

January 5, 2006
A Panel Discussion Presented by the Constitution Project:
Domestic Spying, NSA Surveillance, and the Rule of Law

Sharon Bradford Franklin: I'm Sharon Bradford Franklin. I'm a Senior Counsel with the Constitution Project and I'd like to welcome everyone, and thank you for coming here today for our panel discussion on "Domestic Spying, NSA Surveillance, and the Rule of Law." For those of you not familiar with the Constitution Project, we are a bipartisan non-profit organization here in D.C., and we specialize in conducting public education on controversial constitutional and other legal issues, and in reaching across partisan lines to form consensus among Americans and to conduct public education around those consensus solutions.

Before I introduce our moderator, and as we get the program underway, I do want to thank Hogan & Hartson for hosting this program today and for providing us with refreshments.

And I want to point out that today's program is relevant to, and a project of, two different Initiatives at the Constitution Project. One is our War Powers Initiative, which just released, this past summer, this report – copies of which are available at the front – on "Deciding To Use Force Abroad: War Powers in a System of Checks and Balances," which talks a lot about what we will be talking about today – the importance of having all three branches of our government play a role in decisions about the use of force and the consequent powers to that use of force in a conflict. Also very relevant to our panel is our Liberty and Security Initiative, which was founded shortly after September 11th and which addresses issues of how we preserve our nation's civil liberties even as we work to enhance our security. And our Liberty and Security Initiative, shortly after this program, the NSA domestic surveillance program, was disclosed, did release a statement – copies of which are also available – expressing the grave concerns of committee members about the legality of that program. And you'll hear more about that today. Members of our panel have participated in – most members of our panel have participated in one or more of those Initiatives, as our moderator, Jane Stromseth, will tell you more, and more detail about the bios of our panelists.

We have managed to assemble a group that is a bipartisan group, where each one of our members here today has experience in one or more branches of government. And so we really bring a wealth of experience and a variety of perspectives to the issue before us today. And with that, I'd like to introduce our moderator. Jane Stromseth is a Professor of Law at Georgetown Law Center, where she teaches and writes in areas of constitutional law, international law, law and the use of force, and conflict resolution, and she's published extensively on those topics. And she herself has also served, among other places, at the National Security Council and at the State Department. And with that, I turn it over.

Jane Stromseth: Thank you very much. On behalf of the Constitution Project, I'm pleased to welcome you here at our panel on "Domestic Spying, NSA Surveillance, and the Rule of Law." The recently disclosed administration program of warrantless surveillance raises a whole lot of questions. Some of them are factual questions: What is the full extent of the program – and we obviously don't know as much as we may know in the future? Why didn't the President choose to use the procedures set forth under the Foreign Intelligence Surveillance Act, and if he felt that

those procedures were inadequate, why did he not go to Congress to try to seek some additional procedures and additional authority? To what extent were members of Congress briefed about the program? And what extent did they have opportunities to express concern? These are a set of factual questions, and they're more that we will hopefully learn more about in the days to come, including in upcoming congressional hearings.

But what we'd like to focus on, I think, here today, are more of the legal and some of the policy questions that are raised by the recent disclosures. And let me just mention some of them: Are the President's claims that he had authority – constitutional and statutory authority – to act without first obtaining a warrant, persuasive? How can Congress play a more effective oversight role in addressing the difficult issues raised by electronic surveillance? Another question: Are the FISA procedures adequate for current threats and current technological realities, or do they need to be revised in some manner? And I guess at the deepest level, the questions that are raised by the recent disclosures are the fundamental question of what is the proper balance between actions to protect national security and protecting civil liberties, and how can we ensure that our constitutional system of checks and balances, which is so fundamental, works effectively in these challenging times?

Now our panelists, as Sharon mentioned, come from a diversity of backgrounds. They're a bipartisan group. Many of them have had experience in all three branches of government or at least in one or two of them. And they bring to these issues a wide host of – a wide array of experience, including in many instances direct experience in crafting legislation including the FISA statute, designed to address precisely these questions about the balance between security and civil liberties. So I am delighted to have this group assembled. And let me introduce briefly the panelists now. You have a fuller bio in your program, but I'll highlight some of the most, I think, relevant information.

Our first panelist, Donald Santarelli, is a lawyer in private practice with the law firm of Bell Boyd & Lloyd, and he previously served as counsel to both the House and Senate Judiciary Committees and as Associate Deputy Attorney General. During his time on the Hill, he contributed to the development of Title III of the Omnibus Crime Control and Safe Streets Acts of 1968, which clarified federal authority in electronic surveillance and eavesdropping. Our second panelist will be the Honorable Patricia Wald who served for over a decade as a Judge on the Court of Appeals for the District of Columbia Circuit, including as its Chief Judge. And more recently, she served as a Judge on the International Criminal Tribunal for the former Yugoslavia, and as a Member of the President's Commission on the Capabilities of the Intelligence Community. In the late 1970's, Judge Wald served as Assistant Attorney General for Legislative Affairs, and in that capacity was involved in the negotiations between the Executive and Legislative branches that ultimately lead to the Foreign Intelligence Surveillance Act of 1978. The next speaker will be the Honorable Mickey Edwards, who served as a Member of Congress for over 16 years, where he was the ranking Republican Member of the Appropriations Subcommittee on Foreign Operations and Chair of the House Republican Policy Committee. He is currently Director of the Leadership Program at the Aspen Institute and a Professor at Princeton University's Woodrow Wilson School, and he has written extensively on Congress' role in our constitutional system, and he has served as Co-Chair of the Constitution Project's War Powers Initiative. Our final speaker will be Morton Halperin, who's Director of

U.S. Advocacy at the Open Society Institute and Senior Fellow and Senior Vice President at the Center for American Progress. He served in government in many roles, including as Director of Policy Planning at the State Department and for many years directed the Center for National Securities Studies and the Washington office at the American Civil Liberties Union. And, as far as we know, he's the only panelist who's ever been wiretapped, and I'm sure that will come up in either his remarks or discussion. Each speaker will talk briefly – probably about five minutes. And then I'll give the panelists a chance to respond to one another. And at that point, I may pose a question or two, but I'll try to save plenty of time to open it up to this group, and hopefully we can have a good discussion this morning. So without further ado, I'd like to turn to Donald Santarelli.

Donald Santarelli: And he would like to say, wow, that you left out a very important fact about Pat Wald. She was present when an administration even proposed a right to privacy statute, which was one of the bills being considered by the House and Senate Judiciary Committees in what led up to Title III of the Omnibus Crime Control Act, which was the first real authorization of wiretapping – first clarification of the procedural prohibitions and permissions in the use of what was then called wiretapping or electronic surveillance, which also included eavesdropping. I don't hear much about these bills about right to privacy from present and even immediate past administrations, but this is an old problem.

