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Senate
Judiciary Committee
Committee Hearing

U.S. Senator Arlen Specter (R-PA) Holds a Hearing on the National Security Agency Domestic Surveillance Program

(FINAL COPY: COMPLETES TRANSCRIPT)

U.S. SENATE JUDICIARY COMMITTEE HOLDS A HEARING ON
WARTIME EXECUTIVE POWER AND THE NATIONAL SECURITY
AGENCY'S SURVEILLANCE AUTHORITY
FEBRUARY 6, 2006

SPEAKERS:

U.S. SENATOR ARLEN SPECTER (R-PA)
CHAIRMAN

U.S. SENATOR ORRIN G. HATCH (R-UT)
U.S. SENATOR CHARLES E. GRASSLEY (R-IA)
U.S. SENATOR JON KYL (R-AZ)
U.S. SENATOR MIKE DEWINE (R-OH)
U.S. SENATOR JEFF SESSIONS (R-AL)
U.S. SENATOR LINDSEY O. GRAHAM (R-SC)
U.S. SENATOR JOHN CORNYN (R-TX)
U.S. SENATOR SAM BROWNBACK (R-KS)
U.S. SENATOR TOM COBURN (R-OK)
U.S. SENATOR PATRICK J. LEAHY (D-VT)
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U.S. SENATOR DIANNE FEINSTEIN (D-CA)
U.S. SENATOR RUSSELL D. FEINGOLD (D-WI)
U.S. SENATOR CHARLES E. SCHUMER (D-NY)
U.S. SENATOR RICHARD J. DURBIN (D-IL)

WITNESSES:

ALBERTO GONZALES,
U.S. ATTORNEY GENERAL

SPECTER: It's 9:30. The Judiciary Committee will now proceed
with our hearing on the administration's program administered by the

National Security Agency on surveillance.

We welcome the attorney general of the United States here today, who will be testifying.

We face, as a nation, as we all know, an enormous threat from international terrorism. The terrorists attacked this country on 9/11, and we remain in danger of renewed terrorist attacks.

The president of the United States has the fundamental responsibility to protect the country, but even, as the Supreme Court has said, the president does not have a blank check.

And this hearing is designed to examine the legal underpinnings of the administration's program from the point of view of the statutory interpretation and also from the point of view of constitutional law.

The Foreign Intelligence Surveillance Act was passed in 1978, and has a forceful and blanket prohibition against any electronic surveillance without a court order. That law was signed by President Carter with a signing statement that that was the exclusive way for electronic surveillance.

There is beyond, a constitutional issue as to whether the president has inherent powers under Article II of the Constitution to undertake a program of this sort. If the president has constitutional authority, that trumps and supersedes the statute. The Constitution is the fundamental law of the country, and a statute cannot be inconsistent with a constitutional provision.

SPECTER: We will be examining the administration's contention that, notwithstanding the Foreign Intelligence Surveillance Act, there is statutory authority for what the president has done by virtue of the resolution of Congress authorizing the use of force against the terrorists.

I have already expressed myself as being skeptical of that interpretation. But I believe the administration is entitled to a full and fair opportunity to advance their legal case on that important issue.

We will be examining with the attorney general the generalized rules of statutory interpretation. One of them is that a repeal by implication is disfavored and that the specific governs the generalizations.

And in the Foreign Intelligence Surveillance Act, you have the specific prohibition; contrasted with the generalized authority under the resolution for the authorization for the use of force.

I sent a letter to the attorney general propounding some 15 questions. And I thank the attorney general for his responses. And they will provide, to a substantial extent, the framework for our discussion here today.

One of the key points on my mind is the role of the Foreign Intelligence Surveillance Court. And one of the questions which I asked of the attorney general was the role of the court in granting permission in advance, the role of the court in granting permission within 72 hours after the president exercises surveillance authority; and, beyond that, the issue as to whether the administration might now consider having the Foreign Intelligence Surveillance Court review this entire issue.

The whole question of probable cause is one with very substantial flexibility under our laws, depending upon the circumstances of the case.

SPECTER: The Foreign Intelligence Surveillance Court has a great reputation for integrity, no leaks; candidly, unlike the Congress, candidly, unlike the administration, candidly, unlike all of Washington, perhaps all of the world. But when that court has secrets, they keep the secrets. And they also are well-respected in terms of their technical competence.

And one of the questions, the lead question, which I will be asking the attorney general is whether the administration would consider sending this entire program to the court for their evaluation.

The scope of this hearing is to examine the law on the subject. And the ground rules are that we will not inquire into the factual underpinnings of what is being undertaken here. That is for another committee and for another day. That is for the Intelligence Committee, and that is for a closed session.

It may be that some of the questions which we will ask the attorney general on legal issues may, in his mind, require a closed session. And if they do, we will accommodate his request in that regard.

One of the other questions which I will be directing to the attorney general, following up on the letter, is the practice of making disclosures only to the so-called gang of eight -- the speaker and the Democratic leader in the House, the majority leader and the Democratic leader in the Senate and the chairman and vice president (sic) of the two Intelligence Committees -- and the adequacy of that in terms of the statute, which calls for disclosure to the committees. And the committees are much broader.

And if the administration thinks that the current law is too broad, they have the standing to ask us to change the law. And we would certainly consider that on a showing of necessity to do so.

SPECTER: We have told the attorney general we would require his presence all day. We will have 10-minute rounds, which is double what is the practice of this committee. And, as I've announced in advance,

we will have multiple rounds.

There has been some question about swearing in the attorney general and I discussed that with the attorney general. He said he would be willing to be sworn.

After reflecting on the matter, I think it is unwarranted because the law provides ample punishment for a false official statement or a false statement to Congress under the provisions of 18 United States Code 1001 and [18 United States Code Section 1505](#).

The penalties are equivalent to those under the perjury laws.

There has been a question raised as to the legal memoranda within the department. And at this time and on this showing, it is my judgment that that issue ought to be reserved to another day. I'm sure it will come up in the course of questioning.

The attorney general will have an opportunity to amplify on the administration's position. But there is a fairly well-settled doctrine that internal memoranda within the Department of Justice are not subject to disclosure because of the concern that it would have a chilling effect; that if lawyers are concerned that what they write may later be subjected to review by others, they'll be less than candid in their positions.

SPECTER: This committee has faced those issues in recent times with requests for internal memoranda of Chief Justice Roberts. And they were not produced. And they were more relevant there than here because of the issue of finding some ideas as to how Chief Justice Roberts would function on the court if confirmed.

Here we have legal issues and lawyers on this committee and other lawyers who are as capable as the Department of Justice in interpreting the law.

One other issue has arisen, and that is the issue of showing a video. And I think that would not be in order.

The transcripts of what the president said and the transcripts of what you, Mr. Attorney General, said earlier in a discussion with Senator Feingold are of record -- this is not a Sunday morning talk show -- and the transcripts contain the full statement as to legal import and legal effect. And I'm sure that those statements by the president, those statements by you, will receive considerable attention by this committee.

That's longer than I usually talk, but this is a very big subject.

FEINGOLD: Mr. Chairman?

SPECTER: This is the first of a series of hearings -- at least two more -- because of the very profound and very deep questions which we have here, beyond statutory interpretation and the constitutional implications of the president's Article II powers.

And this is all in the context of the United States being under a continuing threat from terrorism.

But the beauty of our system is the separation of powers, the ability of the Congress to call upon the administration for responses, the response of the attorney general in being willing to come here today, and then the Supreme Court to resolve any conflicts.

SPECTER: I'd like to yield now to...

FEINGOLD: Mr. Chairman, could I just ask a quick clarification?

SPECTER: Senator Feingold?

FEINGOLD: Heard your judgment about whether the witness should be sworn. What would be the distinction between this occasion and the confirmation hearing where he was sworn?

SPECTER: The distinction is that it is the practice to swear nominees for attorney general or nominees for the Supreme Court, or nominees for other Cabinet positions, but the attorneys general have appeared here on many occasions in the 25 years that I have been here and their might be a showing, Senator Feingold, to warrant swearing.

FEINGOLD: Mr. Chairman, I'd just say that the reason that anyone would want him sworn has to do with the fact that certain statements were made under oath at the confirmation hearing. So it seems to me logical that, since we're going to be asking about similar things, that he should be sworn in this occasion, as well.

LEAHY: And, Mr. Chairman, if I might on that point -- if I might on that point, of course, the attorney general was sworn in on another occasion other than his confirmation, when he and Director Mueller appeared before this committee for oversight.

And I had asked the chairman, as he knows, earlier that he should be sworn on this. And I made that request right after the press had pointed out where an answer to Senator Feingold appeared not to have been truthful. And I felt that that is an issue that's going to be brought up during this hearing, and we should go into it.

LEAHY: I also recall the chairman and other Republicans insisting that former Attorney General Reno be sworn, which she came up here on occasions other than her confirmation.

I think, especially because of the article about the questions of the senator from Wisconsin, Senator Feingold, I believe he should have been sworn. That is, obviously, the prerogative of the chairman.

But I would state again, and state strongly for the record, what I've told the chairman privately. I think in this instance, similar to what you did in April with Attorney General Gonzales and Director Mueller, both of whom were sworn, and as the chairman did on -- insisted with then-Attorney General Reno, I believe he should be sworn.

SPECTER: Well, Senator Leahy and I have not disagreed on very

much in the more than a year since we've worked together as the ranking and chairman, and I think it's strengthened the committee. And I did receive your request. And I went back and I dug out the transcript and reviewed Senator Feingold's vigorous cross-examination of the attorney general at the confirmation hearings. And I know the issues as to torture, which Senator Feingold raised, and the issues which Senator Feingold raised as to searches without warrants.

And I have reviewed the provisions of [18 USC 1001](#) in the case involving Admiral Poindexter, who was convicted under that provision; and have reviewed the provisions of [18 United States Code 1505](#), where Oliver North was convicted. And there are penalties provided there commensurate with perjury.

And it is my judgment that it is unnecessary to swear the witness.

LEAHY: But, Mr. Chairman, may I ask, if the witness has no objection to being sworn, why not just do it and then not have this question raised here? I realize only the chairman can do the swearing in.

LEAHY: Otherwise, I'd offer to give him the oath myself, insofar as he said he was willing to be sworn in. But if he's willing to be, why not just do it?

SESSIONS (?): Mr. Chairman...

SPECTER: Well, the answer to why I'm not going to do it is that I've examined all the facts and I've examined the law and I have asked the attorney general whether he would object or mind and he said he wouldn't. And I have put that on the record.

But the reason I'm not going to swear him in is not up to him.

Attorney General Gonzales is not the chairman; I am. And I'm going to make the ruling.

(CROSSTALK)

LEAHY: I would point out that he's been here before this committee three times. The other two times he was sworn. It seems unusual not to swear him in this time.

FEINGOLD (?): Chairman, I move the witness be sworn.

SPECTER: The chairman has ruled. If there is an appeal from the ruling of the chair, I have a pretty good idea how it's going to come out.

FEINGOLD (?): Mr. Chairman, I appeal the ruling of the chair.

SPECTER: All in favor of the ruling of the chair, say "aye."

(UNKNOWN): Roll call.

SPECTER: Opposed?

FEINGOLD (?): Ask for a roll call vote.

SPECTER: The clerk will call the roll.

I'll call the roll.

(LAUGHTER)

SESSIONS: Out of the question.

(LAUGHTER)

SPECTER: Senator Hatch?

HATCH: No.

SPECTER: Senator Grassley?

GRASSLEY: No.

SPECTER: Senator Kyl?

KYL: Mr. Chairman, is the question to uphold or to reject the ruling?

SPECTER: The question is to uphold the ruling of the chair, so we're looking for ayes, Senator.

(LAUGHTER)

LEAHY: But we're very happy with the noes that have started on the Republican side, they being the better position.

HATCH (?): I'm glad somebody clarified that.

SPECTER: So the question is, "Should the ruling of the chair be upheld that Attorney General Gonzales not be sworn?"

(CROSSTALK)

SPECTER: By proxy for Senator Brownback, aye. Senator Coburn?

(CROSSTALK)

SPECTER: We've got enough votes already.

Senator Leahy?

LEAHY: Emphatically, no.

(CROSSTALK)

SPECTER: Aye.

The ayes have it.

FEINGOLD: Mr. Chairman, I request to see the proxies given by the Republican senators.

SPECTER: Would you repeat that, Senator Feingold?

FEINGOLD: I request to see the proxies given by the Republican senators.

SPECTER: The practice is to rely upon the staffers. But without counting that vote -- well, we can rephrase the question if there's any serious challenge of the proxies.

This is really not a very good way to begin this hearing.

SPECTER: But I've found that patience is a good practice here.

SESSIONS: Mr. Chairman (OFF-MIKE) very disappointed that we went through this process.

This attorney general, in my view, is a man of integrity. And having read the questions, as you have, that Senator Feingold put forward, and his answers, I believe he'll have a perfect answer to

those questions when they come up at this hearing.

And I do not believe they're going to show he perjured himself in any way or was inaccurate in what he said.

And I remember having a conversation with General Myers and Secretary of Defense Rumsfeld, and one of the saddest days in their career was having to come in here and stand before a Senate committee and raise their hand as if they are not trustworthy in matters relating to the defense of this country.

And I think it's not necessary that a duly confirmed Cabinet member have to routinely stand up and just give an oath when they are, in effect, under oath and subject to prosecution if they don't tell the truth.

I think it's just a question of propriety and good taste and due respect from one branch to the other.

And that's why I would support the chair.

LEAHY: Mr. Chairman, I don't...

SPECTER: Let's not engage in protracted debate on this subject.

We're not going to swear this witness, and we have the votes to stop it.

Senator Leahy?

LEAHY: Mr. Chairman, I have stated my position why I believe he should be sworn in. But I understand that you have the majority of votes.

Now, the question for this hearing goes into the illegality of the government's domestic spying on ordinary Americans without a warrant.

LEAHY: The question facing us is not whether the government should have all the tools it needs to protect the American people. Of course, they should. Every single member of Congress agrees they should have the tools necessary to protect the American people. The terrorist threat to America's security remains very real. We should have the tools to protect America's security. That's why I coauthored the Patriot Act five years ago and why it passed with such broad, bipartisan support.

And I would also remind everybody that's why we amended FISA, the Foreign Intelligence Surveillance Act, five times since 9/11, to give it more flexibility; twice during the time when I was chairman.

We all agree that if you have AL Qaida terrorists calling we should be wiretapping them. We don't even need authority to do that overseas and certainly going into, so far, the unsuccessful effort to catch Osama bin Laden in Afghanistan, Congress has given the president authority to monitor AL Qaida messages legally, with checks to guard against abuses with Americans' conversations and e-mails that are being monitored.

But instead of doing what the president has the authority to do legally, he decided to do it illegally without safeguards.

A judge from the special court Congress created to monitor domestic spying would grant any request to monitor an AL Qaida terrorist. Of the approximately 20,000 foreign intelligence warrant applications to these judges over the past 28 years, about a half dozen have been turned down.

I'm glad the chairman's having today's hearing. We have precious little oversight in this Congress, but the chairman and I have a long history of conducting vigorous bipartisan oversight investigation. And if Congress is going to serve the role it should, instead of being a rubber stamp for whoever is in the executive, we have to have these kind of oversights.

The domestic spying program into e-mails and telephone calls apparently conducted by the National Security Agency was first reported by the New York Times on December 16, 2005.

The next day, President Bush publicly admitted that secret domestic wiretapping has been conducted without warrants since late 2001, and he's issued secret orders to do this more than 30 times.

LEAHY: We've asked for those presidential orders allowing secret eavesdropping on Americans. They have not been provided.

We've asked for official legal opinions of the government that the administration says justify this program. They too have been withheld from us.

Now, the hearing is expressly about the legality of this program. It's not about the operational details; it's about whether we can legally spy on Americans.

In order for us to conduct effective oversight, we need the official documents to get those answers.

We're an oversight committee of the United States Senate, the oversight committee with jurisdiction over the Department of Justice and over its enforcement of the laws of the United States. We are the duly elected representatives of the United States. It's our duty to determine whether the laws of the United States have been violated. The president and the Justice Department have a constitutional duty to faithfully execute the laws. They do not write the laws. They do not pass the laws. They do not have unchecked powers to decide what laws to follow. And they certainly don't have the power to decide what laws to ignore. They cannot violate the laws and the rights of ordinary Americans.

Mr. Attorney General, in America, our America, nobody is above the law, not even the president of the United States.

There is much that we did not know about the president's secret spying program. I hope we're going to get some more answers, some

real answers, not self-serving characterizations.

Let's start with what we do know.

Point one: The president's secret wiretapping program is not authorized by the Foreign Intelligence Surveillance Act.

The law expressly states it provides the exclusive source of authority for wiretapping for intelligence purposes. Wiretapping that's not authorized under this is a federal crime. That is what the law says, so it's what the law means.

This law was enacted to define how domestic surveillance for intelligence purposes can be conducted while protecting the fundamental rights of Americans.

Now, a couple of generations of Americans are too young to know why we passed this law. It was enacted after decades of abuses by the executive, including the wiretapping of Dr. Martin Luther King and other political opponents of early government officials.

LEAHY: After some of the so-called White House enemies in the Nixon White House enemies list -- during that time, another president asserted he did what was legal because he was president and, being president, he could do whatever he wanted to do.

The law's been updated five times since September 11, 2001. It provides broad and flexible authority.

In fact, on July 31st, 2002, your Justice Department testified, "This law is a highly flexible statute that's been proven effective." You noted, when you were trying to prevent terrorist acts, "that is really what FISA was intended to do and it was written with that in mind."

But now the Bush administration concedes the president knowingly created a program involving thousands of wiretaps of Americans in the United States over the period of the last four or five years without complying with FISA.

And legal scholars and former government officials -- including many Republicans -- have been almost unanimous in stating the obvious: This is against the law.

And point two: The authorization for the use of military force Democratic and Republican lawmakers joined together to pass in the days immediately after the September 11th attacks did not give the president the authority to go around the FISA law to wiretap Americans illegally.

That authorization said "to capture or kill Osama bin Laden" and to use the American military to do that. It did not authorize domestic surveillance of American citizens.

You know, let me be clear: Some Republican senators say that we're talking about special rights for terrorists. I have no interest in that. Just like every member of this committee, and thousands of

our staffs and every member of the House of Representatives, I go to work every single day in a building that was targeted for destruction by AL Qaida.

Of course I want them captured.

I wish the Bush administration had done a better job. I wish that when they almost had Osama bin Laden, they had kept on after him and caught him and destroyed him, rather than taking our special forces out of Afghanistan and sending them precipitously into Iraq.

LEAHY: But my concern is the laws of America. My concern is when we see peaceful Quakers being spied upon, where we see babies and nuns who can't fly on airplanes because they're on a terrorist watch list put together by your government.

And point three: The president never came to Congress and never sought additional legal authority to engage in the type of domestic surveillance in which NSA has been secretly engaged for the last several years.

And after September 11th, 2001, I led an bipartisan effort to provide the legal tools. We passed amendments to FISA. We passed the U.S. Patriot Act. And we upgraded FISA four times since then.

Back when a Republican senator on this committee proposed a legal change to the standards needed for a FISA warrant, the Bush administration didn't support that effort, but raised questions about it and said it wasn't needed.

The administration told the Senate that FISA is working just fine.

You, Mr. Attorney General, said the administration did not ask for legislation authorizing warrantless wiretapping of Americans; did not think such legislation would pass.

Who did you ask? You didn't ask me. You didn't ask Senator Specter.

Not only did the Bush administration not seek broader legal authority, it kept its very existence of this illegal wiretapping program completely secret from 527 of the 535 members of Congress, including members of this committee and members on the Intelligence Committee.

The administration has not suggested to Congress, the American people that FISA was inadequate, outmoded or irrelevant. You never did that until the press caught you violating the statute with this secret wiretapping of Americans without warrants.

In fact, in 2004, two years after you authorized the secret warrantless wiretapping program -- and this is a tape we're told we can't show -- the president said, quote, "Any time you hear the United States government talking about wiretap, a wiretap requires a court order. Nothing has changed. When we're talking about chasing down

terrorists, we're talking about getting a court order before we do so."

LEAHY: That was when he was running for re-election. Today we know, at the very least, that statement was misleading.

So let me conclude with this. I have many questions for you, but first let me give you a message, Mr. Attorney General: to you, to the president and to the administration. This is a message that should be unanimous from every single member of Congress no matter what their party or their ideology.

Under our Constitution, Congress is a coequal branch of government and we make the laws. If you believe you need new laws, then come and tell us. If Congress agrees, we'll amend the law.

If you do not even attempt to persuade Congress to amend the law, then you're required to follow the law as it's written.

That is true of the president, just as it's true of me and you and every American. That's a rule of law. That's a rule on which our nation was founded. That's the rule on which it endures and prospers.

Thank you, Mr. Chairman.

SPECTER: Thank you, Senator Leahy.

We turn now to the attorney general of the United States, Alberto R. Gonzales.

The attorney general has held the office for a little over a year. Before that, he was counsel to the president right after the president's inauguration in 2001.

He had served in state government with Governor Bush. He attended the U.S. Air Force Academy from 1975 to 1977, graduated from Rice University for a bachelor's degree, and from the Harvard Law School, and was a partner in the distinguished firm of Vinson & Elkins in Houston before going into state government.

We have allotted 20 minutes for your opening statement, Mr.

Attorney General, because of the depth and complexity and importance of the issues which you and we will be addressing.

You may proceed.

GONZALES: Good morning, Chairman Specter, Senator Leahy and members of the committee. I'm pleased to have this opportunity to speak with you.

And let me just add for the record, when Chairman Specter asked me whether I would be willing to go under oath, I did say I would have no objections.

GONZALES: I also said that my answers would be the same, whether or not I was under oath or not.

Al Qaida and its affiliates remain deadly dangerous. Osama bin Laden recently warned America that, quote, "Operations are under preparation and you will see them in your homes."

Bin Laden's deputy, Ayman Al-Zawahiri, added just days ago that the American people are, and I again I quote, "destined for a future colored by blood, the smoke of explosions and the shadows of terror." None of us can afford to shrug off warnings like this or forget that we remain a nation at war.

Nor can we forget that this is a war against a radical and unconventional enemy. AL Qaida has no boundaries, no government, no standing army. Yet they are capable of wreaking death and destruction on our shores.

And they have sought to fight us not just with bombs and guns. Our enemies are trained in the most sophisticated communications, counter-intelligence and counter-surveillance techniques. And their tactics are constantly changing.

They use video feed and worldwide television networks to communicate with their forces; e-mail, the Internet and cell phones to direct their operations; and even our own training academies to learn how to fly aircraft as suicide-driven missiles.

To fight this unconventional war, while remaining open and vibrantly engaged with the world, we must search out the terrorists abroad and pinpoint their cells here at home.

GONZALES: To succeed, we must deploy not just soldiers and sailors and airmen and Marines, we must also depend on intelligence analysts, surveillance experts and the nimble use of our technological strength.

Before 9/11, terrorists were clustered throughout the United States preparing their assault. We know from the 9/11 Commission report that they communicated with their superiors abroad using e-mail, the Internet and telephones.

General Hayden, the principal deputy director of national intelligence, testified last week before the Senate that the terrorist surveillance program instituted after 9/11 has helped us detect and prevent terror plots in the United States and abroad. Its continuation is vital to the national defense.

Before going any further, I should make clear what I can discuss today. I am here to explain the department's assessment that the president's terrorist surveillance program is consistent with our laws and the Constitution.

I'm not here to discuss the operational details of that program or any other classified activity.

The president has described the terrorist surveillance program in response to certain leaks, and my discussion in this open forum must be limited to those facts the president has publicly confirmed: nothing more.

Many operational details of our intelligence activities remain

classified and unknown to our enemy. And it is vital that they remain so.

The president is duty-bound to do everything he can to protect the American people. He took an oath to preserve, protect and defend the Constitution.

In the wake of 9/11, he told the American people that to carry out this solemn responsibility, he would use every lawful means at his disposal to prevent another attack.

One of those means is the terrorist surveillance program.

GONZALES: It's an early warning system designed for the 21st century. It is the modern equivalent to a scout team, sent ahead to do reconnaissance, or a series of radar outposts designed to detect enemy movements. And as with all wartime operations, speed, agility and secrecy are essential to its success.

While the president approved this program to respond to the new threats against us, he also imposed several important safeguards to protect the privacy and the civil liberties of all Americans.

First, only international communications are authorized for interception under this program. That is communications between a foreign country and this country.

Second, the program is triggered only when a career professional at the NSA has reasonable grounds to believe that one of the parties to a communication is a member or agent of AL Qaida or an affiliated terrorist organization. As the president has said, if you're talking with AL Qaida, we want to know what you're saying.

Third, to protect the privacy of Americans still further, the NSA employs safeguards to minimize the unnecessary collection and dissemination of information about U.S. persons.

Fourth, this program is administered by career professionals at NSA, expert intelligence analysts and their senior supervisors with access to the best available information. They make the decisions to initiate surveillance. The operation of the program is reviewed by NSA lawyers, and rigorous oversight is provided by the NSA inspector general.

I have been personally assured that no other foreign intelligence program in the history of NSA has received a more thorough review.

Fifth, the program expires by its own terms approximately every 45 days. The program may be reauthorized, but only on the recommendation of intelligence professionals, and there must be a determination that AL Qaida continues to pose a continuing threat to America based on the latest intelligence.

Finally, the bipartisan leadership of the House and Senate Intelligence Committees has known about this program for years.

GONZALES: The bipartisan leadership of both the House and Senate

has also been informed.

During the course of these briefings, no members of Congress asked that the program be discontinued.

Mr. Chairman, the terrorist surveillance program is lawful in all respects. As we have thoroughly explained in our written analysis, the president is acting with authority provided both by the Constitution and by statute.

First and foremost, the president is consistent with our Constitution. Under Article II, the president has the duty and the authority to protect America from attack. Article II also makes the president, in the words of the Supreme Court, quote, "the sole organ of government in the field of international relations."

These inherent authorities vested in the president by the Constitution include the power to spy on enemies like AL Qaida without prior approval from other branches of government. The courts have uniformly upheld this principle in case after case.

Fifty-five years ago, the Supreme Court explained that the president's inherent constitutional authorities expressly include, quote, "the authority to use secretive means to collect intelligence necessary for the conduct of foreign affairs and military campaigns." More recently, in 2002, the FISA Court of review explained that, quote, "All the other courts who have decided the issue have held that the president did have inherent authority to conduct warrantless searches to obtain intelligence information."

The court went on to add, quote, "We take for granted that the president does have that authority. And assuming that that is so, FISA could not encroach on the president's constitutional powers."

Now, it is significant, this statement stressing the constitutional limits of the Foreign Intelligence Surveillance Act, or FISA, came from the very appellate court that Congress established to review the decisions of the FISA Court.

Nor is this just the view of the courts. Presidents throughout our history has authorized the warrantless surveillance of the enemy during wartime, and they have done so in ways far more sweeping than the narrowly targeted terrorist surveillance program authorized by President Bush.

General Washington, for example, instructed his army to intercept letters between British operatives, copy them and allow those communications to go on their way.

President Lincoln used the warrantless wiretapping of telegraph messages during the Civil War to discern the movements and intentions of opposing troops.

GONZALES: President Wilson, in World War I, authorized the military to intercept each and every cable, telephone and telegraph

communication going into or out of the United States.

During World War II, President Roosevelt instructed the government to use listening devices to learn the plans of spies in the United States. He also gave the military the authority to review, without warrant, all telecommunications, quote, "passing between the United States and any foreign country."

The far more focused terrorist surveillance program fully satisfies the reasonableness requirement of the Fourth Amendment. Now, some argue that the passage of FISA diminished the president's inherent authority to intercept any communications, even in a time of conflict. Others disagree, contesting whether and to what degree the legislative branch may extinguish core constitutional authorities granted to the executive branch.

Mr. Chairman, I think that we can all agree that both of the elected branches have important roles to play during a time of war. Even if we assume that the terrorist surveillance programs qualifies as electronic surveillance under FISA, it complies fully with the law. This is especially so in light of the principle that statutes should be read to avoid serious constitutional questions, a principle that has no more important application than during wartime.

GONZALES: By its plain terms, FISA prohibits the government from engaging in electronic surveillance, quote, "except as authorized by statute."

Those words, "except as authorized by statute," are no mere incident of drafting. Instead, they constitute a far-sighted safety valve.

The Congress that passed FISA in 1978 included those words so that future congresses could address unforeseen challenges. The 1978 Congress afforded future lawmakers the ability to modify or eliminate the need for a FISA application without having to amend or repeal FISA.

Congress provided this safety valve because it knew that the only thing certain about foreign threats is that they change in unpredictable ways.

Mr. Chairman, the resolution authorizing the use of military force is exactly the sort of later statutory authorization contemplated by FISA's safety valve.

Just as the 1978 Congress anticipate, a new Congress in 2001 found itself facing a radically new reality. In that new environment, Congress did two critical things when it passed the force resolution. First, Congress recognized the president's inherent constitutional authority to combat Al Qaida. These inherent authorities, as I have explained, include the right to conduct surveillance of foreign enemies operating inside this country.

Second, Congress confirmed and supplemented the president's inherent authority by authorizing him, quote, "to use all necessary and appropriate force against AL Qaida."

GONZALES: This is a very broadly worded authorization. It is also one that must permit electronic surveillance of those associated with AL Qaida.

Our enemies operate secretly and they seek to attack us from within. In this new kind of war, it is both necessary and appropriate for us to take all possible steps to locate our enemy and know what they are plotting before they strike.

Now, we all agree that it's a necessary and appropriate use of force to fire bullets and missiles at AL Qaida strongholds. Given this common ground, how can anyone conclude that it is not necessary and appropriate to intercept AL Qaida phone calls?

The term "necessary and appropriate force" must allow the president to spy on our enemies, not just shoot at them blindly, hoping we might hit the right target.

In fact, other presidents have used statutes like the force resolution as a basis for authorizing far broader intelligence surveillance programs.

President Wilson, in World War I, cited not just his inherent authority as commander in chief to intercept all telecommunications coming into and out of this country. He also relied on a congressional resolution authorizing the use of force against Germany that parallels the force resolution against AL Qaida.

A few members of Congress have suggested that they personally did not intend the force resolution to authorize the electronic surveillance of the enemy, AL Qaida.

But we are a nation governed by written laws, not the unwritten intentions of individuals. What matters is the plain meaning of the statute passed by Congress and signed by the president.

GONZALES: And in this case those plain words could not be clearer.

The words contained in the force resolution do not limit the president to employing certain tactics against AL Qaida. Instead, they authorize the use of all necessary and appropriate force.

Nor does the force resolution require the president to fight AL Qaida only in foreign countries. The preamble to the force resolution acknowledges the continuing threat, quote, "at home and abroad." Congress passed the force resolution in response to a threat that emerged from within our own borders. Plainly, Congress expected the president to address that threat and to do so with all necessary and appropriate force.

Importantly, the Supreme Court has already interpreted the force

resolution in the Hamdi case. There the question was whether the president had the authority to detain an American citizen as an enemy combatant and to do so despite a specific statute that said that no American citizen could be detained except as provided by Congress. A majority of the justices in Hamdi concluded that the broad language of the force resolution gave the president the authority to employ the traditional incidents of waging war. Justice O'Connor explained that these traditional powers include the right to detain enemy combatants and to do so even if they happen to be American citizens.

If the detention of an American citizen who fought with AL Qaida is authorized by the force resolution as an incident of waging war, how can it be that merely listening to AL Qaida phone calls into and out of the country in order to disrupt their plots is not?

Now, some have asked if the president could have obtained the same intelligence using tradition FISA processes. Let me respond by assuring you that we make robust use of FISA in our war efforts. We constantly search for ways to use FISA more effectively.

In this debate, however, I have been concerned that some who've asked, "Why not FISA?" do not understand how that statute really works.

GONZALES: To be sure, FISA allows the government to begin electronic surveillance without a court order for up to 72 hours in emergency situations or circumstances.

But before that emergency provision can be used, the attorney general must make a determination that all of the requirements of the FISA statute are met in advance.

This requirement can be cumbersome and burdensome.

Intelligence officials at NSA first have to assess that they have identified a legitimate target. After that, lawyers at NSA have to review the request to make sure it meets all the requirements of the statute. And then lawyers at the Justice Department must also review the request and reach the same judgment or insist on additional information before processing the emergency application.

Finally I, as attorney general, must review the request and make the determination that all of the requirements of FISA are met.

But even this is not the end of the story.

Each emergency authorization must be followed by a detailed formal application to the FISA courts within three days. The government must prepare legal documents laying out all of the relevant facts and law and obtain the approval of a Cabinet-level officer as well as a certification from a senior official with mass security responsibility, such as the director of the FBI.

Finally, a judge must review, consider and approve the

application.

All of these steps take time. AL Qaida, however, does not wait. While FISA is appropriate for general foreign intelligence collection, the president made the determination that FISA is not always sufficient for providing the sort of nimble early-warning system we need against AL Qaida.

Just as we can't demand that our soldiers bring lawyers onto the battlefield, let alone get the permission of the attorney general or a court before taking action, we can't afford to impose layers of lawyers on top of career intelligence officers who are striving valiantly to provide a first line of defense by tracking secretive Al Qaida operatives in real time.

GONZALES: Mr. Chairman, the terrorist surveillance program is necessary, it is lawful and it respects the civil liberties we all cherish. It is well within the mainstream of what courts and prior presidents have authorized. It is subject to careful constraints. And congressional leaders had been briefed on the details of its operation.

To end the program now would be to afford our enemy dangerous and potential deadly new room for operation within our own borders. I have highlighted the legal authority for the terrorist surveillance program. And I look forward to our discussion, and know that you appreciate there remain serious constraints of what I can say about operational details.

Our enemy is listening. And I cannot help but wonder if they aren't shaking their heads in amazement at the thought that anyone would imperil such a sensitive program by leaking its existence in the first place, and smiling at the prospect that we might now disclose even more or perhaps even unilaterally disarm ourselves of a key tool in the war on terror.

Thank you, Mr. Chairman.

SPECTER: Thank you very much, Attorney General Gonzales. Before proceeding to the 10-minute rounds for each of the senators, let me request that you make your answers as brief as possible.

SPECTER: You're an experienced witness. And we will try to make our questions as pointed, as brief, as each senator sees it appropriate.

LEAHY: Mr. Chairman, could I also ask that we have, for the record, the statement that the attorney general has -- well, obviously, the statement he just gave now, but the statement that he submitted to the committee under our rules a couple days ago as part of the record?

SPECTER: Is there a difference between the two statements, Mr.

Attorney General?

GONZALES: Sir, there is a difference between the written statement and the oral statement, yes, sir.

SPECTER: They're the same?

GONZALES: There is a difference, sir. They're not the same.

SPECTER: Well, both will be made a part of the record.

LEAHY: Thank you.

SPECTER: All right. Now for the 10-minute rounds.

Mr. Attorney General, starting with the FISA Court: well-respected, maintains secrecy, experienced in the field -- and I posed this question to you in my letter -- why not take your entire program to the FISA Court within the broad parameters of what is reasonable and constitutional and ask the FISA Court to approve it or disapprove it?

GONZALES: Senator, I totally agree with you that the FISA Court should be commended for its great service. They are working on weekends, they're working at nights...

SPECTER: Now on to my question.

GONZALES: ... assisting us in the war on terror.

In terms of, "Why not go to the FISA Court?" once the determination was made that neither the Constitution nor FISA prohibited the use of this tool, then the question becomes, for the commander in chief, which of the tools is appropriate given a particular circumstance.

And we studied very carefully the requirements of the Constitution under the Fourth Amendment. We studied very carefully what FISA provides for.

As I said in my statement, we believe that FISA does anticipate that another statute could permit electronic surveillance in a way that...

SPECTER: OK, you think you're right. But there are a lot of people who think you're wrong.

As a matter of public confidence, why not take it to the FISA Court? What do you have to lose if you're right?

GONZALES: What I can say, Senator, is that we are continually looking at ways that we can work with the FISA Court in being more efficient and more effective in fighting the war on terror. Obviously, we would consider and are always considering methods of fighting the war effectively against AL Qaida.

SPECTER: Well, speaking for myself, I would urge the president to take this matter to the FISA Court. They're experts. They'll maintain the secrecy. And let's see what they have to say.

