THE BROOKINGS INSTITUTION

PROSPECTS FOR THE U.S. INTELLIGENCE COMMUNITY: THE HAYDEN NOMINATION, ELECTRONIC SURVEILLANCE, AND THE QUESTION OF REFORM

Washington, D.C.

Monday, May 22, 2006

Moderator:

CANDY CROWLEY
Senior Political Correspondent,
CNN

Panelists:

JANE HARMAN
U.S. Representative (D-Cal.)

JOHN PODESTA
President and CEO,
Center for American Progress

JOHN E. McLAUGHLIN
Former Acting Director,
CIA

GEORGE J. TERWILLIGER, III
Partner,
White & Case, LLP

RICHARD FALKENRATH
Senior Fellow, Foreign Policy Studies
Brookings Institution

* * * * *

P R O C E E D I N G S

MS. CROWLEY: Thank you all for coming. You're obviously at the Brookings Institution. The title of the panel today is Prospects for the Intelligence Community. It was left deliberately broad, because a judge—probably they couldn't figure out what exactly about the intelligence community would be on the front page of the paper today, so they wanted to make sure it covered everything.

So, we have an enormous amount of talent and knowledge on the panel today, and I'm going to introduce them one by one. They're going to do brief opening statements. We want your questions less than we want your rounds. We know you have them, but try to zero in on a question. You can offer it to any of them individually or all of them together, and they'll just let it be a (off mike)

Let me introduce, first, someone that's a very familiar face to you, Congresswoman Jane Harman of the 36th District of California, Democrat, who is the Ranking Democrat on the House Permanent Select Committee on Intelligence, also a member of the Homeland Security Committee. She's going to kick it off for us.

CONGRESSWOMAN HARMAN: Aha. I had a little time to correct myself.

(Laughter)

MS. CROWLEY: No, I'm sorry.

CONGRESSWOMAN HARMAN: Good morning, everyone. Good morning to some very smart panelists. Let me brag on Brookings just for a second, since we're on TV, to say that this is a place that I think brings together some of the best minds from across the spectrum on a variety of issues, and I appreciate being invited over from time to time.

This is a broad topic, and I just want to hit a few highlights, because I think others

will talk after me and amplify these points or totally disagree, and that's, after all, what we want. We want a conversation, not a lecture here.

The topic is broad, so first let me say how vital intelligence is. The enemy has changed. It's no longer a centralized, top-down threat against us. Think Soviet Union. Even think Al Qaeda in the early stages. It's diffuse. And, because of that—and I actually learned this from John McLaughlin outside of the Iraq theater— the fight against this enemy is an intelligence war. I totally agree with that, and the key challenge is to find the enemy—to find the enemy. That was not a problem we had in the fight against Communism.

Because this administration talks, and continues to talk, about preemptive action, my view is we can't have preemptive action—we should have learned that by now—unless we have pristine intelligence so that we really know we are acting against someone with the capability and intention to harm us; and we didn't know that, obviously, in Iraq, as we have learned, and as far as I'm concerned I am not going to support any adventures anywhere else—let's kick another four-letter "I" word, Iran—unless I believe we have as close to pristine intelligence as we can get.

So, number one, intelligence matters, intelligence is the way we prevent harm against us in the future and defeat the threat against us. Number one. That's number one.

Number two, as we build better intelligence—and I think we've done some things right -- we have to have the right legal underpinnings for the activities we undertake, and that is something I am very concerned about.

I think that this White House—I'm not sure, I think it segues a bit to this Justice Department, too, but I don't think all over this government—but surely in the White House, and primarily in the Vice President's office, there is a group of people led by David Addington who believe that the Constitution starts with Article II. Article II sets up the Executive Branch. To remind us all, Article I sets up the Legislative Branch. And there is supposed to be a series of

checks and balances among the three branches of government.

We don't have that right now. We have one branch dominant, and that branch disdains, in my view, oversight by Congress, the laws that Congress passes, and views Congress as a total inconvenience. And because we have what I would call one-party rule in Washington—meaning, one party in charge of both chambers of Congress and the Executive Branch—it has been extremely hard to push back against this view of overwhelming, dominant executive power. It's a dangerous view.

And I remind my Republican colleagues in the House from time to time—I did it last week—that they may not always have a Republican president. And I was talking about President Clinton, and I saw one of them nodding and I said well, when she asserts this view of the Executive power how are you going to feel, and all of a sudden I saw this person sort of flinch.

But my point is what goes around comes around, and this is a very dangerous position for Congress, any member of Congress, to take. It is, I think, an abdication of constitutional responsibility by Congress not to assert stronger oversight. Very hard to do right now.