I'm going to try to put something into perspective because we all start somewhere. We as a government didn't pay very much attention to the issue of national security exemptions for the Executive Branch. When we conducted hearings back in '66 and '67 in what led up to the Title III Act, there was a general understanding that there was an inherent power in the President and the Chief Executive in national security matters to simply be free of legal restraints and/or constitutional prohibitions. And so it was a mantra among the Congress at the time. Nothing contained herein will curtail or control a president's traditional power in national security matters. The problem was that no one ever defined national security matters. We didn't have a significant domestic component to national security considerations during that period, so the focus was almost entirely on foreign intelligence and foreign activities. We were really not confronted with that problem until sort of the *Katz* case, which finally gave us some guidance. You always have to look at the Supreme Court for guidance.

I can remember when congressmen and senators used to say let's discuss the constitutional limitations of our power to legislate, etc. We don't see much of that anymore. Certainly our judiciary committees in my day were referral committees that almost nothing went through the Congress that didn't get screened by Judiciary to see whether it was within the scope of the constitutional power of the Congress to in fact enact it. [Inaudible] loss of debate at the moment and I deplore and decry that. As the guy who wrote the preventative detention statute – the first of them – and the guy who wrote the first of the no-knock statutes, which we called “quick entry” in those days, we were very seriously concerned about the constitutional issues and vetted those proposals for many months (and sometimes years) before, in fact, enacting them and putting them forward for enactment. Again, a sad moment in our history.

But when Title III was considered, I want to give you some insight into what even then was understood. That whereas the President had this plenary power, there was a provision in the

exemption saying that “nothing shall limit the constitutional powers of the president to take such measures as he deems necessary to protect the nation against actual or potential attack or other hostile acts of a foreign power (qualifying that provision) or any other serious threat to the United States.” I was commissioned to write that little preamble and frankly we didn’t make a distinction between domestic and foreign intelligence very carefully in the beginning. But we certainly did in the end. And I want to read you a colloquy between a very distinguished member of the then House of Representatives Senator – late Senator Mack Mathais from Maryland -- and the real author of the Title III provisions Bob Blakey, who was then a professor at Notre Dame and went on to fame as the explicator of organized crime applications in domestic cases of surveillance – electronic surveillance. Blakey says to Mathais “in cases of domestic surveillance we ought to ask for a court order.” And Mathais says “but what is domestic? Is it geographical or subject matter?” Blakey says “Well certainly subject matter. Certainly an activity that takes place in this country and deals with American citizens, perhaps we can make presence or absence of American citizens a key feature.” Mathais says, “That’s an objective test. But if it’s subjective, if it’s purely in the discretion of the Executive, and we have a very difficult job of protecting the right to privacy.” Blakey says “To distinguish between domestic and foreign must be done. It’s not beyond the wit of man.” So that’s sort of where we are — trying to distinguish between the limits on the President’s sort of plenary power and foreign security matters.

That leads us directly to FISA, which was the Congress’ responsible effort to try to bring some rule of law to a significantly exempt area of executive authority. I wish I had here Stephen Ambrose or some other historian with the sweep that I don’t have to put these ups and downs of our Republic’s efforts to try to balance the issue of security versus liberty. At different points in the history of our country, we are more concerned with one than the other. For many periods we were — and certainly our earlier periods — we were very concerned about liberty and how to protect liberty. That’s because the threats to our internal security were not very great. They were all external. With the advent of the protest movement in the Vietnam War, when we saw the excesses of *my* Administration at that time in “spying and surveillance on dissidents,” with the highly questionable basis of national security. How were the student protests threats to national security? Well, that was a very long and probably erroneous reach. We saw the results of that in the Church Commission Committee and the Commission thereafter which put strict restrictions on the use of such intelligence gathering. But now we’re confronted with it like a pie in the face. They weren’t really concerned until the deprivation of liberty began as a result of these surveillances. It was one thing to forego criminal prosecutions, which there seemed to be a willingness to do to gather intelligence. But once that intelligence is used other than for criminal prosecutions, but to detain [inaudible] persons from their liberty then we have the real confrontation that we have not resolved. So, I’ve taken too long only to set up the stage for the real experts who will talk about the processes that we have tried to use to have a [inaudible].

The Honorable Patricia Wald: Okay. As Jane mentioned, I was the Assistant Attorney General for Legislation at the time FISA was passed. I was present at certainly not all but some of the discussions both inside the Department of Justice and between the Department of Justice people and the Hill people when it was passed. But I did find it necessary in the last week when I knew I was going to appear here to go back and look at the actual bound legislative, citable

legislative history of the provision. And it's brought me to the following conclusions, which I'll state very briefly because of the time limits.

First, I think there's been a great deal of confusion among some of the discussions in the press about the inherent authority questions, which, of course, the Administration cites the inherent authority of the President as Commander-in-Chief in Article II as the basis for the authority for this extra FISA wiretapping. I think there's no question that initially the President does have an inherent power to collect foreign intelligence in order to protect the national security of the United States. That power may be – it's never actually been decided by the Supreme Court, there was some lower court holdings – it may be subject to certain Fourth Amendment protections, but we're not quite sure at this point what they are. But I think that in looking at FISA we have to move to the next step, which is that in constitutional jurisprudence it seems relatively clear to me that this is a shared power, a power that is shared between the President and Congress. And, indeed, in the *Youngstown Sheet & Tube* case, the steel seizure cases, in which President Truman's ability to seize the steel plants during the Korean War on grounds of national security was contested – the famous Jackson concurrence – which is still very much so far as I know the law of the land, which says that – and the quote has appeared very often but I think it's key to keep in mind because I point out to you that this is the very quote and this is what the conference report of FISA said it was basing its FISA legislative provisions on. The quote from Jackson is –

Where 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 only upon his own constitutional powers minus any constitutional power of Congress over the matter. In finding inherent authority when it has been expressly withheld is not merely to disregard in a particular instance the will of Congress, it is to disregard the whole legislative process and the constitutional division of authority between the President and Congress.

That I use as a backdrop for my reading of FISA, that this is a question of shared power. Nobody has suggested that the President has sole and exclusive power to deal with the collection of foreign information. Obviously Congress set up CIA and [inaudible] and it's ruled in numerous – in the Patriot Act and various other places – about this particular type of power. So this Jackson quote about shared power is the explicit basis, as I said, on which Congress legislated FISA, and they said in their conference report using that specific quote.

Now, there's no question in my mind, not just from memory which can always be faulty after 20 years but from re-reading the legislative history, that when it came time for FISA, regardless of what had happened earlier with Title III or in some of the earlier enunciations, the Congress was explicit in that FISA was to be the exclusive means by which electronic surveillance was to be carried out. They could not have been more clear, and this, I think, repudiates from my point of view, any talk about tacit agreements that there could still be inherent power in the President that contradicted – that could be used in a way contradictory – to the FISA. This is not to say, and I keep emphasizing this, that there may not still be – and now I have to enter the world of fantasy

about which I want to tell you, despite my having been on the WMD Commission, I knew nothing about this before and I know nothing about the new means that the NSA has at its disposal, if they have any, but I think that it's well to bring home that FISA does deal only with electronic surveillance as defined in the FISA Act. And I think a short way to express that they do is the contents of communications that are intercepted through wire or radio waves. It is possible that there could be some new means that doesn't involve that particular method of collecting information in which there might still be some kind of inherent presidential power out there because Congress has not entered the field. But they were extremely clear in every step along the way, including statements by Attorney General Bell which I reread to say that Congress intended that this would be the exclusive way by which electronic surveillance would be carried on. They made such statements as – I'll just quote one or two in the Senate Report.