SPECTER: Mr. Attorney General, did Judge Robertson of the FISA Court resign in protest because of this program?

GONZALES: I do not know why Judge Robertson resigned, sir.

SPECTER: Has the FISA Court declined to consider any information obtained from this program when considering warrants?

GONZALES: Sir, what I can say is that the sources of information provided or included in our application are advised or disclosed to the FISA Court. Because, obviously, one of the things they have to do is judge the reliability.

SPECTER: So if you have information that you're submitting to the FISA Court in support for a warrant, you tell them that it was obtained from this program?

GONZALES: Senator, I am uncomfortable talking in great detail about how this information is generally shared.

What I can say -- repeat what I just said. And that is, we, as a matter of routine, provide to the FISA Court information about the sources of the information that formed the basis of an application.

SPECTER: I'm not asking you how you get the information from the program. I'm asking you, do you tell the FISA Court that you got it from the program?

I want to know if they are declining to issue warrants because they are dissatisfied with the program.

GONZALES: Senator, I believe that getting into those kind of details is getting into the details about how the program is operated. Obviously, the members of the court understand the existence of this program.

What I can say is, we have very open and very candid discussion and relationship with the FISA Court. To the extent that we're involved in intelligence activities that relate in any way to the FISA Court and they have questions about that, we have discussions with the FISA Court.

Our relationship with the court is extremely important. And we do everything that we can do to assure them with respect to our intelligence activities that affect decisions that they make.

SPECTER: I'm not going to press you further. But I'd ask you to reconsider your answer.

GONZALES: Yes, sir.

SPECTER: In your response to my letter, you said this, quote:

"No communications are intercepted unless it is determined that" -- and then I'm leaving some material out -- "a party to the communication is a member or agent of AL Qaida or an affiliated terrorist organization."

You're representing to this committee that before there's an interception, there's a determination that one of the parties is a member of AL Qaida, an agent of AL Qaida or an affiliated terrorist organization. Is that true?

GONZALES: Sir, I believe that General Hayden, the deputy director of intelligence, yesterday, confirmed that before there is any interception, there is a determination made by an intelligence officers at NSA that, in fact, we have reasonable grounds to believe that one party in the communication is a member or agent of AL Qaida or an affiliated terrorist organization.

SPECTER: Is there any way you can give us assurance that it is true, without disclosing the methods and sources of your program? It seems to me that that is as very important statement. And if we were really sure that you were dealing only with the communication where you have a member of AL Qaida, an agent of AL Qaida or an affiliate of AL Qaida terrorist organization, it would be one thing, because the concern is that there is a broad sweep which includes people who have no connection with AL Qaida.

What assurance can you give to this committee and beyond this committee to millions of Americans who are vitally interested in this issue and following these proceedings?

GONZALES: Well, I would say, Senator, and to the American people and to this committee that the program as operated is a very narrowly tailored program.

And we do have a great number of checks in place to ensure, I am told, by the operations folks that, to a great degree of certainty, a high degree of confidence, that these calls are solely international calls.

We have these career professionals out at NSA who are experts in Al Qaida tactics and AL Qaida communications, AL Qaida aims. They are the best at what they do. And they are the ones that make the judgment as to whether or not someone is on a call that is a member of Al Qaida or a member of an affiliate organization.

The inspector general, as I've indicated, has been involved in this program from its early stages. There are monthly...

SPECTER: Mr. Attorney General, let me interrupt you, because I want to cover a couple more questions and time is fleeting. And I think you've given the substance of the response.

We have contacted former Attorney General Ashcroft about his availability to testify before this committee, and he hasn't said yes and he hasn't said no.

SPECTER: He's considering it.

I believe that the testimony of former Attorney General Ashcroft would fall under a little different line than line attorneys within the department who are giving information and the concern about having a chilling effect if they know their views are later to be determined. I think the attorney general is different. And my question to you is would you have any objection to former Attorney General

Ashcroft's appearance before this committee on this issue?

GONZALES: I would not, Senator. Although, of course, if it relates to questions regarding the law and the position of the executive branch, that is what I'm doing today, is conveying to this committee what is the executive branch position on the legal authorities of the president in authorizing the terrorist surveillance program.

SPECTER: That's all we'd ask him about. We would ask him about the operations.

I take it I heard you correctly, you would not have an objection?

GONZALES: Senator, this committee, of course, can ask who they want to ask come before the committee.

SPECTER: No, no, I know we can ask. A totally different question as to what we hear in response.

He hasn't told us that he's going to look to the Department of Justice, but I think he'd feel more comfortable knowing that you had no objection.

I thought I heard you say earlier that you didn't have an objection.

GONZALES: Senator, I don't think I would have an objection.

SPECTER: OK.

Two more questions which I want to ask before my red light goes on.

On looking at congressional intent as to whether the resolution authorizing the use of force -- whether Congress intended for that in generalized resolution to carry an authorization for this electronic surveillance in distinction to the Foreign Intelligence Surveillance Act, you were quoted as saying, quote, "That was not something that we could likely get."

Now, that's different from the response you had that it might involve disclosures. But I'll limit it to just this one question.

If this is something you could not likely get, then how can you say Congress intended to give you this authority?

GONZALES: Senator...

SPECTER: Let the record show my red light went on with the conclusion of the statement.

GONZALES: ... in that same press conference, I clarified that statement. And then at, I think, the next press conference -- I was there with Mike Chertoff -- I clarified that statement.

And that is the consensus was in a meeting that legislation could not be obtained without compromising the program; i.e., disclosing the existence of the program, how it operated and thereby effectively killing the program.

SPECTER: Thank you very much.

Senator Leahy?

LEAHY: Mr. Chairman, you raised some interesting points, and I -- listening to the attorney general who's now arguing that the president's wiretapping on Americans without a warrant is legal, it does not violate the controlling law, the Foreign Intelligence Surveillance Act -- he's given a fancy name to the president's surveillance, but I'd remind him that the terrorist surveillance program is the FISA law, which we passed -- I think you are violating an express provision of the act.

LEAHY: Let me just ask you a few questions that could easily be answered yes or no.

I'm not asking about operational details, I'm trying to understand when the administration came to the conclusion that the congressional resolution authorizing military force against AL Qaida, where we had hoped that we would actually catch Osama bin Laden, the man who hit us -- but where you came to the conclusion that it authorized warrantless wiretapping of Americans inside the United States.

Did you reach that conclusion before the Senate passed the resolution on September 14th, 2001?

GONZALES: Senator, what I can say is that the program was initiated subsequent to the authorization to use military force.

LEAHY: Well, then, let me...

GONZALES: And our legal analysis was completed prior to the authorization of that program.

LEAHY: So your answer is you did not come to that conclusion before the Senate passed the resolution on September 14th, 2001?

GONZALES: Sir, I certainly had not come to that conclusion.

There may be others in the administration who did.

LEAHY: Were you aware of anybody in the administration that came to that conclusion before September 14th, 2001?

GONZALES: Senator, sitting here right now I don't have any knowledge of that.

LEAHY: Were you aware of anybody coming to that conclusion before the president signed the resolution on September 18th, 2001?

GONZALES: No, sir.

The only thing that I can recall is that we had just been attacked and that we had been attacked by an enemy from within our own borders and that...

LEAHY: Mr. Attorney General, I understand. I was here when that attack happened. And I joined with Republicans and Democrats and virtually every member of this Congress to try to give you the tools that you said you needed for us to go after AL Qaida, and especially to go after Osama bin Laden, the man that we all understood

masterminded the attacks, the man who's still at large.

LEAHY: Now, back to my question: Did you come to the conclusion that you had to have this warrantless wiretapping of Americans inside the United States to protect us before the president signed the resolution on September 18th, 2001? You were the White House counsel at the time.

GONZALES: What I can say is that we came to a conclusion that the president had the authority to authorize this kind of activity before he actually authorized the activity.

LEAHY: When was that?

GONZALES: It was subsequent to the authorization to use military force.

LEAHY: When?

GONZALES: Sir, it was just a short period of time after the authorization to use military force.

LEAHY: Was it before or after NSA began its surveillance program?

GONZALES: Again, the NSA did not commence the activities under the terrorist surveillance program before the president gave his authorization.

Before the president gave the authorization, he was advised by lawyers within the administration that he had the legal authority to authorize this kind of surveillance of the enemy.

LEAHY: So NSA didn't do this until the president gave them the green light that they could authorize warrantless wiretapping of Americans inside the United States, under the circumstances you described in your earlier testimony.

GONZALES: Of course, Senator, the NSA has other authorities to engage in electronic surveillance, and I'm told that they...

LEAHY: I understand that. But I'm talking about the specific program.

GONZALES: ... and I'm told they took advantage of those authorities.

But it's my understanding -- and I believe this to be true -- that the NSA did not commence in the kind of electronic surveillance which I am discussing here today prior to the president's authorization.

LEAHY: The president has said publicly that he gave about 30 of these authorizations, having held off for a period of time, I think when the administration heard the New York Times was looking into it. But you were White House counsel: Did the president give his first authorization before or after Attorney General Ashcroft met with us and gave us the proposals from the administration which ultimately went into the USA Patriot Act?

GONZALES: Sir, I don't know. I don't know when he gave you those proposals.

LEAHY: Well, we enacted the USA Patriot Act in October 2001. And you were there at the signing ceremony. We tried to encompass those things that the administration said they needed. Was the first one of the president's authorizations done before he signed the USA Patriot Act?

GONZALES: I'd have to go back and check. I don't know.

LEAHY: OK, you're going to back here this afternoon. Please check because I'll ask you this question again, and you'll have a chance to ask. I'm looking around the room, you've got an awful lot of staff here. Let's have that answer before. You were there when he signed the act. Let us know when his first authorization -- whether it was before or after he signed that act.

GONZALES: Sir, may I make a statement?

We believe the authorization to use military force constituted statutory grant of authority to engage in this kind of surveillance and therefore...

LEAHY: Did you, with the first...

GONZALES: ... wouldn't be necessary to seek an amendment to FISA through the Patriot Act.

LEAHY: OK. My question still remains, and I, like Senator Specter, I want -- I'm trying to ask these basic things you could answer yes or no.

You talk about authorization for use of military force. We have a chart up over there; says that, "The president is authorized to use all necessary and appropriate force against those nations, organizations of persons that he determines planned, authorized, committed or aided the terrorists attacks that occurred on September 11, 2001, or harbored such organizations of persons, in order to prevent future acts of international terrorism against the United States by such nations, organizations or persons."

Now, basically, what you're saying is that Congress must have understood to have authorized the president to do it: not that we actually did but that we must have understood it.

Now, this authorization is not a wiretap statute. I was a prosecutor, Senator Specter was a prosecutor, a lot of prosecutors here, we know what a wiretap statute looks like. This is not it. So let me ask this: Under that logic, is there anything that stops you from wiretapping without a warrant somebody inside the United States that you suspect of having AL Qaida connections?

GONZALES: Clearly, Senator, that is not what's going on here, first of all.

The president had authorized a much more narrow program.

GONZALES: We are always, of course, subject to the Fourth Amendment. So the activities of any kind of surveillance within the United States would, of course, be subject to the Fourth Amendment.

LEAHY: Well, Mr. Attorney General, we're getting the impression that this administration's, kind of, picking and choosing what they are subject to.

Can you show us in the authorization for use of military force what is the specific language you say that's authorizing wiretapping of Americans without a warrant?

GONZALES: Sir, there is no specific language, but neither is there specific language to detain American citizens. And the Supreme Court said that the words "all necessary and appropriate force" means all activities fundamentally incident to waging war.

LEAHY: But there wasn't a law -- they didn't have a law specifically on this.

GONZALES: Sure they did, sir.

LEAHY: Using the Jackson test, they have a law on wiretapping. It's called FISA. It's called FISA. And if you don't like that law, if that law doesn't work, why not just ask us?

GONZALES: Sir, there was a law at question in Hamdi. It was 18 USC 4001(a). And that is: You cannot detain an American citizens except as authorized by Congress.

And Hamdi came into the court saying, "The authorization to use military force isn't such a permission by Congress to detain an American citizen."

And the Supreme Court -- Justice O'Connor said -- even though the words were not included in the authorization, Justice O'Connor said: Congress clearly and unmistakably authorized the president to detain an American citizen. And detention is far more intrusive than electronic surveillance.

SPECTER: Well, then, let me ask you this.

Under your interpretation of this, can you go in and do mail searches? Can you go into e-mails? Can you open mail? Can you do black-bag jobs?

And under the idea that you don't have much time to go through what you described as a cumbersome procedure, what most people think is a pretty easy procedure, to get a FISA warrant, can you go and do that of Americans?

GONZALES: Sir, I've tried to outline for you and the committee what the president has authorized, and that is all that he has authorized.

LEAHY: Did it authorize the opening of first-class mail of U.S. citizens? That you can answer yes or no.

GONZALES: There is all kinds of wild speculation about...

LEAHY: Did it authorize it?

SPECTER: Let him finish.

GONZALES: There is all kinds of wild speculation out there about what the president has authorized and what we're actually doing. And I'm not going to get into a discussion, Senator, about...

LEAHY: Mr. Attorney General, you're not answering my question.

I'm not asking you what the president authorized.

Does this law -- you're the chief law enforcement officer of the country -- does this law authorize the opening of first-class mail of U.S. citizens, yes or no, under your interpretation?

GONZALES: Senator, I think that, again, that is not what is going on here.

We're only focused on international communications where one part of the communication is AL Qaida. That's what this program is all about.

LEAHY: You haven't answered my question .

Well, Mr. Chairman, I'll come back to this. And the attorney general understands there's some dates he's going to check during the break, and I'll go back to them.

SPECTER: Thank you, Senator Leahy.

Senator Hatch?

HATCH: Well, this is a very interesting set of issues and a lot of constitutional issues for people who are watching this.

We've got -- in addition to all kinds of constitutional issues about interpreting statutes, you've got the canon of constitutional avoidance here; that is a very important rule in constitutional law. You've got the vesting cause, vesting power in the president. You've got inherent executive authority that people seem to just brush aside here.

HATCH: They'll talk in terms of, "Well, Congress is coequal with the president," but they don't ever really talk in terms of the president being coequal with the Congress. OR the past laws, you've got the various canons of statutory interpretation -- all of these are here. And it makes this a very interesting thing.

But let me just ask you some specific questions here.

It's my understanding -- as I've reviewed this and as I've looked at a lot of the cases -- that virtually all of the federal courts of appeal that have addressed the issue have affirmed the president's inherent constitutional authority to collect foreign intelligence without a warrant.

Is that a fair statement?

GONZALES: It is a fair statement, Senator, that all the courts of appeals that have reviewed this issue have concluded that the

president of the United States has the authority under the Constitution to engage in warrantless searches, consistent with the Fourth Amendment, for purposes of gathering foreign intelligence.

HATCH: That's what the Katz v. U.S. case seemed to say, isn't it, that wiretapping to protect the security of the nation has been authorized by successive presidents? Is that correct?

GONZALES: It is certainly the case that successive presidents, particularly during a time of war, have authorized warrantless searches.

HATCH: And you're relying in the Hamdi case as well, where a majority of the court basically authorized the president exceptional powers under the authorize use of military force statute.

GONZALES: I wouldn't say they are exceptional powers. I think that they are traditional powers of a president under time of war.

HATCH: OK, then U.S. v. Truong. That was a 1983 case.

GONZALES: Yes, once again, the court finding that the president of the United States does have the inherent authority to engage in warrantless searches consistent with the Fourth Amendment for purposes of gathering foreign intelligence.

HATCH: That was a case after the enactment of the FISA law, right?

GONZALES: It was a case after the enactment of FISA. But I think, to be fair, I don't think the court did a rigorous analysis about how FISA affects the analysis. But here was a decision by the court that the president had the inherent authority.

HATCH: Yes, that's the important part of the case, as far as I'm concerned.

U.S. v. Latenka (ph) -- that's a 1974 case -- before FISA; U.S. v. Brown, U.S. v. District Courts and the so-called Keith case.

GONZALES: The Keith case was where the court, for the first time, said that electronic surveillance for domestic security purposes is subject to the Fourth Amendment.

HATCH: Well, Haig v. Agee -- that's a 1981 case, again after FISA -- says that, "Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention."

That's a recognition that the president has to make some decisions, right?

GONZALES: Right.

If I could just follow up, Senator, my statement on the Keith case, where the court did say that electronic surveillance for purposes of domestic security would be subject to warrant requirements under the Fourth Amendment, the court expressly made clear that they were not talking about electronic surveillance for foreign

intelligence purposes. They were only talking about electronic surveillance for domestic security purposes.

HATCH: What about the Prize cases? They're very well-known cases, culminating in the case that quotes the Prize cases, in *Campbell v. Clinton*.

GONZALES: Again, there are a number of cases that recognize the president's inherent constitutional authority, particularly in a time of war...

HATCH: And the president's independent authority. Is that correct? That's that *Campbell v. Clinton* says.

GONZALES: ... to engage in surveillance in order to protect our country.

HATCH: In fact, there's a 2002 case, *In Re. Sealed Case*, right?

GONZALES: *In Re. Sealed Case*, as I said in my statement...

HATCH: I mean, that's a case decided by the FISA Court of Review, the actual FISA Court, right?

GONZALES: The FISA Court of Review was created by Congress to review the decisions by the FISA Court.

In that decision, in that case, the FISA Court of Review acknowledged that these cases by other circuit courts, that the president does have the inherent authority. And the FISA Court of Review said, assuming that to be true, that FISA could not encroach upon the powers of the president.

HATCH: It couldn't encroach on the president's constitutional powers.

GONZALES: That's correct.

HATCH: So people who are wildly saying that the president is violating the law are ignoring all these cases that say that -- or at least imply that he has the inherent power to be able to do what he should to protect our nation during a time of war.

GONZALES: And I want to emphasize, Senator, this is not a case of where we're saying FISA -- we're overriding FISA or we're ignoring FISA. Quite the contrary: We're interpreting the authorization to use military force as a statutory grant.

HATCH: You use FISA all the time, don't you?

GONZALES: FISA is an extremely important tool in fighting the war on terror.

GONZALES: And I know today there's going to be some discussion about whether or not we should amend FISA.

I don't know that FISA needs to be amended per se. Because when you think about it, FISA covers much more than international surveillance. It exists even in the peacetime.

And so when you're talking about domestic surveillance during peacetime, I think the procedures of FISA, quite frankly, are quite

reasonable.

And so that's one of the dangers of trying to seek an amendment to FISA is that there are certain parts of FISA that I think provide good protections. And to make an amendment to FISA in order to allow the activities the president has authorized, I'm concerned will jeopardize this program.

HATCH: They may even encroach on the inherent powers of the president, right?

GONZALES: Yes, sir.

HATCH: Well, let me just say this to you.

As I view your arguments, and we are faced with a war unlike any other war we've ever been in, we're faced with a war of international terrorists -- that's one reason we did the Patriot Act, was to bring our international anti-terrorism laws up to the equivalent of domestic criminal laws.

And you're saying that -- and I have to say I find some solace in this -- you're saying that when Congress, through a joint resolution, authorized the use of military force and gave the president these wide powers that are much wider than the ordinary single-sentence declaration of war up through World War II, which was the last one if I recall it correctly, that that statute allowed you, coupled with inherent powers of the president, to be able to go after these terrorists before they hit us again.

GONZALES: This is an example of Congress exercising its Article I powers to pass legislation so that the president, in exercising his inherent authorities under Article II, has all the authority that he needs to fight AL Qaida.

HATCH: Well, the authorize use of military force resolution, which is a joint resolution of both houses of Congress, declared that the nation faces, quote, "an unusual and extraordinary threat," unquote, and acknowledges that the president has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States, and provides that the president is authorized, quote, "to use all necessary and appropriate force," unquote, against those he determines are linked to the September 11th attacks.

Now, that sweeping language goes a lot further than the usual single-sentence declaration of war, right?

GONZALES: It is a very broad authorization, which makes sense.

I don't think anyone in those days and weeks, certainly not in the Congress, were thinking about cataloguing all those authorities that they wanted to give to the president.

I think everyone expected the president of the United States to do everything he could to protect our country. And the Supreme Court

has said that those words, "all necessary and appropriate force," means that the Congress has given to the president of the United States the authority to engage in all the activities that are fundamental and incident to waging war.

HATCH: So you're relying on an act of Congress, a joint resolution; you're relaying on the inherent powers of the president to protect our borders and to protect us; and you're relying on the Fourth Amendment, which allows reasonable searches and seizures in the best interest of the American public. Is that a fair analysis?

GONZALES: That is a fair analysis, yes, sir.

HATCH: My time is up.

SPECTER: Thank you, Senator Hatch.

Senator Kennedy?

KENNEDY: Thank you, Mr. Chairman.

And I think the final comments about all of us desiring to protect our country is something which is common. We certainly respect your strong dedication and commitment to that, Attorney General.

GONZALES: Thank you, Senator.

KENNEDY: And I think all of us remember the time of 9/11 -- I certainly do, being actually with Mrs. Bush just before her testimony on an education hearing. It's a moment that is emblazoned in all our minds.

Now, I want to approach this as a somewhat different way in the questioning. I'm very concerned about the whole issue in question, if you're not right legally.

Now, you make a very strong case in your presentation here about the authority in which you are acting on. You talk about the authorization by the Congress, you talk about inherent power, you talk about the president having the authority and the power to do this. But there is, of course, a very significant legal opinion to the contrary. There was within your department very important, thoughtful lawyers that were in the Department of Justice who questioned it, constitutional authorities that have questioned it.

So we're taking, really, a risk, I think, with national security, which I think is unwise.

KENNEDY: We're sending the wrong message to those that are on the front lines of the NSA that maybe someday they may actually be prosecuted, criminally or civilly. We're sending a message to the courts that perhaps the materials that we're going to take from -- let me just say from eavesdropping or signal intelligence may not be used in the court, again prosecuting AL Qaida, people we really want to go after, because it wasn't done legally.

We're sending a message to the telephone companies that they may

be under assault and attack as well. There are already cases now, brought by individuals against the telephone companies. So we have to get it right. Because if we don't get it right, we're going to find that we have paid a very harsh price on it. Some of those toughest, meanest and cruelest members of AL Qaida may be able to use illegality in the court system to escape justice. Maybe or maybe not, but why take a chance?

Now, we were facing the issue of electronic surveillance at another time, in 1976, when we had the attorney general, Ed Levi, and President Ford. And they followed a much different course than you have followed.

Ed Levi came and consulted with us. Members of this committee went down and visited the Justice Department on four different times. The memoranda that we have from that period of time point out the -- Buchin (ph) memorandas, which are part of the record -- the concerns that the attorney general had about getting it right in terms of electronic surveillance -- uncertainty in courts, validity of evidence, cooperation of the phone companies.

And in a series of memoranda that go to the president of the United States and discussions that were actually held with the important -- with Henry Kissinger, Don Rumsfeld, Ed Levi, Brent Scowcroft, George Bush, lengthy discussions with others, finally the attorney general said the main concern was whether this legislative initiative would succeed or whether, as some feared, the legislation which was actually passed would depart in objectionable ways, so that they were not sure about what Congress would do.

But they dealt with the Congress, and they got FISA.

KENNEDY: Later it goes on to say, "Already the attorney general has found key members of the Senate Judiciary receptive to the legislation."

And then finally, "The attorney general is strongly of the opinion that you, the president, should support the legislation as drafted. If you feel any hesitancy, I'll come by and brief you." This is what we had 27 years ago: an attorney general that came up to the Judiciary Committee, had then come down and work out FISA. And it passed with one dissenting vote in the United States Senate. It might not have gotten it right, but it certainly for that period of time that it got it right.

And the question that I have for you is, why didn't you follow that kind of pathway, which was so successful at a different time? We had a Republican president, Republican attorney general. We're talking about electronic surveillance. And as you know from the FISA, there are very sensitive provisions that were included in there that were directed foreign nationals that this committee was able to

deal with and do it in a responsible way.

Why didn't you follow that pattern?

GONZALES: Sir, the short answer is is that we didn't think we needed to, quite frankly.

I've tried to make clear today that we looked at this issue carefully, decided that neither the Constitution nor FISA, which contemplated a new statute, would prohibit this kind of activity from going forward.

I might also say, this is a little different time, in terms of what existed in 1976. Of course, we are at war. And we have briefed certain members of Congress.

So it's not entirely true that we didn't reach out to the Congress and talk -- certain members of Congress and talk to them about this program and about what we were doing.

KENNEDY: Well, the point I'd say, we were facing a nuclear threat.

KENNEDY: We've got terrorism now, but it was a nuclear threat then. The Cold War was in full flow at that time. It was nuclear threat at that time.

And you know what Attorney General Levi did? He took a day and a half to have outside constitutional authorities to come down and advise him on the questions of the constitutionality of the legislation -- a day and a half.

Now, did you talk to any outside authorities -- not inside authorities that are going to give you, quite frankly, probably what you want to hear? But did you check any -- the reason I question on this, General, is because we've been through the Bybee amendment, we've been through torture amendments, where you and the OLC and the White House counsel thought that those -- not amendments, memoranda -- but that the Bybee memoranda was just fine.

And then we find out, during the course of your hearings, that it wasn't fine and it was effectively repealed a year and a half after it was in effect.

So it's against that kind of background about certainty, about your view about its legality and in-house review of the legality -- some of us would have wondered: Did you do or take the steps that Ed Levi, a Republican attorney general -- on the same subject -- was willing to do to listen to outside constitutional authority? Because as we've seen subsequently, you've had difficulty in your own department and you've had substantial difficulty with constitutional and others that might not believe that you're correct.

If it is correct, we haven't got a problem. If you're not correct, then it is a step back in terms of national security.

And my question to you is, looking at the national security

issue, wouldn't we be in a stronger position if you had come to the Congress and say, "Let's get the kind of legislative authority that we need," rather than take a chance?

Wouldn't our national security have been better defended if we didn't have any question as to the legality of this issue?

Wouldn't the people that are in the front lines of our national security be better protected and our court system better defended?

And when we were able to get those AL Qaida individuals and they know they don't have any loopholes by appealing illegal eavesdropping, maybe then they begin to talk and try and make a deal.

KENNEDY: Maybe then that enhances our national security as well.

GONZALES: Well, sir, you've said a lot, so I don't know...

KENNEDY: Got short time, but I've...

GONZALES: Let me just say: You're absolutely right. We've got to have a very clear message. And we cannot be wrong on this.

I do not think that we are wrong on this.

Are we worried about the front-line people out at NSA? Of course we are. That is why the president, the day after the story ran in the New York Times, went out to the American people to reassure them that this was not a situation where we had an agency running amok, that he had authorized this activity and it was very narrowly tailored.

In terms of whether or not are we concerned about activities that may jeopardize investigations or prosecutions, absolutely we are. That's the last thing we want to do.

We believe this program is lawful. We do not believe that prosecutions are going to be jeopardized as a result of this program.

Obviously, we're in litigation now so I don't want to say much more than that. But, of course, we ought to be operating in a way where we're doing what we need to do to protect our investigations and to protect our prosecutions. And I think that we're doing that.

KENNEDY: My time is just about up.

Thank you very much, General.

SPECTER: I want to -- thank you very much, Senator Kennedy.

I want to acknowledge the presence in the audience of Ms. Debra Burlingame, who's the sister of Captain Charles F. Burlingame, the pilot on American Airlines Flight 77 which crashed into the Pentagon.

Attorney General Gonzales, would you like a break?

GONZALES: If you're offering a break, Mr. Chairman.

(LAUGHTER)

SPECTER: Well, I'm not going to offer you one unless you want one.

(LAUGHTER)

GONZALES: I'm fine, sir. I will defer to you, Mr. Chairman.

LEAHY: Take the break. Take the break.

GONZALES: All right, I'll take a break. Thank you, Mr. Chairman.

SPECTER: Well, let's take a vote here...

(LAUGHTER)

... a 10-minute break.

(RECESS)

SPECTER: The hearing will resume.

Before proceeding, I'd like to acknowledge the presence of Ms. Monica Gabriel (ph) and Ms. Mindy Kleinberg, family members, husbands in the World Trade Center at the time of the 9/11 attack.

SPECTER: Mr. Attorney General, thank you for rejoining us.

And we turn now to Senator Grassley.

GRASSLEY: Thank you very much.

I'm going to start with something that's just peripheral to the issues we're on, but it does deal with our national security, and it's the leak of this information to the New York Times. And I'm greatly concerned about this. And these leaks could be putting our nation's safety into serious jeopardy.

Could you tell us what is being done to investigate who leaked this national security information and whether the Department of Justice will initiate a prosecution of an individual leaking the information?

GONZALES: Senator, we have confirmed the department has initiated an investigation into possible crimes here. And consistent with department practice, I'm not going to talk much further about an ongoing investigation.

Obviously, we have to look at the evidence, and if the evidence shows that a crime has been committed, then obviously we'll have to make a decision about moving forward with a prosecution.

GRASSLEY: And I don't blame you for this, but I don't hear as much about public outcry about this leak as I did about Valerie Plame and the White House disclosures of her -- or presumed disclosures of her identify of a CIA agent. And to me that's a two-bit nothing compared to this sort of issue that we have before us of this information being leaked to the press.

And in the follow-up commentaries, reading the newspapers and TV, you get the impression that this is some sort of an LBJ, J. Edgar Hoover operation that's designed to skirt the law to spy on domestic enemies, and I think you're making very clear the opposite, that this is only concerned about the national security of the United States, and that's where the focus should be.

GRASSLEY: But the constant repetition on the news media of the term "domestic spying," as opposed to spying on -- and electronic surveillance of somebody outside the United States connected with an

organization that has as their goal the killing of Americans or the threatening of America or the destruction that happened on September the 11th, is entirely two different things.

But when domestic spying is often used, you can understand,

General, the people having outrage, maybe, at what's going on.

Also, for my colleagues on this committee, it seems to me that if we're doing our job right, we've got some problems, because let's just say the attorney general is wrong in the statutory authority and constitutional authority by which they've proceeded to do what they're doing, and yet members of Congress was told about this program over a period of four years -- a few members of Congress were; the appropriate ones were.

And then, all of sudden, it hits the New York Times, and all of a sudden, when that story breaks, congressmen change their tune from the one sung in private for four years to outrage that this is going on.

So if Senator Grassley, who's not a member of that elite group that has to be concerned about oversight of foreign intelligence, knows about it and doesn't tell -- if I were a member and didn't tell my colleagues about it and then expressed that outrage, where have I been as a member of that group for the last four years?

If something's wrong after the New York Times reported it, there had to be something wrong before the New York Times reported it. And all of a sudden, I see members of Congress who had that responsibility, if they really, sincerely, think it's wrong today, that were caught not doing their job of congressional oversight as they should have, informing the other members of Congress that there is really something wrong that the president's doing here.

GRASSLEY: So I think we in Congress have to do some internal looking of whether or not we're doing our job, as well, of oversight. Now, I always want to remind people in the United States that what we're talking about here today is to make sure that September the 11th doesn't happen again.

And, somehow, we tend to have short memories. We ought to remember that it happened in Madrid, it happened in London, it happened in Amman, it happened in a resort in Egypt, it happened in Bali twice. And it has happened here; it can happen again.

And it seems to me that what you're trying to tell us is the president's determined to make sure that it doesn't happen in the United States again and that's what this surveillance is all about, yes?

GONZALES: Senator, he is absolutely determined to do everything that he can, under the Constitution and the laws of this country, to prevent another September 11 from happening again.

GRASSLEY: And I think you're telling us that, in the case of

people giving some information on a telephone call, that it's very necessary to act with dispatch; that acting with dispatch or not can be a matter of life or death for Americans.

GONZALES: Absolutely. If we get information that may lead us to other information about a terrorist operating in this country, we may not have a matter of days or weeks or months, which is sometimes the case with respect to a FISA application. But we may not have that much time to begin surveillance.

And, if we wait -- and, again, FISA has been a wonderful tool and has been very effective in the war on terror, but there are certain circumstances where the requirement of FISA present challenges -- and if we wait, we may lose valuable information.

It may help us get information. It might prevent another attack.

GRASSLEY: I had an opportunity to speak to you on the phone recently. And I asked you to come ready to give us some specific instances of when past presidents have ordered warrantless intelligence surveillance in the prosecution of a war or to otherwise fulfill the commander in chief's duties.

GRASSLEY: I think that as the American public hears examples of how Democrat presidents and Republican presidents alike have done similar things, they may begin to see this program in a different light, particularly in regard to the president's over 225 years' use of the exercise of the power of commander in chief.

GONZALES: I gave in my opening statement, Senator, examples where President Washington, President Lincoln, President Wilson, President Roosevelt have all authorized electronic surveillance of the enemy on a far broader scale -- far broader -- without any kind of probable cause standard, all communications in and out of the country. And so, for example, President Wilson, World War I. I mean, he relied upon his inherent constitutional authority and a use of force resolution, a declaration of war that -- very consistent with what we're dealing with today.

GRASSLEY: And December the 8th, '41, the day after Pearl Harbor, FDR ordered the FBI to intercept any communications between our country and any other country, whether it be by mail or any other sort of...

GONZALES: President Roosevelt did authorize very broad surveillance of the enemy.

GRASSLEY: It's well-established that the president has a number of inherent constitutional powers. Today's hearing and the two that will follow will give the Senate an opportunity to analyze the president's case on constitutionality.

When Moussaoui was arrested, the FBI couldn't look at his computer files and telephone contacts. Now, that's been changed so

you can have that sort of communication now.

Could you tell us in the Department of Justice white paper entitled "Legal Authorities Supporting the Activities," of a president doing this, the administration argued that, quote, "the president's power to authorize the NSA activities is at its zenith, citing Justice Jackson's concurrence in the Sawyer case -- I guess you'd call it the Youngstown case -- could you please discuss the framework set by Justice Jackson for determining how much deference the president should be given, including why the administration believes that its power in this regard is at its zenith?

GONZALES: Yes, sir, I'll try to do it in the time remaining. Justice Jackson...

GRASSLEY: All I have to do is finish my question before the time's up.

GONZALES: Pardon me, Senator.

Justice Jackson laid out a three-part test in terms of determining presidential power.

The first part is where the president is exercising his authority with the concurrence, in essence, of Congress.

We believe that's what is occurring here. We believe the authorization to use military forces is such a concurrence by Congress for the president to engage in this kind of activity. And, therefore, we believe the president's power is at its zenith in this first category.

The second category is where the president is exercising his constitutional authority in the absence of any congressional action. And there, Justice Jackson talked about being, sort of, in the zone of twilight and trying to ascertain where the limits are between presidential authority and congressional authority. That is not the case here.

The third part was where the president is acting in contravention -- not in contravention, but in a way that's incompatible with congressional action.

In that particular case, you look at the president's constitutional authority minus whatever constitutional congressional authority Congress has.

And so the question is in which category we are in.

We believe we're in the first category: that the Congress has, through the authorization to use military force, provided its support for presidential action.

If, in fact, that is not the case, then we're in the third category. And I submit, Senator, that this case is very different from Youngstown, where we talked about the president of the United States taking over domestic industry. We're talking here about a core

constitutional action by the president -- a long history of presidents engaging in electronic surveillance of the enemy. And so this is a much different situation.

And my judgment is, while these are always very hard cases and there's very little precedent in this matter, I believe that even under the third part, that the president does have the constitutional authority.

I will just remind the committee that Chairman Roberts just recently submitted a letter to the committee. And he, himself, opined that he also believes that if we were in the third category, that he believes that the president would have the constitutional authority to engage in these kind of activities.

SPECTER: Thank you, Senator Grassley.

Without objection, we will admit into the record the letter from Senator Pat Roberts, chairman of the Intelligence Committee, to Senator Leahy and myself, dated February 3rd of this year.

SPECTER: Senator Biden?

BIDEN: Thank you, Mr. Chairman.

I hope Chairman Roberts will see it his responsibility to also hold extensive hearings in the forum that is more appropriate, totally secret. Thus far, I'm told, he intends on not holding any, which I find bordering on lacking any responsibility in terms of congressional oversight. But I hope he will do as you have done here.

General, there are two real issues here, in my view, and I'm going to focus on one, and that is the president's reassurance as to what is exactly happening. For if, in fact, the only people being wiretapped or e-mails read are AL Qaida operatives contacting American citizens, I don't think you're going to find anybody in America saying, "Oh, my God, don't do that."

