MR. ALLAN KORNBLUM: Thank you, Senator.

I want to first express to you the humility that we feel, the five of us, in having the privilege to comment on this extraordinary proposed legislation. And I will be forthcoming and direct, but first I need to make two disclaimers. You should appreciate that we are not here to testify on behalf of the federal judiciary or the judicial conference, and we are not here to testify in any way representing the Foreign Intelligence Surveillance Court.

I will take up three points in my introductory remarks: the importance of the FISA statute; the value of the proposal that you've made in the National Security Surveillance Act of 2006; and I will also take up the question of presidential authority to authorize warrantless surveillance of Americans.

I would point out that I've carefully chosen the word presidential authority because I exercise that authority through a number of attorneys general for almost 20 years, and further disclaim that we will not be testifying today with regard to the present program implemented by President Bush.

The main reason we're not going to discuss that program is because we've never been briefed on it, we don't know what it involves, and we're not in a position to comment intelligently about it. I would also like to begin with our bottom line. Many judicial decisions begin with the court's holding, and so I'd like to tell you right up front where we come out on these issues.

We believe that the Fourth Amendment permits the Congress to empower the president to seek judicial warrants, targeting networks of communications of terrorist abroad used by persons who are engaged in international terrorism or activities in preparation therefore, which is the FISA standard, without having specific probable cause for all of those in the terrorist network, including incidental collection of U.S. person communications, balanced by stringent minimization procedures enforced by the FISA Court. That is the sort of holding that we've come to and the position which I will argue in the next 10 or 12 minutes.

I'd like to point out that I was very privileged in 1978 to be appointed by Attorney General Griffin Bell to handle all of the FBI and NSA warrant list surveillance applications, and subsequently the Foreign Intelligence Surveillance Act. The purpose of our testimony today will be to assist the committee in legislating in this field.

Because of my extensive experience in implementing the FISA statute from its inception in 1978 and my close working relationships with the FBI and NSA for more than 20 years, I am in a unique position to fully inform the committee, full inform as the statutory provision in FISA, which I carried out for a number of years as the deputy counsel for intelligence operations. And my presentation today is not going to be an academic discussion but actually a discussion of my personal experiences -- that is, I'm going to be testifying from the things that I know happened of my own personal knowledge.

I'd like to begin by emphasizing one critical point. The FISA statute has been the most successful foreign intelligence program the United States has had since the code-breaking operations of World War II, the deciphering of the Japanese codes and the German codes. It has allowed the U.S. intelligence agencies to conduct intelligence activities beyond what they ever expected, and to succeed in many ways which have never been revealed because in the intelligence business, your success is measured by the fact that these things are never disclosed.

I've also been involved in litigating more than 80 cases involving the FISA statute, and that also came to the Officer of Intelligence Policy and Review -- OIPR for short. And our office worked with the criminal division in preparing the briefs both for the District Court and the appellate courts on issues relating to FISA. I was very proud of the fact that there were more than -- and now, there were more than 80 district and circuit court decisions upholding the constitutionality of the FISA statute and its use by the FBI and NSA.

In my experience, the success of the FISA statute has been due to the professional efforts of hundreds of FBI agents and NSA officials, of numerous Department of Justice lawyers, of six counsels for intelligence policy who I've served under, and eight attorneys general who I've served under, and not to mention the 30 or 35 federal district judges, such as those before you today, who have served on the FISA Court.

I also want to emphasize that the real success of the FISA statute is that it's proven indisputably that intelligence and counterintelligence activities are fully enhanced by the rule of law and in fact are fully compatible with the rule of law.

The final introductory point I would make is that the legal protections afforded to FBI agents and NSA personnel and all the others involved in clandestine collection and counterintelligence activities is under-appreciated by many people, but it is not under- appreciated by the men and women working for the FBI and NSA and the other intelligence agencies in the field.