“This constitutes the exclusive means by which electronic surveillance is conducted.”

“The bill recognizes no inherent power of the President in this area.”

And to cement that, two specific things they did. One is they repealed 18 U.S.C. 2511(3), which is in the wiretap bill, which is somewhat ambiguously worded, but appeared to suggest that the President might still retain some inherent power to carry on in areas that went beyond the scope of the statute. But they said this has been confusing, it's caused controversy, we're just plain repealing it because this, as far as we're concerned, is the exclusive realm. The second thing they did was an earlier version of this very bill, which had been first introduced during the President Ford administration, preceding President Carter, had actually contained a provision in a 1976 bill which said nothing limits the constitutional power of the president to order electronic surveillance if the facts and circumstances give rise to situations beyond the scope of this chapter. They took that out completely. They made it crystal clear that this was to be the exclusive means by which – I take from that that in the area of electronic surveillance and under the constitutional jurisprudence as I understand it, Congress has entered the field (hasn't totally taken over the field) but it's entered the field in electronic surveillance. It's made its view crystal clear that this is the exclusive means and therefore I can come to no conclusion except that it is a violation of FISA, in fact they do say that it's a criminal act to electronically surveil in any way except through this.

But jumping over that, just very quickly and I'll finish in one minute, it does seem to me that the implications, the constitutional implications are very serious in the sense that if the argument is being made, and I think it is but as we see [inaudible] elaborated in later congressional hearings, that there is some inherent power in the President to violate laws which have been passed in areas of shared power, then it's very difficult to see how a separation of powers government can operate in areas of national security or in times of war time, because it appears it would make the Executive primus among peers. And I keep asking myself, although the Administration stresses we're only doing it in terms of communications in which one person is in the United States but the other person is based abroad or is a foreigner and is not a United States person. But if it is inherent power which transcends the legislative means by which it was to be exercised, what is to prevent it from transcending these international communications and going straight to all the domestic communications? Certainly there may come a time when communications between

people in the United States themselves, etc. will be considered to be in the national security. So it is a power which is not easy to keep cabined in.

I'll finish, though, to say that I think there is a real problem here and I don't know how Congress is going to solve it. It may well be, and I don't have the expertise to know, that FISA could possibly be inadequate to the task of collecting the necessary information. Some people, on the other hand, say it's all outdated anyway – what NSA does now. I simply don't know about that. But if it is to be changed, if powers are to be given to the President or to other parts of the Executive, then I think certainly Congress has to enter this field unless it repeals FISA. But the means by which it can conduct this debate, given real national security risks to disseminating information, I think it's a giant challenge to Congress. How it's going to retain its shared power in this area at the same time it allows a fulsome debate about what's necessary.

The last point I just mentioned, I'm sure one of the other people will pick it up, is I do not think by any count the Authorization For the Use of Military Force – that is the resolution that Congress passed allowing all appropriate and necessary force – can trump FISA here. Other people in the war power – there's a longer discussion of this in the War Powers Report of the Constitution Project – historically that's never been proven. Resolutions wipe out all prior constraints on the Executive in war time? And, additionally, I think the citation of the *Hamdi* case is not very persuasive. *Hamdi* involved someone being detained on the battlefield. There is no question if you authorize military force that allows you to go to war it's got to include some ability to detain people who are on the military battleground. Even then, however, you had arguably five members of the Supreme Court in their various opinions saying they still thought that a prior statute saying you can't detain a United States citizen except in pursuance of a congressional act had been violated. So that question is certainly up in the air. I'm done.

Jane Stromseth: Thank you very much Pat, and now Mickey will address the issues from the congressional perspective.

The Honorable Mickey Edwards: I think probably because of some of the things I want to say I ought to reiterate that in my previous life I was a member of the Republican leadership in the Congress, and at one time, believe it or not, was the National Chairman of the American Conservative Union, which I just want you to keep that in mind when I say some of the things I'm going to say about the Administration and about the Congressional leadership. I'm really delighted that we've decided to put on this program today, Jane, and to talk about this issue because basically what has been going on from the Administration's standpoint in my view is a shell game. The essence of the shell game is misdirection. It's getting people to look off in one direction while you move things around over here. And the Administration has been very good at getting everybody to consider this issue from the standpoint of – in a time of national security dangers, you know, should we or should we not allow eavesdropping, wiretapping, mail opening or whatever it is – and it's [inaudible] – or torture or extraordinary rendition, whatever – it's always, hey, we have this problem and we're under threat and therefore don't you all agree – even torture, you know – imagine that the person you torture then reveals information that would allow us to stop them from blowing up the school at which your children are going to class. So it's real easy to get people talking about and nodding their heads in agreement with the President that we should do whatever is necessary to protect ourselves.

But the real issue here is not whether or not the government is permitted to do that but who decides whether or not the government is permitted to do that. And so – and I worry because I would imagine as I look at the reaction some people in the country have when the President makes these arguments is that – to a significant degree a lot of people today may tend to look at the separation of powers as a legal technicality. That’s why I’m glad we’re having a program like this that focuses on the separation of powers. I want to start with today: Number one, I don’t have the expertise that the other people on the panel have about what’s the technicalities of the current law, or how it came about, what its history was. To me that’s not relevant, frankly, because if – I’m not concerned with what the current language says. I’m not concerned with catching the President at having violated an existing statute. What matters is what it should say, what the law should be, what should be permitted and what should not be permitted from this day forward.

And the – I do speak from a congressional perspective but I also think it’s a constitutional perspective. And one of the things I always took very seriously when I was sworn into Congress and thereafter was, people don’t think about this – Article I, Section 1, sentence 1, phrase 1, clause 1, word 1, you know, all legislative authority is within the Congress of the United States. Not *most*, not all *domestic* legislative authority, *all* legislative authority – who decides what the law is – is the Congress. There is no lack of clarity in the – there’s a lack of clarity in the constitution about a lot of things, but not about that. Believe it or not, as critical as I am about the President, I’m not going to focus my criticism on the President. It is in the nature of the Presidency to overreach. With due respect, you know what you’re talking about, in the old days, long time ago, our primary focus was more on liberty rather than security. Well, you know, not when we had the Alien and Sedition Act, not when we suspended habeas corpus, not when we locked up Japanese Americans. We’ve had a history of people in the executive office trying to gather more power unto themselves. It’s probably in the nature of humanity not just the presidency.