What's really at stake here is the administration's made assertions in the past where their credibility has somewhat been questioned. And so it's not merely the constitutional reach you have; it is: What is actually happening, what is actually going on?

I'm going to focus on that first, if I may.

How will we know, General, when this war it over?

GONZALES: I presume the straightforward answer, Senator, is that when AL Qaida is destroyed and it no longer poses a threat to the United States.

Whenever that may be, we know it's not today. We know we're still at war today. We know we'll probably be at war still tomorrow. And so we know it still continues today.

BIDEN: The truth is, there is no definition of when we're going to know whether we've won, because AL Qaida, as the president points out, has mutated into many other organizations that are not directly

dealing with bin Laden and are free agents themselves.

BIDEN: Is that correct?

GONZALES: It is certainly true that there are a number of terrorist groups who share many of the same objectives of AL Qaida in terms of destroying America.

BIDEN: So as long as any of them are there, I assume you would assert you have this plenary authority.

GONZALES: Well, Senator, obviously if Congress were to take some kind of action, and say the president no longer has the authority to engage in electronic surveillance of the enemy, then I think that would put us into the third part of Justice Jackson's three-part test, and that would present a much harder question as to whether or not the president has the authority.

As I've already indicated in response to Senator Grassley, I believe that under those circumstances -- and again, it's a hard question, and it may have been irresponsible for me to offer up an opinion, because I would like the opportunity to study it.

But I think the facts would present a much different case than what we had in *Youngstown v. Sawyer*.

BIDEN: Why, if you -- and I've read everything you submitted, and I was here when FISA was written -- I was a cosponsor. I was on the Intelligence Committee and on the Foreign Relations Committee, and as the ranking member of the Foreign Relations Committee, I was charged by the Democratic leadership to be part of the small group to write the authorization for the use of force.

So I've been involved in this. It doesn't mean I'm right, but I've been deeply involved.

As I understand your reasoning, I don't understand why you would limit your eavesdropping only to foreign conversations -- in other words, AL Qaida communicating from Algeria -- I'm making it up -- or from France or Germany, wherever, to the United States.

That's the assertion. It's only emanating from a foreign country, correct?

GONZALES: Yes, sir: authorization of the program I'm talking about.

BIDEN: Why limit it to that?

GONZALES: Well, of course, that's a presidential decision.

And I believe, Senator -- and now I'm purporting to speak for the president, but I believe it's because of trying to balance concerns that might arise that, in fact, the NSA was engaged in electronic surveillance with respect to domestic calls.

And so there was a decision made that this is the appropriate balance.

There may be some in America -- I suspect there are some in

America who are saying, "Well, why aren't you -- you know, if you've got reason to believe that you've got two members of AL Qaida talking to each in America, my God, why aren't you listening to their conversations?"

Again, this was a judgment made that this was the right balance between the security of our country and protecting the privacy interests of Americans.

BIDEN: Well, the president said he'd do everything under the law to prevent another 9/11. The communications that occurred within this country, not outside this country, which, in fact, brought about 9/11 would not be captured by the president's efforts here.

BIDEN: Is he refusing to do it for public relations reasons, for purist (ph) reasons or because he thinks he doesn't have the constitutional authority to do it?

GONZALES: I don't believe that it's a question of constitutional authority. That analysis, quite frankly, has not been conducted. It's not a question of public relations. In his judgment, it was the appropriate thing to do, given the circumstances that we find ourselves in.

BIDEN: Who determines what calls or e-mails are to be monitored?

GONZALES: The decision as to which communications will be surveilled are made by intelligence experts out at NSA.

As I indicated, I believe, in response to an earlier question, these are individuals who are expert in AL Qaida aims, objectives, communications. I've heard General Hayden say that they are the best at what they do. They know about AL Qaida.

And they would probably be in the best position -- better than, certainly, any lawyer -- in evaluating whether or not there is reasonable grounds to believe that this person is an agent or member of AL Qaida or an affiliated terrorist organization.

BIDEN: How many of them are there?

GONZALES: Sir, I do not know.

BIDEN: There's thousands of people who work for NSA. It would be useful for us to know. Are there two people, five people, 25 people, 250 people, 1,000 people?

GONZALES: Sir, I don't know the exact number of people out at NSA who are working on this program.

But, as I indicated to you, the people that are making the decision about whether surveillance should occur are people that are experts with respect to AL Qaida.

BIDEN: Well, what are the guidelines? Are there any written guidelines they are bound by?

GONZALES: Sir, there are guidelines. There are minimization procedures, as you know. There are minimization procedures for the

work of NSA with respect to its collection activities under FISA, with respect to its collection activities under Executive Order 12333. There are minimization requirements that are generally comparable with respect to this program.

I understand there is also a monthly, sort of, senior directors' meeting, due diligence meeting, out at NSA where they talk about how the program is going; they evaluate how the program is going, try to identify if there are any problems.

And so they spend a great deal of time making sure the program is being authorized in a way that's consistent with the president's authorization.

BIDEN: By definition, you've acknowledged that these minimization -- the very minimization programs that exist under FISA, you're not bound by. You've acknowledged that you're not bound by FISA under this program.

Therefore, are you telling me the minimization programs that exist under FISA, as the way FISA is applied, are adhered to?

GONZALES: OK, I'm sorry if I was confusing in my response.

What I was meaning to say is that there are minimization requirements. Those minimization requirements are basically consistent with the minimization requirements that exist with respect to FISA if FISA were to apply.

BIDEN: Would it be in any way compromising the program if you made available to the Intelligence Committee what those minimization procedures that are being followed are?

GONZALES: Well, of course, the minimization procedures themselves, under 12333, and I believe perhaps under the FISA Court, are classified. I also believe they probably have been shared with the Intel Committee.

BIDEN: They have not, to the best of my knowledge. They have not been shared with the Intelligence Committee to the best of my knowledge, unless you're talking about this very small group of the chairman and the ranking member.

GONZALES: Sir, I'm talking about the minimization procedures for 12333 and for FISA.

BIDEN: Let me very precise.

GONZALES: OK.

BIDEN: I have not heard of NSA saying to the Intelligence Committee, "We are binding ourselves as we engage in this activity under the minimization procedures of 12333, as well as other statutes." I'm unaware that that's written down or stated anywhere or been presented to the Intelligence Committee. Can you assure us that has been done?

GONZALES: No, sir, I can't assure you that.

BIDEN: Can you assure us, General, that you are fully, totally informed and confident that you know the absolute detail with which this program is being conducted? Can you assure us you personally can assure us that no one is being eavesdropped upon in the United States other than someone who has a communication that is emanating from foreign soil by a suspected terrorist, AL Qaida or otherwise?

GONZALES: Sir, I can't give you absolutely assurance of the kind that you've asked for.

BIDEN: Who can?

GONZALES: Certainly, General Hayden knows more about the operational details of this program.

What I can give the American people assurance is, is that we have a number of safeguards in place so that we can say with a high degree of confidence, [****] of certainty, that what the president has authorized in connection with this program -- that those procedures are being followed.

BIDEN: Mr. Chairman, my time's up.

This is why the Intelligence Committee has the responsibility to be able to look at someone and have an absolute guaranteed assurance under no circumstance is any American being eavesdropped upon unless it's coming from a foreign soil and a suspected terrorist, and do it under oath and do it under penalty of law if they've misrepresented. I'm not suggesting the attorney general can do that. We've got to find out who can do that.

SPECTER: Thank you, Senator Biden.

Senator Leahy?

LEAHY: Mr. Chairman, just for Senator Biden's round, you put into record the letter from Senator Roberts sent to the two of us concerning the authority. I want to place in the record a letter from Mr. Bruce Fein, formerly a senior Justice Department official in the Reagan administration, basically responding to Senator Roberts' letter.

I mentioned earlier that Mr. Fein was very critical of this program. In fact, at that point, why don't you just put it -- I have a number of things here [****].

SPECTER: Without objection, the letter from Mr. Bruce Fein will be made a part of the record.

SPECTER: And do you have other unanimous consent requests?

LEAHY: For other material regarding this hearing, if I might put them all in the record.

SPECTER: Without objection, those materials will be made a part of the record.

Senator Kyl?

KYL: Thank you, Mr. Chairman.

Thank you, Mr. Attorney General.

I think it's very interesting how the argument over this program has evolved in the last several weeks from initial concerns about the program itself now to some very different questions.

And I think it's a good evolution because I doubt, if we polled the members of this committee today, that there would be anybody who would vote against the conduct of this particular kind of surveillance.

There was then the suggestion that while the program is good, it's being conducted illegally. That was the charge, and I would submit a very serious charge, that the ranking member made earlier in this remarks.

It seems to me that a little humility is called for by the members of this committee, especially before we accuse the president of committing a crime, which is what illegal activity is.

If our hearings with now-Justices Alito and Roberts demonstrated anything, I think it is that there are a lot of smart lawyers in Washington, D.C., other than those who are sitting here on this committee.

And in that regard, I appreciate the last couple of rounds of questions that were asked by Senators Kennedy, Biden and Grassley, because they got more into specifics about how we might have better oversight.

Before I get into that, let me just ask four specific questions that I think you can answer very, very briefly.

I'm reminded, by the way -- I told one of my staff the very first time I saw a murder trial before I went to law school, I was absolutely persuaded after the prosecution's summation that this guy was guilty as could be. Then after his lawyers argued, I was absolutely certain that he was innocent. And by the time the prosecutor finished, I was once again convinced that maybe he was guilty.

The bottom line being that, with tough legal questions, good lawyers take both sides and there are two sides to every question.

KYL: And you shouldn't prejudge.

And that's what I think happened with regard to this program.

Before you and others in the administration explained the legal rationale for it, there were people jumping to conclusions about its illegality.

Now, I think you made four key points, and I just want to make sure that we've got them right.

Your first key point was that Article II of the U.S. Constitution has always been interpreted as allowing the president to do what's necessary to conduct war, and that includes surveillance of the enemy.

Is that right?

GONZALES: Yes, sir.

KYL: Secondly, that when Congress passed the authorization of military force on September 18th, 2001, we actually did two things in that resolution. First of all, we affirmed the president's constitutional authority that I just spoke of.

GONZALES: Yes.

KYL: And secondly, that we granted authority that included the words, "all necessary and appropriate force."

GONZALES: Yes.

KYL: And your point has been that that activity has always included surveillance of the enemy, and, in fact, that the FISA Court itself has commented on that inherent authority in a situation in which it involved the detention of an American citizen who was involved in terrorist activity.

GONZALES: That would be the Supreme Court, sir, not the FISA Court.

KYL: The Supreme Court. I'm sorry.

GONZALES: Yes, sir.

KYL: And that also, your second point is that the statutory authorization is contemplated in the FISA language, "except as authorized by statute."

GONZALES: That is correct. We are acting in a way -- the president has authorized activities that are consistent with what FISA anticipated.

KYL: The third point is, you talked a little bit about FISA, and noted that in your view -- and it's difficult to further discuss the point, because you can't discuss the detail of the program itself -- but that the 1978 FISA law is really not well suited to the particular kind of program that's being conducted here, including the 72-hour provision of FISA. Is that correct?

GONZALES: That is correct, Senator.

But I don't want these hearings to concluded today with the notion that FISA has not been effective. And, again, I think a lot of the safeguards, some of the procedures in FISA, make a lot of sense. When you're talking about a peacetime situation, particularly domestic surveillance, FISA also covers that kind of activity.

And so when you're talking about amending FISA because FISA's broke, well, the procedures in FISA under certain circumstances I think seem quite reasonable.

KYL: And you continue to use FISA, not only -- well, you continue to use FISA, including in regard to the war on terrorism.

GONZALES: Absolutely.

KYL: The fourth key point was that you argued about the checks

and balances in the program: the fact that it has to be reauthorized every 45 days by the president himself, that there has been extensive congressional briefing of the Democrat and Republican leaders and chairmen and ranking members, respectively, of the Intelligence Committee, and that there is extensive I.G. review. Is that correct?

GONZALES: That is correct.

KYL: And the inspector general is what inspector general?

GONZALES: This is the inspector general for the NSA.

KYL: OK.

In addition, you noted the two qualifications of the program: international communications involving AL Qaida or affiliated individuals.

GONZALES: That is correct, Senator.

KYL: And finally, you noted that this was as interpreted by the NSA professionals.

Now, I thought there were two particularly interesting lines of inquiry. And one was Senator Biden's question about whether or not, if this program is really necessary, we shouldn't try to evaluate whether it should also be applied to calls from AL Qaida terrorist A to AL Qaida terrorist B, although they happen to be in the United States.

And it was my understanding you said that the analysis of that had not been conducted. Is that correct?

GONZALES: The legal analysis as to whether or not that kind of surveillance -- we haven't done that kind of analysis, because, of course, the president -- that's not what the president has authorized.

KYL: I understand that, but I would suggest that that analysis should be undertaken. Because I think most Americans now appreciate that this is a very important program. It might warn us of an impending attack.

It could be that the attackers are already in the United States. And therefore, it could involve communication within the United States.

Understanding the need to balance the potential intrusion on privacy of American citizens within the United States, you would want to have a very careful constitutional analysis.

KYL: And certainly the president wouldn't want to authorize such an activity unless he felt that he was on very sound legal ground. On the other hand, there is no less reason to do it than there is to intercept international communications with respect to a potential terrorist warning or attack.

So I would submit that Senator Biden is correct and that this -- at least the inference was in his question that this study should be accomplished. And I would think that it should.

I also think that both he and Senator Grassley and Senator Kennedy, to some extent, talked about, "Well, what happens if we're wrong here? How can we be assured that there is no improper surveillance?"

And in this regard, I would ask you to think about it. And if you care to comment right now, fine. But this might hit you cold.

It seems to me that you might consider, either in the presidential directive and the execution of that or even potentially in congressional legislative authorization, some kind of after-action report, some kind of quarterly review or some other appropriate time frame -- maybe ever 45 days; whatever's appropriate -- to the eight people who are currently briefed in the Congress on questions such as whether the program acted as it was intended, whether it appeared that somebody might have been surveilled who, under the guidelines, should not have been, and if there ever were such a case, how it happened and what's done to ensure that it doesn't happen again and whether there was any damage as a result of that, and also just generally whether the program is having the intended result of being able to demonstrate important information to the people that we charge with that responsibility.

It seems to me that reporting on that kind of activity, including information about the guidelines to provide some additional assurance that it's being conducted properly, would be appropriately briefed to the members of Congress.

We do have an oversight responsibility, but we are not the only governmental entity with responsibility here. The president has critical responsibility.

And I agree with those who say that, should there be an attack and a review of all of this activity is conducted, the president would be roundly criticized if he had a tool like this at his disposal and did not utilize it to protect the people of the United States.

GONZALES: Senator, I can say that I have not been present in all the briefings with members of Congress.

But in connection with those briefings where I was present, there was discussion regarding some of the types of issues that you've just outlined.

GONZALES: Be happy to take back your comments.

KYL: Thank you, Mr. Attorney General.

SPECTER: Thank you, Senator Kyl.

Senator Kohl?

KOHL: Thank you, Mr. Chairman.

Mr. Attorney General, the administration, the Congress and the courts share a common goal: to protect the American people. We all believe that as we face the long-term threat from terrorism, we must

work together to ensure that the American people are safe. We in Congress have our role to play by writing the laws that protect Americans, and you have your role executing those laws and, of course, the courts have their role.

As part of this effort against terrorism, we have drafted many laws to give the administration the powers that it needs. And I'm hopeful that we can work together again to ensure that our laws are working to protect the American people.

Mr. Attorney General, if terrorists are operating in this country or people in this country are communicating with terrorists, of course, we must collect whatever information that we can.

To accomplish this, the administration had three options, as you know: first, you could have followed the current law, which most experts believe gives you all the authority you need to listen to these calls; second, if you thought the law inadequate, you could have asked Congress to grant you additional authority; or third, the course you followed, conduct warrantless spying outside current law and without new authorization.

If you had the two options that would have given you unquestionable authority to monitor these calls and one whose legality was at best questionable, then why did you go for the most questionable one? Why not either follow the law or seek new laws?

GONZALES: Well, Senator, I agree with you: We are a nation of laws. And we do believe we are following the law. And we do believe that the Constitution allows the president of the United States to engage in this kind of surveillance.

We also believe the authorization to use military force represents a supplemental grant of authority by the Congress to engage in this kind of surveillance totally consistent with FISA.

If you study carefully the white paper that we've submitted, we're not arguing that somehow FISA was amended or that we're somehow overriding FISA. That's not what we're talking about here.

We are acting in a manner consistent with FISA. FISA contemplates another statute. The Congress provided additional supplemental statutory grant of authority through the authorization to use military force.

GONZALES: And so I totally agree with what you're saying. We should be acting -- particularly, in a time of war, I think it is good to have the branches of government working together. It's good for the country.

I believe that's what happened here. Congress exercised its Article I authorities to pass the authorization to use military force. You supplement that with the president's constitutional authority as commander in chief and we're working together...

KOHL: Are you saying that there was never any debate within the administration at any level or Justice Department at any level about whether or not you were pursuing the right course? It's my understanding that there was debate.

GONZALES: Senator, of course, there was a great deal of debate. Think about the issues that were implicated...

KOHL: But if there were debate, if there...

GONZALES: Of course, there were debates, Senator.

If I may just finish this thought, think about the issues that are implicated here: a very complicated Foreign Intelligence Surveillance Act -- it's extremely complicated -- the president's inherent authority under the Constitution as commander in chief, the Fourth Amendment, the interpretation of the authorization to use military force.

You've got a program that's existed over four years. You have multiple lawyers looking at the legal analysis. Of course, there's -- I mean, this is what lawyers do. We disagree, we debate, we argue. At the end of the day, this position represents a position of the executive branch, [****] the president of the United States.

KOHL: With all the debate we're going through today and leading up to today, it seems to me clear that there is a real question about the course you pursued. That's why we're here today.

Which would, it seem to me, justify asking the question: Why did you take the third option? And, of course, you've given your answer. But there are some of us that would question that answer.

Let's just move on.

GONZALES: Yes, sir.

KOHL: Mr. Attorney General, if applying to the secret FISA Court is too burdensome, then would you agree to after-the-fact review by the FISA Court and by Congress of the wiretaps used specifically in this program?

At least in this way, we can ensure, going forward, that the authority will never be abused by this or any other president.

GONZALES: Sir, obviously, we want to ensure that there are no abuses. The president has said we're happy to listen to your ideas about legislation.

There is concern, however, that, of course, the legislative process may result -- first of all, of course, we believe the president already has the authority and legislation is not necessary here.

But the legislative process may result in attempted restrictions upon the president's inherent constitutional authority and he may not be able to protect the country in the way that he believes he has the authority to do under the Constitution.

And then finally, of course, the legislative process is one where it is pretty difficult to keep certain information confidential. Again, because if you're talking about amending FISA, there are many aspects of FISA that make sense to me; they work well.

Again, if you're talking about domestic surveillance during peacetime, I think having the kind of restrictions that are in FISA make all the sense in the world. And so you're probably talking about a very narrowly tailored, focused amendment of FISA.

And, again, I'm not the expert on legislation, but we're talking potentially a very narrow focused amendment of FISA. And I think I'm concerned that that process will inform our enemies about what we're doing here and how we're doing it.

But subject to those concerns, of course, as the president said, we're happy to listen to your ideas.

KOHL: After-the-fact review by the FISA Court; you don't have any problem with that?

GONZALES: Again, Senator, we're happy to consider it.

KOHL: Attorney General, is there anything that a president cannot do in a time of war in the name of protecting our country? We saw that the Justice Department changed its position on torture, but are there other limits to the president's power or can, in your opinion, the president assign to himself, without an act of Congress, any powers that he believes are necessary?

GONZALES: Well, of course, we're not talking about acting outside of an act of Congress. We think in this case the president has acted with an act of Congress.

And, of course, there are limits upon the president of the United States. The Constitution serves as a limit of the president. The president's authorities under Article II as commander in chief are not limitless. Obviously Congress has a role to play in a time of war. The Constitution says Congress can declare war. The Constitution says it is Congress to raise and support armies. The Constitution says it is Congress's job to provide and maintain navies. It is the role of Congress to provide rules regarding capture. And so, in the arena of war, it is not true that the president works in that arena to the exclusion of Congress. Quite the contrary: Our framers intended that in a time of war both branches of government have a role to play.

KOHL: If the administration investigates an American for terrorism using this program and finds nothing -- and, of course, news reports have indicated that this happens in the vast majority of the time -- then what is done with the information collected? Does the administration keep this information on file somewhere? Is it disposed of? What happens with this information?

GONZALES: Well, let me tell you that every morning I receive an intelligence briefing out at the FBI. And there are numbers of possible threats against the United States. Many of them wash out, thank God.

The fact that they washed out doesn't mean that we should stop our intelligence collection. Intelligence is not perfect.

In terms of what is actually done with that information, what I can say is, again, I can't talk about specifics about it, but information is collected, information is retained and information is disseminated in a way to protect the privacy interests of all Americans.

KOHL: So you're saying the information -- even if it turns out to be without any correctness, the information is retained.

GONZALES: Senator, I can't provide any more of an answer than the one I just gave, in terms of there are minimization requirements that exist and we understand that we have an obligation to try to minimize intrusion into the privacy interests of Americans, and we endeavor to do that.

KOHL: Just to go back to what Senator Biden and then Senator Kyl referred to about AL Qaida-to-Al Qaida within the country, you're saying we do not get involved in those calls...

GONZALES: Not under the program in which I'm testifying, that's right.

(CROSSTALK)

KOHL: It seems to me that you need to tell us a little bit more because to those of us who are listening, that's incomprehensible. If you would go AL Qaida-to-Al Qaida outside the country -- domestic-outside the country but you would not intrude into AL Qaida-to-Al Qaida within the country -- you are very smart, so are we, and to those of us who are interacting here today, there's something that unfathomable about that remark.

GONZALES: Well, Senator, we certainly endeavor to try to get that information in other ways if we can. But that is not what the president...

KOHL: No, but isn't -- we need to have some logic, some sense, some clarity to this discussion this morning.

GONZALES: Senator, think about the reaction, the public reaction that has arisen in some quarters about this program. If the president had authorized domestic surveillance, as well, even though we're talking about AL Qaida-to-Al Qaida, I think the reaction would have been twice as great.

And so there was a judgment made that this was the appropriate line to draw in ensuring the security of our country and the protection of the privacy interests of Americans.

KOHL: I appreciate that.

And before I turn it back to the -- but yet the president has said with great justification, he's going to protect the American people regardless.

KOHL: And if there's some criticism, he'll take the criticism. And yet you're saying AL Qaida-to-Al Qaida within the country is beyond the bounds?

GONZALES: Sir, it is beyond the bound of the program which I'm testifying about today.

KOHL: Thank you.

Thank you, Mr. Chairman.

SPECTER: Thank you, Senator Kohl.

PROTESTER: (OFF-MIKE) probable cause, then go get a warrant. That's why (OFF-MIKE) the United States.

SPECTER: If you do not sit down immediately, you will be removed from the chamber.

(UNKNOWN): Without a warrant.

(LAUGHTER)

SPECTER: Senator DeWine? Senator DeWine, that's your introduction.

DEWINE: Thank you...

(CROSSTALK)

SESSIONS: Mr. Chairman, I'd like to state for the record that you're not a fascist.

(LAUGHTER)

DEWINE: Thank you, Mr. Chairman.

SPECTER: Thank you for that reassurance, Senator Sessions. Senator DeWine?

DEWINE: Mr. Chairman, this issue has been raised several times by several members. My understanding is Senator Roberts, chairman of the Intelligence Committee, has announced that there will be a closed hearing on February 9th with Attorney General Gonzales, as well as General Hayden, to cover this issue.

Mr. Attorney General, thank you very much for being with us today. We've had a lot of discussion, and I know we're going to continue to have discussion, about this very serious constitutional issue, constitutional law issue.

Let me tell you, though, what I know and what I truly believe.

I truly believe that the American people expect the president of the United States, in a time of national emergency and peril, to take actions to protect them, even if those actions are not specifically authorized by statute. I think they expect no less. They would want the president to do no less than that.

DEWINE: Second, though, it is clear that there are serious legal

and constitutional questions concerning whether the Fourth Amendment's reasonable requirement for searches requires the president, after a period of time, after a program has been in place for a period of time, to come to the Congress for statutory authorization to continue such actions.

Legal scholars, Mr. Attorney General, can and certainly are debating this issue.

But what is not debatable is that both from a constitutional as well as from a policy point of view, the president and the American people would be stronger -- this country would be stronger and the president would be stronger -- if he did so, if he did come to the Congress for such specific statutory authorization.

There was a reason that President George H.W. Bush and President George W. Bush both came to Congress prior to the respective wars in Iraq, even though some people argued -- and would still argue today -- that such resolutions were legally, constitutionally, unnecessary. Presidents are always stronger in the conduct of foreign affairs when Congress is on board.

Statutory authorization and congressional oversight for this program would avoid what may be a very divisive, hurtful debate here in Congress. I truly believe it's in our national interest to resolve this matter as quickly as possible.

Mr. Attorney General, we need meaningful oversight by the Intelligence Committee, followed then by whatever statutory changes in the law might be appropriate.

Let me ask you, to follow on that statement, a question.

What if Congress passed a law which just excluded FISA from any electronic surveillance of international communications where one party to the communications is a member of or affiliated with AL Qaida or a related terrorist group; and further, if we went on and provided that there would be normal oversight by both the House and the Senate Intelligence Committee, periodically that the administration would report to the Intelligence Committees on the progress of that program?

DEWINE: We, obviously, have the ability within the committee to keep such things classified. We do it all the time.

What would be your reaction to that? Is that something that would be possible from your point of view?

GONZALES: Well, Senator, I'll repeat what the president has said, and that is to the extent that Congress wants to suggest legislation, obviously, we'll listen to your ideas.

I've already, in response to an earlier question, talked about some of the concerns that we have. Obviously, generally, most concerns can be addressed in one way or the other, and if they can legitimately be concerned, then, obviously, we'd listen and consider

your ideas.

DEWINE: I appreciate that.

You know, I understand your legal position. You've made it very clear today, I think, articulated it very well. The administration has articulated it. Obviously, there are others who don't agree with your position. This is going to be a debate we're going to continue to have.

It just seems to me that some four years into this program this debate could be put aside if we could -- we ought to be able to find some way to be able to protect the American people but take care of what legal issues that some might find to be there. And I would look forward, frankly, to working with you on that.

Let me move to, if I could, to me, what has been a troubling question about FISA, really unrelated to this program. And you and I've talked about this before.

You've talked today about how FISA is being used -- frankly, is being used more than it's been used in the past.

GONZALES: The use of FISA is up 18 percent from 2004 to 2005.

DEWINE: Let me talk about something, though, that troubles me.

And I've been talking and asking about this problem since 2004. Let me give you a quote from 2004.

Director Mueller of the FBI said, and I quote, "We still have some concerns and we're addressing it with the Department of Justice. But there's still frustration out there in the field in certain areas where, because we've had to prioritize, we cannot get to certain requests for FISA as fast as perhaps we might have in the past."

DEWINE: My understanding, Mr. Attorney General, is, from recent information that I have, current information, that there still is a backlog, that there are still mechanical -- what I would call mechanical problems, both in the FISA Court and at Justice. Could you just briefly address that? Because every time I see you I'm going to go back at this, because I'm not saying it's your fault, but I just think it's something that, working together, we need to resolve.

And this is something, I think, that Congress has to play a part in, if you don't have the money, if you don't have the resources. We cannot tolerate a backlog in FISA applications if it can be fixed mechanically.

GONZALES: I appreciate the opportunity to respond to that question, Senator.

I will say that our staff at the Department of Justice -- these are the experts in the FISA process -- has in essence tripled since 2002. I think we all realized following the attacks of 9/11 that we needed to get more folks on board to help us with the FISA

application.

It still takes too long, in my judgment, to get FISAs approved.

I've described in my opening statement the process that's involved here.

FISA applications are often an inch thick. And it requires the sign-off by analysts out at NSA, lawyers at NSA, lawyers at the department, and finally me. And then it's got to be approved by the FISA Court.

I've got to tell you -- I was going to try to make this point in response to a question from the chairman -- the members of the FISA Court are heroes, as far as I'm concerned. I mean, they're available day or night, they're working on weekends and holidays, because they want to make themselves available. They're killing themselves, quite frankly, making themselves available to be there to sign off on a FISA application if it meets the requirements of the statute.

GONZALES: But we still have some problems.

It is true that, because of the procedures that are in FISA, it inherently is going to result in some kind of delay. And for that reason, the president made the determination that for certain very narrow circumstances, he's going to authorize the terrorist surveillance program.

But we continue to work at it. And I know you're very interested in this. And I look forward to continuing to have discussions with you about it.

DEWINE: Well, I appreciate that, Mr. Attorney General. It is something that continues to trouble me. Putting aside the issue that we are here about today, FISA is a matter of national security. And I'm still hearing things that, frankly, disturb me. And it's just a question of whether this can be sped up. And some things are inherent, as you say, but I get the impression that part of the problem is not inherent and could be fixed.

GONZALES: Well, one of the things that, hopefully, will happen soon is the creation of a new national security division.

As you know, the Patriot Act has a provision in it that creates a new assistant attorney general for the national security division. We believe that division will assist in the streamlining of the FISA process.

DEWINE: Thank you, Mr. Attorney General.

GONZALES: Mr. Chairman...

SPECTER: Thank you, Senator DeWine.

Senator Feinstein?

SESSIONS: Mr. Chairman, I think the attorney general had a question.

GONZALES: I'm sorry. Can I make one point about in response to

Senator Kohl? I made this point, but I want to make sure the committee understands this in terms of domestic-to-domestic AL Qaida communications.

I said that we're using other authorities. I mean, to the extent we can engage in intercepting AL Qaida domestic-to-domestic calls, even under FISA, if we can do it, we're doing it.

GONZALES: So I don't want the American people to believe that we're doing absolutely nothing about AL Qaida domestic-to-domestic calls.

The president made a determination, "This is where the line's going to be," and so we operate within those boundaries. And so we take advantage of the tools that are out there.

And if FISA isn't always the most efficient way to deal with that, if that's all we have, that's what we use.

So I guess I want to make sure the American people understand that we're not simply ignoring domestic-to-domestic communications of AL Qaida. We're going after it.

SPECTER: Thank you, Attorney General Gonzales for that clarification.

Senator Feinstein?

FEINSTEIN: Thanks very much, Mr. Chairman.

I'd like to make clear that, for me, at least, this hearing isn't about whether our nation should aggressively combat terrorism; I think we all agree on that. And it's not about whether we should use sophisticated electronic surveillance to learn about terrorist plans and intentions and capabilities; we all agree on that. And it's not about whether we should use those techniques inside the United States to guard against attacks; we all agree on that.

But this administration is effectively saying, and the attorney general has said it today, it doesn't have to follow the law.

And this, Mr. Attorney General, I believe, is a very slippery slope. It's fraught with consequences.

The Intelligence Committees have not been briefed on the scope and nature of the program. They have not been able to explore what is a link or an affiliate to AL Qaida or what minimization procedures are in place. We know nothing about the program other than what we read in the newspapers.

And so it comes with huge shock, as Senator Leahy said, that the president of the United States in Buffalo, New York, in 2004, would say, and I quote, "Any time you hear the United States government talking about wiretap, it requires -- a wiretap requires a court order. Nothing has changed, by the way. When we're talking about chasing down terrorists, we're talking about getting a court order before we do so."

Mr. Attorney General, in light of what you and the president have said in the past month, this statement appears to be false. Do you agree?

GONZALES: No, I don't, Senator. In fact, I take great issue with your suggestion that somehow that president of the United States was not being totally forthcoming with the American people.

I have his statement, and in the sentence immediately before what you're talking about, he said -- he was referring to roving wiretaps. And so I think anyone...

FEINSTEIN: So you're saying that statement only relates to roving wiretaps, is that correct?

GONZALES: Senator, that discussion was about the Patriot Act. And right before he uttered those words that you're referring to, he said, "Secondly, there are such things as roving wiretaps. Now, by the way, any time you hear the United States government talk about wiretaps, it requires -- a wiretap requires a court order."

GONZALES: So, as you know, the president is not a lawyer, but this was a discussion about the Patriot Act, this was a discussion about roving wiretaps. And I think some people are trying to take part of his statement out of context, and I think that's unfair.

FEINSTEIN: OK, fair enough. Let me move along.

In October 2002, at a public hearing of the Senate-House joint inquiry into NSA activities, the then-NSA Director General Michael Hayden told me, quote, "If at times I seem indirect or incomplete, I hope that you and the public understand that I have discussed our operations fully and unreservedly in earlier closed sessions." As I mentioned, the Intelligence Committee has not been notified.

Let me ask you this: If the president determined that a truthful answer to questions posed by the Congress to you, including the questions I ask here today, would hinder his ability to function as commander in chief, does the authorization for use of military force or his asserted plenary powers authorize you to provide false or misleading answers to such questions?

GONZALES: Absolutely not, Senator. Of course not.

FEINSTEIN: Thank you. I just asked the question. A yes or no...

GONZALES: Nothing would excuse false statements before the Congress.

FEINSTEIN: All right.

You have advanced what I think is a radical legal theory here today. The theory compels the conclusion that the president's power to defend the nation is unchecked by law, that he acts alone and according to his own discretion, and that the Congress's role, at best, is advisory.

FEINSTEIN: You say that the authorization for use of military force allows the president to circumvent the Foreign Intelligence Surveillance Act and that if the AUMF doesn't, then the Constitution does.

Senator Daschle has testified that when he was majority leader, the administration came to him shortly before the AUMF came to the floor and asked that the words "inside the United States" be added to the authorization, and that he said, "Absolutely not," and it was withdrawn.

The question I have is how do you interpret congressional intent from the passage of the AUMF that it gave the administration the authority to order electronic surveillance of Americans in contravention to the FISA law?

GONZALES: Senator, it is not in contravention of the FISA law. We believe the authorization to use military force is the kind of congressional action that the FISA law anticipated.

It has never been our position that somehow the AUMF amended FISA. It's never been our position that somehow FISA has been overridden. Quite the contrary: We believe that the president's authorizations are fully consistent with the provisions of FISA.

FEINSTEIN: Now, let me stop you just for a second.

I read the FISA law. There are only two escape hatches. One is 15 days after a declaration of war and the second is the 72-hour provision, which was actually amended by us in the Patriot Act from a lower number to 72 hours.

FEINSTEIN: Those are the only two escape hatches in FISA.

What in FISA specifically, then, allows you to conduct electronic surveillance within America, on Americans?

GONZALES: I believe that it's Section 109, which talks about persons not engaged in electronic surveillance under cover of law except as authorized by statute. And I may not have it exactly right. We believe that that is the provision in the statute which allows us to rely upon the authorization to use military force.

Now, you may say, "Well, that -- I disagree with that construction." That may be so. There may be other constructions that may be fairly possible. We believe this is a fairly possible reading of FISA. And as the Supreme Court has said under the canon of constitutional avoidance, if you have two possible constructions of a statute and one would result in raising a constitutional issue, if the other interpretation is one that is fairly possible, that is the interpretation that must be applied.

And if you reject our interpretation of FISA, Senator, then you have a situation where you've got an act of Congress intention with the president's constitutional authority as commander in chief. And

the Supreme Court has said when that happens you go with another interpretation if it's a fair application. And that's what we've done here.

FEINSTEIN: Could you check your citation? I just read 109 and I don't believe it says that, and we'll talk about that after lunch.

GONZALES: Yes, ma'am.

FEINSTEIN: Let me go on and tell you why it's a slippery slope.

FEINSTEIN: Senator Kennedy asked you about first-class mail, has it been opened, and you declined answering.

Let me ask this way: Has any other secret order or directive been issued by the president or any other senior administration official which authorizes conduct which would otherwise be prohibited by law? Yes or no will do.

GONZALES: Senator, the president has not authorized any conduct that I'm aware of that is in contravention of law.

FEINSTEIN: Has the president ever invoked this authority with respect to any activity other than NSA surveillance?

GONZALES: Again, Senator, I'm not sure how to answer that question.

The president has exercised his authority to authorize this very targeted surveillance of international communication of the enemy. So I'm sorry, your question is?

FEINSTEIN: Has the president ever invoked this authority with respect to any activity other than the program we're discussing, the NSA surveillance program?