Having said that, I'd now like to turn to Senator Specter's bill and discuss specifically some of the provisions and the constitutional framework why we believe that the statement I made a few moments ago about surveillance of communications networks -- terrorist communications networks -- is constitutional.

As you know, the Fourth Amendment bars unreasonable searches and seizures, and the term "unreasonable" is the over-arching concept. The substantive requirements of the Fourth Amendment are for probable cause and particularity. The standard of reasonableness applies to both substantive provisions -- that is, what is probable cause and what is sufficient particularity -- are subject to the standard of reasonableness which the Supreme Court has indicated is subject to different standards. That is, the standards under the Fourth Amendment for criminal warrants, for arrest warrants, may be different from those necessary for foreign intelligence collection and counterintelligence investigations.

Just to clarify that. That NSA -- the National Security Agency -- is in the foreign intelligence business. they're concerned with the plans, capabilities and tensions of foreign governments. The FBI is concerned with counterintelligence work, with countering the efforts of hostile intelligence services and terrorists in the United States and abroad.

The definitions in FISA include a definition of international terrorism, as well as definitions of clandestine intelligence activities and terrorist organizations. The critical thing about terrorist organizations is that they bear a remarkable similarity to foreign governments. They have large numbers of people, they operate clandestinely, they have training facilities, they have weapons and munitions, and today they use the worldwide network of sophisticated communications to further their terrorist plans.

The intelligence issues -- sorry -- the intelligence activities at issue and the proposed bill from Senator Specter, that is, surveillance of terrorist communications networks, are directed at foreign powers and their agents. They include, primarily, collection abroad, but since the networks are undetermined when these surveillances begin, it is not unreasonable to expect that some of those communications may come to persons in the United States. At least on my personal experience, I would think that they are relatively small in number, however they are extremely important because communications to the United States from terrorist networks abroad would signal the presence in the United States of terrorist cells as well as a forthcoming attack on the United States.

In the 1972 landmark decision of U.S. v. U.S. District Court, after striking down the executive branch's warrantless surveillance program -- by the way, in that case, it was a bombing case in Ann Arbor, Michigan of a CIA recruiting station. Nevertheless the Supreme Court struck it down, but in doing so, the Supreme Court sent a signal to the Congress. The Supreme Court said that the Fourth Amendment was highly flexible and that the standard for criminal -- what they call ordinary crimes, what I would call traditional law enforcement, need not be the same as that for foreign intelligence collection, and that different standards for different government purposes are compatible with the Fourth Amendment. That decision served as the basis for the FISA statute.

There was actually a FISA statute in 1976 supported by Attorney General Levi and President Ford. That never passed. It was the act of '78 championed by Attorney General Griffin Bell and President Carter that actually passed when I came to be involved in these intelligence activities.

The reason I got involved is, I was originally hired in '75 to write the FBI's guidelines for domestic security and counterintelligence work. When that was done, some staff unit was necessary to apply the guidelines and then to handle the warrantless surveillances and then the FISA surveillances. And so I turned out to be the natural repository for that authority.

Because of the differences between traditional law enforcement and the intelligence gathering requirements of the Fourth Amendment, the standards for intelligence gathering may be substantially different from those for traditional law enforcement.

Notice I've used the words "different" not "lower." In other words, under rule 41 of the Federal Rules of Criminal Procedure, if you want an arrest warrant, you must convince the judge there's probable cause to believe that somebody has committed a crime, and then you must particularly describe that person. If you want a search warrant, you need probable cause to believe that the place to be searched contains the contraband or illegal substances, and you must describe that place with particularity.

Under the FISA statute you need probably cause to believe that someone is a foreign power or an agent of a foreign power. You must also describe with some particularity what you want to seize. And in the case of FISA, what you want to seize is foreign intelligence information. One of the critical factors in this is that the information which is often foreign intelligence can often be considered criminal evidence, and that has always been a complicating factor in the operation of the FISA statute.

