a number of them. I think that the questions
are hard. If they were easy, they would have been resolved long ago. And that what it
really boils down to is what do you do with the communications of Americans when
you’re targeting a person abroad? What do you do with them when they start talking to a person in the United States? That’s the nub of the issue, and if that can get resolved, I think we’ll move a long way toward solving these problems.

MR. FEIN: Just three points. One, this issue is exceptionally important because given the administration’s understanding of when we’re at war, namely, when there’s any terrorist anywhere in the Milky Way who voices some desire to kill an American anywhere in the Milky Way, we’re in a permanent state of war, and I’ve been dismayed that Congress has acquiesced in that rather sweeping conception of war. So in so far as these changes are justified because we have an international terrorist threat, they’re not temporary like measures of Lincoln during the Civil War.

The second thing in my judgment is to remember is that the whole idea of our Constitution and Declaration of Independence was to fashion a government where freedom and liberty was the rule and government encroachments were the exception. It wasn’t to create a suicide pact where we set the barriers so high that you could never get government to do anything, because we do have a lot of evil people out there. But it meant to create a serious burden on government to explain why an encroachment was necessary. The founding fathers said that we have certain inalienable rights to life, liberty and the pursuit of happiness, not at the sufferance of the government, not at the sufferance of President Bush.

That’s how they conceived the mission of this state, the mission of this state and that means that whenever we’re authorizing the government to encroach upon those liberties, we have to insist the government could create a convincing case why this is important, why this is important and that is where in my judgment Congress has totally defaulted. They’ve accepted “trust me,” accepted blindly administration assertion and let all the encroachments occur, not because there was any showing of need, but just because it happened to be a politically popular slogan to say we’re tough on terrorists. If we accept that rule in the future, then I think we can expect we will not have a Bill of Rights for the remainder of this century.

REP. HARMAN: The threat out there is real. There’s no question about that. Al Qaeda has metastasized around the world, other terror groups like Hezbollah already had international reach. Our assumption should be that there are terrorist cells in America. Fortunately, they are not adequately activated to harm us, but that could happen any day. I worry about that a lot and I think that so should you. The question is what is the responsible thing to do about it? This administration has played the fear card brilliantly. It is still playing the fear card brilliantly. I held this up before. This is the myth fact sheet distributed by the DNI yesterday. It says, provisions of Protect America Act of 2007 must be made permanent to prevent gaps in our ability to collect vital foreign intelligence information. There’s the bumper sticker: vital foreign intelligence information.

Everyone here on this panel and all of you get the nuance in this situation, but it is not being communicated effectively by the group that would like to amend FISA as the title of this topic said, “Getting Surveillance Right: Another Look at FISA.” I think it is
our obligation, I certainly believe I’m a number of the team, to do an effective pushback in the next month. If we don’t do that, we’re going to end up with provisions of Protect America Act of 2007 made permanent, and that’s where it’s going to go. And so hopefully, this panel and others like it and some of the very responsible hearings being held in Congress by the Judiciary and Intelligence Committees will generate enough information to an informed public so that we can create the effective counter to this unbelievably politically effective push for unfettered executive power.

MR. HALPERIN: And that is exactly why we wanted to hold this panel and why we’re grateful to our three panelists and to all of you for participating.

Thank you.

(Applause.)

(END)