GONZALES: Senator, I am not comfortable going down the road of saying yes or no as to what the president has or has not authorized. I'm here to...

FEINSTEIN: OK. That's fine.

GONZALES: OK.

FEINSTEIN: That's fine. I just want to ask some others. If you don't want to answer them, don't answer them.

GONZALES: Yes, ma'am.

FEINSTEIN: Can the president suspend the application of the Posse Comitatus Act legally?

GONZALES: Well, of course, Senator, that is not what is at issue here.

FEINSTEIN: I understand that.

GONZALES: This is not about law enforcement, it's about foreign intelligence.

FEINSTEIN: I'm asking a question. You choose not to answer it?

GONZALES: Yes, ma'am.

FEINSTEIN: OK.

Can the president suspend, in secret or otherwise, the

application of Section 503 of the National Security Act, which states that "no covert action may be conducted which is intended to influence United States political processes, public opinion, policies or media"?

FEINSTEIN: In other words, can he engage in otherwise illegal propaganda?

GONZALES: Senator, let me respond to -- this will probably be my response to all your questions with these kind of hypotheticals. And the question as to whether or not -- can Congress pass a statute that is in tension with a president's constitutional authority. Those are very, very difficult questions. And for me to answer those questions, sort of, off the cuff, I think would not be responsible. I think that, again...

FEINSTEIN: OK, that's fine. I don't want to argue with you.

All I'm trying to say is, this is a slippery slope. Once you do one, there are a whole series of actions that can be taken. And I suspect the temptations to take them are very great. And we are either a nation that practices our rule of law or we're not. Has any Supreme Court case since FISA held that the president can wiretap Americans, once Congress has passed a law forbidding this, without warrant?

GONZALES: I think the only case it come to mind that's really pertinent would be the 2002 case, In Re. Sealed case by the FISA Court of Review. While the court did not decide this issue, the court acknowledged that every case that's considered this has found that the president has the authority.

And assuming that to be true, that court said that FISA could not encroach upon those constitutional inherent authorities.

FEINSTEIN: My time is up.

Thank you, Mr. Chairman.

SPECTER: Thank you, Senator Feinstein.

Senator Sessions?

SESSIONS: Thank you, Attorney General Gonzales.

I believe you've faithfully fulfilled your responsibility to give your best, honest answers to the questions so far. I think they've been very effective.

If people have listened, I think they will feel much better about the program that that the president has authorized and that you are explaining. Because some of the news articles, in particular, gave the impression that there's widespread of wiretapping of American citizens in domestic situations and in every instance there's an international call.

Most of us by plain language would understand "international" to be different from domestic. And the president has limited this to international calls in which one or more parties are connected to Al

Qaida.

Is that correct?

GONZALES: Sir, the program that I'm talking about today, yes, is limited to international calls.

SESSIONS: And I'm sorry that there are those who would suggest that in previous testimony you may have not been truthful with the committee. I don't believe that's your reputation. I don't believe that's fair. I think you have a good answer to any of those charges. And I also think it's unfortunate that we're in a position where, when the president is talking about the Patriot Act, just like we talk about the Patriot Act throughout the debate on the Patriot Act, we insisted that it did not authorize non-warrant wiretaps or searches. I mean, that's what we said about the Patriot Act, because it didn't. So don't you think it's unfair to mix classified international surveillance issues with the Patriot Act debate?

GONZALES: Well, Senator, I don't know if it's my place to characterize whether it's fair or unfair.

I do believe that there is a difference, certainly in practice and a difference recognizing the courts, between domestic surveillance and international surveillance.

SESSIONS: Well, I think it's important for us to remember the world is hearing this. And so we have people suggesting the attorney general of the United States and the president of the United States are deliberately lying? And it's not fair, it's not accurate, it's not true. So I think that's important.

With regard to the briefing of Congress, the eight members that have been designated to receive highly secret information were briefed on this program, were they not, Attorney General Gonzales?

GONZALES: Sir, from the outset, the bipartisan leadership of the Intel Committees have been briefed in great detail about this. And there have also, in addition, been fewer briefings with respect to the bipartisan congressional leadership.

SESSIONS: I would just note, then -- of course, there are eight that hold those position -- but since the beginning of the program, at least 15 individuals have been in and out of those position, including Tom Daschle, Bob Graham, Dick Gephardt, who are no longer in Congress but were presumably part of that process and were aware of it and participated in passing the FISA Act and believed that it was correct to go forward.

I don't think they were hot-boxed or forced into this. I believe they weighed these issues based on what they thought the national interest was and what the law was and they made their decision not to object to this program.

SESSIONS: And there's been no formal objection by any of those

members to this program. And I think it's unfair to suggest the president has acted in secret without informing key members of Congress about this highly classified program.

GONZALES: Senator, of course, I can't speak for the members of Congress. But to my knowledge no one has asserted that the program should be stopped.

SESSIONS: Well, I thought about the Super Bowl. There was some reference to the security intensity around that event; that police and Secret Service and every available federal and I guess state agency that could be brought into that were intensely aware that there could be an attack on the Super Bowl or any other major public event like that.

But Super Bowl would be a prime target, would you not agree, of the AL Qaida types?

GONZALES: Clearly, we would have concerns events like the Super Bowl would be ones that would be attractive to AL Qaida.

SESSIONS: And intelligence is valuable to that. I mean, that's the key to it, and that's what we're trying to gather. And everybody understood after 9/11 that our failure was not in the capability to stop people, it was our capability to identify them.

This program seems to me to be a step forward in our ability to identify them. And I believe, as you've explained it, it's consistent with our laws.

With regard to statutory construction and how we should construe it, people have made the point that it's a general principle that a specific statute might control over a general statute.

But isn't it true that if a general statute clearly contemplates certain actions, and it can't be effective without those actions, then it would overrule the more specific earlier statute?

GONZALES: Depending on the circumstances, that would certainly be true, Senator.

I might just also remind people, when you talk about general statutes versus specific statutes, this same argument was raised in connection with the Hamdi case.

GONZALES: We had a specific statute that said no American citizen could be detained except as otherwise authorized by a statute. And the Supreme Court said, the authorization to use military force, even though it may have been characterized by some as a broad grant of authority, nonetheless, that was sufficient to override the prohibition in 4001(a).

SESSIONS: I think that's absolutely critical. I believe the Hamdi case is a pivotal authority here, after FISA, after the authorization of force on AL Qaida. An American citizen was detained without trial and the Supreme Court of the United States held that

since it was part of a military action in wartime that that person could be held without trial as an incident to the authorization of force.

Would you not agree that listening on a conversation is less intrusive than putting an American citizen in jail?

GONZALES: It would certainly seem to me that it would be less intrusive.

Just for the record, the language that I keep referring to -- "fundamental incident of waging war" -- was from Justice O'Connor. It is part of a plurality. And, of course, Justice Thomas, in essence, would have felt the president had the inherent authority under the Constitution to detain an American citizen.

So I just want to make sure that we're accurate in the way we describe decisions by the court.

SESSIONS: Well, you've been very careful about those things, and we appreciate that.

With regard to history -- you made reference to history -- isn't it true, of course, President Washington instructed his army to find ways to intercept letters from British operatives, that President Lincoln issued warrantless tapping of telegraph communications during the Civil War to try to identify troop movements of the enemy?

SESSIONS: Is it true that President Wilson authorized the military to intercept all telephone and telegraph traffic going into and out of the United States?

GONZALES: That is correct.

SESSIONS: And that President Roosevelt instructed the government to use listening devices to learn the plans of spies in the United States, and that he gave the military the authority to access, without review, without warrant, all telecommunications, quote, "passing between the United States and any foreign country"?

GONZALES: That is correct, sir.

SESSIONS: What I would say to my colleagues and to the American people is, under FISA and other standards that we are using today, we have far more restraints on our military and the executive branch than history has demonstrated.

We have absolutely not -- we are not going hog-wild restraining American liberties. In fact, the trend has been to provide more and more protections.

And there can be a danger that we go too far in that and allow sleeper cells in this country to operate in a way that they are successful in killing American citizens that could have been intercepted and stopped.

GONZALES: Of course, Senator, we're doing everything we can to ensure that that doesn't happen.

SESSIONS: But when you do domestic -- well, I won't go into that.

I want to ask you this question about that President Clinton's administration ordered several warrantless searches on the home and property of an alleged spy, Aldrich Ames. Actually, he was convicted. Isn't that true?

And it also authorized a warrantless search of the Mississippi home of a suspected terrorist financier.

And the deputy attorney general, Jamie Gorelick, the second in command of the Clinton Department of Justice, said this: "The president has inherent authority to conduct warrantless physical searches for foreign intelligence purposes, and the rules and methodologies for criminal searches are inconsistent with the collection of foreign intelligence and would unduly frustrate the president in carrying out his foreign intelligence responsibilities." Are those comments relevant to the discussion that we are having today?

GONZALES: As I understand it, that was her testimony. I think there was an acknowledgment of the president's inherent constitutional authority.

Now, of course, some would rightly say that, in response to that, FISA was changed to include physical searches.

And so the question is -- again, that queues up, I think, a difficult constitutional issue, whether or not -- can the Congress constitutionally restrict the ability of the president of the United States to engage in surveillance of the enemy during a time of war?

GONZALES: And, fortunately, I don't think we need to answer that question. I think in this case the Congress has authorized the president to use all necessary and appropriate force, which would include the electronic surveillance of the enemy.

SESSIONS: But Deputy Attorney General Gorelick in the Clinton administration, defending these searches, she asserted it was a constitutional power of the president, and this was in a period of peace, not even in war. Isn't that correct?

GONZALES: That's correct.

SESSIONS: Thank you, Mr. Chairman.

SPECTER: Thank you, Senator Sessions.

We'll now take a luncheon break, and we'll resume at 1:45.

GONZALES: Yes, sir.

(RECESS)

SPECTER: It's 1:45. The committee prides itself on being prompt, and we thank you, Mr. Attorney General, for being prompt and coming back.

I think the hearings have been very productive. And we have had

full attendance, almost full attendance, and I think the other senators who could not be here earlier -- it is unusual to have a Monday morning session for the United States Senate. And we have done that because this committee has been so busy.

And we have asbestos reform legislation, which Senator Leahy and I are cosponsoring, which is coming to the floor later today. And we've had a full platter with the confirmation of Justice Alito. And we wanted to have this hearing at an early day, and this was the earliest we could do, which given the intervening holidays after the program was announced back on December 16th, we have proceeded. We anticipated a full day of hearings, and at least two rounds. And it's apparent to me at this point that we're not going to be able to finish today within a reasonable time.

Senator Feingold's nodding in the affirmative. That's the first time I've got him to nod in the affirmative today. So you see we're making some progress.

But I do believe there will be a full second round. And we don't function too well into the evening. If we have to, we do, but it's difficult for the witness.

And I've conferred with the attorney general, who has graciously considered to come back on a second day. So we will proceed through until about 5 o'clock this afternoon, and then we will reschedule another day.

By that time, everybody would have had a first round, and it'll give us the time to digest what we have heard, and we will proceed on a second day.

Senator Feingold, you're recognized.

FEINGOLD: Good afternoon, Mr. Attorney General.

And, Mr. Chairman, let me say, of course, we have a disagreement, Mr. Chairman, about whether this witness should have been sworn. And that is a serious disagreement.

But let me nod in an affirmative way about your Pittsburgh Steelers, first of all.

(LAUGHTER)

Secondly, let me say...

SPECTER: Green Bay...

FEINGOLD: Green Bay will be back.

SPECTER: With Green Bay out of it, why not root for the Steelers, Senator Feingold?

LEAHY: That's why we didn't have the hearing last night.

FEINGOLD: Well, I understood that. I was curious about that.

SPECTER: Reset the clock at 10 minutes.

(LAUGHTER)

I was only kidding.

FEINGOLD: Let me also say, Mr. Chairman, despite our disagreement about the swearing-in issue, that I praise you for your candor and your leadership on this issue and for holding this hearing and the other hearings you may be holding.

I also want to compliment some of my colleagues on the other side of the aisle for their candor on this issue already, publicly. People like Senator DeWine, Senator Graham, Senator Brownback, maybe they don't want me to mention their names, but the fact is they have publicly disputed this fantasy version of the justification of this based on the Afghanistan resolution. It is a fantasy version that no senator, I think, can actually believe, that we authorized this wiretapping.

So the fact is, this can and should be a bipartisan issue. I see real promise for this being a bipartisan issue, and it should be. But the problem here is that what the administration has said is that when it comes to national security, the problem is that the Democrats have a pre-9/11 view of the world.

Well, let me tell you what I think the problem is. The real problem is that the president seems to have a pre-1776 view of the world. That's the problem here.

All of us are committed to defeating the terrorists who threaten our country, Mr. Attorney General. It is, without a doubt, our top priority. In fact, I just want to read again what you said.

"As the president has said, if you are talking with AL Qaida, we want to know what you're saying."

Absolutely right. No one on this committee, I think no one in this body, believes anything other than that, and I want to state it as firmly as I can.

But I believe that we can and must do that without violating the Constitution or jeopardizing the freedoms on which this country was founded.

Our forefathers fought a revolution -- a revolution -- to be free from rulers who put themselves above the law. And I got to say, Mr. Chairman, I think this administration has been violating the law and is misleading the American people to try to justify it.

FEINGOLD: This hearing is not just a hearing about future possible solutions. That is fine to be part of the answer and part of the hearing. This hearing, Mr. Chairman, is also an inquiry into possible wrongdoing.

Mr. Attorney General, there already have been a few mentions today of your testimony in January of '05, your confirmation hearing. I'm going to ask you a few quick, simple and factual questions, but I want to make it clear that I don't think this hearing is about our exchange or about me, or what you said to me, in particular.

I am concerned about your testimony at that time, because I do believe it was materially misleading. But I am even more concerned about the credibility of your administration. And I'm even more concerned than that about the respect for the rule of law in this country. So that is the spirit of my questions.

Mr. Attorney General, you served as White House counsel from January 2001 until you became attorney general in 2005. On January 6, 2005, you had a confirmation hearing for the attorney general position before this committee.

Mr. Attorney General, you testified under oath at that hearing, didn't you?

GONZALES: Yes, sir.

FEINGOLD: And, sir, I don't mean to belabor the point, but just so the record is clear, did you or anyone in the administration ask Chairman Specter or his staff that you not be put under oath today?

GONZALES: Senator, I've already indicated for the record that the chairman asked my views about being sworn in and I said I had no objection.

FEINGOLD: But did you or anyone in the administration ask the chairman to not have you sworn?

GONZALES: Sir, not to my knowledge.

SPECTER: The answer is no.

FEINGOLD: That's fine.

At the time you testified in January of '05, you were fully aware of the NSA program, were you not?

GONZALES: Yes, sir.

FEINGOLD: You were also fully aware at the time you testified that the Justice Department had issued a legal justification for the program, isn't that right?

GONZALES: Yes, there had been legal analysis performed by the Department of Justice.

FEINGOLD: And you, as White House counsel, agreed with that legal analysis, didn't you?

GONZALES: I agreed with the legal analysis, yes.

FEINGOLD: And you had signed off on the program, right?

GONZALES: Yes, I did believe at the time the president had the authority to authorize these kinds of...

FEINGOLD: And you had signed off on that legal opinion.

And yet when I specifically asked you at the January 2005 hearing whether, in your opinion, the president can authorize warrantless surveillance notwithstanding the foreign intelligence statutes of this country, you didn't tell us yes. Why not?

GONZALES: Sir, I believe your question, the hypothetical you pose -- and I do consider it a hypothetical -- which is whether or

not, had the president authorized specific electronic surveillance in violation of the laws -- and I've tried to make clear today that, in the legal analysis in the white paper, the position of the administration is that the president has authorized electronic surveillance in a manner that is totally consistent -- not in violation, not overwriting provisions of FISA but totally consistent with FISA.

FEINGOLD: Mr. General, it certainly was not a hypothetical, as we now know.

GONZALES: Senator, your question was whether or not the president had authorized certain conduct in violation of law.

GONZALES: That was a hypothetical.

FEINGOLD: My question was whether the president could have authorized this kind of wiretapping...

GONZALES: In violation of the criminal statutes. And our position is, and has been, is that, no, this is not in violation of the criminal statutes. FISA cannot be...

FEINGOLD: You said the question was merely hypothetical.

Now, look, this is what you said: "It's not the policy or the agenda of this president to authorize actions that would be in contravention of our criminal statutes." And when you said that, you knew about this program; in fact, you just told me that you had approved it and you were aware of the legal analysis to justify it. You wanted this committee and the American people to think that this kind of program was not going on. But it was and you knew that. And I think that's unacceptable.

GONZALES: Senator, your question was whether or not the president had authorized conduct in violation of law. And I've laid out...

FEINGOLD: Mr. Attorney General, my question was whether the president would have the power to do that.

GONZALES: And, Senator, has not authorized conduct in violation of our criminal statutes.

We've laid out a 42-page analysis of our legal position here.

The authorities the president has exercised are totally consistent with the primary criminal provision in FISA, Section 109.

FEINGOLD: I've heard all your arguments, but I want to get back to your testimony, which, frankly, Mr. Attorney General, anybody that reads it basically realizes you were misleading this committee. You could have answered the question truthfully; you could have told the committee that, yes, in your opinion, the president has that authority. By simply saying the truth that you believe the president has the power to wiretap Americans without a warrant would not have exposed any classified information.

And my question wasn't whether such illegal wiretapping was going on. Like almost everyone in Congress, I didn't know, of course, about the program then.

It wasn't even about whether the administration believed that the president has this authority.

FEINGOLD: It was a question about your view of the law -- about your view of the law -- during a confirmation on your nomination to be attorney general.

So, of course, if you had told the truth maybe that would have jeopardized your nomination. You wanted to be confirmed, and so you let a misleading statement about one of the central issues of your confirmation, your view of executive power, stay on the record until the New York Times revealed the program.

GONZALES: Senator, I told the truth then, I'm telling the truth now.

You asked about a hypothetical situation of the president of the United States authorizing electronic surveillance in violation of our criminal statutes. That has not occurred.

FEINGOLD: Mr. Chairman, I think the witness has taken mincing words to a new high.

There's no question in my mind that when you answered the question that was a hypothetical you knew it was not a hypothetical and you were under oath at the time.

Let me switch to some other misrepresentations.

SPECTER: Wait a minute.

Do you care to answer that, Attorney General Gonzales?

GONZALES: Senator, as I've stated before, what I said was the truth then, it is the truth today.

The president of the United States has not authorized electronic surveillance in violation of our criminal statutes. We have laid out in great detail our position that the activities are totally consistent with the criminal statute.

FEINGOLD: All you have to, Mr. Attorney General, was indicate it was your view that it was legal. That was what my question was. I would have disagreed with your conclusions. But that's not what you said, and you referred to this as merely a hypothetical.

Mr. Attorney General, administration officials have been very misleading in their claims in justifying the spying program. To make matters worse, last week in the State of the Union the president repeated some of these claims. For one thing, the president said that his predecessors have used the same constitutional authority that he has.

Isn't it true that the Supreme Court first found that phone conversations are protected by the Fourth Amendment in the 1967 Katz

case?

GONZALES: Yes. In the 1967 Katz case, the Supreme Court did find that telephone conversations are covered by the Fourth Amendment.

FEINGOLD: So when the Justice Department points to Presidents Wilson and Roosevelt's actions, those are really irrelevant, aren't they?

GONZALES: Absolutely not, Senator. I think that they're important in showing that presidents have relied upon their constitutional authority to engage in warrantless surveillance of the enemy during a time of war.

The fact that the Fourth Amendment may apply doesn't mean that a warrant is instantly required in every case, as you know. There is a jurisprudence of the Supreme Court regarding special needs, normally in the national security context, outside of the ordinary criminal law context, where, because of the circumstances, searches without warrants would be justified.

FEINGOLD: Mr. Chairman, my time's up. I'll continue this line of questioning later.

SPECTER: Thank you very much, Senator Feingold. Senator Graham?

GRAHAM: Thank you, Mr. Chairman. I would like to congratulate you, also, for having these hearings.

I think what we're talking about is incredibly important to the country in terms of the future conduct of wars and how we relate constitutionally to each other and personally how we relate.

I find your testimony honest, straightforward. You legal reasoning is well articulated. I don't agree with it all.

About hiding something about this program, is it not true that the Congress has been briefed extensively -- at least a small group of congressmen and senators -- about this program?

GONZALES: Senator, I have not been present, as I've testified before, at all of the briefings. But in the briefings that I have been present, the briefings were extensive, the briefings were detailed. Certain members who were present at the briefing were given an opportunity to ask questions, to voice concerns.

GRAHAM: And if any member of this body believes that you've done something illegal, they could put in legislation to terminate this program, couldn't they? Isn't that our power?

GONZALES: Certainly, Senator, it is...

GRAHAM: Well, I would think, if you believe that our president was breaking the law, you'd have the courage of your convictions and you'd stop funding for it.

Now, it seems to me there's two ways we can do this. We can argue what the law is, we can argue if it was broken, we can play a

political dance of shirts versus skins, or we can find consensus as to what the law should be. And I associate myself with Senator DeWine as to what I think it should be.

In a dangerous and difficult time for our country, I chose inquiry versus inquisition, collaboration versus conflict. To me there's two big things that this Congress faces and this president faces.

In all honesty, Mr. Attorney General, this statutory force resolution argument that you're making is very dangerous in terms of its application for the future. Because, if you overly interpret the force resolution -- and I'll be the first to say, when I voted for it, I never envisioned that I was giving to this president or any other president the ability to go around FISA carte blanche.

And you're right: It is not my intent it's the letter of the resolution.

What I'm saying is that, if you came back next time or the next president came back to this body, there would be a memory bank established here and I would suggest to you, Mr. Attorney General, it would be harder for the next president to get a force resolution if we take this too far. And the exceptions may be a mile long.

Do you share my concern?

GONZALES: I understand your concern, Senator.

GRAHAM: Thank you. And I appreciate that.

So that's just a comment about the practical application of where we could go one day if we overinterpret. Because the offer is on the table; let's make sure we have the same understanding. Because if we have the same understanding between the executive, the legislative and the judicial branch, our enemy is weaker and we're stronger.

Now, to the inherent authority argument, taken to its logical conclusion, it concerns me that it could basically neuter the Congress and weaken the courts. And I'd like to focus a minute on the inherent authority of the president during a time of war concept.

I'll give you a hypothetical and you can answer it if you choose to. And I understand if you won't.

There's a detainee in our charge, an enemy prisoner, a high-value target. We reasonably believe that this person possesses information that could save millions or thousands of American lives.

The president, as commander in chief, tells the military authorities in charge, "You have my permission, my authority, I'm ordering you to do all things necessary and these five things, I'm authorizing. Do it because I'm commander in chief and we've got to protect the country."

There's a preexisting statute on the book, passed by the Congress, called the Uniform Code of Military Justice and it tells our

troops that, "If you have a prisoner in your charge, you're not to do these things," and they are the same five things. What do we do?

GONZALES: Well, of course, Senator, the president has already said that we're not going to engage in torture.

GONZALES: That is a categorical statement by the president.

As to whether or not the statute that you referred to would be constitutional, these kinds of questions are very, very difficult.

One could make the argument, for example, that the provision in the Constitution that talks about Congress under Section 8 of Article I, giving Congress the specific authority to make rules regarding captures, that that would give Congress the authority to legislate in this area.

Now, there is some disagreement amongst scholars about what "captures" means.

GRAHAM: And I take this, it's talking about ships, it's not talking about people.

But it's clear to me that the Congress has the authority to regulate the military, to fund the military. And the Uniform Code of Military Justice is a statutory scheme providing guidance, regulation and punishment to the military that the Congress passes.

GONZALES: I think most scholars would say that would fall under the clause in Section 8 of Article I giving the Congress the authority to pass rules regarding government and regulation of the armed forces.

GRAHAM: And I would agree with those scholars.

And the point I'm trying to say is that we can tell our military, "Don't you do this to a detainee." And you, as commander in chief, can tell the military, "We've got to win the war, we've got to protect ourselves."

Now, what I'm trying to say is that I'm worried about the person in the middle here. Because if we had adopted the reasoning of the Bybee memo -- that's repudiated, appropriately -- the point I was trying to make at your confirmation hearing is that the legal reasoning used in determining what torture would be under the Convention of Torture or the torture statute not only was strained that made me feel uncomfortable, it violated an existing body of law that was already on the books called the Uniform Code of Military Justice.

If a military member had engaged in the conduct outlined by the Bybee memo, they could have been prosecuted for abusing a detainee because it's a crime in the military, Mr. Attorney General, for a guard to slap a prisoner, much less have something short of major organ failure.

This is really a big deal for the people fighting the war. And if you take your inherent authority argument too far, then I am really

concerned that there is no check and balance.

GRAHAM: And when the nation's at war, I would argue, Mr. Attorney General, you need checks and balances more than ever, because within the law we put a whole group of people in jail who just looked like the enemy.

GONZALES: Senator, if I could just respond. I'm not -- maybe I haven't been as precise with my words as I might have been. I don't think I've talked about inherent exclusive authority. I talked inherent authority under the Constitution and the commander in chief.

Congress, of course, and I've said in response to other questions, they have a constitutional role to play also during a time of war.

GRAHAM: We coexist.

Now, can I get to the FISA statute in two minutes here? And I hope we do have another round, because this is very important. And I'm not here to accuse anyone of breaking the law. I want to create law that will help people fight the war know what they can and can't do.

The FISA statute -- if you look at the legislative language, they made a conscious decision back in 1978 to resolve this two-lane debate. There's two lanes you can go down as commander in chief. You can act with the Congress and you can have inherent authority as commander in chief.

The FISA statute said, basically, "This is the exclusive means to conduct foreign surveillance where American citizens are involved." And the Congress, seems to me, gave you a one-lane highway, not a two-lane highway. They took the inherent authority argument, they thought about it, they debated it, and they passed a statute -- if you look at the legislative language -- saying, "This shall be the exclusive means." And it's different than 1401.

So I guess what I'm saying, Mr. Attorney General, if I buy your argument about FISA, I can't think of a reason you wouldn't have the ability if you chose to to set aside the statute on torture if you believed it impeded the war effort.

GONZALES: Well, Senator, whether or not we set aside a statute, of course...

GRAHAM: But inherent authority sets aside the statute.

GONZALES: That's what we're talking about here. We don't need to get to that tough question.

GRAHAM: If you don't buy the force resolution argument, if we somehow magically took that off the table, that's all your left with is the inherent authority. And Congress could tomorrow change that resolution, and that's dangerous for the country if we get in a

political fight over that.

All I'm saying is that the inherent authority argument, in its application, to me, seems to have no boundaries when it comes to executive decisions in a time of war. It deals the Congress out, it deals the courts out.

And, Mr. Attorney General, there is a better way. And on our next round of questioning we will talk about that better way.

GONZALES: Can I simply make one quick response?

SPECTER: You may respond, Attorney General.

GONZALES: Well, the fact that the president, again, may have inherent authority doesn't mean that Congress has no authority in a particular area. And when we look at the words of the Constitution, and there are clear grants of authority to the Congress in a time of war.

And so if we're talking about competing constitutional interests, that's when you get into, sort of, the third part of the Jackson analysis.

GRAHAM: That's where we're at right now.

GONZALES: I don't believe that's where we're at right now.

GRAHAM: That's where you're at with me.

(LAUGHTER)

GONZALES: Sir, even under the third part of the Jackson analysis -- again, I haven't done the detailed work that, obviously, these kinds of questions requires. These are tough questions -- but I believe that the president does have the authority under the Constitution.

SPECTER: Thank you, Senator Graham.

Senator Schumer?

SCHUMER: Thank you, Mr. Chairman.

And, General Gonzales, I just want to make a couple of points that are important to keep in mind as we ask you questions.

First, we all support a strong, robust and vigorous national security program. Like everyone else in this room, I want the president to have all the legal tools he needs as we work together to keep our nation safe and free, including wiretapping.

SCHUMER: And I appreciate the difficult job you and the president have balancing security and liberty. That is not an easy one.

But I firmly believe that we can have both security and rule of law. And I'm sure you agree with that, General Gonzales, don't you?

GONZALES: Yes, Senator.

SCHUMER: And that's what distinguishes us from so many other nations, including our enemies. Is that correct?

GONZALES: That is correct.

SCHUMER: OK.

Now, the first job of government is to protect our security, and everyone on this committee supports that.

But another important job of government is to enforce the rule of law, because the temptation to abuse the enormous power of the government's very real. And that's why we have checks and balances. They're at the fulcrum of our democracy. You agree with that?

GONZALES: I agree with that, Senator.

SCHUMER: I have to say, by the way, that's why I'm disappointed that Chairman Specter wouldn't let us show the clip of the president's speech.

Senator Specter said that the transcript speaks for itself. But seeing the speech, with its nuances, is actually very different from reading the record. And when you watch the speech, it seems clear that the president isn't simply talking about roving wiretaps, he's talking about all wiretaps, because the fact that you don't wiretap citizens without a warrant has been a bedrock of American principles for decades.

Nonetheless, having said that, I am gratified that these hearings have been a lot less partisan than the previous ones we held in this room. And many Republican colleagues have voiced concerns about the administration policy. I want to salute my Republican colleagues for questioning some of these policies: Chairman Specter and Senator DeWine, Senator Brownback, Senator Graham and others.

But it's not just Republican senators who seriously question the NSA program, but very high-ranking officials within the administration itself.

Now, you've already acknowledged that there were lawyers in the administration who expressed reservations about the NSA program.

SCHUMER: There was dissent; is that right?

GONZALES: Of course, Senator. As I indicated, this program implicates some very difficult issues. The war on terror has generated several issues that are very, very complicated.

SCHUMER: Understood.

GONZALES: Lawyers disagree.

SCHUMER: I concede all those points. Let me ask you about some specific reports.

It's been reported by multiple news outlets that the former number two man in the Justice Department, the premier terrorism prosecutor, Jim Comey, expressed grave reservations about the NSA program and at least once refused to give it his blessing. Is that true?

GONZALES: Senator, here's the response that I feel that I can give with respect to recent speculation or stories about

disagreements.

There has not been any serious disagreement -- and I think this is accurate -- there has not been any serious disagreement about the program that the president has confirmed. There have been disagreements about other matters regarding operations which I cannot get into.

I will also say...

SCHUMER: But there was some -- I'm sorry to cut you off -- but there was some dissent within the administration. And Jim Comey did express, at some point -- that's all I asked you -- some reservations.

GONZALES: The point I want to make is that, to my knowledge, none of the reservations dealt with the program that we're talking about today. They dealt with operational capabilities that we're not talking about today.

SCHUMER: I want to ask you, again, about -- we have limited time.

GONZALES: Yes, sir.

SCHUMER: It's also been reported that the head of the Office of Legal Counsel, Jack Goldsmith, respected lawyer and professor at Harvard Law School, expressed reservations about the program. Is that true?

GONZALES: Senator, rather than going individual by individual, let me just say that I think the differing views that have been the subject of some of these stories did not deal with the program that I'm here testifying about today.

SCHUMER: But you were telling us that none of these people expressed any reservations about the ultimate program, is that right?

GONZALES: Senator, I want to be very careful here, because, of course, I'm here only testifying about what the president has confirmed.

And with respect to what the president has confirmed, I do not believe that these DOJ officials that you're identifying had concerns about this program.

SCHUMER: There are other reports, I'm sorry to -- you're not giving me a yes-or-no answer here. I understand that.

Newsweek reported that several Department of Justice lawyers were so concerned about the legal basis for the NSA program that they went so far as to line up private lawyers. Do you know if that's true?

GONZALES: I do not know if that's true.

SCHUMER: Now, let me just ask you a question here.

You mentioned earlier that you had no problem with Attorney General Ashcroft, someone else -- I didn't want to ask you about him; he's your predecessor -- people have said have doubts. But you said that you had no problem with him coming before this committee and

testifying when Senator Specter asked, is that right?

GONZALES: Senator, who the chairman chooses to call as a witness is up to the chairman.

SCHUMER: The administration doesn't object to that, do they?

GONZALES: Obviously, the administration -- by saying that we would have no objection doesn't mean that we would waive any privileges that might exist.

SCHUMER: I understand. I got that.

But I assume the same would go for Mr. Comey, Mr. Goldsmith and any other individuals. Assuming you didn't waive executive privilege, you wouldn't have an objection to them coming before this committee.

GONZALES: Attorney-client privilege, deliberative privilege. To the extent that there are privileges, it is up to the chairman to decide who he wants to call as a witness.

But let me just say that if we're engaged in a debate about what the law is and the position of the administration, that is my job and that's what I'm doing here today.

SCHUMER: I understand. And you are doing your job.

And that's why I am requesting, as I have in the past, but renewing it here today, reaffirmed even more strongly by your testimony and everything else, that we invite these people, that we invite former Attorney General Ashcroft, Deputy Attorney General Comey, OLC Chair Goldsmith to this hearing and actually compel them to come if they won't on their own.

And as for privilege, I certainly...

SPECTER: If I may interrupt you for just one moment...

SCHUMER: Please.

SPECTER: ... you'll have extra time...

SCHUMER: Yes, thank you.

SPECTER: ... I think the record was in great shape where I left it at. If you bring in Attorney General Ashcroft, that's a critical step.

SCHUMER: Right.

SPECTER: It wasn't that I hadn't thought of Mr. Comey and Mr. Goldsmith and other people, but I sought to leave the record with the agreement of the attorney general to bring in former Attorney General Ashcroft.

SCHUMER: Mr. Chairman, I respect that. I think others are important as well.

But I want to get to the issue of privilege here.

SPECTER: I'm not saying they aren't important. I'm just saying, what's the best way to get them here?

SCHUMER: OK. Well, whatever way we can, I'd be all for.

On privilege -- because that's going to be the issue, even if

they come here, as I'm sure you will acknowledge, Mr. Chairman -- I take it you'd have no problem with them talking about their general views on the legality of this program, just as you are talking about those; not to go into the specific details of what happened back then, but their general views on the legality of these programs.

SCHUMER: Do you have any problem with that?

GONZALES: General views of the program that the president has confirmed, Senator, that's -- again, if we're talking about the general views of the...

SCHUMER: I just want them to be able to testify as freely as you've testified here, because it wouldn't be fair if you're an advocate of administration policies, you have one set of rules and if you're an opponent or a possible opponent of administration policies, you have another set of rules. That's not unfair, is it?

GONZALES: Sir, it's up to the chairman to...

SCHUMER: No, but would you or the administration -- you, as the chief legal officer -- have any problem with them testifying in the same way you did about general legal views of the program?

GONZALES: I would defer to the chairman.

SCHUMER: I'm not asking you -- sir, in all due respect, I'm not asking you what the chairman thinks. He's doing a good job here, and I don't begrudge that one bit.

GONZALES: Sir, my answer is...

SCHUMER: I'm asking you what the administration would think in terms of exercising any claim of privilege.

You're not going to have -- I'm sorry, here -- you're not going to have different rules for yourself, an administration advocate, then for these people who might be administration dissenters in one way or another, are you?

GONZALES: Sir, I don't know if you're asking what are they going to say...

SCHUMER: I'm not asking you that.

Would the rules be same? I think you answer that yes or no.

GONZALES: If they came to testify?

SCHUMER: Correct.

GONZALES: Well, sir, the client here is the president of the United States. I'm not sure it's in my place to offer...

SCHUMER: OR his chief...

GONZALES: ... up a position or my recommendation to you about what I might recommend to the president of the United States would not be appropriate here.

SCHUMER: What would be -- I just am asking you, as a very fine, well-educated lawyer, should or could the rules be any different for what you are allowed to say with privilege hovering over your head and

what they are allowed to say with those same privileges hovering over their heads? Should the rules be any different?

If you can't say "yes" to that, then that's fundamentally unfair. It's saying that these hearings, or that -- it's saying really that the administration doesn't have the confidence to get out the whole truth.

GONZALES: Sir, my hesitation is, quite frankly, I haven't thought recently about the issue about former employees coming to testify about their legal analysis or their legal recommendations to their client, and that is the source of my hesitation.

SCHUMER: I was just -- my time...

SPECTER: Senator Schumer, take two more minutes for my interruption...

SCHUMER: OH, thank you, Mr. Chairman.

SPECTER: ... providing you move to another subject.

(LAUGHTER)

SCHUMER: Well, OK.

(LAUGHTER)

Again, I think this is very important, Mr. Chairman...