So my concern – and just the simple point I want to make and I’m not going to take any full five minutes – is that I’m not concerned so much about presidential overreaching as I am by the absence of the Congress, by the silence of the Congress, by the submissiveness of the Congress. And I might say that I fault both parties, the Republicans control the Congress and have an obligation to stand up for what the Congress’ duties and obligations are. But the Democrats equally – take whether it’s this or Abramoff – tend to try to paint themselves as the opposite party, as the challengers of what’s going on rather than sitting down and saying what is our obligation. Let me make clear my understanding. As I read Article I of the Constitution, which gives all legislative authority to the Congress, this is not granting to the Congress a right, it not granting to the Congress an authority, it is putting upon the Congress an obligation. It is putting upon the Congress a responsibility. If today we are engaged in doing things that are counter to what we believe the Constitution requires or our love of liberty demands – wiretapping. It is up to the Congress to step in and clarify, to state – well maybe when we originally wrote the law we didn’t make it clear enough, maybe we left something out, maybe we added something we should not have – we’re not bound by what happened. This is one of the things about the Congress. It’s not a court. The Congress is not bound by what was done 10 years ago, 20 years ago. The members of Congress can step in today and say we’re looking at the situation and this

is what we are going to declare the obligation and the limits of the authorities to be. I would hope that as we continue the discussion we consider not only whether or not there is malfeasance by the President but whether there's nonfeasance by the Congress.

And I go to the Hill and I spend my time talking to the people I worked with there and the people who I – you know, [inaudible] I've been gone from Congress for 12 years and so a lot of the younger members I don't know. As it happens, the ones I do know are all the people in charge now in the House and Senate. And I go to the House floor and I look at them and I say, "where are you guys?" I mention Abramoff, it's everything, whether it's the ethics or whether it's setting the rules about what we can do about people we capture on the battlefield, where we can send them, whether or not we can tap the phones of American citizens. Where are you Congress? As you sit there, you're now on a break. It's a nice break. Congress is not in session in January because if the Congress had been in session in January, you know, if Tom Delay did not have his legal problems behind him, you know, we would be in a terrible situation where there might be challenges to the Republican leadership. Well, we certainly wouldn't want that to happen, so, you know, the Congress, everybody's back home. That's the only point I really wanted to make. We have to seriously concern ourselves with a situation in which Americans are being overheard in their telephone conversations or other things, and if the situation we're in for our national security demands that that be done, then that's up to the people themselves to say protect us by listening in. And you do that through the Congress, and that's where I would put the burden.

Jane Stromseth: Thank you, Mickey Edwards. Our last speaker is Morton Halperin.

Dr. Morton Halperin: Thank you. I want to pick up and elaborate on some of the points that have already been made. I think we start with the fact as Pat suggested that Congress was absolutely clear that it intended that FISA be the exclusive means to conduct electronic surveillance within the United States. The Administration has not yet given us its legal rationale which was given to the President before he started the program. One has to hope that a President of the United States does not start a program of domestic surveillance without being shown a piece of paper. But we have not been given that yet. What we have been given is a legal justification clearly written after the event because it relies primarily on a Supreme Court decision that did not come down until long after the program started. So as prescient as the Justice Department is, it could not have been relying on that decision. Moreover, the legal analysis in the memo is short, sloppy and incompatible with all the basic tenets of both Constitutional and statutory analysis and therefore it's almost insulting. But I think one does have to take it seriously because it's all we have.

And as Judge Wald says it basically argues that the Authorization For the Use of Military Force authorizes this electronic surveillance program. And it argues that because it says the Supreme Court said in *Hamdi* that the Authorization For Use of Military Force authorizes the United States to arrest people on the battlefield and to detain them for the duration of the conflict in Afghanistan. There're many problems with that legal logic, but let me just suggest one way to think about it, which is that Congress occupied these two fields – one the question of the right to detain Americans captured in a war very differently than it occupied the field in electronic surveillance. In the case of detention of Americans, it repealed the statute which had authorized

the detention of Americans in war time and had been part of the basis for the Japanese detention. And it said you may not detain Americans except pursuant to a statute, by which it meant a statute that we may enact in the future because neither that war nor any other war set us a scheme for detaining Americans. So in that context the question of did the Authorization For Use of Military Force include the authorization to detain Americans captured on the battlefield? And I think the answer is yes, because Congress surely did not intend that when American soldiers are fighting in Afghanistan and somebody offers to surrender that they have to ask the person if they are an American citizen and say if they're not an American – if they are an American citizen they have no right to detain them and have to let them go on shooting at Americans. Given that Congress said you can only detain people pursuant to a statute if they are Americans and given that it authorized the use of military force in Afghanistan, I think Justice O'Connor was correct in saying that Congress had intended – had to be understood to have intended this.

In the case of electronic surveillance, Congress occupied the field in a totally different way. It did repeal the section that had granted authority to the President – the one that's been quoted before. But then as Judge Wald stated, in a number of ways made it absolutely clear that it had occupied the field. It said this is the exclusive means. It said it's a crime to wiretap under [inaudible] or unless you base it on a warrant. And it repealed the section that had granted the additional authority. And the legislative history is full of clear statements reinforcing the clear and unambiguous language of the statute. Moreover, I was deeply involved in these negotiations. Congress knew the Executive Branch was then engaging in warrantless electronic surveillance and made it clear that it would grant this new authority, create the FISA court, create a different standard for wiretapping only if the Executive Branch agreed – whatever it thought was its inherent power in the absence of legislation – only if the Executive Branch agreed that this was the sole means to do so. Moreover, Congress considered both emergencies and war-time. It said first in FISA that the President could wiretap for 24 hours in an emergency and in the Patriot Act it extended it to 72 hours. It also said that if the Congress declared war (and certainly this Authorization For the Use of Military Force resolution is not more than a declaration of war) that if Congress declared war, the President could wiretap warrantlessly for 15 days while he came back to the Congress to seek additional authority.

So here Congress occupied the field in a totally clear and unambiguous way and it is, I think, not the serious legal argument to suggest that it meant to wipe all that away by authorizing the use of military force on the battlefield, because it had already provided with the President with the authority he needed to conduct electronic surveillance in war time and in emergencies by the scheme that it set out in FISA. And, therefore, I think, it is a frivolous legal argument to claim that the Authorization For the Use of Military Force will do that. I think by the way that the Executive Branch knows that, which is why it is so desperate to keep the *Padilla* case away from the Supreme Court, because it is I think very likely that the reasoning by which the Supreme Court deals with *Padilla* will make clear that the Executive Branch's interpretation of *Hamdi* is simply overreaching enormously by what it means.

But I think beyond the sort of formal constitutional issue there's something much more at stake here. And it goes to not only this issue but the way the Executive Branch has dealt with a wide range of issues. It is often said that post-9/11 that the question is how do we balance between national security and civil liberties. But I would say that it is a prior question. And it's one that

Justice O'Connor was again concerned with. Which is the question of how we decide that in a constitutional democracy. And the way we decide that in a constitutional democracy is that the president comes forward and asks for the authorities he needed, as President Ford did with FISA. And then the Congress debates what is to be done and it enacts legislation, and that legislation provides for meaningful judicial review of what the President proposes to do and what the Congress has given him the authority to do. And then the court openly decides whether that is constitutional.