The NSA program is my poster child for this point of view. The capability—and Rich has written about this—the capability to target Al Qaeda and organizations linked to Al Qaeda and know if somebody in America is plotting with them to harm us is important. I've never flinched from that position, and I know he agrees with me. But the legal underpinnings are just as important, and Congress passed a law in 1978—some of us are old enough to remember; I was working in the Carter White House at the time—that carefully balanced the branches of government for a scheme that would provide warrants when you're eavesdropping on Americans in America. That scheme, the Foreign Intelligence Surveillance Act, has been updated 12 times at the administration's request since 9/11, and if it still doesn't fit the problem, let's hear about it, but my view is it does fit the problem.

I know enough about the program on which I've been briefed and about the law on which I've been briefed to believe that the only impediment to making FISA work here is resources, and that is why a number of us have introduced a bill in the House that says the law has to be followed; the authorization to use military force, which was passed shortly after 2001, does not give permission to do a program outside of FISA; and that if there is a need for more resources, either human beings or more IT, to make FISA to work properly, come and tell us and we'll provide such (off mike) as are necessary. And that bill is picking up steam. It was recently endorsed by the ACLU, and it is something that I feel very strongly is necessary because of the way this administration behaves.

Let me just make a couple of other points. Over-the-horizon threats, yes, there is a lot to worry about in the world beyond Iraq. Problem is, we have an intelligence surge in Iraq, because we don't have intelligence dominance on the battlefield. My proof of that is Walter Reed, sadly. Just go out there and see how many of our lovely, wonderful kids have had limbs blown off by IEDs, which, sadly, we still can't find in advance. Most of the casualties in Iraq are from IEDs. That is something, sadly, that is getting worse, not better, and the ability of the insurgents to design better and more lethal IEDs is ahead of our ability to find them. So, over-the-horizon threats, there are many. Iran isn't over the horizon. Iran is present. North Korea is present. But China is an over-the-horizon threat, and there are others that we don't have enough focus on.

And, finally, let me just close with Mike Hayden and the CIA. I have said over and over again that Mike is a very capable man. I've worked with him for years, and his love of country is obvious. However, there are some issues about Mike taking over the CIA, I believe.

Number one, his military background. Taking off the uniform doesn't change the fact that he's had 35 or 36 years in the military. That's number one.

Number two is his technical background. He really is not a guy who has been

charged in the past with fielding the kind of human intelligence resources that we will need in the future to penetrate these plots. It is good news, by my lights, that he will bring in Steve Kappas with him. I think Kappas is exactly the right kind of guy to restore some morale in an agency where 300 years of experience has either walked out or been pushed out the door in the last couple of years. So, that's a good thing.

But the third point—and let me close on this—is truth to power. On the front door of John McLaughlin's agency it says "And the truth shall make you free." That is the point of having a central intelligence agency. It is to field the most accurate and actionable intelligence we can and make certain that that is what policymakers see, and if they choose to disregard it, that is the policymaker's option, but then they can't claim, in my view, that the policy they're making is based on intelligence; and if they do claim that or if they cherry pick or hype intelligence, and the truth shall make you free, I think it is the obligation of the Central Intelligence Agency to push back, or our intelligence community, which leaves me finally with the DNI.

I was one of the godmothers of the DNI reform. Surely it's not perfect, but given the time in which we did it and the enormous push-back from the Pentagon, I think we did a pretty darn good job. The legislation or the challenge is 50 percent law and 50 percent leadership. I think the law is doing its part. I think we need much stronger leadership on the part of Director Negroponte, not Ambassador Negroponte, and his crowd, and we wanted a joint command, not a bureaucracy, and I think you've all seen the fact that both Peter Hoekstra, Chairman of the House Intelligence Committee, and I have pushed together to show our impatience both with the pace of reform and with the style of reform, and more to come. We still don't think it's fast enough, and if Hayden is confirmed, and it looks increasingly likely, then there is a deputy slot there and an opportunity to put in a very capable change agent, and I hope that that's the kind of person that will be reached for.

MS. CROWLEY: Congresswoman Harman, thank you.

We want to move directly to my left, John Podesta, another familiar face, former Chief of Staff in the Clinton White House, currently president of the Center for American Progress and a visiting professor law at Georgetown University Law Center.

John?

MR. PODESTA: Thanks, Candy. And thanks, Rich, for putting this panel together.

My background really is in electronic surveillance, but I don't want to -- and Candy started off by saying what's on the front page of the newspaper today. We've seen a lot about the NSA. I'm not going to drill right into that, because I want to pick up where Jane left off and talk more broadly about the state of the intelligence community today as a sort of sense of opening, and maybe we can get to the specific issues around the NSA surveillance programs that we've seen on the front pages.

But I think anybody who was watching General Hayden's hearings last week, whether from the witness table or from the questions the senators were asking, it's clear that there are serious concerns about, I think, the state of the community in general today. I think there's questions about the structural condition of the intelligence community.

There are over a hundred thousand employees, 16 separate agencies, critical responsibilities, and it's certainly clear that the intelligence community is no stranger to turf wars, for fights for resources, for influence. Those are common. They've been around for a very long time.