SPECTER: OH, I do too.

SCHUMER: ... and I think you would agree.

OK.

SPECTER: If this were a courtroom, I'd move to strike all your questions and his answers, because the record was so much better off before.

(LAUGHTER)

SCHUMER: Well, I don't buy that, Mr. Chairman.

SPECTER: But take two more minutes on the conditions stated.

SCHUMER: I don't buy that. I think we have to tie down as much as we can here, OK.

Let me go to another bit of questions here.

You said, Mr. Attorney General, that the AUMF allowed the president -- that's one of the legal justifications, the Constitution, to go ahead with this program.

Now, under your legal theory, could the government, without ever going to a judge or getting a warrant, search an American's home or office?

GONZALES: Well, of course, Senator, any authorization or activity by the president would be subject to the Fourth Amendment. And what you're talking about -- I presume we're talking about a law enforcement effort. This is not a law enforcement effort.

SCHUMER: Let me interrupt for a minute. Aren't wiretaps subject to the Fourth Amendment, as well?

GONZALES: Of course. Of course, they are.

SCHUMER: So they're both subject.

What would prevent the president's theory, your theory, from -- given the danger, given, maybe, some of the difficulties -- from going this far?

GONZALES: Well, sir, it's hard to answer a hypothetical question in the way that you pose it in terms of how do the president's authorities extend.

However far they may extend, Senator, they clearly extend so far as to allow the president of the United States to engage in electronic surveillance of the enemy during a time of war.

SCHUMER: Would he engage in electronic surveillance when the phone calls both originated and ended in the United States if there were AL Qaida suspects?

GONZALES: I think that question was asked earlier. I've said that I don't believe that we've done the analysis on that.

SCHUMER: I asked what do you think the theory is?

GONZALES: That's a different situation, Senator. And, again, these kind of constitutional questions -- I could offer up a guess, but these are hard questions.

SCHUMER: Has this come up? Has it happened?

GONZALES: Sir, what the president has authorized is only international phone calls.

SCHUMER: I understand.

Has there been a situation brought to your attention where there were AL Qaida calls -- someone suspected of being part of AL Qaida or another terrorist group calling someone from the United States to the United States?

GONZALES: Sir, now, you're getting into, sort of, operations.

And I'm not going to respond to that.

SCHUMER: Well, I'm not asking any specific; I'm asking "ever."

GONZALES: You're asking about how this program has operated.

And I'm not going to answer that question, sir.

SCHUMER: Thank you, Mr. Chairman.

SPECTER: Thank you, Senator Schumer.

Senator Cornyn?

CORNYN: Thank you, Mr. Chairman.

And I think your comments, Mr. Chairman, about this not being a court of law, are apt. Because I don't think we're going to get resolution about the disagreement among lawyers as to what the legal answer is.

But I do believe it's important to have the hearing and to air the various points of view.

But I would hope -- and I trust, along the lines of what Senator Schumer stated -- is that there would be a consensus on the committee

and throughout the Congress that we should use all legal means available to us to gather actionable intelligence that has the potential of saving American lives.

CORNBYN: You certainly would agree with that, wouldn't you, General Gonzales?

GONZALES: Yes, Senator.

CORNBYN: And some at [****] "Well, has the Foreign Intelligence Surveillance Act, which was passed in 1978, authorized the president to conduct this particular program?"

I have a couple of problems with that question stated that way.

Number one, the technology has surpassed what it was in 1978, so our capacity to gain actionable intelligence has certainly changed. And the very premise of the question suggests that the president can only exercise the authority that Congress confers. And when people talk about the law, the law that pertains to this particular question is not just the Foreign Intelligence Surveillance Act, but it includes the Constitution and the authorization for use of military force.

Would you agree with that, General Gonzales?

GONZALES: Senator, you raised a very important point. People focus on the Foreign Intelligence Surveillance Act and say, "This is what the words say and that's the end of it; if you're not following it in total, you're obviously in violation of the law."

That is only the beginning of the analysis. You have to look to see what Congress has done subsequent to that. And then, of course, you have to look at the Constitution.

There have been many statements today about "No one is above the law." And I would simply remind -- and I know this doesn't need to be stated -- but no one is above the Constitution either, not even the Congress.

CORNBYN: And clearly the Supreme Court, in the Hamdi case, said what we all know to be the fact, and that is no president is above the law, no person in this country, regardless of how exalted their position may be or how relatively modest their position may be -- we're all governed by the Constitution and laws of the United States.

GONZALES: During my confirmation hearings, I talked about Justice O'Connor's statement from Hamdi that a state of war is not a blank check for the president of the United States.

GONZALES: And I said in my hearings that I agreed with that.

CORNBYN: General Gonzales, I regret to say that when I was just a few minutes ago watching the crawler or the caption in a cable news network, it referred to domestic surveillance, which strikes me as a fundamental error in the accuracy of the reporting of what's going on here.

You made clear that what's been authorized here is not domestic surveillance; that is, starting from and ending in the United States. This is an international surveillance with known Al Qaida operatives, correct?

GONZALES: I think people who call this a domestic surveillance program are doing a disservice to the American people. It would be like flying from Texas to Poland and saying that's a domestic flight. We know that's not true. That would be an international flight. And what we're talking about are international communications.

And so I agree with your point, Senator.

CORNBYN: With regard to the authorization of the use of military force, some have questioned whether it was actually discussed in Congress whether surveillance of international phone calls between Al Qaida overseas and here, whether that was actually in the minds of individual members of Congress when they voted to support the authorization of the use of military force.

It strikes me as odd to say that Congress authorized the commander in chief to capture, to detain, to kill, if necessary, Al Qaida, but we can't listen to their phone calls and we can't gather intelligence to find out what they're doing so we can prevent future attacks against the American people.

CORNBYN: Now, you've explained your legal analysis with regard to the Hamdi decision and explaining that intelligence is a fundamental incident of war. And I think that makes good sense.

And, here again, I realize we have some very fine lawyers on the committee. And there are a lot of lawyers around the country who've opined on this: some who have been negative, some who have been positive.

I was struck by the fact that John Schmidt, who was associate attorney general during the Clinton Justice Department, wrote what I thought was an eloquent op-ed piece for the Chicago Tribune, dated December the 21st, 2005, agreeing with the administration's point of view. But that's only to point out that lawyers, regardless of their party affiliation, will have, perhaps, differing views.

But, again, I would hope that what we're not engaged in is either a partisan debate or even an ideological debate, but a legal debate on what the constitutional laws of the United States provide for.

Let me turn to another subject that's caused me a lot of concern, and that is our espionage laws and the laws that criminalize the intentional leaking of classified information.

It's my understanding from the news reports that the Department of Justice has undertaken an investigation to see whether those who actually leaked this program to the New York Times or any other media outlet might have violated our espionage laws.

CORNYN: Is that correct?

GONZALES: I can confirm, Senator, that an investigation has been initiated.

CORNYN: Does that investigation also include any potential violation for publishing that information?

GONZALES: Senator, I'm not going to get into specific laws that are being looked at. But, obviously, our prosecutors are going to look to see all the laws that have been violated. And if the evidence is there, they're going to prosecute those violations.

CORNYN: Well, you may give me the same answer to this next question.

But I'm wondering, is there any exclusion or immunity for the New York Times or any other person to receive information from a lawbreaker seeking to divulge classified information? Is there any explicit protection in the law says that if you receive that and you publish it, you are somehow immune from a criminal investigation?

GONZALES: Senator, I'm sure the New York Times has their own great set of lawyers, and I would hate in this public forum to provide them my views as to what would be a legitimate defense.

CORNYN: Well, there's a lot of very strange circumstances surrounding this initial report in the New York Times, including the fact that the New York Times apparently sat on the story for a year. And then, of course, the coincidence, some might say, that the story was broken on the date that Congress was going to vote -- the Senate was going to vote on reauthorization of the Patriot Act. But we'll leave that perhaps for another day.

I believe I will yield the rest of my time back. Thank you, Mr. Chairman.

SPECTER: Thank you very much, Senator Cornyn.

DURBIN: Thank you very much, Mr. Chairman.

Thank you, Attorney General, for being here.

During the course of this hearing, you have referred to FISA several times as "a useful tool, a useful tool in wiretapping and surveillance."

And I've thought about that phrase because it's a phrase that's been used by the White House too.

Referring to FISA as a useful tool in wiretapping is like referring to speed limits and troopers with radar guns as useful tools on a motoring trip.

I think FISA is not there as a useful tool to the administration. It is there as a limitation on the power of a president when it comes to wiretapping.

And I think your use of that phrase, "useful tool," captures the attitude of this administration toward this law: We'll use it when it

doesn't cause a problem; we'll ignore it when we have to."

And I think that's why we're here today.

And I'm curious, Mr. Attorney General, as we get into this, and I look back on some of your previous testimony and what you said to this committee in confirmation hearings and the like, how far will this administration go, under the theories which you have stated today, to ignore or circumvent laws like FISA.

I asked you during the course of your confirmation hearing a question about this whole power of the commander in chief. I wish I could play it to you here, but there's a decision made by the committee that we aren't going to allow that sort of thing to take place.

But I do believe that, if I could play it, you would be asked to explain your answer to a question which I posed to you.

And the question was this: "Mr. Attorney General, has this president ever invoked that authority, as commander in chief or otherwise, to conclude that a law was unconstitutional and refused to comply with it?"

Mr. Gonzales: "I believe that I stated in my June briefing about these memos that the president has not exercised that authority." You've said to us today, several times, that the president is claiming his power for this domestic spying -- whatever you want to call it, terrorist surveillance -- program because of the president's inherent powers, his core constitutional authority of the executive branch.

DURBIN: And so I have to ask you point-blank, as Senator Feingold asked you earlier.

You knew when you answered my question that this administration had decided that it was going to basically find a way around the FISA law, based on the president's, as you called it, inherent constitutional powers. So how can your response be valid today in light of what we now know?

GONZALES: OH, it's absolutely valid, Senator.

And this is going to sound repetitious, but it has never been our position that we are circumventing or ignoring FISA. Quite the contrary, the president has authorized activities that are totally consistent with FISA, with what FISA contemplates.

I have indicated that I believe that, putting aside the question of the authorization to use military force, that, while it's a tough legal question as to whether or not Congress has the authority under the Constitution to cabin or to limit the president's constitutional authority to engage in electronic surveillance of the enemy, that is not a question that we even need to get to.

It has always been our position that FISA can be and must be read

in a way that it doesn't infringe upon the president's constitutional authority.

DURBIN: So let me read to you what your own Justice Department just issued, within the last few weeks, in relation to the president's authority, the NSA program and FISA.

I quote, "Because the president also is determined that NSA activities are necessary to defend the United States from a subsequent terrorist attack in the armed conflict with AL Qaida," I quote, "FISA would impermissably interfere with the president's most solemn constitutional obligation to defend the United States against foreign attack."

You can't have it both ways.

DURBIN: You can't tell me that you're not circumventing it and then publish this and say that FISA interferes with the president constitutional authority.

GONZALES: And that's why you have to interpret FISA in a way where you don't tee up that very difficult constitutional question under the canon of constitutional avoidance.

DURBIN: What you have to do is take out the express language in FISA which says it is the exclusive means -- it is exclusive. And the way you take it out is by referring to -- and I think you've said it over and over here again -- you just have to look to that phrase you say, "except as otherwise authorized by statute."

Senator Feinstein and I were struggling. We were looking through FISA. Where is that phrase, "except as otherwise authorized by statute"? It's not in FISA. It's not in the FISA law.

You may find it in the criminal statute and may want to adopt it by reference. But this FISA law, signed by a president and the law of the land, is the exclusive way that a president can wiretap.

And I want to ask you, if this is exclusive, why didn't you take advantage of the fact that you had and the president had such a strong bipartisan support for fighting terrorism that we gave the president the Patriot Act with only one dissenting vote? We're supported this president with every dollar he's asked for to fight terrorism.

Why didn't you come to this Congress and say, "There are certain things we need to change," which you characterized as cumbersome and burdensome in FISA? Why didn't you work with us to make the law better and stronger and more effective when you knew that you had a bipartisan consensus behind you?

GONZALES: Senator, the primary criminal provision in FISA, Section 109, [50 USC 1809](#), it is page 179 if you've got one of these books, provides that "a person is guilty of offense if he intentionally engages in electronic surveillance under cover of law except as authorized by statute."

This provision means that you have to engage in electronic surveillance as provided here except as otherwise provided by statute. And this is the provision that we're relying upon. It's in the Foreign Intelligence Surveillance Act.

DURBIN: It's Title XVIII. But let me just tell you, what you don't want to read to us is...

GONZALES: Sir, it's not Title XVIII.

DURBIN: ... "The Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in Section 101 of such act, and interception of domestic wire electronic communication may be conducted."

DURBIN: And so what you've said is, "Well, when you authorizes the war, you must have known that we were going to really expand beyond FISA."

I've got the book here; you can look through it if you like.

There's not a single reference in our passing this AUMF that we talk about -- authorize use of military force -- not a single reference to surveillance and intelligence in the manner that you've described it.

GONZALES: Sir, there's probably not a single reference to the detainment of American citizens, either, but the Supreme Court has said that that is exactly what you have authorized because it is a fundamental incident of waging war.

DURBIN: So, since you quoted that repeatedly, let me read what that court has said.

"We conclude..." -- Hamdi decision -- "We conclude that detention of individuals falling into the limited category we are considering for the duration of the particular conflict in which they are captured is so fundamental and accepted an incident to war to be an exercise of necessary and appropriate force."

GONZALES: No question: That case was not about electronic surveillance. I will concede that.

DURBIN: But I'll tell you something else, Mr. Attorney General.

If you then read, I think, the fine reasoning of Justice O'Connor, she comes to a point which brings us here today. And I thank the chairman for allowing us to be here today.

And this is what she says, in the course of this decision: "It is during our most challenging and uncertain moments that our nation's commitment to due process is most severely tested and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad."

We have said repeatedly, as nominees for the Supreme Court have come here, "Do you accept the basis of Hamdi that a war is not a blank check for a president?" They have said, "Yes; that's consistent with Johnson and Youngstown."

And now, what we hear from you is that you are going to take this decision in Hamdi and build it into a way to avoid the most basic statute when it comes to electronic surveillance in America, a statute which describes itself as the exclusive means by which this government can legally do this.

GONZALES: Senator, I think that, in reading that provision you just cited, you have to consider Section 109.

Section 109 contemplates an additional authorization by the Congress. Congress provided that additional authorization when it authorized the use of military force following the attacks of 9/11.

DURBIN: The last thing I'd like to say -- and I only have a minute to go -- is the greatest fear that we have is that what this president is now claiming is going to go far beyond what you've described today.

What you've described today is something we would all join in on a bipartisan basis to support: Use every wiretap capacity you have to stop dangerous terrorists from hurting Americans.

If you came to Capitol Hill and asked us to change a law in a reasonable way to reach that goal, you'd have the same bipartisan support.

Our concern is that what this president is asking for will allow this administration to comb through thousands of ordinary Americans' e-mails and phone calls.

In the audience today is Richard Fleischer (ph) of Willowbrook, Illinois; I don't know if Mr. Fleischer (ph) is still here. Mr. Fleischer (ph) wrote to the NSA and asked if he had been wiretapped because he had had conversations with people overseas.

And after several letters that he sent back and forth, the best he could get from the National Security Administration is that they would neither confirm nor deny the existence of records responsive to his request.

Ordinary Americans wondering if their telephone calls, if their e-mails overseas have been wiretapped. And there is no safeguard for their liberty and freedom.

What we have today is your announcement that career professionals and experts will watch out for the freedoms of America.

Career professionals and experts, sadly, in our nation's history, have done things in the past that we're not proud of. Career professionals have made bad decisions: Japanese internment camps, enemies lists.

What we really rely on is the rule of law and the Constitution: safeguards we can trust by people we can see. And when it comes to some person working at NSA, I don't think it gives us much comfort.

SPECTER: Thank you, Senator Durbin.

Before yielding to Senator Brownback, I want to announce that I'm going to have to excuse myself for just a few minutes. We're starting a floor debate this afternoon at 3 o'clock on the asbestos reform bill, of which Senator Leahy and I are co-sponsors.

And I am scheduled to start the debate at 3 o'clock. And I will return as soon as I have made a floor statement.

And, in the interim, Senator Hatch has agreed to chair the hearing.

Senator Brownback, you're recognized.

BROWNBAC: Thank you, Mr. Chairman. I appreciate the hearing.

Attorney General, thank you for being here.

I want to look at the reason we're in this war on terrorism. I want to talk about the length of time we may be in this war on terrorism. And then I want to look at FISA's use, forward from this point, in the war on terrorism.

I don't need to remind the attorney general, but I certainly would my colleagues, that we are very actively engaged in a war on terrorism today.

BROWNBAC: January 19th of this year, Osama bin Laden in a tape says this, quote: "The reason why we didn't have such an operation will take place and you will see such operations, by the grace of God." And by that he's talking about more 9/11s. And that was January 19th, 2006.

Al Zawahiri, number two person, January 30th of this year, says this: "Bush, do you know where I am? I'm among the Muslim masses enjoying their care with God's blessings and sharing with them their holy war against you until we defeat you, God willing. The lion of Islam, Sheik Osama bin Laden, may God protect him, offered you a decent exit from your dilemma, but your leaders, who are keen to accumulate wealth, insist on throwing you and battles and killing your souls in Iraq and Afghanistan and, God willing, on your own land."

I just want to remind people that as we get away from 9/11 in 2001, we'd not forget that we're still very much in a war on terrorism and people are very much at war against us.

And we're talking about probably one of the lead techniques we can use in this war, which I would note recent testimony of General Hayden said this about the technique of the information you're using right now, he said, quote, "Had this program been in effect prior to 9/11, it's my professional judgment that we would have detected some of the 9/11 AL Qaida operatives in the United States and we would have identified them as such."

So, Attorney General, I don't know if you have a different opinion from General Hayden on that, but...

GONZALES: I never have a different opinion from General Hayden

on the intel capabilities that we're talking about here. Both he and Director Mueller have recently testified about the importance of the terrorist surveillance program.

General Hayden did say it's been very successful, that we've gotten information we would not have otherwise gotten, that it has helped us -- I think he said -- deter and detect attacks here and abroad.

FBI Director Mueller said that it was a valuable tool, it helped identified would-be terrorists in the United States and helped identify individuals providing material support to terrorists.

So those are the experts saying how valuable this tool has been.

BROWNBACK: Having said that, I've read through most of your white paper material, and I've looked at a great deal of it. I'm struck and I think we have an issue we need to deal with.

Part of what we're working off of is a war declaration dated September 18th, 2001, and the war declaration on Afghanistan, and the war declaration October 16th, 2002 on the use of military force in Iraq, and "The president is authorized to use all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, committed or aided the terrorist attacks."

It strikes me that we're going to be in this war on terrorism possibly for decades; maybe not. But this could be the Cold War of our generation. Maybe it doesn't go that period of time, but it has the possibilities of going for some extended period of time.

And I share Senator DeWine's concern that we should look, then, at the FISA law, and make sure that as we move forward in this, that we're not just depending upon these authorizations of war to say that that puts us in a superior position under the Article II powers, but that to maintain the support of the American public, to have another set of eyes also looking at this surveillance technique is an important thing in maintaining the public's support for this.

And so I want to look and direct you to looking at the FISA law in particular. And you've made some comments here this today that have been very well stated and thought through. You've talked to one point the FISA law was not well structured to the needs of today's terrorist war effort. The law was passed -- what? -- 27 years ago or something of that nature, and certainly didn't contemplate a war on terrorism like we're in today.

And I want to look specifically at how we could amend that FISA law, looking at a possible decades-long war on terrorism.

Now, one of the areas you've talked about that's cumbersome is the 72-hour provision within the law, if I'm gathering what you're saying correctly.

BROWNBAC: Congress extended this period from 24 to 72 hours in 2001.

Just looking narrowly at what would need to be done to use the FISA authority more broadly and still be able to stop terrorists, if that is extended further, would it make it more likely that she would use the FISA process, if that's extended beyond 72 hours?

GONZALES: It's hard to say, Senator, because whether it's 24 or 72, whatever, I have got to make a determination under the law that at the time I grant emergency authorization, that all the requirements of FISA are met. I think General Hayden said it best yesterday: This is not a 72-hour sort of hall pass.

I've got to know when I grant that authorization, whether I then have 24 or 72 hours to submit a written application to the court, I've got to know at the time I say, "Yes, go forward," that all the requirements of FISA are met. That's the problem.

If I could just also make one final point.

BROWNBAC: Fair enough.

GONZALES: There was not a war declaration, either in connection with AL Qaida or in Iraq. It was an authorization to use military force.

I only want to clarify that, because there are implications. Obviously, when you talk about a war declaration, you're possibly talking about affecting treaties, diplomatic relations. And so there is a distinction in law and in practice. And we're not talking about a war declaration. This is an authorization only to use military force.

BROWNBAC: Looking forward in the war on terrorism and the use of FISA and this committee's desire, I believe, to have the administration wherever possibly and more frequently use FISA -- and you noted you've used it more this past year than the year before -- what specific areas would make this decision on your part easier, more likely to use the FISA process?

GONZALES: Well, Senator, if you're talking about domestic surveillance in a peacetime situation for other kinds of terrorists beyond AL Qaida...

BROWNBAC: No. I'm talking about the war on terrorism.

GONZALES: Senator, I would like to get the opportunity to think about that and maybe talk to the experts in the department, I think who have a better sense about what kinds of specific things. I can say that the Patriot Act includes a provision which allows these orders to stay in place a longer period of time before they're renewed. It is quite burdensome, the fact that these things expire. We then have to go back and get a renewal. That just places an additional burden on our staff.

But I would like to have the opportunity to get back to you about what other kinds of specific changes might be helpful.

BROWNBACK: If you could, because I think we're going to be in this for a period of time, and we're going to be in it for succeeding administrations in this war on terrorism. And probably our most valuable tool that we have is information, early information, to be able to cut this off.

So the American public I think clearly wants us to be able to get as much information as we can. And yet I think we need to provide a process that has as much security to the American public that there's no abuse in this system. This is about us trying to protect people and protect people in the United States.

And I want to know, too, presidential authority that you're protecting, this has been talked about by the Clinton administration attorney general before, many others; it's not just this administration at all, as others have specifically quoted.

BROWNBACK: But I do think, as this wears on, we really need to have those thoughts of how we can make the FISA system work better.

GONZALES: Senator, we are as likewise concerned about ensuring that we protect the rights of all Americans.

BROWNBACK: I'm sure you are. And I appreciate that. I want you to protect us from security attacks, too. And bin Laden has, to my knowledge, when he normally makes a threat, he has followed through on these.

This is a very active and live area. I just want to see if we can make that law change where it can work for a long-term war on terrorism.

Thank you, Mr. Chairman.

HATCH: Senator Leahy?

LEAHY: Thank you, Mr. Chairman.

You know, incidentally, Senator Brownback rightfully pointed out the date when FISA enacted. Of course, we have updated it five times since 9/11, two of those when I was chairman.

In the year 2000, the last year of the Clinton administration, they used the FISA Court 1,005 times. The year of September 11, your administration actually used it less times even than the Clinton administration used it before.

I'm just curious. You know, when I started this morning, I asked you a very straightforward question. I told you I'd come back to it, so I'm sure you've had time to check for the answer during the lunch hour.

So, I come to you again with it. When did the Bush administration come to the conclusion that the congressional resolution authorizing the use of military force against AL Qaida also

authorized warrantless wiretapping of Americans inside the United States?

LEAHY: So I'm sure you've had time to check for the answer during the lunch hour.

So I come to you again with it: When did the Bush administration come to the conclusion that the congressional resolution authorizing the use of military force against AL Qaida also authorized warrantless wiretapping of Americans inside the United States?

GONZALES: Sir, the authorization of this program began...

LEAHY: I can't hear you. Can you pull your mike a little bit...

GONZALES: Pardon me. The authorization regarding the terrorist surveillance program occurred subsequent to the authorization to use military force and prior to the Patriot Act.

LEAHY: OK. So what you call terrorist surveillance, some would call the breaking of the Foreign Intelligence security?

I'm asking, when did you decide that the authorization for use of military force gave you the power to do this? I mean, you were White House counsel then. What date did it give you the power?

GONZALES: Well, sir, I can't give you specific dates about when...

LEAHY: That's what I asked you this morning, and you had the time to go and look. I mean, you had to sign that, or sign off on that before the president.

When did you reach the conclusion that you didn't have to follow FISA?

GONZALES: Sir, I'm not going to give an exact date as to when the program actually commenced, but it's always been the case...

LEAHY: Why not?

GONZALES: Because that's an operational detail, sir, and I've already indicated the chairman has invited me -- the committee has invited me here to talk about the legal analysis of what the president authorized.

LEAHY: We're asking for a legal analysis. I mean, obviously you had to make a determination that you had the right to do this. When did you make the determination that AUMF gave you the right to do this?

GONZALES: From the very outset, before the program actually commenced, it has always been the position that FISA cannot be interpreted in a way that infringes upon the president's constitutional authority, that FISA must be interpreted, can be interpreted in a way...

LEAHY: Did you tell anybody that when you were up here seeking the Patriot Act and seeking the changes in FISA?

LEAHY: Did you tell anybody you had already determined -- it was

your testimony here today that you made the determination, virtually immediately -- that you had this power without using FISA?

GONZALES: Well, sir, the fact that we were having discussions about the Patriot Act -- and there wasn't a specific mention about electronic surveillance with respect to this program -- I would remind the committee that there was also discussion about detention in connection with the Patriot Act discussions.

Justice Souter, in the Hamdi decision, made that as an argument, that, clearly, Congress did not authorize...

LEAHY: Judge Gonzales, I'm not asking about what happens when you catch somebody on a battlefield and detain them; I'm not asking about what you do in the battlefield in our failed attempt to catch Osama bin Laden, what we were actually asking the administration to do. I'm not asking about what happens on that battlefield.

I'm asking, why did you feel that -- now, your testimony is that, virtually immediately, you determined you had the power to do this warrantless wiretapping because of AUMF.

You didn't ask anybody up here. Did you tell anybody that you needed something more than FISA?

GONZALES: Sir, I don't recall. Did I tell anyone in Congress or tell...

LEAHY: Congress. I said Congress first.

GONZALES: Sir, I don't recall having conversations with anyone in Congress about it.

LEAHY: Do you recall that anybody on this committee, which actually is the one that would be amending FISA, was told?

GONZALES: Sir, I have no personal knowledge that anyone on this committee was told.

LEAHY: Apparently then, according to your interpretation, Congress -- and a lot of Republicans and a lot of Democrats disagree with you on this when we voted for the authorization for military force -- that we were authorizing warrantless wiretapping.

Did we -- were we authorizing you to go into people's medical records here in the United States by your interpretation?

GONZALES: Senator, whatever the limits of the president's authority given under the authorization of the use of military force and his inherent authority as commander in chief in a time of war, it clearly includes the electronic surveillance of the enemy.

LEAHY: Well, just let it be noted that you did not answer my question. But here you also said, "We've had discussions with the Congress in the past, certain members of Congress, as to whether or not FISA could be amended to allow us to adequately deal with this kind of threat. We were advised that that would be difficult, if not impossible."

That's your statement. All right. Who told you that?

GONZALES: Senator, there was discussion with a bipartisan group of leaders in Congress, leaders of the Intel Committee, to talk about legislation. And the consensus was that obtaining such legislation -- the legislative process is such that it could not be successfully accomplished without compromising...

LEAHY: When did they give you that advice?

GONZALES: Sir, that was some time in 2004.

LEAHY: OH, three years later. You mean you've been doing this wiretapping for three years and then suddenly you come up here and say, "Oh, by the way, guys, could we have a little bit of authorization for this"? Is that what you're saying?

GONZALES: Sir, it's always been our position that the president has the authority, under the authorization to use military force and under the Constitution.

LEAHY: It's always been your position but, frankly, it flies in the face of the statute, Mr. Attorney General. And I doubt very much if one single person of Congress would have known that was your position, had you not known the newspapers were going to print what you were doing -- not that anybody up here knew it.

When you found out the newspapers were going to bring it, you came up here.

Did you talk to any member of the Judiciary Committee that would actually write it?

And let me ask you this: Did any member of this committee, this Judiciary Committee which has to write the law, did anybody here tell you we couldn't write a law that would allow you to go after AL Qaida in the way you're talking about?

GONZALES: Sir, I don't believe there were any discussions with any members of the Judiciary Committee...

LEAHY: Even though we're the ones that have to write the law, and you're saying that you were told by members of Congress we couldn't write a law that would fit it, and now you tell us that the committee that has to write the law never was asked.

GONZALES: We had...

LEAHY: Does this sound like a CYA on your part? It does to me.

GONZALES: We had discussions with a bipartisan leadership of the Congress about this program.

LEAHY: But not from this committee. We have both Republicans and Democrats on this committee, you know?

GONZALES: Yes, sir, I do know that.

LEAHY: And this committee has given you, twice under my chairmanship, we have given you five amendments to FISA because you requested it.

But this, you never came to us.

Mr. Attorney General, can you see why I have every reason to believe we never would have found out about this if the press hadn't?

LEAHY: Now, there's been talk about, "Well, let's go prosecute the press." Heavens, thank God we have a press that at least tells us what the heck you guys are doing because you're obviously not telling us.

GONZALES: Sir, we have advised bipartisan leadership of the Congress and the Intel Committees about this program.

LEAHY: Well, did you tell them that before the passage of the USA Patriot Act?

GONZALES: Sir, I don't recall when the first briefing occurred. But my recollection is that it was shortly after the program was initiated.

LEAHY: OK, well, let me ask you this, then.

You say, several years after it started, you came up here and talked to some group of members of Congress. The press reports said that the president's program of spying on Americans without warrants was shut down for some time in 2004. That sounds like the time you were up here.

If the president believed the program was necessary and legally justified, why did he shut it down?

GONZALES: Sir, you're asking me about the operations of the program.

LEAHY: Of course, I'm sorry, Mr. Attorney General, I forgot you can't answer any questions that might be relevant to this.

(LAUGHTER)

Well, if the president has that authority, does he also have the authority to wiretap Americans' domestic calls and e-mails under this authority if he feels it involves Al Qaida activity?

I'm talking about within this country, under this authority you have talked about. Does he have the power under your authority to wiretap Americans within the United States if they're involved in Al Qaida activity?

GONZALES: Sir, I've been asked this question several times.

LEAHY: I know. And you've had somewhat of a vague answer, so I'm asking again.

GONZALES: And I've said that that presents a different legal question, a possibly tough constitutional question. And I am not comfortable, just off the cuff, talking about whether or not such activity would, in fact, be constitutional.

GONZALES: I will say that that is not what we are talking about here. That is not...

LEAHY: Are you doing that?

GONZALES: ... what the president has authorized.

LEAHY: Are you doing that?

GONZALES: I can't give you assurances. That is not what the president has authorized for this program.

LEAHY: Are you doing that? Are you doing that?

GONZALES: Senator, you're asking me again about operations, what are we doing.

LEAHY: Thank you.

HATCH: Throughout this process, you don't know when it began, but at least eight members of Congress have been informed about what has been disclosed by people who have violated the law in disclosing it and by the media that has printed the disclosures. Is that correct?

GONZALES: That is generally correct, sir, yes, sir.

HATCH: Did you have one complaint about the program from any of the eight?

And that was bipartisan by the way, those eight people: four Democrat leaders in the Congress, four Republican leaders in the Congress. Is that right?

GONZALES: It was a bipartisan briefing, yes, sir.

HATCH: Did you have any gripes or complaints about what was disclosed to them, to the best of your recollection?

GONZALES: Again, I want to be careful about speaking for members, but...

HATCH: I'm not asking you to speak for members. I'm asking you if you had any gripes or complaints...

GONZALES: And again, I wasn't present...

HATCH: ... or suggestions.

GONZALES: I wasn't present at all the briefings.

But for those briefings that I was present at, they received very detailed briefings about these operations. They were given ample opportunity to ask questions. They were given ample opportunity to express concerns.

HATCH: You were somewhat criticized here in some of the questions that your argument that the authorized use of military force is a faulty argument, because the FISA act does not really talk about "except as authorized by statute."

But you pointed out that Section 109, or, if you want to be more specific, Title 50, Chapter 36 of Chapter 1, 1809 does say that "a person is guilty of an offense if he intentionally engages in electronic surveillance under cover of law except as authorized by statute."

GONZALES: That is the main criminal prohibition against engaging in electronic surveillance, except as otherwise provided by FISA or

except as otherwise provided by statute.

HATCH: Now, this authorized use of military force enabled you, quote, "to use all necessary and appropriate force against the nations, organizations or persons the president determines planned, authorized, committed or aided the terrorist attacks." Is that correct?

GONZALES: This is a very important point, Senator. Think about it. The authorization doesn't identify -- specifically never mentions the word "Al Qaida." It authorizes the president to engage in "all necessary and appropriate force to identify those he determines" -- who the president determines. And the president is not able to do that without information, without intelligence, without the kind of electronic surveillance we're talking about today.

HATCH: That's right.

As someone who helped to write the original Patriot Act, I can't help but express the awareness of those of us around here that here we are, well over a month after the expiration of the Patriot Act, and we keep renewing it from month to month because we can't get Congress to really agree on what the changes should be. Is that a fair assessment?

GONZALES: Well, what I will say is I think the tools of the Patriot Act are important, and I hope that they are reauthorized.

HATCH: But the reason I'm bringing that up is because at one time, at least one report was is that one of these eight members was asked -- who had the program disclosed to them -- or at least remarked that he didn't think that a statute could be passed to resolve these issues.

GONZALES: I don't want to attribute to any particular member that statement.

What I will say is that...

HATCH: You don't have to do that, but is that true?

GONZALES: There was a consensus that pursuing the legislative process would result likely in compromising the program.

HATCH: In other words, it's not easy to get things through 535 members of Congress, 435 in the House and 100 in the Senate.

HATCH: Now, I know that you love the Congress and will not find any fault with any of us...

GONZALES: Sir, you've been at this a little bit longer than I have. But it's certainly been my experience that it's sometimes difficult.

HATCH: Yes, it is.

Is it not true that one check on the president's power to operate the NSA surveillance program is the Congress' power over the purse, as

listed in Article 1, Section 8 of the Constitution?

GONZALES: Absolutely.

I think even those who are sort of in the pro-executive camp in terms of the allocation of constitutional powers in a time of war would have to concede that the power of the purse is an extremely strong check on the president's commander in chief.

HATCH: Well, I've noticed that while many in Congress have sharply criticized the president and the NSA program that we've been discussing here, I am not aware of any member of Congress introducing legislation to end the program through either an authorization or an appropriations mechanism.

From what we know about the intent of the program today, I expect that few members of either the House or the Senate would vote to eliminate this program or cut off its funding.

And the reason I state that is because all of us are concerned about this battle that we're raging; that this is not an easy battle. This is a war unlike any war we've ever had before, and it's a very secret war on their side.

And I think the administration has taken the position that we've got to be very careful about disclosures on our side as well.

Is it not true that the disclosures that have occurred have very definitely hurt our ability to gather intelligence?

GONZALES: The director of the CIA, I believe, has publicly commented that it has hurt us.

HATCH: Well, it's important, General, to bring out that President Clinton's administration ordered several warrantless searches on the home and property of a domestic spy, Aldrich Ames. That's true, isn't it?

GONZALES: That is correct, sir.

HATCH: That was a warrantless set of searches.

GONZALES: That is correct, sir.

HATCH: And the Clinton administration also authorized the warrantless search of the Mississippi home of a suspected terrorist financier. Is that correct?

GONZALES: I think that is correct, sir.

HATCH: The Clinton Justice Department authorized these searches because it was the judgment of Deputy Attorney General Jamie Gorelick, somebody I have great admiration for, that -- and let me quote her. It has been quoted before, but I think it's worth quoting it again. This is the deputy attorney general of the United States in the Clinton administration.

The president, quote, she said, "The president has inherent authority to conduct warrantless physical searches for foreign intelligence purposes." Now this is against the domestic people.

"And the rules and methodologies for criminal searches are inconsistent with the collection of foreign intelligence and would unduly frustrate the president in carrying out his foreign intelligence responsibilities."

You're aware of that quote.

GONZALES: I am aware of it, yes, sir.