We thought after 9/11 that the President was still committed to that procedure. He came to Congress and asked for expanded authority to detain aliens and got expanded authority to detain aliens. And then ignored it. He's never used that authority. Instead, he invented his own scheme where he sits in his office and decides that one of you or one of us is something called an enemy combatant and then tells the military to put you in a military prison and not tell your lawyer and not tell your family and not let you have access to the courts at all. And it was only when people finally realized that people were in a military prison that the case eventually got to the Supreme Court and the Court said 8 to 1 that the courts have to play a role here and that there's got to be some legislative authority. We've now discovered that he's done the same thing with electronic surveillance and that in that case he's affirmatively lied to us about it. Because the President told the American people what every president since Jimmy Carter signed FISA has said – that whatever they may think about their inherent power they accept the fact that FISA legislated a scheme which says simply you need a warrant if you're going to do electronic surveillance in the United States. The President – we've all seen the quote now in the ACLU ads and other places – said this scheme is in place, we only do electronic surveillance with a court order. He was lying to us. He was telling some version of the truth to eight members of Congress – in violation of the statute which limits the notification to eight people only to covert action and not to intelligence activities. It's not clear how much he told them, whether he told them the full story – it might be that's irrelevant. The scheme was out there.

If the President thought he needed additional authority, he had an obligation to come to the Congress (and not be deterred by advice you won't get the authority). The notion that the President thinks he can conduct surveillance of Americans without Congressional authority and he doesn't ask for it because he's told won't get it is mind-boggling. But I think if he had a reasonable case, he might have gotten it. In any case, he has an obligation to come to the Congress and say I need this additional authority and here is why, and then the Congress can decide whether to give it to him. And then the FISA court and other courts, because the FISA has civil [inaudible] as well as procedures when you use this in a criminal trial, could decide whether that new procedure was constitutional. And I think until that is done, if it is done, that the President is bound by the law as it is and we only get to the question of whether he needs new authority if he comes forward and says what new authority he needs and why. And the notion that you can't defend that without giving away the secret is belied by the FISA legislation. There were many cases in FISA where the government justified a particular sentence by conversations with the Congress (and even with people like me) which never became public, still have not been made public. So what those – how the Executive Branch intended to do or why it needed this can be presented to people in private and still enable the legislation to go forward. There's nothing to suggest that the President could not do that now. In my view, the reason the President has not come to the Congress is that he is in violation of the fundamental principle that

was embodied in FISA, conducting intrusions into the Fourth Amendment protected activities of Americans in the United States without probable cause to believe that they are engaging in improper activity and are agents of a foreign power. I think Americans are being surveilled without the President having that kind of facts about them. And that is really on the substantive level what is fundamentally at stake.

Jane Stromseth: Thank you to Mort and to all of our panelists. I'd like to give them each just half a minute to respond if they wish to something that another panelist said before proceeding further.

Honorable Patricia Wald: I don't know if this is in response but it'll be less than a minute. There are two additional points, I think, on FISA. One is we've been concentrating on the fact that this has been done without a warrant from the FISA court. But I think it's also necessary to emphasize FISA was more than just the warrant procedure in there and so when you are conducting electronic surveillance over and above FISA you are losing not just the judicial review such as it is in the FISA court, but you're losing all the protections for minimization, for U.S. persons that's in the Act; you're losing the protections that are in the Act for what use can be made in court proceedings of that information. We're seeing beginnings of lawsuits involving that and we're using (and this has cropped up in a couple of newspaper accounts), we're using – we're losing, I'm sorry, we're losing the protections against indiscriminate sharing. We're now finding that indeed this information from NSA has been widely shared and we don't know to whom and we don't know on what basis, so that the whole business of trying to somehow go above the congressional-enacted scheme – you're losing a great deal. It's not just a question of whether courts get in it or courts stay out of it, you're losing a whole protective scheme. The only other point I had is that we are involved in this war without end apparently. I mean this is not a declared war as historically we're more used to, so that whatever authority is claimed now theoretically won't ever end till the last terrorist has been wiped off the face of the earth, which could mean several generations hence.

Honorable Mickey Edwards: It's not a response; in addition to something that Mort brought up. When the President was justifying what information he had that led him to decide to go into Iraq, he argued that members of the Congress had access to the same information that he had. And, of course, anybody who had ever served in Congress knew that was nonsense. You had access to whatever information they chose to give you and would answer any question you were smart enough to be sure to ask. And just in the same case, and again I'm being very critical of the people who currently serve in the Congress, but the small group of leaders, intelligence committee and elected leadership, who were ostensibly briefed to some degree about what was happening in terms of the wiretap themselves had an obligation to be aware of this not being something that really fell within the scope of that information that should be limited to only those eight people should have challenged that point. And they should have said well, we're not going to keep it just to ourselves – this is information that needs to be shared on a much broader basis with the Congress. And that again I think was a failure of the – at least with that small group in Congress, the leadership in Congress to say, you know, we're not going to give you the cover where you come in and just talk to eight of us and then we have to keep it secret from everybody else. I thought that was a good point Mort.

Donald Santarelli: Two points that really don't have an answer but need to be in the bosom of all of you young and older policy influential people. What do we do in a society where technology outstrips our traditional concepts of a bill of rights and limited powers of a government? Our only solution to that seems to have been over the years the separation of powers – and that doesn't include just the federal separation of powers but dual federalism and the role that states and local governments play in maintaining divided authority, although with the federalization of criminal law we are in a dangerous position of eliminating the real meaning of dual federalism. Because if the Feds can do everything, they'll do everything because they print money and states have budgets.

I'm terribly troubled by the fact that nobody, there's no [inaudible], there's no central place, there's no group of people really worrying about what it means to have the technological capability to simply mine data. It isn't just surveillance, but data now is shared by everybody with everybody. I mean commercial data sources are mined just as much as government data sources by these massive-type [inaudible] technologies and so the capacity to do dossier development, the capacity to combine with cameras sited in various places to a real time tracing of every human being remains and is capable. I mean you could monitor your bodily functions through your cell phone pulses if the technology – someone devoted themselves to it – since we don't know what NSA's doing. We seem to be in this conundrum of having a secret government and a public government with our liberties at stake and nobody's really asking the question.

And the second point I wanted to make is I've never been comfortable with the FISA court. It is a unilateral and conceivably star chamberish kind of place. Given the data that has been released from it, the number, the proportion of the ratio of grants to denials, you simply have to ask yourself have we created a sham to our consciences by shamming a judicial role which really is meaningful or not? Do we really know whether that judicial role is meaningful? Given the nature of how the appointments are made, given the secrecy of the court, and given the nonstandard of probable cause – I don't know what probable cause is to that court as it is to standard federal court in a hundred years of jurisprudence that we have under the Fourth Amendment – who's asking that question? Is the FISA court a reality or is it the Wizard of Oz, keep your eyes on the screen? We have a process, we have due process – don't tell me how due it is! – but I'm [inaudible] troubling to those of us who have been in government and have seen the tendency of all governments to react, to be reactionary to crises, particularly crises that bestir in the human breast fear. There is no greater enemy to the individual and its collective powers than to be afraid. We will surrender liberty every time we're afraid. Every tyranny has arisen that way, every excess of any government has arisen that way. Where are our voices to quell the tendency of power, questioning of our government when the patriotic accusation is made? If you question the government in time of crisis you are somehow not a patriot.