I think that, for the purpose of Senator Specter's bill, the critical factor here is that in targeting terrorist communications networks abroad and applying the standard of reasonableness, you have to look at the fact that the terrorists are located outside the United States. They're overseas in foreign lands, using foreign languages and modern modes of communications to carry out their terrorism, thus it would be unreasonable to expect U.S. intelligence agencies to know in advance the identity or identities of all of the people in these intelligence networks, where they are located, what their telephone numbers are, what their e-mail addresses are, indeed this is the very purpose of the FISA surveillance, is to identify these people and neutralize their terrorist activities.

As I mentioned, U.S. persons may be in the network or chain of communications of known terrorists, but there will undoubtedly be many other people in the communications network who are known to the intelligence agencies. Some of them may include U.S. persons, thus it is perfectly logical and reasonable to expect that although the program is targeted against terrorist networks abroad, that communications may come to the United States and are of great intelligence interest.

This situation is not unlike things I've seen as a magistrate judge in drug trafficking, where the DEA or state officers are able to secure a cell phone used by a drug dealer. They look at the records of the cell phone, they see he's talked to other cell phones, and the people of those cell phones have talked to other people on cell phones. And so the DEA begins to track all of the people to identify the people in the network of drug trafficking. But till you get the records from the communications companies that keep these phone records, until you determine what the pattern of operation is, until you determine the identities of these people, it can take more than a year. And that was a case I recently saw in Gainesville.

However, we don't have that time in dealing with international terrorism. Thus, as phone communications or e-mail communications are moving rapidly in international commerce, the intelligence agencies need to follow those communications without coming back to the FISA Court to specifically identify each individual in the network the way the law enforcement officers do in the drug trafficking networks.

And that's where I ended up a few minutes ago, that is, the Fourth Amendment permits Congress to empower the president to seek judicial warrants targeting networks of communications of terrorists abroad without having specific probable cause for all of those in the network, including the incidental collection of U.S. person communications. And the critical factor here is the reasonableness standard in the Fourth Amendment.

The Fourth Amendment is not a suicide pact; it is intended to be a check on government authority. And what is required is a reasonable application of that authority. And so, when you're dealing with these communications networks worldwide -- Saudi Arabia, Pakistan, Dubai, and all the countries in South East Asia -- we cannot, that is, U.S. intelligence, cannot know who all these people are and come to court and each time someone is identified in the network, to rush back in the next morning and come to court.

So the government and the intelligence community needs a reasonable amount of time to gather this information and analyze it and determine who are the real terrorists and who are the people who are being contacted but not necessarily involved in terrorism.

These collection programs would be primarily focused on networks outside the U.S., supported by probable cause. I believe you bill calls for identifying at least one person in the network, but not requiring the identification of all of the persons in the network. And we support that basic concept because it would be unreasonable to expect the government to have that information and present it to the judges.

But balanced against that broad collection is restricted minimization procedures. And I don't think many people understand what minimization procedures are, and so I'm going to explain it. It's not a difficult concept. Most foreign intelligence information is collected in foreign languages. Much of it is encoded or encrypted or used as vague concepts. For example, terrorists might say, "Is everything ready for the wedding? Have all the presents for the wedding been gathered?" when referring to terrorist activities. So the first step in minimization is that the information collected, whether in electronic surveillance or a search, needs to be translated or decoded and put into an intelligible form. Once it's in an intelligible form, then the intelligence agencies can make an analysis -- is it foreign intelligence information, and if so, how does it fit into the big picture; and if it's not, then we shouldn't be keeping it.

Thus, in discussing this with your staff, I have suggested some changes to the bill, simple ones. For example, in section 701 where it talks about program, it's often misleading, and some people I think have misunderstood the purpose of the bill to think that the bill would allow targeting of just generic programs, as opposed to specific terrorist networks.

So in the definition of your program in section 701(5) where it says, "The term electronic surveillance program means a program to engage in electronic surveillance," I would add, "targeting terrorist communications networks." That's what the program is about, targeting terrorist communications networks.