HATCH: But if the president has inherent ability to surveil American citizens in national security cases during peacetime, I guess what's bothering me, how can it be that President Bush is precluded, as some have argued, from surveilling AL Qaida sources by intercepting foreign calls into this country to people who may be AL Qaida or affiliated with AL Qaida or affiliated with somebody who is affiliated with AL Qaida?

How can that be?

GONZALES: Senator, I think that the president's authority as commander in chief obviously is stronger during a time of war. If the authorization to use military force did not exist or was repealed or was not interpreted in the way that we are advocating, then it seems to me you're teeing up a fairly difficult constitutional question as to whether or not Congress can constitutionally limit the president's ability to engage in electronic surveillance of the enemy during a time of war.

HATCH: Well, we were aware of the Clinton administration's approaches. I don't know of any Republicans who raised Cain about that.

Walter Dellinger, the former head of the office of legal counsel under President Clinton, in a final opinion published on July 14th, 1994, wrote, quote, "Specifically, we believe that the prohibition on destruction of aircraft would not apply to the actions of United States military forces acting on behalf of the United States during a state of hostilities.

"We note specifically that the application of the provision to acts of the United States military personnel in a state of hostilities could lead to absurdities. For example, it could mean in some circumstances that military personnel would not be able to engage in reasonable self-defense without subjecting themselves to the risk of criminal prosecution."

General, do you believe that Walter Dellinger, who is now a critic of the president's authorization of wartime surveillance of Al Qaida was correct in 1994?

GONZALES: Sir, I haven't studied that opinion in a while, but it sounds like it would be correct, in my judgment.

HATCH: All right.

Let me just bring up again, as I understand it, just so we can

repeat it one more time, the administration takes the position that a further statute, on top of Section 109, the FISA act, would also complement the act.

And the authorized use of military force, granted by Congress, is an acceptable, legitimate statute that goes to the point that I made earlier "to use all necessary and appropriate force against the nations, organizations or persons the president determines planned, authorized, committed or aided the terrorist attacks," and that justifies doing what you can to interdict these foreign terrorists who are calling into our country to people who may also be affiliated.

HATCH: Now as I understand it, that's part of it.

The second part of it is the fact that you are citing that the president does have inherent powers under Article 2 of the Constitution to engage in these activities; and, thirdly, that you have not violated the Fourth Amendment of the Constitution because the position you're taking under these circumstances, with the obligation to protect this country, are reasonable searches and seizures.

GONZALES: I think clearly these searches are reasonable given the circumstances: the fact that we have been attacked by enemy here within this country.

I think it would fall within the special needs jurisprudence of the Supreme Court that would allow warrantless searches.

Let me just say that an important component of our argument relies upon the canon of constitutional avoidance, because I've heard some members of the committee say they're not sure they buy the authorization to use military force analysis.

If our interpretation is simply fairly possible, if it is only fairly possible, then the court has held that that interpretation must be adopted if it means that we can avoid a tough constitutional issue.

HATCH: Well, thank you, sir. My time's done.

Senator Feinstein?

FEINSTEIN: Thank you, Mr. Chairman.

Mr. Chairman, I want to respond to you on the Jamie Gorelick/Aldrich Ames situation...

HATCH: Sure.

FEINSTEIN: ... because, in fact, the law was changed directly after the Aldrich Ames case.

I called -- because I heard you say this before -- so I called Jamie Gorelick and I asked her to put this in writing. She has done so and I have it before me now.

And she points out in this letter that her '94 testimony arose in context of congressional consideration of an extension of FISA to cover physical searches.

And at the time, FISA covered only electronic surveillance such

as wiretaps.

In 1993, the attorney general had authorized foreign intelligence physical searches in the investigation of Aldrich Ames, whose counsel thereafter raised legal challenges to those searches.

FEINSTEIN: Point: There was no law at that time.

And then she goes on to say that the Clinton administration believed, quote, "It would be better if there were congressional authorization and judicial oversight of such searches. My testimony did not address inherent presidential authority to conduct electronic surveillance which was already covered by FISA."

I would ask that this letter and her testimony be entered into the record.

HATCH: Without question, it will be entered into the record.

FEINSTEIN: Thank you.

You know, I respect you greatly, but I think that's a bit of a red herring.

HATCH: But you need to also quote, in the same letter, that she said, "My testimony did not address whether there would be inherent authority to conduct physical searches if FISA were extended to cover physical searches."

And she goes on -- we'll put it into the record.

FEINSTEIN: All right.

SESSIONS: Mr. Chairman, can I just make one point...

FEINSTEIN: If I have extra time...

HATCH: You will have extra time. You'll have extra time.

SESSIONS: The attorney general explained that when I asked him. He narrowed my question when I raised it and made that qualification. Perhaps you weren't here when he did that.

FEINSTEIN: All right.

And, Mr. Attorney General, it's my view that the briefings of the big eight essentially violate the law as well. I believe that's a second violation of law, because I believe that [Section 502 of 5 USC](#) 13(a)(1) and (a)(2) and (b)(1) and (2) specifically say how the Intelligence Committee should be notified.

I was present in the Intelligence Committee in December of 2001 when this was considered. And Senator Graham was chairman of the committee and the committee really wanted all sensitive intelligence reported in writing. And what this did was set up a mechanism for that.

So, in my view, it was very clear that what the Intelligence Committee wanted at the time was all sensitive intelligence outside of covert to be reported to the committee. And this set up the format.

Now, let me just move on if I can.

GONZALES: Senator, could I respond to that?

FEINSTEIN: Sure, of course.

GONZALES: Because I disagree.

First of all, both Chairman Roberts and Chairman Hoekstra disagree. They believe that we have provided notice as required by the law to the Intel Committees. And they both take the position that nowhere in the law does it require that each individual member of the Intel Committee be briefed.

The section that I think you quoted to -- and I must tell you, sometimes it gets, kind of, confusing to read these (bb)s and (1.1)s -- it gets kind of confusing.

GONZALES: I think you're referring to a section which imposes an obligation on the president to ensure that agencies within the administration meet the notice requirements.

If you go at the actual notice requirements, however, under 413(aa) and 413(bb), those impose the obligations to provide to make sure that the Intel Committees are currently and fully informed. However, (aa), which deals with noncovert action, and (bb), which deals with covert action, both have a proviso that to the extent it doesn't mean compromising -- and I'm paraphrasing here -- sources and methods, and especially sensitive matters.

And so I think we've been acting consistent with the law based upon these provisions that I just cited to. There's been a long practice of giving briefings only to the chair and ranking or a certain limited subset of the Intel Committees.

And, again, I would just simply remind the senator, chairmen I know guard their prerogatives jealously. And both the chairman of the Intel Committee, Senate and House, both chairmen had said, "We have met our obligations to provide briefings to the Intel Committee."

FEINSTEIN: Well, my reading of the law, I disagree. I still disagree. I recognize we have a difference of opinion.

I will propose an amendment to strengthen it in the next authorization bill.

And I remember being there, I remember the discussion.

Anyway, I'd like to move on.

I am puzzled -- and I want to go back to why you didn't come for a change in FISA. Let me just read off a few of the changes that we have made to FISA.

We extended the emergency exemption from 24 to 72 hours.

We lowered the legal standard for surveillance to the significant purpose test.

We allowed for John DOE roving wiretaps.

We lowered the standard for FISA pen traps.

We expanded their scope to include Internet routing information.

We extended the scope of business records that could be sought

under FISA.

We extended the duration of FISA warrants.

We broadened FISA to enable the surveillance of lone wolf terrorists.

And we made the director of national intelligence the lead authority.

FEINSTEIN: Now, in view of the changes that we have made, I cannot understand why you didn't come to the committee unless the program was much broader and you believed it would not be authorized. That's the only reason I can figure you didn't come to the committee. Because if the program is as the president has said and you have said, to this date you haven't briefed the Intelligence Committee, you haven't let us ask the question, "What is a link? What is an affiliate? How many people are covered? What are the precise -- and I don't believe in the briefings those questions were asked -- what are the precise numbers? What happens to the data? How long is it retained in a database? When are innocent people taken out of the database?"

And I can only believe -- and this is my honest view -- that this program is much bigger and much broader than you want anyone to know.

GONZALES: Well, Senator, of course, I cannot talk about aspects here that are beyond what the president has already confirmed. What I can say is that those members of Congress who have received briefings know -- I think they know; and, of course, I don't know what they actually know -- but they have been briefed on all the details about all of the activities. So they know what's going on.

FEINSTEIN: I understand your point of view.

Let me go to this morning. I asked you whether there was any Supreme case -- this goes to precedent -- that's held that the president can wiretap Americans since the Congress passed the FISA law? And you responded In Re. Sealed Case.

GONZALES: Which, of course, is not a Supreme Court case.

FEINSTEIN: That's right. I was going to bring that -- which is not a Supreme Court case.

GONZALES: And I apologize if I wasn't clear in making...

FEINSTEIN: I just wanted to come back at you.

GONZALES: Yes, ma'am.

FEINSTEIN: So is pure dicta and...

GONZALES: It was not...

(CROSSTALK)

FEINSTEIN: I wanted to ask a question that you might not like, but I'm going to ask it anyway.

At the time of the In Re. Sealed Case, did the Department of Justice or other administration officials tell the FISA Court that

warrantless domestic electronic wiretapping was going on?

GONZALES: In connection with the litigation, not to my knowledge, Senator.

FEINSTEIN: OK.

And since the passage of FISA, has any court spoken specifically to the president's authority to conduct warrantless domestic electronic surveillance -- since the passage of FISA? Any Supreme Court?

GONZALES: The Supreme Court, I do not believe so.

I think the last word on this by the Supreme Court is the Keith case, the 1972 case. And I think that year is right.

And there the court dealt with domestic security surveillance.

And the court was very clear -- it went out of its way I believe to make it clear that they were not talking about electronic surveillance for foreign intelligence purposes.

FEINSTEIN: Was the program mentioned to the court in the Hamdi case?

GONZALES: I do not know the answer to that question, Senator.

FEINSTEIN: I'd appreciate it if you could find the answer and let us know.

HATCH: Senator, take another two minutes, because of our interruptions.

FEINSTEIN: Thank you very much.

This morning you said, and I quote, "Presidents throughout our history have authorized the warrantless surveillance of the enemy during wartime," end quote.

Has any president ever authorized warrantless surveillance in the face of a statute passed by the Congress which prohibits that surveillance?

GONZALES: I think, actually I think there was a statute on the books in connection with the order by President Roosevelt. I want to confirm that, but it's my recollection that that is, in fact, the case, that even though there was a statute on the books -- and maybe even a Supreme Court case; I can't remember now -- President Roosevelt ordered electronic surveillance.

FEINSTEIN: I'd be very interested to know that.

If I understand your argument, it's that if one doesn't agree that the resolution to authorize military force provides a statutory exception to FISA, then FISA is unconstitutional.

GONZALES: No -- well, if I was -- if that's the impression I gave, I don't want to leave you with that impression.

GONZALES: That tees up, I think, a difficult constitutional issue. I think the -- it's an easier issue for the executive branch side than the facts that were dealt with under *Youngstown v. Sawyer*

because there you were talking about the president of the United States exercising dominion over part of our domestic industry, the steel industry.

Here you're talking about what I think is a much more core constitutional right of the commander in chief.

I believe that the president -- that a statute that would infringe upon that, I think there would be some serious constitutional questions there -- but I'm not prepared at this juncture to say, absolutely, that if the AUMF argument doesn't work here that FISA is unconstitutional as applied. I'm not saying that.

FEINSTEIN: All right, but you sidestepped FISA, using the plenary authority as commander in chief. The problem there, as I see it, is that Article 1 Section 8 gives the Congress the authority to make the regulations for the military. NSA is part of DOD; therefore the Congress has the right to make those regulations.

GONZALES: I think that the clause you're referring to is the clause in Section 8 of Article 1 which clearly gives to the Congress the authority and power to make rules regarding the government and regulation of our armed forces.

And then the question is, well -- electronic surveillance -- is that part of the government and regulation of our armed forces?

There are many scholars who believe that, there, we are only talking about, sort of, the internal administration of our military, like courts-martial, like selective service.

And so, I think there would be a question, a good debate and discussion about whether or not -- what does that clause mean and does it give to the Congress, under the Constitution, the authority to impose regulations regarding electronic surveillance?

I'm not saying that it doesn't. I'm just saying that I think that's obviously a question that would have to be resolved.

HATCH: Senator, your time is up. Senator Grassley?

FEINSTEIN: Thank you very much.

Thanks, Mr. Attorney General.

GRASSLEY: Thank you.

It appear to me that FISA generally requires that, if surveillance is initiated under the Emergency Authorization provisions and an order is not obtained from the FISA Court, that the judge must, quote, "cause to be served on any U.S. person named in the application and on such other U.S. persons subject to electronic surveillance as the judge and the court," quote, "believes warranted the fact of the application; two, the period of the surveillance; and, three, the fact that during the period information was or was not obtained."

So, that brings these questions, if that is the factual reading of the statute.

GRASSLEY: Does this explain the caution and the care and the time that is used when deciding whether to authorize 72-hour emergency surveillance?

And let me follow up. And then the possibility that if you got it wrong, could you wind up tipping off an enemy? In this case, we're worried about AL Qaida terrorists.

Would this interfere with the president's ability to establish this vital early warning system under FISA?

And is this one of the reasons then -- and this is the last question -- is this one of the reasons why FISA is not as nimble and quick a tool as you need to combat terrorist threats and that members of this committee think ought to be used to a greater extent?

GONZALES: Senator, those are all very good questions.

The reason we're careful about our work in seeking a FISA is that we want to get it right. We absolutely want to get it right in every case.

And we have career professionals working hard on these kinds of issues. And we want to get it right.

It is true that if I give an emergency authorization and an order is not obtained, my understanding of the statute is that the presumption is that the judge will then notify the target of that surveillance during that 72-hour period.

We would have the opportunity and make arguments as to why the judge should not do that. But in making those arguments, we may have to disclose information certainly to the target.

And if we fail, the judge may very well notify the target that they were under surveillance. And that would be damaging. That could possibly tip off a member of AL Qaida or someone working with AL Qaida that -- and we have reasons to be concerns about their activities.

And so it is one of the many reasons why we take such great care to ensure that when I grant an emergency authorization, that all the requirements of FISA are met.

The reason we have such a high approval rate at the FISA Court is not because the FISA Court is a rubber stamp. It's because we do our work in ensuring that those applications are going to meet the requirements of the statute.

GRASSLEY: What we know about AL Qaida and their method of operation -- which I think, at the very least, we think that it involves the placement of sleeper cells in our country for months -- or they look way ahead; it could even be for years -- for a planned attack, and the need to rely upon electronic communication network to convey instructions to those cells from command structures that would be located, for AL Qaida, outside the country.

The surveillance program authorized by the president was tailored

precisely to meet the natures of the threat that we face as a nation, particularly with sleeper cells.

Would that be right?

GONZALES: It is a narrowly tailored program. And, of course, that helps us in the Fourth Amendment analysis as to whether or not these are reasonable searches.

And we believe that, under the special needs jurisprudence, given the fact that we have been attacked from folks from AL Qaida within our country, we believe that these would satisfy the requirements of the Fourth Amendment.

GRASSLEY: I think in your opening statement, didn't you make a reference to bin Laden about his recent speech two weeks ago -- and that's obviously a reiteration of the threat -- and he said that these future attacks could dwarf the 9/11 magnitude?

GRASSLEY: If that is true, is it in some sense incredible to you that we're sitting here having this discussion today about whether the president acted lawfully and appropriately in authorizing a program narrowly targeted at communication that could well lead to a disruption or prevention of such an attack?

GONZALES: Senator, I think that we should all be concerned to ensure that all branches of government are operating within the limits of the Constitution. And so I certainly -- I can't disagree with this hearing, the discussions, the questions in these hearings.

I think we have a good story to tell from the administration viewpoint.

I wish there were more that we could tell, because it's not simply a coincidence that the United States of America has not been hit again since 9/11. It's because of the brilliant and wonderful work of our men and women in the military overseas, it's because of tools like the Patriot Act, it's because of tools like the terrorist surveillance program.

GRASSLEY: Howard Dean, the chairman of the Democratic Party, was quote recently as equating the terrorist surveillance program authorized by President Bush to, quote, "abuses of power during the dark days of the Nixon administration."

You're awful young, but does that have a fair comparison to you?

And if it isn't a fair comparison, why or why not?

GONZALES: Well, it is not a fair comparison.

I would direct you and the other members of the committee to Chairman Roberts' response to Mr. Dean in terms of making it clear that what's going on here is much more akin to the directive by President Roosevelt to Attorney General Jackson in terms of authorizing his administration to initiate warrantless surveillance of the enemy.

And so, again, this is not domestic surveillance, this is not going after our political enemies. This is about international communications, this is about going after AL Qaida.

GRASSLEY: I wonder if you'd discuss the nature of the threat posed by AL Qaida to our country because AL Qaida operates not under the rules of law, but disregard and contempt for conventional warfare.

GRASSLEY: In combating AL Qaida, can we afford to rely purely upon conventional law enforcement techniques such as those traditionally used to combat organized crime groups or narcotic traffickers?

And if we were to do that, what would be the result?

GONZALES: The president expects us to use all the tools available under the Constitution.

Obviously, we have strong law enforcement tools that we have been using and will continue to use. But this is also a very serious military campaign. And we're going to exercise and use all the tools, again, that are available to us in fighting this new kind of threat in this new kind of war.

GRASSLEY: I think we had some discussion from you about the review that goes on every 45 days, or approximately every 45 days.

But the president himself said, quote, "carefully reviewed approximately every 45 days to ensure its ongoing propriety."

The surveillance is then reauthorized only after the president signs off on it. So I want to ask you a few questions about this review process. I want to ask these questions because it's important that the American people know whether the president has instituted appropriate procedures to guard against abuses.

In the 42-page legal memorandum from your department, it's noted about the program, quote, "reviewed for legality by the Department of Justice and are monitored by the general counsel and the inspector general of the NSA to ensure that civil liberties are being protected."

I'd like to give you the opportunity to explain to the fullest extent possible without compromising the programs, the what, who, when, why, where and how of the periodic review.

What can you tell us about the periodic review and reauthorization of the surveillance program? What assurances can you give the American people about their constitutional rights being zealously guarded against abuses?

GONZALES: There's a lot there in that question, Senator. I will do my best to respond.

Obviously, this is a periodic review, approximately every 45 days or so. And we have people from the intelligence community evaluate whether or not AL Qaida -- what is the level of threat that continues

to be posed by AL Qaida?

And during that period of time, we have monthly meetings out at NSA where people who are involved in the program, senior officials, get together, sit down, talk about how the program is operating, ensure that the program is being operated in a way that's consistent with the president's authorization.

GONZALES: In connection with each authorization, the Department does make an analysis with respect to the legal authority of the president of the United States to move forward.

And so there are administration lawyers that are involved, looking to see whether or not -- does the president still have the authority to authorize the terrorist surveillance program that I've described here today?

GRASSLEY: I think my time's up. I was going to have some follow-up questions on that point but, if it's necessary, I'll submit it for answer in writing.

HATCH: Thank you, Senator.
Senator Feingold?

FEINGOLD: Thank you, Mr. Chairman. General Gonzales, when my time ended last time, we were beginning to talk about the president's statements in the State of the Union that his predecessors used the same legal authority that he is asserting.

Let me first ask: Do you know of any other president who has authorized warrantless wiretaps outside of FISA since 1978 when FISA was passed?

GONZALES: None come to mind, Senator, but I'd be happy to look to see whether or not that's the case.

FEINGOLD: I'll take it as a "no" unless you submit something.

GONZALES: I can't give you an answer.

FEINGOLD: OK. Isn't it true that the only federal courts to decide the president's authorized warrantless national security wiretaps were considering wiretaps carried out before the enactment of FISA?

GONZALES: I'm sorry, Senator, I was thinking about your question and I...

FEINGOLD: Would you like to answer the previous question?

GONZALES: No, but I was thinking about -- I was trying to think of an answer and I didn't catch the first part of your second question.

FEINGOLD: Isn't it true that the only federal courts to decide the president's authority to authorize warrantless national security wiretaps were considering wiretaps that were carried out before the enactment of FISA?

GONZALES: In which there were actual decisions? Actually, there

was a 4th Circuit decision, the Truong decision, which was decided after FISA.

To be fair, I don't think they really got into an analysis...

FEINGOLD: And that case was about a Vietnam era wiretap, before FISA was enacted, right?

GONZALES: The collection occurred before FISA was enacted. The decision was made after FISA. And consequently my recollection is that case doesn't really get into a discussion about how the passage of FISA impacts or affects the...

FEINGOLD: If it was based on facts prior to FISA, then the only law that controls is the law prior to FISA, right?

GONZALES: That's right.

And then of course In Re. Sealed Case...

FEINGOLD: You covered that with Senator Feinstein. That was dicta...

GONZALES: Yes.

FEINGOLD: Correct?

GONZALES: Yes.

FEINGOLD: Thank you.

So when the president said that federal courts have, quote, "approved the use of that authority," unquote, he was trying to make people think that the courts had approved the authority he was invoking and the legal theory that you put forward here. That isn't really accurate, is it?

GONZALES: The president was totally accurate in saying that in considering the question as to whether or not the president has inherent constitutional authority to authorize warrantless searches consistent with the Fourth Amendment to obtain foreign intelligence, the statement I think is perfectly accurate.

FEINGOLD: But he said the federal courts had said it was all right.

GONZALES: That's right.

FEINGOLD: And you weren't able to give me anything here since FISA that indicates that.

GONZALES: But, Senator, I don't believe that he was making a statement since or before FISA. He was making the statement that courts who have considered the president's inherent constitutional authority, the court of appeals have said, there were five court of appeals decisions cited in the In Re. Sealed Case, all of them have said, I believe, that the president does have the constitutional authority to engaged in this kind of surveillance.

FEINGOLD: Mr. Attorney General, that's why we just went over all this, because all of that is based on pre-FISA law. And here's my concern. The president has somehow suggested that he couldn't wiretap

terrorists before he authorized this program.

He said, quote, "If there are people inside our country who are talking with AL Qaida, we want to know about it," unquote. And of course I agree with that 100 percent, and have a law that permits it. Isn't it true that FISA permits the NSA to wiretap people overseas without a court, even if they call into the United States.

GONZALES: Well, of course, it depends, Senator.

FEINGOLD: Well, it does do that in some circumstances, does it not?

GONZALES: It could do it in certain circumstances, depending on whether or not it is an electronic surveillance, as defined under FISA. As you know, it's a very -- I don't want to say convoluted -- it's a very complicated definition of what kind of radio or wire communications would in fact be covered.

FEINGOLD: General, I understand that, but clearly FISA in part does permit that kind of activity, in certain cases.

GONZALES: Depending on the circumstances.

FEINGOLD: To leave the impression that there is no law permitting that would be incorrect.

GONZALES: Of course not. We use FISA...

(CROSSTALK)

FEINGOLD: That's what I'm trying to get at is the impression that the president left I think in the State of the Union was not completely accurate.

Isn't it true that FISA permits the FBI to wiretap individuals inside the United States who are suspected of being terrorists or spies, so long as the FBI gets secret approval from a judge?

GONZALES: Senator, I think I've already said that with respect to even domestic communication involving members of AL Qaida we use all the tools available to us, including FISA. If we can get a FISA...

FEINGOLD: So the fact is when the president suggested he doesn't have that, that power doesn't exist, that power does exist, at least in part, under FISA, under current law.

GONZALES: I don't know whether or not that's what the president suggested. But clearly the authority does exist for the FBI, assuming we can meet the requirements of FISA, assuming it is electronic surveillance covered by FISA, to engage in electronic surveillance of Al Qaida here in this country.

FEINGOLD: Here is what the president said. He said again, quote, "If there are people inside our country who are talking with Al Qaida, we want to know about it," unquote.

I was sitting in the room. He sure left me the impression that he was suggesting that without this NSA program somehow he didn't have

the power to do that. That's misleading.

So when the president said that he authorized a program to, quote, "aggressively pursue the international communications of suspected AL Qaida operatives and affiliates to and from America," trying to suggest that without this program he could not do that under the law, that's not really right, is it?

GONZALES: Senator, I believe what the president has said is accurate. It is not misleading. The day following the New York Times story, he came out to the American people and explained what he had authorized.

GONZALES: We have given numerous briefings to Congress since that day. I'm here today to talk about the legal authorities for this program.

FEINGOLD: I think the president's comments in the State of the Union were highly misleading. The American people need to know that you already have legal authority to wiretap anyone you suspect of helping AL Qaida.

And every person on this committee in the Senate supports your use of FISA to do just that.

Let me switch to another subject. Senator Feinstein sort of got at this, but I want to try a different angle.

If you can answer this with a yes or no, I would obviously appreciate it: Has the president taken or authorized any other actions, any other actions that would be illegal if not permitted by his constitutional powers or the authorization to use military force?

GONZALES: Repeat your question please, Senator.

FEINGOLD: Has the president taken or authorized any other actions that would be illegal if not permitted by his constitutional powers or the authorization to use military force?

GONZALES: You mean in direct contradiction of a statute, and relying upon his commander in chief authority?

FEINGOLD: Has he taken any other action that would be illegal...

GONZALES: Not to my knowledge, Senator.

FEINGOLD: In other words, are there other actions under the use of military force for Afghanistan resolution that, without the inherent power, would not be permitted because of the FISA statute? Are there any other programs like that?

GONZALES: Well, I guess what I'd like to do, Senator, is I want to be careful about answering your question. I obviously cannot talk about operational matters that are not before this committee today.

And I don't want to leave you with the wrong impression.

And so I would like to get back to you with an answer to that question.

FEINGOLD: I definitely prefer that to being told that

something's a hypothetical.

On September 10th, 2002, Associate Attorney General David Kris testified before the Senate Judiciary Committee. His prepared testimony includes the following statement, quote:

"Thus both before and after the Patriot Act, FISA can be used only against foreign powers and their agents and only where there is at least a significant foreign intelligence purpose for the surveillance."

FEINGOLD: Let me repeat, for emphasis: "We cannot monitor anyone today whom we could not have monitored at this time last year," unquote.

And this last sentence was actually underlined for emphasis in the testimony, so let me repeat it, too: "We cannot monitor anyone today whom we could not have monitored at this time last year."

Now, I understand that Mr. Kris did not know about the NSA program and has been highly critical of the legal justifications offered by the department.

I also realize that you were not the attorney general in 2002.

So, I know you won't know the direct answer to my question.

But can you find out -- and I'd like if you could give a response in writing -- who in the White House and at the Department of Justice reviewed and approved Mr. Kris' testimony?

And, of those people, which of them were aware of the NSA program and thus let what was obviously a highly misleading statement be made to the Congress of the United States?

Will you provide me with that information?

GONZALES: We'll see what we can provide to you, Senator.

Sir, my understanding is that Mr. Kris -- I don't think it's fair to characterize his position as highly critical. I think he may disagree, but saying it's highly critical, I think, is unfair.

FEINGOLD: Well, we could debate that. But the point here is to get to the underlying information. I appreciate your willingness to get that for me if you can.

General Gonzales, I'd like to explore a bit further the role of the telecommunications companies and Internet service providers in this program.

As I understand it, surveillance often requires the assistance of these service providers.

And the providers are protected from criminal and civil liability if they have been provided a court order from the FISA court or criminal court or if a high-ranking Justice Department official has certified in writing that, quote, "No warrant or court order is required by law, that all statutory requirements have been met and that the specified assistance is required."

Am I accurately stating the law?

GONZALES: I believe that's right, Senator. But...

FEINGOLD: Have you or anyone at the Justice Department provided any telephone companies or ISPs with these certifications in the course of implementing the NSA's program?

GONZALES: Senator, that is an operational detail that I just can't go into in this hearing.

FEINGOLD: I look forward to an opportunity to pursue it in other venues. And thank you very much.

GONZALES: Thank you, Senator.

HATCH: Thank you, Senator.

Senator Kyl?

KYL: Thank you, Mr. Chairman.

I hadn't intended to ask any questions. But I think there are two areas that need to be cleared up.

First, with regard to two points that Senator Feingold said, in which the president made highly misleading statements, one in the State of the Union, allegedly, leaving the impression that the president had authority he didn't have -- when he discussed -- the president -- the authority that he had that other presidents had or had exercised, what was he referring to there?

Was he referring to FISA or was he referring to something else?

GONZALES: Senator, he was referring to the president's inherent constitutional authority to engage in electronic surveillance of the enemy.

KYL: Exactly.

And, secondly, Senator Feingold asked you if there was authority under FISA to conduct wiretaps, including of suspected AL Qaida terrorists and that it was misleading of the president to infer otherwise.

Is it possible to acknowledge the FISA authority exists while also making the point that it's not the optimal or maybe even workable method of collection of the kind that's done under the surveillance program at issue here?

GONZALES: No question about it. It was one of the reasons for the terrorist surveillance program, is that while FISA ultimately may be used, it would be used in a way that's ineffective, because of the procedures that are in FISA.

KYL: Thank you.

Now, let me clear up a concern expressed by Senator Feinstein that the reason that Congress hadn't been asked to statutorily authorize this surveillance program may be because it's much bigger than we have been led to believe. Is that the reason?

GONZALES: Senator, the reason is because, quite frankly, we

didn't think we needed it under the Constitution, and also because we thought we had it with respect to the action by the Congress. We have believed from the outset that FISA has to be read in a way where it's not inconsistent with the president's constitutional authority as commander in chief.

KYL: Right. Now, there was also discussion about briefings by the intelligence community, General Hayden and perhaps others, to what's been called the big eight, which are the four elected leaders, bipartisan, of the House and Senate, and the four chairmen and ranking members of the two intelligence committees of the Congress.

Was that the group that you referred to when you said that there had been discussion about whether to seek an amendment of FISA in the Congress?

GONZALES: Senator, it did include the leadership of the Congress and the leadership of the Intel Committees.

KYL: OK. And in terms of evaluating -- there was also Senator Leahy asked the question about why you didn't come to members of this committee.

Who would be in a better position to judge the or to assess the impact on our intelligence with respect to compromise of the program? Would it be the leadership and chairmen and ranking members of the Intelligence Committees or members of this committee that hadn't been read into the program?

GONZALES: Senator, the judgment was made that the conversation should occur with members of the Intel Committee and the leadership of the Congress, bipartisan.

KYL: And, in fact, if you came to this committee to seek amendments to cover the program at issue, the members of this committee would have to be read into the program, would they not?

GONZALES: Yes, sir.

KYL: Now, Senator Leahy also said: "Thank goodness" -- I'm paraphrasing now -- "Thank goodness that we have the press to tell us what the administration's doing with this program, because we wouldn't know otherwise."

And of course the press did disclose the existence of this highly classified program, which you have indicated has compromised the program to some extent or has done damage to it.

KYL: I forgot your exact phrase.

GONZALES: Those, I believe, were the comments from the CIA director.

KYL: All right.

And it seems to me, Mr. Chairman, that the attitude that it's a good thing that this program was compromised validates the view of the bipartisan leadership that briefing members of Congress further or at

least briefing members of this committee would further jeopardize the program.

It seems to me those entrusted with knowledge of this program must be committed to its protection.

Thank you, Mr. Chairman.

HATCH: Thank you, Senator.

Senator Schumer?

SCHUMER: Thank you, Mr. Chairman.

I just want to go back to where we left off, and then I'll move forward.

And thank you, General Gonzales. I know it's been a long day for you, especially with all that bobbing and weaving. It's not so easy.

We talked before about the legal theory that you have, under AUMF. And I had asked you that under your legal theory, can the government, without ever going to a judge or getting a warrant, search an American's home or office.

I'm not saying -- well, can you give me an answer to that? Why wouldn't the same exact legal theory apply? That the Congress in the resolution gave the president power he needed to protect America. Why is one different than the other? Both are Fourth Amendment.

GONZALES: I'm not suggesting that it is different, quite frankly. I would like the opportunity, simply, to think...

SCHUMER: I'm sorry. If you could pull the mike up. Sorry.

GONZALES: I'm sorry. I'm not saying that it would be different.

I would simply like the opportunity to contemplate over it and give you an answer.

SCHUMER: And you will be back here so we can ask that. Right?

GONZALES: According to the chairman.

SCHUMER: OK. Good.

If not, I would ask unanimous consent that General Gonzales be given time to answer that one in writing.

HATCH: He said he would.

SCHUMER: OK. Good.

Now, here's the next question I have: Has the government done this? Has the government searched someone's home, an American citizen, or office, without a warrant since 9/11, let's say?

GONZALES: To my knowledge, that has not happened under the terrorist surveillance program, and I'm not going to go beyond that.

SCHUMER: I don't know what that -- what does that mean, under the terrorist surveillance program? The terrorist surveillance program is about wiretaps. This is about searching someone's home. It's different.

So it wouldn't be done under the surveillance program. I'm asking you if it has been done, period.

GONZALES: But now you're asking me questions about operations or possible operations, and I'm not going to get into that, Senator.

SCHUMER: I'm not asking you about any operation. I'm not asking you how many times. I'm not asking you where...

GONZALES: You asked me has that been done.

SCHUMER: Yes.

GONZALES: Have we done something?

SCHUMER: Yes.

GONZALES: That is an operational question, in terms of how we're using capabilities.

SCHUMER: So you won't answer whether it is allowed and you won't answer whether it's been done.

I mean, isn't part of your -- in all due respect, as somebody who genuinely likes you, but isn't this part of your job, to answer a question like this?

GONZALES: Of course it is, Senator.

SCHUMER: But you're not answering it.

GONZALES: Well, I'm not saying that I will not answer the question.

SCHUMER: Oh.

GONZALES: I'm just not prepared to give you an answer at this time.

SCHUMER: OK. All right. Well, I'll accept.

And I have another one, and we can go through the same thing.

How about wiretaps? Under the legal theory, can the government, without ever going to a judge, wiretap purely domestic phone calls?

GONZALES: Again, Senator, give me the opportunity to think about that. But, of course, that is not what this program is...

SCHUMER: It's not. I understand. I'm asking because, under the AUMF theory, you were allowed to do it for these wiretaps. I just want to know what's going on now.

Let me just -- has the government done this? You can get back to me in writing.

GONZALES: Thank you, Senator.

SCHUMER: OK. And one other. Same issue. Placed a listening device -- has the government, without every going to a judge, placed a listening device inside an American home to listen to the conversations that go on there?

Same answer.

GONZALES: Same answer, Senator.

SCHUMER: OK.

But now I have another one. And let's see if you give the same answer here.

GONZALES: All right.

SCHUMER: And that is: Under the legal theory, can the government, without going to a judge -- this is legal theory; I'm not asking you whether they do this -- monitor private calls of its political enemies, people not associated with terrorism but people who they don't like politically?

GONZALES: We're not going to do that. That's not going to happen.

SCHUMER: OK.

All right. Next, different issue.

Last week in the hearing before the Intelligence Committee, General Hayden refused to state publicly how many wiretaps have been authorized under this NSA program since 2001. Are you willing to answer that question, how many have been authorized?

GONZALES: I cannot. No, sir. I am not at liberty to do that. I believe -- and, of course, I have not been to all the briefings to the congressional leaders and the leaders of the Intel Committee -- I believe that that number has been shared, however, with members of Congress.

SCHUMER: You mean the chair of the Intelligence Committee or something?

It's not a classified number, is it?

GONZALES: I believe it is a classified number -- yes, sir.

SCHUMER: But here's the issue. FISA is also important to our national security. And you've praised the program, right?

GONZALES: I couldn't agree more with you, Senator.

SCHUMER: OK.

GONZALES: It's very important.

SCHUMER: Now FISA makes public every year the number of applications. In 2004, there were 1,758 applications. Why can't we know how many under this program? Why should one be any more classified than the other?

GONZALES: I don't know whether or not I have a good answer for you, Senator.

SCHUMER: I don't think you do.

(LAUGHTER)

GONZALES: The information is classified, and I certainly would not be at liberty to talk about it here in this public forum.

SCHUMER: And I understand this isn't exactly your domain, but I can't even think of a rationale why one should be classified and one should be made routinely public. Both involve wiretaps, both involve terrorism, both involve protecting American security, and we've been doing the FISA one all along.

I'm sure if the -- well, let me ask you this. If the administration thought that revealing the FISA number would damage

security, wouldn't they move to classify it?