We need to – you need to look into your hearts guys, cause all – I was there, you were all – you worked for people who make policy. Are you part of the process or are you part of the difference between what ought to be and what is? I say to you – and I'm taking a liberty here – I held several government jobs and every one of them I say to myself today, Santarelli, you weren't bold enough, you didn't do enough to make a difference. You went along a lot of the times, including shredding documents that came to the department from places that they should not have come. Be bold, guys, make a difference. Care about this stuff. Don't let it all be swept

under the carpet of convenience or unattractiveness. There are some in here who have been unattractive and have made a difference.

Morton Halperin: I want to endorse that and [inaudible] I have two other quick points. One is maybe because from my sins I have some responsibility for FISA. I actually think the court has worked reasonably well and I'd be prepared to get into that discussion if people want to. But I want to make a different point, which is that one of the reasons we all thought it was so important to have an unambiguous rule that you needed a warrant was to send a clear signal to the communications industry. At that point it was only AT&T. And the way it worked, and I know because this is the way they started tapping my phone and tapped my own phone for 21 months. On a single phone call between an official in the FBI to an official in AT&T who said hey we've got a number here we need to tap. And he said national security and he said yes. And that was it and the phone company put the tap on. FISA said to the phone company, and now to the communications companies, you can't do that without a warrant or you are violating the criminal laws of the United States. Now it now seems clear that some communications companies have in fact, in violation of the criminal laws of the United States, opened up their communications and let NSA come in and take it all. I think that is one the Achilles heel of this program. And that we need to find a way to get to those companies to tell them they're breaking the law, they're therefore violating the trust of their shareholders who have a right to assume that they obey the criminal laws of the United States. And to make them stop because it is clear that notwithstanding NSA's powers they need the cooperation of the communications industry and they're being given it in violation of the laws of the United States.

Jane Stromseth: Great. Well I'm very appreciative for all these very thoughtful and provocative and bold remarks. And I think it's clear from the panel that they're a lot of shared concerns among the panelists. A clear point – that war powers, protecting the United States and striking a balance between national security and liberty, is a shared power, a power that depends vitally on Congress as well as the President, on public debate about how those lines should be struck and then how critical it is when we've got a war against terrorism that could go on indefinitely, that these issues are debated and taken up by Congress. And the sort of overarching question of who will stand up to defend the system of checks and balances that is the foundation of our constitutional structure. When few members of Congress are informed of secret programs, if the President doesn't come to Congress to seek authority, who will stand up and say this is something that Congress needs to address and needs to address on behalf of the American people? Who after all are those for whom this Constitution is established? So, there are a number of very critical issues that I think have been raised, but I don't want to take more time. I'd like to open it up because I know there're a lots of very interesting people in the audience who deal with these issues all the time. Mark --

Mark Agrast (member of audience): Thanks very much to all the panelists. I have a question chiefly for Congressman Edwards. I'm Mark Agrast, Center for American Progress. I just wondered in light of the comments yesterday from the ranking member of the House Intelligence Committee in which he said that the consultation [inaudible] was insufficient as a legal matter under the National Security Act [inaudible] consultation with Congress. Do you first of all agree that's the case, and secondly, if it's so, whether or not it's sufficient [inaudible] what ought to be put in its place, if anything, [inaudible] comply with the National Security Act [inaudible]?

Congressman Edwards: Mark, yes, I definitely agree with what Jane said that this was the President trying to put his notice, and we obviously don't know what he said to the [inaudible] but trying to limit it in a way that the law did not permit. I love the call to be bold. What has to happen in my view is for the Speaker and Dr. Frist – I think he forgot he's a Senator – I think for the Speaker and Dr. Frist –

Donald Santarelli: His diagnoses are suspect.

Congressman Edwards: Right – and for Nancy Pelosi and Ron for Harry Reid to jointly say to the President that that notice was insufficient and that the Congress expects a complete briefing on exactly what's being done. Where? It can be done in private, but to the members of Congress generally and to the relevant committees. If the leaders in both parties in the Congress don't stand up for what they're entitled to know as representatives of the American people, the President is going to keep doing stuff like this. I just think the leadership has to be bold and say you owe us an explanation and eight people is not enough.

Morton Halperin: Can I comment? I find that of all the scary things we've learned in the last few weeks about this, maybe the scariest is the notion that now what 12 to 15 leaders of Congress felt themselves bound by a statement from the Executive Branch that they could not share this information with other members of Congress or with their staffs to perform their constitutional functions –

Unknown speaker: It's not separation of powers, is it?

Morton Halperin: There is nothing in the Constitution that says that, the laws setting up the intelligence community say exactly the opposite. Members of Congress are independently elected. The classification system is an Executive Order, has no legal basis in legislation. And it just scares me that a member of – distinguished members of the Senate and House would say – I had no choice I was told, presumably by the Vice President of the United States, that I could not share this with my colleagues. I think their constitutional obligation was to say to the Vice President this is not information that I can keep, that I'm going back to share this with my colleagues, that, if necessary, we will hold a secret session of the Senate and the House to discuss it. But the notion that they just accepted that they could be ordered about by an official of the Executive Branch, I find really scary.

Moderator: Yes, go ahead –

Jonathan Landay (member of audience): Jonathan Landay, Knight-Ridder Newspapers. One of the points that hasn't been addressed here is the fact that the surveillance program is still going on. The President has said he intends to continue it. There has been no one as far as I know, either on the Hill or anywhere else, who've said you have to stop that right now or have gone to court to try to obtain an injunction against this program. What is the – I'm not a lawyer, obviously, so what is the process? Does someone have to show harm before you even go to court or does a member of the intelligence committee, as a member of Congress, do they have

the legal right to go to a court and say I have been harmed by this and I would like to get an injunction?

Jane Stromseth: Pat, do you want take this?

Honorable Patricia Wald: Well, I think we're certainly in uncharted territory here and I'm not as up to date as possible as I should be on the latest standing doctrines. There's always been a problem of Congress going to the courts to object to Executive action. I think, however, when I last looked at this body of jurisprudence, there was room, for instance, if you had, especially if you have the leadership of both houses of Congress saying that this is an infringement of the separation of powers doctrine and also it's an infringement of – well subsequent to that, it's an infringement of FISA. One might well, I'm not suggesting it would be out of the range – one might well run into the kind of political question doctrine as to when two branches try to settle what courts have often called their sort of political/constitutional problems in court as opposed to working them out. However, if I were involved in that litigation I certainly would draw attention to the fact that if you had a situation where Congress had first exhausted its constitutional powers – and its constitutional powers may be in passing legislation or resolutions or whatever – saying we want this stopped until we can see whether or not we'll agree with any kind of amendments or any kind of new legislation that you pass.