SEN. SPECTER: Judge Kornblum, how much more time do you think you will require?

MR. KORNBLUM: Five minutes.

SEN. SPECTER: Thank you.

MR. KORNBLUM: I can stop now if you --

SEN. SPECTER: No. Proceed. Five minutes would be fine.

MR. KORNBLUM: Based on my -- I wrote the original sets of minimization procedures which have been in use by the FBI and NSA since 1978. They've been amended from time to time to deal with new problems. But what I would see is, under your statute, broad collection, including incidental collection of Americans, if that could come about, but with stringent minimization at the end of the surveillance period, that is, if the information is determined not to be foreign intelligence, it should be discarded. If it is foreign intelligence, it should be used to produce additional applications in the FISA Court.

But there's going to be a large body of information about which the intelligence community would not have had an opportunity to do a complete analysis and determine if it's foreign intelligence. In those cases I would allow the government to come to the FISA Court and seek a motion to allow the government to continue to retain the information for continued analysis until such time, with continuing court approval.

And I'll now just spend a few minutes talking about presidential authority. Again, I'm not talking about the president's program. Presidential authority to conduct wireless surveillance in the United States I believe exists, but it is not the president's job to determine what that authority is, it is the job of the judiciary. Just as the judiciary determines the extent of Congress' authority to legislate, so it determines the executive's authority to carry out his executive responsibilities.

The president's intelligence authorities come from three brief elements in article II -- the executive power is vested exclusively in the president, so is much of the responsibility as commander in chief, as well as his responsibility to conduct foreign affairs. All three are the underpinnings for the president's intelligence authorities. Most of the authority I see referred to in the press calls it inherent authority. I'm

very wary of inherent authority. It sounds like King George. It sounds like the kind of authority that comes to a head of a nation through international law.

As you know, in article I section 8, Congress has enumerated powers as well as the power to legislate all enactments necessary and proper to their specific authorities. And I believe that's what the president has, similar authority to take executive action necessary and proper to carry out his enumerated responsibilities, of which today we're only talking about surveillance of Americans.

Again I emphasize that it's the judicial decisions that define the president's authority. These decisions pre-date the FISA statute, and I was reviewing the FBI and NSA applications for warrantless surveillance. Those surveillances by law were transferred to the FISA court in 1978 and actually when it began in May of '79, however, the FISA statute has very specific definitions, and there are intelligence activities that fall outside the FISA statute. Those activities went forward and have continued to this day and are still being done under the president's authority as set forth in the executive orders describing U.S. intelligence activities.

There were three orders -- President Ford's order, 11905; President Carter's order, 12036; and the current order, 12333, which was issued by President Regan in December of '81. That order has been used by all of the presidents following President Regan without change. And I was responsible for processing those applications. They go to the attorney general based on a delegation of authority. I have asked the staff to give you a copy of the current executive order, and that's the authority that is being used today to some extent.

The presidential authority that is being used today is being used unilaterally. I think all of the judges agree with me, that when the president operates unilaterally, his power is at its lowest ebb, as has been mentioned in judicial decisions. But when Congress passes a law, such as one authorizing the surveillance program targeting communications networks -- when the Congress does that and the judiciary has a role in overseeing it, well, then the executive branch's authority is at its maximum. What that means is, they can do things, I believe, under an amended FISA statute that they cannot do now.

For example, the president's program says that president reviews it every 45 days. But I would think, if Congress authorized the program and the court oversaw it, that the surveillance programs could run for 90 days.

SEN. SPECTER: Judge Kornblum, would you summarize at this point.

MR. KORNBLUM: I'll go back to what I started, that I think -- and the judges all think -- that Congress can empower the president to conduct broad foreign intelligence surveillance programs targeting the communications networks of terrorists abroad; that the program can be monitored effectively by the FISA Court; that security can be maintained; and the bottom line would be an enhanced foreign intelligence collection program.

SEN. SPECTER: That you very much, Judge Kornblum.