GONZALES: I think maybe -- of course, now I'm going to give you an answer. Perhaps it has to do with the fact that FISA, of course, is much, much broader. We're talking about enemies beyond AL Qaida. We're talking about domestic surveillance. We're talking about surveillance that may exist in peacetime, not just in wartime. And so perhaps the equities are different in making that information available to Congress.

SCHUMER: Would you support declassifying that number?

GONZALES: Senator, I would have to think about that.

SCHUMER: OK, we'll wait. Wait for the next [****], it's another one. We have a lot of questions to follow up on here.

GONZALES: I look forward to our conversation.

SCHUMER: ME, too. ME, too.

Abuses. When Frank Church was speaking at the hearing that Senator Kennedy, I think, talked about much earlier this morning, he said the NSA's, quote, "capability at any time could be turned around on the American people and no American would have any privacy left -- such is the capability to monitor everything: telephone conversations, telegrams, it doesn't matter, there would be no place to hide."

Now it's 31 years later and we have even more technology. So the potential that Senator Church mentioned for abuse is greater.

So let me ask you these questions. I'm going to ask a few of them so you can answer them together.

Have there been any abuses of the NSA surveillance program? Have there been any investigations arising from concerns about abuse of NSA program? Has there been any disciplinary action taken against any official for abuses of the program?

GONZALES: Senator, I think that...

SCHUMER: Because this gets to another thing. This is what we're worried about.

Most of us -- I think all of us -- want to give the president the power he needs to protect us. I certainly do. But we also want to make sure there are no abuses.

And so if there have been some abuses, we ought to know about it. And it might make your case to say, "Yes, we found an abuse or a potential abuse and we snuffed it out."

Tell me what the story is.

GONZALES: Well, I do not have answers to all those questions. I'd like to remind people that, of course, even in the area of criminal law enforcement, when you talk about probable cause, sometimes there are mistakes made, as you know.

SCHUMER: No question -- no one's perfect.

GONZALES: A mistake has to be one that would be made by a reasonable man. And so when you ask, "Have there been abuses?," these are all investigations, disciplinary action...

(CROSSTALK)

SCHUMER: So has there been -- yes, this is something you ought to know, if there's been any disciplinary action, because I take it that would be taken...

GONZALES: Not necessarily. I think the NSA, I think, has a regimen in place where they ensure that people are abiding by agency policies and regulations.

SCHUMER: If I asked those two questions about the Justice Department, any investigations arising out of concerns about abuse of NSA surveillance or any disciplinary action taken against official, in either case by the Justice Department, you would know the answer to that.

GONZALES: I'd probably know the answer to that. To my knowledge, no.

SCHUMER: OK. Could you commit when we come back to tell us if there have been -- you know, you can then go broader than -- more broadly than what you know now...

GONZALES: As to what's going on at NSA or Justice?

SCHUMER: NSA.

GONZALES: Well.

SCHUMER: I mean, as the chief law enforcement officer, it's still your job to sort of know what's going on at other agencies.

GONZALES: Sir, but if we're not talking about -- each agency has its own policies...

SCHUMER: Yes. Just asking you when you come back next time to try and find...

GONZALES: I'll see what I can do about providing you additional information to your questions.

SCHUMER: It's a little soft, but I'll have to take it, I guess. Thank you, Mr. Chairman.

HATCH: Thank you.

Senator DeWine?

DEWINE: Thank you, Mr. Chairman.

Long day, Mr. Attorney General.

Let me just ask you a few questions. We've had a lot of discussion today, and you've referenced a lot to this group of eight, reporting to this group of eight.

I just want to make a point. It's a small point, I guess, but the statutory authorization for this group of eight is [50 USC 413\(b\)](#). When you look at that section, the only thing this references as far as what this Group of Eight does is receive reports in regard to

covert action. So that's really what all it is. It does not cover a situation like we're talking about here at all.

I just want to make that point. We all have a great deal of respect for these eight people. And it's a different group of eight at different periods of time. We've elected them; we've selected them. They're leaders of the Congress. But there's no statutory authority for this group, other than the section that has to do with covert operation, and this is not a covert operation as defined in this specific section.

GONZALES: Senator, could I respond to you, because I had a similar question from Senator Feinstein? I don't know whether or not you were here or not.

First of all, again repeating for the record that of course the chairman of the Senate Intel Committee and the chairman of the House Intel Committee...

DEWINE: And I was here when she...

(CROSSTALK)

GONZALES: OK. Well, they both have communicated that we are meeting our statutory obligations.

There is a provision that requires the president of the United States to ensure that agencies are complying with their notice requirements.

The actual notice requirements, as I read it, are 413(aa) and 413(bb). And 413(aa) deals with noncovert action, 413(bb) deals with covert action. And both of them...

DEWINE: Mr. Attorney General, I don't have much time. I don't mean to be impolite. I listened to that, and I respect your position on it. My only point was a small point, and that point simply is that when we reference the group of eight, there's no statutory authorization for the group of eight other than for a covert operation.

I guess I'm just kind of a strict constructionist, kind of a conservative guy, and that's how I read the statute. And that's my only point. And I understand your legal interpretation, I respect that, but that's it. I don't see it any other way on that.

Let me ask you a couple other questions that I wonder if you could clarify for me.

One is the legal standard that you are using -- that's being used by the NSA under this program for deciding when to conduct surveillance of a suspected terrorist.

In your December 19th press conference you said that you must have a, and I quote, "reasonable basis to conclude that one party to the communication is affiliated with AL Qaida."

Speaking on Fox TV yesterday, General Hayden referred to the

standard as "in the probable cause range."

Could you just define it for me? I know you talked about it today, but we're hearing a lot of different definitions. You're the attorney general, just clarify it for me, pinpoint it, give me the definition that the people who are administering this every single day in the field are following.

GONZALES: To the extent there's confusion, we must take some of the credit for some of the confusion, because we have used different words.

The standard is a probable cause standard. It is reasonable grounds to...

DEWINE: A probable cause standard. Is that different than probable cause as we would normally learn that in law school...

GONZALES: Not in my judgment.

DEWINE: OK. So that means...

GONZALES: I think it's probable cause. But it's not probable cause as to guilt.

DEWINE: I understand.

GONZALES: OR probable cause as to a crime being committed. It's probable cause that a party to the communication is a member or agent of AL Qaida. The precise language that I'd like to refer to is, "There are reasonable grounds to believe that a party to communication is a member or agent or AL Qaida or of an affiliated terrorist organization." It is a probable cause standard, in my judgment.

DEWINE: So probable cause...

GONZALES: ... is probable cause.

DEWINE: And so all the case law or anything else that we would learn throughout the years about probable cause, about that specific question, would be what we would look at and what the people are being instructed to follow.

GONZALES: But, again, it has nothing to do with probable cause of guilt or probable cause that a crime had been committed. It's about...

DEWINE: I understand. We're extrapolating that traditional standard over to another question.

GONZALES: And the reason that we use these words instead of "probably cause" is because people who are relying upon the standard are not lawyers.

DEWINE: All right, let me follow up. I don't have much time.

General Hayden described the standard as a softer trigger than the one that's used under FISA.

What does that mean?

GONZALES: I think what General Hayden meant was that the standard is the same but the procedures are different and that you

have more procedures that have to be complied with under FISA. But the standards are the same in terms of probable cause. But there clearly are more procedures that have to be met under FISA. And that's what I believe General Hayden meant by "a softer trigger."

DEWINE: So, it's a procedure issue, then. In other words, I have to go through more hoops on one, loops on the other. I mean, it's a difference, what I have to go through, but my legal standard is the same. Is that what you're saying?

GONZALES: There's a probable cause standard for both. And yes, sir, what has to...

DEWINE: It's the same standard?

GONZALES: It is the same standard...

DEWINE: Different question, but same standard?

GONZALES: Different procedures.

DEWINE: Final follow-up question on this. I believe you've said that the individual NSA analysts are the ones who are making these decisions -- people who are actually doing this are making the decisions, obviously.

What kind of training are these individuals given in regard to applying this standard?

Are you involved in that or are you not involved in that?

GONZALES: This is primarily handled by the general counsel's office out at NSA. And, as you know, they are very, very aware of the history of abuses.

They care very much about ensuring that all the activities that are ongoing out at NSA are consistent with the Constitution and, certainly, consistent with the authorization by the president for this terrorist surveillance program?

DEWINE: So this is not something your department is directly involved in?

GONZALES: No, sir, I think it would be unfair to say that we are directly involved. We have provided some guidance, but I think it would be unfair to say that we are directly involved.

We have provided some guidance, but I think it would be unfair to say that the Department of Justice has been intimately involved in providing training and guidance.

I think it's fair to say that that responsibility has fallen primarily to the general counsel's office out at NSA.

DEWINE: Mr. Attorney General, I want to conclude at this point. I'll just go back to what I said this morning. And that is, we've heard a lot of debate, even more debate than we had this morning, about these legal issues, people on different sides of these legal issues.

I just really believe it's in the country's best interest, the

president's best interest, the war on terrorism's best interest, which is what we're all concerned about, some four years or so after this program has been initiated for the president to come to Congress and to get -- for us -- the Intelligence Committee, which is the committee that has jurisdiction, to take a look at this program, to get the briefing on the program, and then to see whatever changes in the law have to be made and to deal with it.

DEWINE: I think you will be in a -- the president will be in a much stronger position at this point to go forward and it will be in the best interest of the country.

GONZALES: Thank you, Senator.

HATCH: Thank you, Senator.

Senator Kennedy?

KENNEDY: Thank you, Mr. Chairman.

And thank you, General Gonzales. I join all of those that pay tribute to you for your patience on this and thank you for responding to these questions.

Just to pick up on what my friend and colleague Senator DeWine has mentioned, I am in strong agreement with that recommendation. It's bipartisan. I didn't have a chance to talk to Senator DeWine. I mentioned earlier in the course of our visit this morning that we had, I thought, extraordinary precedent with Attorney General Levi -- Ed Levi and President Ford, where the members of this committee, a number of us went down to the Justice Department, worked with them. And they wanted to get it right. The issue was on eavesdropping, very related subject matter. They wanted to get it right.

And then General Levi had a day and a half of where he listened to outside constitutional experts, because he wanted to get it right. My very great concern is that we're not getting it right. Maybe in terms of the NSA thinks that they're getting the information, but what we are seeing now with the leaks and others, that there are many people out there that wonder whether they are going to face future prosecution, whether the court system is going to be tied up because of information that's gained as a result of the NSA taps that's not going to be permitted, and that we're going to have these known Al Qaida personnel that are going to be either freed or given a lesser sentence or whatever, and that they're less inclined to sort of spill the beans, because if they know that they're going away, or worse, they'll be better prepared to make a deal with the law enforcement authorities than if they think they can tie up the courts.

So in the FISA act, as you well know, the 15 days that were included in there were included, as the legislative history shows, so that if they needed to have a broader context, it was spelled out in the legislative history. The administration would have seven days,

allegedly, to make emergency recommendations, and we'd have seven days to act.

Maybe that was too precipitous, but that was certainly the intent, the invitation at the time to recognize the time.

And I think I believe very strongly that that, as Senator DeWine has made, we want to get -- we have uncertainty now, when you have those within your own department who wonder about the legality, the list of constitutional authorities that question the legality. You have Professor Curtis Bradley, someone who had been a part of the administration, the State Department, who questions the legality. I think this is a matter of concern.

I understand, I asked you -- I don't think I gave you a chance to answer, but you really didn't have a chance to test this out with outside constitutional authority, as I understand it.

GONZALES: Of course I wasn't at the department when the program commenced. And so, certainly, from within the White House, I'm not aware of any discussions generally or specifically. I don't think there would have been any specific discussions with outside experts. And I suspect -- in fact, I'm fairly sure -- that there were not discussions with outside experts at the department, although I don't know for sure.

KENNEDY: Well, we'll have our chance and an opportunity, hopefully, to find that out, in further hearings.

KENNEDY: But it is impressive what was done previously and the coming together when the legislation was passed with virtually unanimity in the House and the Senate.

And I think that, as others have expressed, we want to give the president the power to get what's right in terms of protecting us, but we need, as we do on other issues, have the kinds of checks and balance to make sure that it's done right.

Let me just -- I have just a couple of other areas that I'm not sure that you might have been asked about this, and if you can't answer it you can't answer.

But since September 11th, has the president authorized any other surveillance program within the United States under his authority as commander in chief or under the authorization for use of military force in Afghanistan?

GONZALES: Senator, I can't answer that question in terms of other operations.

KENNEDY: OK. All right.

On another issue, and I've heard from staff -- I apologize for not being here through the whole session. We were dealing with the asbestos legislation on the floor at the time, and I needed to go over to the floor.

I'm interested in the telephone companies that assist the government engaging in electronic surveillance face potential criminal and civil penalties if they disclose consumer information unlawfully. So they are protected from such liability if they receive a written certification from the attorney general or his designee saying that, and I quote, "No warrant or court order is required by law, that all statutory requirements have been met and that the specific assistance is required."

So you understand that telephone companies can face criminal and civil liability if they provide wiretapping assistance in a way that's not authorized by statute?

GONZALES: I do understand that -- yes, sir.

KENNEDY: And have you provided a certification to the telephone companies that all statutory requirements have been met?

GONZALES: Senator, I can't provide that kind of information.

KENNEDY: You can't answer that? And you couldn't even provide us with redacted copies.

So, I guess we'd assume that, since that's a requirement, or otherwise, that they can be -- they will be held under the criminal code and that is a requirement, one would have to assume that you've given them that kind of authority, by that...

GONZALES: Sir, two points: There is a lot in the media about, potentially, what the president has authorized.

KENNEDY: OK.

GONZALES: Much of it is incomplete; much of it is, quite frankly, wrong. And so, you have this muddled picture that the president has authorized something that's much greater than what, in fact, he has authorized.

I can't remember my second point.

KENNEDY: But your response to the earlier question about the range of different programs...

GONZALES: OH, I remember my second point. My second point is that your question -- again, I think this is true and I want to give you -- well, maybe I shouldn't make this statement. I'm sorry. Go ahead, Senator.

KENNEDY: Well, we were looking at, sort of, the range of different programs.

I want to just mention, General, as someone that was here when we had the testimony, just quickly, on the wiretaps, there was -- prior to the time that J. Edgar Hoover used to appear, they used to lift all the wiretaps.

They'd just had 450 or 500 wiretaps; then they'd have 20 the day he'd testify and then 500 the next day. No one's suggesting that that's what's happening.

But that's really what -- many of us who have been on this committee for some time have seen those abuses. No one's suggesting that. And we understand your reluctance in mentioning this. But this is an issue that's been around over some period of time.

I'd just say, in conclusion, Mr. Chairman, I'm very hopeful. We want to have as much certainty on the program as possible.

I think what we've seen out in the public now is the information that has been out there almost, certainly, weekly, as a result of concerned individuals in these agencies, hardworking Americans that are trying to do a job and are concerned about the legality of this job.

And I think they are entitled to the protections that we ought to be able to provide for them.

Now, someone who has been a member of this committee, I think that this committee has in the past, and certainly would, recognizing the extraordinary sensitivity and the importance of it, do the job and do it right and do it well.

KENNEDY: And then, done so, I think we would have a different atmosphere and a different climate. And I think we'd be able to get the kind of information that is going to be so important to our national security.

I hope that'll be a judgment that you'll consider, as Senator DeWine has mentioned and others have mentioned.

And I appreciate your testimony.

Thank you, Mr. Chairman.

SPECTER: Before proceeding to Senator Sessions, who's next on the Republican side -- and I will defer my turn until after Senator Sessions has had his turn -- I think this is a good time to make an announcement.

Senator Kennedy made this suggestion earlier today about the committee's intentions with respect to renewing the Voting Rights Act -- especially propitious time with the death of Coretta Scott King. We have been talking about hearings, and we're going to move to renew the Voting Rights Act this year if we possible can in advance of the 2007 date.

We have been laboring under a very, very heavy workload, which everybody knows about. And we will be scheduling those hearings early on. They have to be very comprehensive, provide an evidentiary base, and it is a matter of great concern, really, to everybody on the committee.

Senator Kennedy?

KENNEDY: Well, I want to thank the chair. We've had a chance to talk about this at other times. And I particularly increase his sensitivity as many of us are going down to the funeral for Coretta

Scott King. I think it's an important statement, the comment that her legacy will continue.

So I thank the chair. I know we have broad support, my friend.

Senator Leahy has been a strong supporter, others here -- Senator Biden.

I look around this committee. It's a very, very important legislation.

In the time that we inquired of General Gonzales, he had indicated the full support of the administration on this. We'll look forward to working with you.

I thank the chair for making that announcement.

SPECTER: Thank you, Senator Kennedy.

Senator Sessions?

SESSIONS: Thank you, Mr. Chairman.

I would like to offer for the record a letter from Mr. H. Bryan Cunningham, who served for six years with the CIA and the Department of Justice in President Clinton's administration and for a term in President Bush's administration in which he defends the actions of the terrorist surveillance program.

I would also join with the chairman in welcoming Ms. Debra Burlingame here. She's been here all day. Her brother was a pilot who lost his life in the plane that crashed into the Pentagon. And I think her presence today is a vivid reminder of the human cost that can occur as a result of negligence or failure of will or failure to utilize the capabilities that are constitutional and legal in this country.

SESSIONS: And we have a responsibility to make sure that we do those things that are appropriate and legal to defend this country. It's not merely an academic matter. We've had some good discussions here today. But it's beyond academics, it's a matter of life and death, and we've lost a lot of people. Nearly 3,000 people have no civil rights today. They're no longer with us as the result of a terrorist attack.

Thank you, Ms. Burlingame, for coming and being with us today. We talked about the inherent power of the president. I think there's been a remarkable unanimity of support for the inherent power of the president to do these kind of things in the interest of national security. And I know post-Aldrich Ames, as you pointed out when I asked you about it, Mr. Gonzales, Attorney General Gonzales, that laws were changed with regard to that.

But, in fact, Jamie Gorelick, the deputy attorney general in the Clinton administration, testified before Congress in defense of a warrantless search of Aldrich Ames' home and the warrantless search of the Mississippi home of a terrorist in the Aldrich Ames case. She

testified that the president has inherent authority to conduct warrantless physical searches for foreign intelligence purposes. That sounds to me like that she was saying that that is an inherent constitutional power. I don't understand it any other way. Would you?

BIDEN: Would Senator yield for a question? What year was that? I'm sorry.

SESSIONS: This would have been after the Aldrich Ames case, '94, '95.

BIDEN: Thank you.

SESSIONS: It was before the statute was changed by the Congress. But she did not discuss it in that context. Her context was that it's the inherent power of the president. And she went on to say: And the rules and methodologies for criminal searches are inconsistent with the collection of foreign intelligence and would unduly frustrate the president in carrying out his foreign intelligence responsibilities.

SESSIONS: And in addition to that, Judge Griffin Bell, who served as a federal judge for a number of years and was attorney general under a Democratic president, Jimmy Carter, when the FISA act was passed, acknowledged that while the bill did not recognize the president's inherent power to conduct electronic surveillance, he said this, quote, "This does not take away the power of the president under the Constitution. It simply in my view is not necessary to state that power, so there is no reason to reiterate or iterate it, as the case may be. It is in the Constitution, whatever it is."

And then he went on to say a little later when asked about the inherent power of the president to order electronic surveillance without first obtaining a warrant, former Attorney General Griffin Bell testified, "We can't change the Constitution by agreement," or by statute, I would add.

A little later, he said, when asked if he thought the president has, quote -- he was asked this question: Does the president have, quote, "the inherent right to engage in electronic surveillance of an American citizen in this country." Judge Bell responded, "I do. I think he has a constitutional right to do that, and he has a concomitant constitutional duty to do it under certain circumstances."

So I don't know all the answers to what the powers are here. There are a lot of different opinions. I would say this. You've almost been criticized some today for not going further, not surveilling purely phone calls within our country. Some on the other side have criticized you, apparently, I'm surprised you didn't assert that authority.

But the president I think acted narrowly and within what he thought would be appropriate, given our constitutional and statutory

structure and after having informed eight of the top leaders in the United States Congress.

Would you comment on that?

GONZALES: It is a very narrow authorization. And again, I want to repeat what I said earlier in the hearings in terms of I want to assure you that while domestic to domestic is not covered under the terrorist surveillance program, we are using all the tools available, including FISA, to get information regarding those kind of communications.

I mean, if there are other ways to do it that are permitted under the Constitution, we're going to try to get that information. It's so very, very important.

SESSIONS: Thank you.

I would just observe that I think the system was working. It was a narrow program that the president explained to congressional leaders. He had his top lawyers in the Department of Justice and the White House review its constitutionality, and he was convinced that it was legal. He narrowly constrained it to international calls, not domestic calls, and AL Qaida connected individuals. And he also did it with the one group that he has concluded was responsible for 9/11, Al Qaida, the group that this Congress has authorized him to have hostilities against, to go to war against.

SESSIONS: And they declared war on us even before 9/11.

That's the one group, not other groups that may have hostile interests to the United States like Hezbollah or any other Colombian group or terrorist group around the world.

That's what he authorized to occur. So I think he showed respect for the Congress, not a disrespect.

And, General Gonzales, other groups that may have violent elements within them are not authorized to be surveilled through this terrorist surveillance program -- isn't that correct?

GONZALES: Senator, under the president's terrorist surveillance program again, as I've indicated, what we're talking about today is members or agents of AL Qaida or related terrorist organizations. That's what we're talking about.

And I think General Hayden, I believe, testified before the Intel Committee that there are professionals out at NSA -- and I presume from other branches of the intel community -- that provide input as to what it does that mean to be sort of related or working with AL Qaida.

SESSIONS: Well, let me just conclude with this point. I think the system was working in that way. We were conducting a highly classified important operation that had the ability to prevent other people from being killed, as Ms. Burlingame's brother was killed, and several thousand others, on 9/11.

I believe that CIA Director Porter Goss recently in his statement that the revealing of this program resulted in severe damage to our intelligence capabilities is important to note.

And I would just like to follow up on Senator Cornyn's questions, General Gonzales, and ask you to assure us that you will investigate this matter and, if people are found to have violated a law, that the Department of Justice will prosecute those cases when they revealed this highly secret, highly important program?

GONZALES: Of course, we are going to investigate it. And we will make the appropriate decisions regarding a subsequent prosecution.

SESSIONS: Will you prosecute if it's appropriate?

GONZALES: We will prosecute if it's appropriate, yes sir.

SESSIONS: Thank you.

SPECTER: Thank you, Senator Sessions.

Senator Biden?

BIDEN: Thank you very much.

General, how has this revelation damaged the program?

I'm almost confused by it but, I mean, it seems to presuppose that these very sophisticated AL Qaida folks didn't think we were intercepting their phone calls.

I mean, I'm a little confused. How did it damage this?

GONZALES: Well, Senator, I would first refer to the experts in the Intel Committee who are making that statement, first of all. I'm just the lawyer.

And so, when the director of the CIA says this should really damage our intel capabilities, I would defer to that statement. I think, based on my experience, it is true -- you would assume that the enemy is presuming that we are engaged in some kind of surveillance. But if they're not reminded about it all the time in the newspapers and in stories, they sometimes forget.

(LAUGHTER)

And you're amazed at some of the communications that exist. And so when you keep sticking it in their face that we're involved in some kind of surveillance, even if it's unclear in these stories, it can't help but make a difference, I think.

BIDEN: Well, I hope you and my distinguished friend from Alabama are right, that they're that stupid and naive because we're much better off if that's the case.

I go the impression from the work I've done in this area that they're pretty darn sophisticated; they pretty well know.

It's a little like when we talk about -- when I say you all haven't -- not you, personally -- the administration has done very little for rail security.

They've done virtually nothing and people say, oh, my Lord, don't tell them; don't tell them there's vulnerabilities in the rail system. They'll know to use terror. Don't tell them that that tunnel was built in 1860 and there's no lighting, no ventilation.

BIDEN: I mean, I hope they're that stupid.

GONZALES: Sir, I think you can be very, very smart and be careless.

BIDEN: Well, OK. But if that's the extent of the damage, then I hope we focus on some other things, too.

Look, I'd like to submit for the record a letter to the -- it's probably already been done -- to Senators Specter and Leahy from former Secretary Jamie Gorelick. She makes a very basic point. I don't want to debate at this time. She said the Aldrich Ames case is about physical search. FISA didn't cover physical searches, as my distinguished friend from Alabama knows. At the time they conducted the search, FISA did not cover physical searches.

And then she went on to say, "My testimony did not address whether there would be inherent authority to conduct physical search if FISA were extended to cover physical searches. After FISA was extended to cover physical searches, to my knowledge, FISA warrants were sought."

So, I mean, let's compare apples and apples and oranges and oranges.

Let me ask a few other basic questions, because for me, I have real doubts about the constitutionality, as others have raised here. I used to have a friend who used to say, you got to know how to know. You got to know how to know. And we don't know.

Now, you're telling me and the rest of us that the director of the CIA says we've been damaged. Well, the former director told us that we were be going to be greeted with open arms, that they had weapons of mass destruction. It was honest mistakes. I mean, for me to accept the assertion made by a single person is something I'd consider, but is not dispositive.

Let me ask you this question. Do you know -- and you may not -- do you know how many of these wiretaps and/or e-mail intercepts have resulted in anything?

GONZALES: Well...

BIDEN: Any criminal referral.

GONZALES: Without getting into specifics, Senator, I can say that the director of the FBI said this has been a very valuable program. And it has helped identify would-be terrorists here in the United States, it has helped identify individuals providing material support for terrorists.

General Hayden has said this has been a very successful program,

that but for this program, we would not have discovered certain kinds of information.

General Hayden also said that this program has helped detect and prevent -- I think those were his words -- attacks both here and abroad.

These folks are the ones that are paid to make these kinds of assessments. I'm not.

BIDEN: Have we arrested those people? Have we arrested the people we've identified as terrorists in the United States?

GONZALES: When we can use our law enforcement tools to go after the bad guys, we do that.

BIDEN: No, that's not my question, General. You said that -- you cited the assertions made by Defense Department, by General Hayden, by the FBI that this has identified AL Qaida terrorists. Have we arrested them?

GONZALES: Senator, I'm not going to go into specific discussions about...

BIDEN: I'm not asking for specifics, with all due respect.

GONZALES: ... in terms of how that information has been used and the results of that information.

BIDEN: Well, I hope we arrested them, if you identified them. I mean, it kind of worries me because you all talk about how you identify these people, and I've not heard anything about anybody being arrested. I hope they're not just hanging out there like we had these other guys hanging out prior to 9/11. I don't think you'd make that mistake again.

Can I ask you again, how is this material that proves not to -- suspected AL Qaida terrorist calls from Abu Dhabi, American citizen in Selma, Alabama. Turns out that when you do the intercept the person on the other end from Abu Dhabi wasn't a terrorist -- understandable mistake -- and it turns out the person in Selma wasn't talking to a terrorist. What do you do with that conversation that's now been recorded?

GONZALES: What I can say, Senator, is there are minimization procedures in place. You and I had this conversation before about the minimization procedures that may exist with respect to this program.

BIDEN: That may exist? Either they do or they don't. Do they exist?

GONZALES: There are minimization procedures that do exist with this program. And they would govern what happens to that information.

BIDEN: Does anybody know what they are?

GONZALES: Yes, sir, the folks out at NSA who are actually administering this program.

BIDEN: Have they told anybody in the Congress? Have they told

any court?

GONZALES: Sir, I don't know the answer to that question.

BIDEN: I guess maybe you all don't have the same problem I have.

If, in fact, there are minimization procedures, and they are being adhered to, no problem. If, in fact, the people being intercepted are Al Qaeda folks, and they're talking to American citizens, no problem. But how do we know? I mean, doesn't anybody get to look at this, ever? Doesn't a court, retrospectively get to look at it? Doesn't the royalty within the Senate get to look at it? You know, this two, four, or eight people. Doesn't somebody look at it?

Or, you know, the Cold War lasted 40 years. This war is likely to last 40 years. Is this for 40 years we have so sit here and assume that every president is, yes, well, we know old Charlie. He's a good man. We're sure they wouldn't do anything wrong.

And we know no one in the intelligence community would ever do anything wrong. We have a history of proving that never occurred. And we know nobody in the FBI will ever do anything wrong. That's clear. That never occurred.

I mean, is there someplace along the line that somebody other than an analyst who we don't know, but we know he's asserted to be an expert on AL Qaida, is there somebody other than that person who is ever going to know what happened?

And whether or not there is, the next president may be less scrupulous. Maybe he or she will be engaged in data mining.

GONZALES: Sir, as I indicated in my opening remarks, that of course, the inspector general out at NSA, he has the responsibility to ensure that the activities under this program are done in a way that's consistent with the president's authorization, including the minimization requirements.

BIDEN: OK. This reminds me of a Supreme Court hearing.

What goes into the president making his decision on reauthorization every 45 days? Does anybody come and say, Mr. President, look, we have done 2117 wire taps or 219. You've had 60 percent of them had some impact, or only 1 percent has an impact. And we think -- or is it automatic? What kinds of things does the president look at, other than we still have AL Qaida out there?

GONZALES: It's not automatic. As I also indicated in my opening statement, the president receives information from the intelligence community about the threat. The threat is carefully evaluated as to whether or not we believe AL Qaida continues to be a continuing threat to the United States of America.

BIDEN: So as long as it is the program, so that's the criteria, "is AL Qaida a threat," not "is the program working," but "is AL Qaida the threat"? Is that the criteria?

GONZALES: Well, of course not. If we don't have a tool, a lawful tool that's effective, why would we use it? We only use a tool if it's effective.

BIDEN: Thank you, General.

GONZALES: Mr. Chairman -- Mr. Chairman, could I ask for a short break?

SPECTER: Granted.

GONZALES: Thank you, Mr. Chairman.

(RECESS)

SPECTER: The Judiciary Committee hearing will resume.

SPECTER: We have four more senators who have not completed their next round who are on the premises. So it may be that we can finish today.

Other senators have looked toward another round, so let me negotiate that between today and some date in the future to see if it is necessary to ask to you come back, Mr. Attorney General.

And I had thought about limiting the time to five-minute rounds, but we're going to be here until at least about 5:30. So let's go ahead with the full 10 minutes.

And I'll yield at this time to Senator Graham.

BIDEN: Mr. Chairman, a parliamentary inquiry: I do have other questions. I'm not asking they be asked today or even tomorrow. But, if we end today, which I think makes a lot of sense.

The general has been very generous and his physical constitution has been required to be pretty strong today here, too.

(LAUGHTER)

Is it likely, if, after you survey us after we close down the day that you may very well ask the general back for more questions from us in open session?

SPECTER: Senator Biden, I would like to leave that open.

Senator Leahy said that he was looking forward to another round, which is where we were when he left.

I thought we would have a number of senators who wouldn't have finished a second round, so Attorney General Gonzales would have had to have come back for a second round.

But it may be that others will have further questions or it may be that, in some of our other hearings, we'll have matters we want to take up with the attorney general.

And the attorney general has stated to me his flexibility in coming back. So, let's -- is that correct, Mr. Attorney General?

GONZALES: I try to be as helpful as I can to you, Mr. Chairman.

SPECTER: I take that to be a yes.

BIDEN: The only reason I ask -- I, like you, want to go to the floor and speak on the asbestos bill that's up. And I didn't whether

I should stay here for a third round or...

SPECTER: OH, I can answer that. You should stay here.

(LAUGHTER)

BIDEN: I oppose the chairman's position on asbestos. I shouldn't have asked that question.

I withdraw the question, Mr. Chairman.

(LAUGHTER)

I expect to go until 9:00, Senator Biden. You're going to miss very important materials if you leave.

(LAUGHTER)

Senator Graham?

GRAHAM: Thank you, Mr. Chairman.

Mr. Attorney General, we'll see if we can talk a little more about this constitutional tension that is sort of my pet peeve, for lack of a better word.

I would just echo again what Senator DeWine said. Instead of another round at another time, I would love to engage in a collaborative process with the administration to see if we can resolve this tension.

I want to talk to you exclusively about inherent power and your view of it and the administration's view of it and share some thoughts about my view of it.

GRAHAM: The signing statement issued by the administration on the McCain language prohibiting cruel, inhumane and degrading treatment -- are you familiar with the administration's signing statement?

GONZALES: I am familiar with it, Senator.

GRAHAM: What does that mean?

GONZALES: The entirety of the statement, Senator?

GRAHAM: Well, I mean -- I guess to me, I was taken back a bit by saying "notwithstanding." It was sort of an assertion that the president's inherent authority may allow him to ignore the dictates of the statute.

Does it mean that, or did I misunderstand it?

GONZALES: Well, of course, it may mean that this president -- first of all, no president can waive constitutional authority of the executive branch.

GRAHAM: And my question is very simple but very important: Is it the position of the administration that an enactment by Congress prohibiting the cruel, inhumane and degrading treatment of a detainee intrudes on the inherent power of the president to conduct the war?

GONZALES: Senator, I don't know whether or not we have done that specific analysis.

GRAHAM: Can I ask you this question, then?

GONZALES: Yes.

GRAHAM: Is it your opinion and the administration's position, without the force resolution that FISA is unconstitutional in the sense it intrudes on the power of the president to conduct surveillance in the time of war?

GONZALES: I think that question has been raised a couple of times today. I have indicated that that, then, puts us into the third part of the Jackson analysis.

I've also indicated that these are difficult questions, and...

GRAHAM: I'll accept that as an honest, sincere answer, because they are difficult.

Let's get back to my scenario about the military member who has a detainee under their charge.

GRAHAM: They get an order from the commander in chief or some higher authority to do certain techniques. The justification is that we need to know about what's going to happen in terms of battlefield developments: "We believe this person possesses information." And those techniques are expressly prohibited by prior statute under the authority of the Congress to regulate the military.

That is another classic moment of tension. What do we tell that troop? I mean, if they called you as a lawyer and they said, "I've got the order from my commander, maybe even from the president, to engage in five things, but I've been told there's a statute that says I can't do that passed by Congress. What should I do?"

What would be your answer to that?

GONZALES: I don't know if I could give that person an immediate answer. I think that's the point that you're making. To put our military in that kind of a position, that's a very difficult place to be.

GRAHAM: Thank you for -- that is absolutely the point I've been trying to make for a year and a half. I want to give that troop an answer that we can all live with.

And let me take this just a little bit further. The FISA statute, in a time of war, is a check and balance. But here's where I think I'm your biggest fan. During the time of war, the administration has the inherent power, in my opinion, to surveil the enemy and to map the battlefield electronically -- not just physical, but to electronically map what the enemy is up to by seizing information and putting that puzzle together.

And the administration has not only the right, but the duty, in my opinion, to pursue fifth column movements.

And let me tell folks who are watching what a fifth column movement is. It is a movement known to every war where American citizens will sympathize with the enemy and collaborate with the

enemy. And it's happened in every war.

And President Roosevelt talked about, "We need to know about fifth column movements."

So my friends on the other side, I stand by this president's ability, inherent to being commander in chief, to find out about fifth column movements, and I don't think you need a warrant to do that.

GRAHAM: But here's my challenge to you, Mr. Attorney General.

There will come a point in time where the information leads to us believe that citizen A may be involved in a fifth column movement. At that point in time where we will need to know more about citizen A's activity on an ongoing basis, here is where I part.

I think that's where the courts really come in. I would like you and the next attorney general and next president, if you have that serious information that you need to monitor this American's citizen's conduct in the future, that they may be part of a fifth column movement to collaborate with the enemy, I want a check and a balance.

Here's why: Emotions run high in war. And we've put a lot of people in prison who just looked like the enemy and never did anything wrong, just as loyal American as you or I.

But it would be very easy in this war for an American citizen to be called up by the enemy and labeled as something they are not. It would be very easy, in my opinion, if you're a business person dealing in the Mideast who happens to be an American citizen, the business deal goes bad, that bad things could happen to you.

And I would just like the administration to entertain the idea of sitting down with Senator DeWine and others to see if we can find a way at some point in the process of monitoring fifth column movements to have a check and balance system that not only would strengthen the commander in chief's role, it will give guidance to the people fighting the war. You'll have Congress on board. You'll be stronger in courts. And the enemy will be weaker.

How does that proposition sit with you?

GONZALES: Senator, the president already said we'd be happy to listen to your ideas.

GRAHAM: But do you understand my inherent authority argument concern with that argument? Because taken the next president may not be as sensitive to this limited role of the government.