And what can we do other than that? Well, one answer to that would be I suppose you can cut off some NSA appropriations for it. So whether a court would actually require that Congress exhaust all of its constitutional powers in order to stop this before the court would intervene, I don't know. On the other hand, certainly if an individual, I think – and again I'm speculating – but if an individual could show, but the problem would always be could you show, and it's secret and that's what some of these people are objecting in criminal cases, saying the evidence has been tainted, we think, but they're not sure. If it could show that in fact that they had been injured by the use of this program, I think their standing would be – and it's an unauthorized program – their standing would be clear.

Jonathan Landay (audience): How would you discover that?

Honorable Patricia Wald: Well, I don't know that. I don't know how you discover it. And again we're back to technology and –

Honorable Mickey Edwards: And what would the scope be –

Honorable Patricia Wald: And what would the scope of the relief be.

Honorable Mickey Edwards: Yes.

Honorable Patricia Wald: That would be [inaudible] the thing they say you can't do – bother this guy any more as opposed to a general injunction kind of thing. I think it may be that the answer here is political in the final analysis, but bold political.

Honorable Mickey Edwards: Can I have one thing to add? My first reaction to your question was when I was in the House during the debate on Panama Canal I sued the President in *Woods v. Carter*, which you can look up, and one of the very interesting and disturbing things to me was that I filed this lawsuit with 59, I think it was, other members of Congress as co-plaintiffs and we were denied on standing. And so that's why I say the leadership has to act to have the Congress to speak out. But the other point Pat made, which is a terrific point, it certainly fits the idea of being bold, if I were still on the Appropriations Committee, I would say Mr. President, maybe we can't get you in court, maybe we don't have the standing, you know, but we're going to cut out 50% of the funds for the Office of the President or the Secretary of Defense or whatever else. I mean the Congress has powers that it is too timid to use. And the power of the purse is a big one.

Dr. Morton Halperin: Can I just – Congress, unfortunately, the first bill Congress passed after it learned about this program was the Defense Appropriations bill where the money was for this program and all they had to do was put in there a line that said no money in this bill can be used to conduct warrantless electronic surveillance in the United States. And it would have all stopped.

Honorable Patricia Wald: [Inaudible] In violation, right –

Dr. Morton Halperin: [inaudible] Not with – except pursuant to FISA. And it would have all stopped. They didn't do that. Nobody proposed it because we feared we'd get the reverse, which is legislation saying that if the President thinks it's necessary, it is authorized. Having spent many years trying to litigate the abuses of the intelligence agencies in the 70s, I think it's pretty clear that it will be very hard to sustain a suit, except what I've already mentioned, which is against the companies based on their failure to honor their fiduciary duties to their stockholders. I think suits against the government, for lots of reasons we can go into, is very, very hard in this area given the Supreme Court's decisions on these questions.

Jane Stromseth: I've seen four hands. What I think I'm going to do is collect the questions from the four people that originally had their hands up and then we'll go back to the panel and then if we have more time we take some additional ones. I think Don was next.

Don Wallace (member of audience): The question is for Pat. There's no question, I think [inaudible] if everything you said is right, and the country shares your views [inaudible] the President, are you so sure, Pat, that you said no question that this is an area of shared power, [inaudible] campaign against terror, the President is the Chief Executive, he's Commander-in-Chief, he very well may think he has exclusive power that cannot be taken from him by the Congress, by all the exclusive, all the exhausted legislation, and I'm sure that's their thinking, [inaudible] prepared to answer. And nothing the Supreme Court has said in recent years answered it. This is not like the [inaudible] it's internal but also it's external. That's the horror of this campaign against terrorists. I do not sleep well at night thinking that you have answered this question. I'm curious to know your view is [inaudible].

Jane Stromseth: In back, yes –

From Audience: Professor Stromseth, you mentioned or requested who would get up for checks and balances and Congressman Edwards discussed [inaudible] how the [inaudible] the Executive Branch was overreaching here and how Congress may not be asserting its constitutional role to the degree that it should. My question is whether anyone is concerned [inaudible] or to address the concerns that to the degree that judicial nominees are deferential to the military and Executive theory [inaudible] that the Judicial Branch would then also not assert its constitutional role and would advocate its role just as Congress would advocate its role?

Ed Spannaus (member of audience): My name is Ed Spannaus, Executive Intelligence Review. If Congress had put in a restriction on NSA funding in the Defense Appropriations bill, what probably would have happened to that is what happened to the McCain Amendment, and the Graham-Levin Amendment and so forth. And the signing statement, as the President said, in my interpretation of the Commander-in-Chief and military executive and blah, blah, blah, I reserve the right to enforce this the way as I see fit. So you have an outright defiance of the clearly expressed [inaudible], McCain Amendment and probably the same thing would have happened there. Now, by way of background, Donald Santarelli, do I need to make any disclosures? (laughter) –

Donald Santarelli: No. But you may (more laughter) –

Ed Spannaus (audience): You were around when Cheney was around and most of [inaudible] the accounts of this current situation indicate that the driving force behind this is Dick Cheney and David Addington and so forth, and that he never accepted the Church Committee, the legislative restrictions that were put on the Executive following everything that happened, not just Watergate but the military –

Donald Santarelli: It's an article of faith in that gang that the Church Committee didn't happen. They chose to ignore it.

Ed Spannaus (audience): So if they ignored it when you have clear legislation, you've got [inaudible] constitutional question of separation of powers, what bold political remedy is there other than impeachment in that kind of situation? What else can be done if they say we're not bound by the laws, we reserve to ourselves the right to do whatever we want and not to listen to the courts, not to listen to Congress? What else can you do?

Jane Stromseth: Great question. I guess I'll take these two in the front, and then you and then we'll go back to the panel. That probably will be all the time we'll have but I encourage those of you who still have questions to come up afterwards. Go ahead.

Stuart Powell (member of audience): I'm Stuart Powell from Hearst Newspapers. I wanted to ask you since FISA was approved in 1978 and we have to presume that NSA's developed additional means to surveil beyond wire radio waves, whether it be surveil via lasers, fiber optic, cable, whatever. Does this open the possibility of the definitional loophole here essentially, where the Administration can argue we're adhering to the FISA requirements, [inaudible] capability to surveil in non-FISA [inaudible] way?

Brittany Benowitz (member of audience): In terms of asking the right question from the Administration – I’m sorry, I’m Brittany Benowitz from the Center for National Security Studies. In terms of asking the right questions from the Administration, [inaudible] and someone asked me [inaudible] electronic surveillance in the United States without a warrant, I would say what’s my justification for doing that? It would [inaudible] make secret [inaudible] take much comfort in that answer. In terms of all the recent Executive Orders, [inaudible] my question is, do we have any [inaudible] recent decision that’s gone beyond [inaudible]?

Jane Stromseth: Well these are superb questions and I will turn it over and perhaps we’ll start with Pat and go down and see if people want to respond to the questions.