Really, Mr. Attorney General, you could use the inherent authority argument of a commander in chief at a time in war almost wipe out anything Congress wanted to do.

GONZALES: See, I disagree with that, Senator. I really meant what I said earlier that in...

GRAHAM: Is there a situation where the Congress could regulate or trump the inherent power argument when it comes to war?

GONZALES: I think Congress has a powerful check on the commander in chief, is through the purse.

GRAHAM: If the Congress decided to limit treatment or interrogation techniques of a detainee, would the president have to honor that? Is that part of our authority under the Constitution to regulate the military? Do we have the authority to tell the military, "You will not do the following things"? Would that intrude on the inherent power of the president to run the military.

(CROSSTALK)

GONZALES: ... the question is whether or not this is an interference of the day-to-day command functions of the commander in chief or does it fall within that clause of Section 8 of Article I, which says that Congress...

GRAHAM: Do you believe it's lawful for the Congress to tell the military that, "You cannot physically abuse a prisoner of war"?

GONZALES: I'm not prepared to say that, Senator. I think you can make an argument that that's part of the rule...

(CROSSTALK)

GRAHAM: Mr. Attorney General, if we can't do that, if we can't, during a time of war, regulate the behavior of our troops, then really we have no power in a time of war.

And that's the point here. I think we share power.

GONZALES: I agree. I agree that power is shared in a time of war.

GRAHAM: I think we share a purpose of winning the war.

GONZALES: No question about that.

GRAHAM: But we need to get together so the people on the front lines who are pulled and torn -- if the Bybee memo, Mr. Attorney General, had become the policy there would have been people subject to court-martial. And in your good judgment you repealed that. But I can assure, Mr. Attorney General, that if the Bybee memo's view of how you handle a detainee and what's torture and what's not, if it had been implemented, it would have violated the Uniform Code of Military Justice and our guys could have gone to jail.

And in your good judgment, you repealed that. I'm asking for you to use that good judgment again and advise our president to come to this Congress and let us sit down and work through these constitutional tensions, because we don't need tension among ourselves, we need unanimity.

Thank you for your service to our country.

GONZALES: Thank you, Senator.

SPECTER: Thank you very much, Senator Graham.

Senator Durbin?

DURBIN: Thank you.

Attorney General, you've said that the safeguards for this program, this terrorist surveillance or domestic spying program, include the fact that they're reviewed by career professionals -- I believe you referred to the National Security Agency, perhaps other agencies -- and that there is a 45-day review as to whether you will continue the program.

Where did the 45-day review requirement come from?

GONZALES: Senator, that really sort of arose by, quite frankly, schedules in terms of having folks be in a position to provide recommendations and advice as to whether the program can continue. There's nothing magical about the 45 days.

DURBIN: I'm not worried about the magic so much as is there a statute that drives this? Is there a legal requirement of a 45-day review?

GONZALES: I think it helps us in the Fourth Amendment analysis in terms of, is this a reasonable search, the fact that it is reviewed periodically. And I think it's more sort of by happenstance that it really has come out to be approximately every 45 days.

Let me just also mention that when I talked about the review out at NSA, there are monthly meetings, as I understand it, unconnected with this 45-day review, in which senior officials involved in this program sit down and evaluate how the program is being operated. That's a process that's totally independent of this 45-day review process.

DURBIN: Who chooses the professionals that evaluate this program?

GONZALES: Senator, I'm led to believe -- I don't know for sure, but I'm led to believe that they are people -- I'm assuming that senior officials at NSA identify people at NSA who have AL Qaida experience, AL Qaida expertise, knowledge about AL Qaida tactics and aims, and therefore in the best position to evaluate whether or not a person who is on the call is in fact a member or agent of AL Qaida or an affiliated terrorist organization.

DURBIN: Which gets to my point. This so-called safeguard -- and it has been referred to as a check and balance -- is literally the administration talking to itself. People within the administration meet within their offices and decide about the civil liberties and freedoms of those who are going to be subjected to this surveillance. That is a significant departure from the ordinary checks and balances of our government, is it not, that all of this is being decided within the same executive branch?

GONZALES: I don't know if I would characterize it that way. I think that there is intelligence that is collected by the National Security Agency, where they have control over this information, they

have internal rules and regulations. They are subject to minimization requirements. Those are classified. Those have been shared, as I understand it, with the Intel Committee, if you're talking about Executive Order 12333.

And so I don't know it's so unique to this program.

DURBIN: Well, let me just say, if you want to wiretap, as attorney general, you know what you have to do.

GONZALES: Yes, sir.

DURBIN: You have to go to another branch of our government. You have to get a warrant. That's the case in criminal cases...

(CROSSTALK)

GONZALES: In a criminal case, Title III, that's right.

DURBIN: In terrorist cases you know that FISA applies. And now, when it comes to these wiretaps or whatever they may be, this surveillance, whatever it may be, you don't go to another branch of government, you meet within your own branch of government.

DURBIN: And that, I think, is the significant difference.

Here's what it comes down to: There's a general concern here as to whether or not the scope of what we're talking about and what it might be -- and I know you're limited in what you can tell us, but I also know that Michael Chertoff, the secretary of homeland security, recently said the NSA was, quote, "culling through literally thousands of phone numbers and trying to sift through an enormous amount of data very quickly."

You've assured us this is not a dragnet. But I think the thing that it continues to come back to is whether innocent Americans, ordinary Americans, are going to have their e-mails and their phone calls combed through.

And you may shake your head and say, "Oh, we would never do that," but, Attorney General, no one's looking over your shoulder. You're not going to anyone, as you would with another wiretap request, to determine whether or not it's a reasonable about or goes too far or, in fact, is targeted rather than random.

I talked to you about Mr. Fleischer (ph), who is sitting out here, who asked the very basic question: Have I been victimized by this program? Have I been subject to this program?

He couldn't get an answer. He's had communications overseas.

The fact that he's sitting here today is a suggestion that he's not worried about what the outcome might be, but he is worried about his freedoms and his liberties.

There is no one for him to speak to. When he contacts your administration, they neither confirm nor deny. So there's no check and balance here. There's nothing to protect his freedom or liberty or the freedom and liberty of a lot of innocent people who wonder if

you're going too far.

That, I think, is why many of us are absolutely stunned that this administration won't come to Capitol Hill and ask us, on a bipartisan basis, for help with this FISA act -- if, in fact, it does create a problem.

I voted for the Patriot Act. All but one of the senators in the Senate voted for the Patriot Act. It isn't as if we're not ready to cooperate with you.

We would feel better about your conduct and the conduct of this administration if there was a law you that followed. We're not asking you to spell out the operational details, but we're asking you to have at least a FISA court judge -- someone from another branch of government -- taking a look at what you're doing.

DURBIN: There is some assurance under that situation, for 28 years, that there is a check and balance. Do you understand why the blank check that you've asked for causes so much heartburn?

GONZALES: Senator, I do understand concern about a blank check.

I don't believe that that is what we have here.

In your comments, you've talked about going around the law, going around FISA. That is not the case here. We believe we are acting consistent with the requirements of FISA.

I don't know about the comments that Secretary Chertoff made.

General Hayden has been out very publicly talking about what this program is about and it is not about -- it doesn't sound like it's the kind of program that Secretary Chertoff is talking about, but I would be very interested in studying his remarks. This is a very narrowly tailored program.

DURBIN: But how do I know that? There's no one -- other than your good word today -- there's no one that can tell me, "I've looked at this program; trust me, Senator, you can tell Mr. Fleischer (ph) and your constituents in Illinois not to worry."

We're not going to comb through the records of innocent Americans. There is no one for me to turn to.

GONZALES: I don't know if it's proper ask you a question, but I'm going to ask you a question.

(LAUGHTER)

If we were to brief you into the program, how would anyone be assured that you would protect the rights of ordinary citizens? Because we have briefed congressional leaders. And so they know what we're doing.

DURBIN: They are sworn to secrecy, are they not?

GONZALES: This is a highly classified program.

DURBIN: They were sworn to secrecy. If they found the most egregious violation of civil rights taking place in this program, they

are sworn not to say one word about it.

GONZALES: Senator, I have to believe all of us -- we take an oath of office and if we honestly believe that a crime is being committed that we would do something about it.

DURBIN: How would they?

I've been on the Intelligence Committee. And I can tell you that when you're briefed with classified material -- I sat in briefings not from here, just a few feet away and listened to what I thought was very meager evidence about weapons of mass destruction before the invasion of Iraq.

Based on that, I voted against it. But I couldn't walk outside that room until it became public much later and say this administration was at war within when it came to this issue.

GONZALES: I think we're letting members of Congress off the hook easily by saying that, if they get briefed into a secret program and they believe it's against the law, that they can't do anything about it.

GONZALES: I think you have an obligation, quite frankly, when you take that oath of office, if you believe that conduct is fact unlawful, I think you can do something about it.

DURBIN: Let's talk about one congressman, congresswoman in this case, who has spoken out, Congresswoman Jane Harman. She has been briefed on the program and she has said publicly, "You can use FISA. You don't need to do what you're doing. You don't need to go through this warrantless process." From her point of view, I think she's gone as far as she can go. That's it.

GONZALES: Senator, I don't think we've ever said that we couldn't use FISA in particular cases, but the time it would take to get a FISA application approved would mean that we may lose access to valuable information.

DURBIN: You won't come before us and tell us how to change the law to overcome that problem. That's what I find absolutely inexplicable.

Last thing, I'd like to do, Mr. Chairman, or whoever is now presiding, we've had several references to Mrs. Burlingame who is here. I thank her for joining us today and for her statements to the press.

I would like to acknowledge the presence of Monica Gabriel and Mindy Kleinberg, who are also in the families of victims of 9/11. They are here today, and they've made a statement for the record. I'll read the last sentence, and ask that this be part of the record: "Retaining our civil liberties and our cherished democracy in the face of a looming terrorist threat is the only way we will win this war on terror." I ask that this statement be made a part of the

record.

GRAHAM: Without objection.

DURBIN: Thank you very much, Chairman Graham.

Thank you, General.

GONZALES: Thank you, Senator.

CORNBYN: Attorney General Gonzales, Chairman Specter had to step out, but he asked me to proceed after Senator Durbin, and I'm happy to do that, so we can move on.

If an employee of the National Security Agency has a concern about the legality of what they're being asked to do, is it -- are they authorized to have a press conference or to otherwise leak that information to outside sources?

GONZALES: Senator, I think there are laws that prohibit the disclosure of classified information. I think there might be other ways that maybe would -- that would certainly be more appropriate.

CORNBYN: Let me suggest one to you.

CORNBYN: 1998, Congress passed the Intelligence Community Whistleblower Protection Act, which provides in part that an employee of the DIA, The National Imagery and Mapping Agency, the National Reconnaissance Office or the National Security Agency or a contractor of any of those agencies who intends to report to Congress a complaint about the legality of the program, that they can report that to the inspector general of the Department of Defense or to the leadership of the Intelligence Committees in the United States Congress.

Would you consider that to be a more appropriate place for a so-called whistleblower to report their concerns?

GONZALES: Yes, sir, I would.

CORNBYN: Well, at the very least, there would be an opportunity for those officials to evaluate the complaint of this individual, and we wouldn't risk the disclosure of highly classified information or programs that are collecting intelligence.

GONZALES: No question about it.

The danger or problem of going to the media as an initial matter is that you have some people, I think, whose motivation, I think can be questioned in terms of why are they doing that.

And when they go out and talk to the public about a highly classified program, they harm the national security of this country. I think Congress realized that when they passed the statute that you just described, to try to provide an avenue for those people who legitimately are concerned about perhaps wrongdoing, that they have an avenue to pursue to express their grievances and to do so in a way that we don't jeopardize the nation's secrets.

CORNBYN: Let me ask you the last theory I want to ask you about.

You've endured through a long day, and I know we're trying to wrap up.

I've read a lot about the debate on this program and trying to understand why it is the administration believed that it needed to exercise the authority that it was granted by Congress in the authorization for the use of military force.

CORNYN: And perhaps the president's power under the Constitution -- over and above what FISA would ordinarily provide.

First of all, if the NSA wants to listen to communications between terrorists abroad that are wholly located in some other country, they can do that without a warrant, can they not?

GONZALES: Whether or not FISA applies depends on the answer to basically four key questions: Who is the target? Primarily, we're concerned about whether or not the communication involves a U.S. person.

Where is the target? Primarily we're concerned whether or not the person is in the United States.

Where is the acquisition taking place?

And then, finally, what are you trying to acquire? Is it wire communication? Is it radio communication?

And so the answer as to whether or not FISA would apply with respect to a particular communication primarily depends upon answering those kinds of questions.

CORNYN: Thank you for the precise answer. But, as a general matter, if the persons are located in a foreign country, and they are not American citizens and the communications are taking place within that foreign country, then FISA does not require the issuance of a warrant.

GONZALES: As a general matter, if you're talking about non-U.S. persons outside the United States and, certainly, if the acquisition is outside the United States, you don't have to worry about FISA.

CORNYN: Isn't it true that the problem that this program has tried to address, the gap in FISA that it tries to address, is that, in order in order to get a warrant under FISA, the government must have grounds to believe that the U.S. person it wishes to monitor is a foreign spy or terrorist?

And, even if a person is here on a student or tourist visa or no visa, the government can't get a warrant to find out whether they are a terrorist; they must already have reason to believe they are one?

GONZALES: Well, certainly, to obtain an order from the FISA Court, the court has to be satisfied that there's probable cause to believe that the target is either a foreign power or an agent of a foreign power and probably cause to believe that the facility being targeted is actually being used or about to be used by a foreign power or an agent of a foreign power.

CORNYN: Stated another way...

GONZALES: OK.

CORNBYN: The problem with FISA, as written, is that the surveillance it authorizes is unusable to discover who is a terrorist, is distinct from eavesdropping on known terrorists.

Would you agree with that?

GONZALES: That would be a different way of putting it, yes, sir.

CORNBYN: You would agree with that statement?

GONZALES: Yes, sir.

CORNBYN: So the particular program that's been debated here and the authority that the National Security Agency has to conduct it is filling a gap that exists in our intelligence-gathering capabilities.

Is that an accurate description?

GONZALES: I think we quickly realized, after the attacks of 9/11, that the tools that we had traditionally been using were insufficient.

And this was the opinion of the intelligence community. And that's why the president authorized this program. It's because we did have vulnerabilities into our access to information about the enemy.

CORNBYN: Finally, with regard to exclusivity, there have been some on the committee who have asked whether the statement that Congress has made in the FISA statute, that it's the exclusive means to gather foreign intelligence, whether that is necessarily binding obligation when it comes in conflict, if it does, with the Constitution.

And I know you've cited the doctrine of I guess constitutional avoidance or -- did I get that correct?

GONZALES: The canon of constitutional avoidance -- yes, sir.

CORNBYN: Thank you.

For example, this has more than just hypothetical applications.

For example, are the law enforcement authorities in this country authorized to shoot down a plane that they believe is carrying illegal drugs or committing some other crime?

GONZALES: Senator, I guess I'd have to think about that. If you were asking whether or not the military has the authorization to shoot down an airplane...

CORNBYN: Well, I'm asking about law enforcement authorities other than the military.

GONZALES: Well, let me just say that we do not expect our law enforcement officers to be perfect in their judgment when you're talking about the Fourth Amendment and searches.

The standard is probable cause. It is a totality of the circumstances.

But it's very, very important to remember, we're talking about the judgment from the eye of a professional officer. This is what the

courts have said.

And that's why in the terrorist surveillance program, we have the determination made by someone who is experienced for knowing AL Qaida tactics and communications. He's making that decision from the view of -- like the police officer on the beat in terms of what is reasonable, what satisfies a probable cause standard.

CORNBYN: Well, making this very personal and real, if a plane is heading toward the Capitol, don't you believe that the use of force resolution in Article 2 of the Constitution authorized the president to have the United States military forces shoot that plane down, if necessary?

GONZALES: I believe so, sir. And I, quite frankly, believe that the president had the authority prior to the authorization to use military force.

I think even though proponents, pro-Congress group of scholars who believe very strongly in the power of Congress during a time of war, even they acknowledge that with respect to initiation of hostilities, that only the Congress can declare war, but of course military force can be initiated if the United States has been attacked -- initiated by the president, if the United States has already been attacked or if there is an imminent threat to the United States. And so I think there are strong arguments that would support the notion that the president of the United States, even before the authorization to use military force was passed by Congress, after we had been attacked already, of course, could then use military force to repel an additional attack.

We have to remember, of course, that in the days and weeks following 9/11 there were combat air patrols. So the president was exercising his authority, even before the authorization to use military force, to have the military in place to protect us from another attack.

CORNBYN: Thank you.

SPECTER: Thank you, Senator Cornbyn.
Senator Kohl?

KOHL: Thank you very much.

Just a couple questions, Mr. Attorney General. Can you tell us how many U.S. citizens have had communications intercepted, listened to or recorded by this program since it started?

GONZALES: Senator, I wish I could share more information with you, but that information is classified and I can't disclose that now.

KOHL: How many Americans have had their phone conversations recorded or their e-mails intercepted without a court order? Any idea?

GONZALES: Again, Senator, you're asking about the operations of

this program, and I really can't get into it. I've outlined today that this is a very narrowly tailored program that's been authorized by the president of the United States. And we have taken great pains to try to protect the privacy interests of every American. But as the president has said, even if you're an American citizen, if you're talking to a member of AL Qaida, we'd like to know why.

KOHL: You've talked at length today and over the course of the past month about how the program has to be authorized every 45 days. And you have lauded that as a strong check and a balance on the potential for abuse. And news reports suggest that one of the authorizations has led to changes in the program. Could you tell us what those changes were?

GONZALES: Again, Senator, you're asking me about operational details of the program, and I can't get into operational details.

KOHL: All right. The New York Times reported that in interviews with current and former law enforcement officials, that the flood of NSA tips that came from this program led them to expend considerable resources in following the leads and diverted some agents from work that they had viewed as more productive.

KOHL: Law enforcement officials interviewed said that the program had uncovered no active plots in the United States. One said that, quote, "The information was so thin and connections were so remote that they never led to anything," unquote. Another said, quote, "It affected the FBI in the sense that they had to devote so many resources to tracking every single one of these leads and, in my experience, they were all dry leads," unquote. So was there a concern that this program is not collecting enough worthwhile information?

And does this suggest that the net was perhaps too large and that you ensnared too many Americans who were not in fact involved in any terrorist activities?

GONZALES: Thank you for that question, Senator. I'm aware of these stories.

First of all, it is true that Director Mueller feels very strongly that we cannot afford to not investigate, one way or the other, or to check out every particular tip. We have an obligation to do that.

I think General Hayden has already indicated publicly that, immediately following the attacks of 9/11, he exercised his own independent authorities which do exist for the NSA to gather up information -- gather up more information than he normally would do -- again, these are under existing authorities, lawful authorities -- and to share all that information with the FBI.

And so you had a situation where the NSA was gathering up more information than it normally does and then sharing more of that information with the FBI.

We quickly discovered that that was not very efficient because of the fact that it required the FBI to utilize their resources. And so that procedure stopped.

And so, I think the stories that you're referring to do not relate to the terrorist surveillance program about which I'm testifying today.

KOHL: I thank you very much.

And I thank you, Mr. Chairman.

SPECTER: I thank you, Senator Kohl.

Senator Brownback?

BROWNBAC: Mr. Chairman, thank you.

General, interesting line of questioning. And I want to pursue going after a FISA warrant with some specificity with you because I want to understand this process better. And I think you've covered it in bits and pieces today. And I've been in and out at times.

And I want to go into it in some depth. although, before I do that, I want to note, in the New York Post online edition, February 6, just really in response to the last question here, a 2004 NBC report graphically illustrated -- and I'm reading from this -- what not having the program cost us 4.5 years ago.

BROWNBAC: In 1999, the NSA began monitoring a known AL Qaida switchboard in Yemen. They relayed calls from Osama bin Laden to operatives all over the world. Surveillance picked up the phone number of a Khalid in the United States, but the NSA didn't intercept those calls, fearing it would be accused of, quote, "domestic spying." After 9/11, investigators learned that Khalid was Khalid al-Mihdhar, then living in San Diego under his own name, one of the hijackers who flew American Airlines Flight 77 into the Pentagon. He made more than a dozen calls to the Yemen house where his brother in law lived.

NBC News called this, quote, "one of the missed clues that could have saved 3,000 lives."

It's a very real thing and very real thing for us today -- and one that, had we been operating that effectively prior to 9/11, could have possibly saved thousands of lives.

Mr. Attorney General, we continue to hear -- and I certainly appreciate the need for expediency in carrying out electronic surveillance. And you've mentioned that getting a FISA warrant is often a time-consuming procedure.

I wondered, could you go into some specificity for me, so I can hear this, how long that process generally takes? Just to the degree

you can, without revealing information that's classified, how long does this process take?

GONZALES: Well, it varies.

What I can say, Senator, is that we have, for a variety of reasons, some applications that have been pending for months, quite frankly.

Sometimes that's a result because we can't get sufficient information from the FBI or NSA in order to satisfy the lawyers at the department that, in fact, we can meet the requirements of the FISA act.

Sometimes it's a situation where priorities -- with each passing day, renewals expire on very important programs, so we then have to prepare a renewal package to submit to the FISA court.

And that means other FISA applications that our lawyers have been working on kind of get pushed to the side as they work on the more important cases.

So there are a variety of reasons why it takes some time to get a FISA application approved.

GONZALES: If you want me to get into a more down-in-the-weeds discussion...

BROWNBACK: I would. What is it that takes so much time in these FISA applications?

GONZALES: Well, of course, we can't begin surveillance just based on a whim by someone, say, at the FBI. There has to be a reason to believe that all of the standards of the FISA statute can be satisfied. We have to know that a FISA court judge is going to be absolutely convinced that this is an agent of a foreign power, that this facility is going to be a facility that's going to be used or is being used by an agent of a foreign power.

The things that I have to approve, I have to, when I sign an application, we have to identify the target, we have to set forth the circumstances and the reasons that I believe that the target is a foreign power or an agent of a foreign power. I have to set forth the circumstances for why I believe that this facility is being used or about to be used by a foreign power or agent of a foreign power.

We have to set forth in the application the minimization requirements that we intend to use. We have to set forth in the application, with specificity, the type of information we're hoping to get and the type of facilities or communications that we're targeting. So those are just some of the things that I have to include in the application. The application has to be accompanied by a certification that is signed by a senior official of the administration who has national security responsibility. Normally it's the FBI director. It could be the director of the CIA.

And so that person has to certify that, in fact, this is foreign intelligence information. That person has to certify that the primary purpose -- a significant purpose of the surveillance is for foreign intelligence purposes. That person has to certify that normal investigative techniques or means are not otherwise available. And there are some other provisions that have to be certified.

So all those conditions, requirements, have to be met, even before I authorize verbally an emergency authorization, and it takes time. Even in a perfect world, even in an ideal case it's going to take a period of time. And I'm not talking about hours. We're normally talking about days, weeks. On the more complicated cases, again, sometimes months.

BROWNBAC: And this would include these sort of operations we've read about, about data-mining operations? Would that include those sorts of operations or are those totally a separate type of field?

GONZALES: I'm not here to talk about that. Again, let me just caution everyone that you need to read these stories with caution.

GONZALES: There is a lot of mumbling -- I mean mixing and mangling of activities that are totally unrelated to what the president has authorized under the terrorist surveillance program. So I'm uncomfortable talking about other kinds of operations that might -- that are unrelated to the terrorist surveillance program.

BROWNBAC: These would be strictly ones where you are going after a targeted set of individuals that are...

GONZALES: Is this under FISA?

BROWNBAC: Yes, that are done under the FISA application.

GONZALES: You have to remember, of course...

BROWNBAC: Along the lines of what you've just described in some detail; this is the sort of information you're seeking before you're going after anything under FISA?

GONZALES: In every case. And of course, we always have to remember that we're not just talking about AL Qaida when you're talking about FISA. You are talking about agents of other countries. And it's not limited to only international communications under FISA, it's domestic communications. So we want to get it right, of course. And as I said earlier in response to another question, the fact that we've had such a high approval rate by the FISA Court isn't an indication that the FISA Court is a rubber stamp, it is more, I think, a proof that we've got a legitimate process. We take this very seriously.

BROWNBAC: Well, I don't want to drag on the questioning.

You've been here a long period of time.

I just do want to encourage us, that as the war on terrorism wears on, because it is going to wear on for a period of time, that we

do have a check and balance system in place that's workable, so that you can get the type of information that you need, that we need, to protect the country, but at the same time can protect the civil liberties of the nation. And you're doing everything you can in that regard.

I just think as we look on forward, this is going to be a key policy factor of how we move forward and sustain support for the war on terrorism over the periods of various administrations and possible length of time that this could well take.

Thank you for being here.

Thank you, Chairman.

SPECTER: Thank you, Senator Brownback.

Mr. Attorney General, you've held up remarkably well for a long day. I have deferred my second round until everyone else has concluded a second round, because as chairman, I have to stay, so I thought I'd go last, in any event.

So it's just you and me. When we came here today there was a long line in the hallway, waiting to get in and now only a few people are here and the senators' bench is pretty well cleared.

SPECTER: I want to come back to the issue as to whether the resolution authorizing the use of force of September 14th gives the president congressional authority to undertake the electronic surveillance.

And I said candidly at the outset that I did not think that it did. And let me explore with you a number of questions I have that I'm interested in the administration's response.

Let me start first with the signing statement of President Carter, when he signed the Foreign Intelligence Surveillance Act in 1978, on October 25th.

He said in part, quote, "the bill requires, for the first time, a prior judicial warrant for all electronic surveillance for foreign intelligence or counterintelligence purposes in the United States in which communications of U.S. persons might be intercepted.

"It clarifies the executive's authority to gather foreign intelligence by electronic surveillance in the United States. It will remove any doubt about the legality of those surveillances which are conducted to protect our country against espionage and international terrorism."

So that when you talk about what happened in Washington's time on intercepting messages or unsealing envelopes -- what happened in Lincoln's time -- or what happened in Franklin Delano Roosevelt's time, or when you talk about a number of the circuit court opinions giving broad presidential authority saying that the gathering of intelligence was his prerogative without respect to the Fourth

Amendment, that's before Congress acted.

Now, a signing statement is subject to a number of limitations.

If the president, in a signing statement, seeks to distinguish his view from what the Congress has passed, I think they're entitled to very little, if any waive.

Where the president, as President Carter did, squarely backs what the Congress has done, then you have a concurrence of the Congress and the president.

And you really have very forceful, very plain, very strict language in the Foreign Intelligence Surveillance Act.

How do you counter what President Carter has said, that it applies to all U.S. persons and covers all foreign intelligence by electronic surveillance in the United States?

GONZALES: Well, of course, Senator, I don't believe that it is possible for any president to waive, for future presidents, any constitutional authority, any authority given to a president under the Constitution.

I haven't read that statement in a while. I don't think in the statement President Carter says, "I have no inherent authority remaining in this area."

Finally, I would just simply remind the chair -- I think this was mentioned earlier by one of the senators -- his attorney general in hearings in connection with the legislation -- I think it was before the House, I think it was before a committee of the House -- talked about the fact that this is -- and I'm paraphrasing here -- this in no way takes away from the president's inherent constitutional authority, this legislation.

And so that's how I would respond to your question.

SPECTER: Well, Mr. Attorney General, that's not the Jackson test, which you've subscribed to, but I'm going to come back to that in just a minute.

In your responses to my question about statutory interpretation -- and we've covered the line that it is disfavored to have a repeal by implication, and you have the statute of FISA specific, no interception of electronic communication without a warrant, which is very specific. And then you have the generalized statement of the September 14th resolution, which at best would be repealed by implication, which is disfavored.

But then we come upon another very important provision of statutory construction, and that is the one which relates to specific language takes precedence over more generalized pronouncements. And in our answer you said, quote, "It is not clear which provision is more specific," close quote.

Well, that is false on its face. If you have the statute saying

no electronic surveillance without a warrant, there's no doubt that that is more specific than the September 14th resolution.

SPECTER: Isn't it?

How could you disagree with those plain words?

GONZALES: By that answer, I only meant to convey, Senator, that the resolution is more specific with respect to AL Qaida, certainly.

And, of course, the FISA statute is not limited only to AL Qaida.

I might also, as the answer also indicates -- we had -- this same discussion occurred with respect in the Hamdi decision.

We had the same situation; you had a specific statute, 18 USC 4000 (1)(a) that said no American citizen could be detained except as otherwise provided by Congress or, maybe, otherwise provided by a statute by Congress.

And the Supreme Court said that, nonetheless, you had a broader authorization on the authorization to use military force and that would satisfy the statute, even though you had a specific statute with respect to detention and you had a broad authorization.

SPECTER: Did the Supreme Court deal with that statute?

GONZALES: That was the statute at issue, yes, sir, in the Hamdi decision, of course.

SPECTER: Did the Supreme Court deal with it, specifically?

GONZALES: Sir, in Hamdi, Mr. Hamdi was contesting that that statute prohibited the president of the United States from detaining him because he was an American citizen.

And the Supreme Court said, well, OK, you're right; you have this specific statute, but you also have this broad ground of authority by the Congress. And that is sufficient to allow the president of the United States to detain you, even as an American citizen.

SPECTER: Well, I think you're dealing with very different circumstances when you talking about a soldier on the field, as opposed to a United States person whose conversations are being electronically surveilled.

But let me move on here. It may well be that you and I won't agree on this point.

The resolution of September 14 did not add the words "in the United States" after the words, quote "appropriate force." That was rejected to give the president the broad authority, not just overseas, but in the United States.

Isn't that a clear indication of congressional intent not to give the president the authority for interceptions in the United States?

GONZALES: Sir, I don't know where that record is to reflect that that actually happened.

I think the CRS, Congressional Research Service, said that in the legislative history -- and I may be wrong; it's late -- but I believe

that they said there's no record to indicate that that ever occurred, quite frankly.

I think, as I indicated in my opening statement, I think the American public, I think our soldiers, I think our courts ought to be able to rely upon the plain language passed by the Congress. And there's no question that the resolution talked about the president of the United States protecting Americans both here and abroad.

And we have to put it in context. We were just attacked here in this country, from folks within our country, communicating within our country.

It's hard to imagine, as smart as you are, that you wouldn't provide to the president of the United States the grantive authority to at least deal with a similar kind of threat to the one we just experienced.

SPECTER: The law involving wiretapping, prior to the enactment of the Foreign Intelligence Surveillance Act, had the preceding sentence, quote: "Nothing contained" -- referring to the law -- "shall limit the constitutional power of the president to obtain foreign intelligence information deemed essential to the security of the United States."

When the Foreign Intelligence Surveillance Act was passed, that language was stricken. So by all customary standards of statutory interpretation, FISA, Foreign Intelligence Surveillance Act, changed that 180 degrees, didn't it?

GONZALES: There is no question, if you look at the legislative history and in the record, that Congress intended to try to limit whatever president's inherent authority existed.

But there's also, from my review of the record, a clear indication that some members of Congress were concerned about the constitutionality of this effort.

And I think the House conference report talked about the fact -- this is what we're trying to do. It may be that the Supreme Court may have a different view of this. And I'm paraphrasing here. But that's a remarkable acknowledgement by a member of Congress that: Geez, is what we're doing here is constitutional?

No question about it than that.

Certainly, Congress intended to [****] the president's authority, but also Congress, when they passed FISA, included Section 109, which is a main criminal provision in FISA that talks about, "You can't engage in electronic surveillance under [****] law, except as otherwise provided by statute."

And so I think we have to apply a fairly possible reading of the statute in that way, in order to avoid a very, in my judgment, a tough

constitutional question as to whether or not -- does the Congress have the constitutional authority to pass the statute that infringes upon the president's inherent authority as commander in chief to engage in electronic surveillance of an enemy during a time of war?

SPECTER: I don't think you can use the principle of avoiding a tough constitutional conflict by disagreeing with the plain words of the statute.

Attorney General Gonzales, when members of Congress heard about your contention that the resolution authorizing the use of force amended the Foreign Intelligence Surveillance Act, there was general shock.

GONZALES: Sir, we've never asserted that FISA has been amended. We've always asserted that our interpretation of FISA, which contemplates another statute and we have that here in the authorization to use force, that those complement each other. This is not a situation where FISA has been overwritten or FISA has been amended. That's never been our position.

SPECTER: That just defies logic and plain English. FISA says squarely that you can't have electronic surveillance of any person without a warrant.

And you are saying, when you tag on to this other statute, which isn't a penal provision, that those words in FISA are no longer applicable, that there's been a later statutory resolution by Congress which changes that.

Attorney General Gonzales, I think we come back to the Jackson formula. And my judgment, with some experience in the field -- and I was starting to tell you how shocked people were when we found out you thought that what we had done on the resolution of September 14th authorized electronic surveillance, just nobody had that in the remotest concept.

And Senator Graham has articulated in very forceful terms the consequence of the administration making this interpretation, that before you ever get any authority from Congress again, we're going to go through every conceivable exception we can think of, or we just may not give the authority, because you come back to relying on inherent authority.

And you may have the inherent authority. You may have the Article II authority, but I do not think that any fair, realistic reading of the September 14th resolution gives you the power to conduct electronic surveillance.

That brings me to, really, what Jackson said, and it's so wise, it's worth reading again, quote: "When the president takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb, for then he can rely upon his own constitutional

powers, minus any constitutional powers of Congress over the matter."

Now, my reading of this situation legally is that there has been an express will of Congress to the contrary. And that when the president seeks to rely upon his own inherent power, then he is disregarding Congressional constitutional power.

And then Jackson goes on, quote, "Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon subject."

And I think that's what you're doing, you're disabling Congress from acting on the subject which Congress did, signed by the president.

And then Justice Jackson goes on for really the critical language, "Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution."

SPECTER: That's what we're doing here today. We're going to do it a lot more.

And then these are the critical words, more so than any of the others, quote: "For what is at stake is the equilibrium established by our constitutional system."

And there's a very high value placed on the equilibrium of our constitutional system. That means everything.

GONZALES: I agree, Senator.

SPECTER: OK. Well, finally we found something to agree upon.

Now, on the issue of the inherent power of the president, I believe the president has very substantial Article II power. I believe he does. And we have to be concerned, as a life-or-death matter, about AL Qaida. We really do.

And I subscribe to the good faith of the president as to what he has done here. And I've said that publicly. And I subscribe to your good faith in what you have done here.

And I just hope that there will be oversight somewhere along the line -- perhaps in the Intelligence Committee, perhaps in the Intelligence Committee -- to get into the details, the interstices, the semicolons is what you're doing -- because I know you can't do that here.

But I don't think you can measure the president's inherent authority under Article II without knowing what you're doing. Just cannot do it. Because that authority is not unlimited, and you've agreed to that.

GONZALES: I agree with that.

SPECTER: It's not a blank check.

GONZALES: That is correct, sir.

SPECTER: So it has to be within the parameters of being reasonable. And the cases, the circuit opinions emphasize the

reasonable parameters. And the Supreme Court hasn't ruled on this issue yet. It's an open question. And the circuit opinions are mostly, if not all predating the Foreign Intelligence Surveillance Act.

So I just hope the Intelligence Committee is going to come down to brass tacks here, and I hope it's the committee and not just the ranking and chairman. Both Senator Roberts and Senator Rockefeller have expressed forcefully their concern about not being lawyers and not having an opportunity to present these issues to lawyers to get a legal interpretation to square the facts up with what the law is. They just have been very explicit in their own limitations.

So, in conclusion, two most popular words of any presentation, I hope you will give weighty thought to taking this issue to the Foreign Intelligence Surveillance Court, lock, stock and barrel. Let them see the whole thing and let them pass judgment. Because if they did disagree with you, it's the equilibrium of our constitutional system which is involved.

And the AL Qaida threat is very weighty, but so is the equilibrium of our constitutional system.

GONZALES: I agree, Senator.

SPECTER: And security is weighty, but so are civil rights.

Thank you very much, Attorney General Gonzales. You have established very forcefully your fortitude and stamina here today, even if we disagree with portions of your case.

GONZALES: Thank you, Mr. Chairman.

SPECTER: That concludes the hearing.

END

U.S. SENATOR ARLEN SPECTER (R-PA)

Chairman

Washington, D.C.

2006 WL 270364 (F.D.C.H.)

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