Honorable Patricia Wald: On Don’s question – I think you’re, as I understand your question, is might there not be a decent argument that in this area, given the risk of terrorism, etc., that in this area, despite the fact that Congress has entered, entered it in 1978, that the risk is so great that there is some exclusive power that the President has over and above FISA even in this area. The only answers I can give you that are satisfactory to me at least is that kind of reasoning at least in our past constitutional jurisprudence has no end, I mean it’s open-ended. That would mean that the President could in effect if the risk of, the security risk – if he deemed the security risk is high enough, he could overwhelm or trump any statute that Congress has ever passed. I’m using an absurd example here, but if it said you could break into citizens’ homes, etc., because maybe they’ve got some stuff in there, citizens that you think might be suspicious, you can break into their homes –

Panel member: Black bag jobs.

Honorable Patricia Wald: maybe they have something that you need to know. So that – I think it is, without sounding cataclysmic, it is –would be the end certainly during any kind of national security crisis, and as I pointed out this could go on for generations – is the end of constitutional governance in the separation of powers jurisprudence as we know it.

Now I will admit there is somewhere out there a doctrine which we recognize in constitutional law which is even if Congress has passed a law, if that law infringes itself on constitutional separation of powers (and usually the test for that is has it taken away from one of the branches of government something that is so textually granted to that branch in the Constitution or so necessary for it to exercise its powers), then even though Congress had passed the law (and it looked like there was shared powers of the law itself), can be held unconstitutional. The only thing I can think of off the top of my head is not a national security one was *Buckley v. Valeo*, where even though you had a law on appointments which said Congress can make some appointments and the Supreme Court said sorry, appointment power is so much the Executive even if Congress passes a law and accepts it, it’s no way. I don’t think this is comparable and I certainly don’t think in terms of just the President saying this national security is so vital that I have to have this exclusive power over and above whatever Congress has done.

I point out in our War Powers pamphlet – which I hope some of you will read because I think it’s helpful on some of these points – it points out that way back, I guess in the 1800s, that actually when Congress passed a declaration of war it limited you would say, if anything that President as

commander-in-chief has the power to decide how to conduct the war once Congress has declared war. But yet the Congress made limitations on the way that war could be conducted and the Supreme Court upheld that as against a power of – of Executive power. That’s the best I can do, Don.

Let me just say something about non-FISA definitions on that. I am not a technical expert. All I can tell you is my memory of the Act. And a lot of – as Mort pointed out – a lot sessions were held in secret both inside the Department and on the Hill dealing with some of the technical – I remember one of the public witnesses talked about – this was in public and in the hearings – David Watson, who was a communications expert, he talked about this in 1978 – the vast NSA vacuum cleaner mechanisms, you know, which can scoop up everything subject to it being filtered out later. I do read, and I reread, without perhaps understanding at the technical level the definition which is, you know, of electronic surveillance in the Act, which is electrical, mechanical or other surveillance devices of the contents of any wire or radio communication sent or intended to be received by a U.S. person. And then it went on – I don’t know if there’s something that doesn’t fit that definition. If I took a strict legal interpretation, I’d say if there is something that doesn’t fit that definition, there’s an argument there – that you may still be in an area that’s not covered by FISA and may be pre-FISA type thing, which the Supreme Court, as I pointed out, never really got to deal with as to what the Fourth Amendment limitations are on –

Donald Santarelli: Isn’t that the definition of the black bag job? I mean that does not involve –

Honorable Patricia Wald: That does not involve –

Donald Santarelli: radio waves, that’s going in and picking up the piece of paper –

Honorable Patricia Wald: piece of paper, you’re right [inaudible]

Honorable Mickey Edwards: Don, I’m not going to answer your question because I don’t have any expertise, I’m just taking notes when Pat speaks (laughter) –

Honorable Patricia Wald: That’s not true. You just have to be bold, [inaudible] members of Congress, right?

Honorable Mickey Edwards: I’ll just comment very quickly, very quickly on three points. One of the terms of the definitional loophole – we ran into that with Ollie North, remember, you get into real a danger when you don’t just prohibit blankly, but that you start listing all the things, you know, anything you have left out of the list, you know, creates a problem. That’s something we have to be very careful of. On the judicial confirmation – if I were sitting in the Senate now and considering the Alito nomination or any other nomination, I’d stop talking about *Roe v. Wade* and all the other – there’s one question here that I would want know is any nominee’s position as to the powers of the Presidency in relationship to the powers of the Congress. You know, one of the great dangers we have now is that people who are opposed to the Alito nomination or who are supportive of the Alito nomination, you know, are considering the nomination on all the wrong issues. And the most important issue in the country

today is in regard to presidential prerogative and that's what I would want to know of the nominee's position.

The last thing, comment about what can be done. Your question. Yeah, you know, impeachment is always an option; it ain't easy. But back to the – the Congress, and the President hasn't challenged this yet, the Congress has the power of the purse. And you can do a lot from the Appropriations Committee. As Mort says, you just say none of the money may be used for X or you make substantial cuts in the funding of the offices where it hurts the most, OSD or the Office of the President, or whatever, just take their money away. They'll listen. No matter what they believe their prerogatives are, if you don't give them any money they're gonna come say – well, we better talk.

Donald Santarelli: The answer to that is a quote from a high government office in my old Justice Department was “The Chairman of the Appropriations Committee wants that guy to be a district judge?” And the answer was “Thank God he didn't ask to put him on the court of appeals.” (laughter) Appropriations Chairman. The answer to this question what can be done about it isn't simple. Impeachment is a very cumbersome process. What we really lack and Mickey is talking about is *leadership*. Every member of Congress has the capacity to be a leader. Some members are more thoughtful than others, some are bolder than others. A principled, rational, clear explanation for a position that may be unpopular taken by a congressman never fails to work. I don't know why more of them simply don't recognize that. The public is not that stupid even when it's fearful. Lindsay Graham, for example, has taken advantage of the fact of his credentials and his careful, reasoned position which he takes a position on this detention issue and due process in the military detention area – there isn't a person in America that would say he's dead wrong, simply because he has been bold enough and careful enough to be rational in his explanation of the position he's taken. So I simply say the only offset to the Executive Branch's exercise of natural, *natural* instinctive power, is for the Congress to be bolder than it has been – bolder than it has been, whether that's individual leadership, collective leadership or the power of the purse – those are all options.

Dr. Morton Halperin: I guess I would say the outcome of this has to be that the program is stopped. I don't know how that happens. Congress has got to be bold. We've got to find ways to get this into court. We've got to find ways to get this into the court of public opinion on the simple question that we have lost our constitutional system if in violation of clear legislation the President can intrude into our Fourth Amendment protected area and not only suffer no consequence but be allowed to continue to do so. So I think we are in a constitutional crisis and a very serious constitutional crisis, one that requires all of us to be willing to speak and to act on the just fundamental principle that in a constitutional democracy the Congress makes the laws, the Court interprets them and the President has to be bound by both of those.

Jane Stromseth: Well, thank you very much for attending and I hope this is the beginning of a conversation that will lead to bolder action in defense of our system of checks and balances and join me in thanking our panelists.