For those of you who want to go back and delve into the history, I recommend David Martin's book, *Wilderness of Mirrors*, about James J. Angleton's search for a mole and the relationship between the FBI and the CIA. It's sort of a classic on that topic.

But I think that what we see today is not necessarily that that community has come more together but maybe it's as fragmented as ever. Perhaps because of the reorganization, it's hard to digest and swallow a big reorganization like we've seen in recent days.

I think it's certainly now an open secret, if it's a secret at all, that DCI Porter Goss was asked to resign at least in part because he was out of sync with the DNI's views about the plans that were moving forward. I think there were questions about staff morale at the Agency as well, but I think that there was clearly a vision, organizational issues at stake there.

And, as Congresswoman Harman alluded to, I think that there have been at least some members of Congress who have raised an objection to General Hayden's nomination, because they fear he can't stand up to the Secretary of Defense in the turf wars between CIA and DoD. Actually, that's not something I share. I've known and worked with General Hayden for a long time, and I think that there may be serious questions about what went on in NSA, but I don't think that that should be a serious question in his confirmation hearings.

But, I think there's sort of -- there still is ongoing confusion at the top, which appears to be delaying setting clear guidelines for cooperation within and between agencies. It's not just a question of coordination among DNI, DoD, and CIA and the fight for turf particularly between CIA and DoD, which General Hayden really talked about last week, but there's also a question of coordination between DNI, Homeland Security, and the FBI, which aren't fully resolved and need, I think, a look.

And, I think that uncertainty itself is contributing to the serious morale problems at the agencies. John can speak better to this about the CIA, but I think there's no question that some of that exodus was as a result of bad morale, and I think that was in part because of those questions and of course in part because I think political decisions that were made by Mr. Goss and particularly his top lieutenants that he brought with him over from the Hill. So, I think that this low morale politicalization both appears to be factors in the departure and, you know, we can get into the -- whether -- you know, how to put that back together, but I think that that's General Hayden's principle mission -- is to try to fix that and to restore the morale at the Agency.

So, I think as we consider prospects for the intelligence community, the topic today, I hope we can get some concrete ideas on the table about how to restore public confidence in the intelligence community and to restore the IC's independence and ultimately its confidence in itself.

I want to just throw out a couple of ideas as a point of departure. I think principally and perhaps above all else we must keep the politics out of intelligence. When it comes to deterring threats, facts should actually matter. The data should determine the appropriate course of action, not ideology.

Second, we have to find a way to balance the IC's focus on current problems, whether it's consideration of the longer-term threats, the over-the-horizon threats that, again, Congressman Harman mentioned. We have so much need now to be collecting intelligence in Iraq but I think that to some extent can divert from the attention to the long-term strategic goal and strategic intelligence that the country needs, particularly in Iran.

Third, I think we must make sure that our intelligence-gathering programs operate within the constraints of the law. The administration, I think, is offering a false choice to the American public. We can meet our national security goals and, at the same time, respect the laws that make this country great. Congress and courts need to be partners in that. They shouldn't be viewed as impediments to bring together the law and the needs of the country. Again, General Hayden talked about if you want someone on the craft you've got to have them on the manifest. I think for too long we haven't had either the Congress or the courts on the manifest.

And, finally, I think our government can't continue to operate in the kind of culture of secrecy I think that's happened since 9/11. Of course there are -- we have to have operational secrecy in order to protect vital secrets that are critical to carrying out a mission, but when you create a culture of secrecy, as I think to some extent this administration has done, I think it can lead to very mistaken policy choices, wasted resources, and it's clearly a decline in public trust. I would

point again to the questions of the NSA. I think we need not to just put that under the rug. We need to have a vital debate. We can do that in an intelligent way.

What are the domestic intelligence requirements? We're sort of making some progress, I think, on the foreign intelligence requirements, but what are the domestic intelligence requirements, who should do it, how do we do it, what's the legal foundation, and what are the safeguards that will make sure that this program is conducted in a constitutional manner?

Those are important issues that need debate in Congress, and I think this notion that to merely suggest that they get debated somehow harms national security actually undermines our Constitution and does precious little to promote the security of our nation.

Thank you.

MS. CROWLEY: John, thank you.

Another John, John McLaughlin, a View from Within. He is the former deputy director of the CIA, currently a senior fellow at the School of Advanced International Studies at Johns Hopkins University right down the street, and a CNN contributor.

John?

MR. McLAUGHLIN: Thank you, Candy, and great to be with you. Is this microphone working?

I'd like to take a little different tack here today and talk a bit about the future of the intelligence community, prospects for intelligence. Let me say at the outset, just to get this off the table, I certainly do support Mike Hayden's nomination to be Director of CIA. I think he'll do a fine job there, and happy to elaborate on that later.

But for the moment, let me say that we all understand intelligence is there to help our policymakers understand what's happening in the world and understand how it might be changing. And I would say, looking back over my career, that the world as we see it today presents a far more

challenging picture to the intelligence community than anything I recall over 30 years in the profession.

Why do I say that? Well, looking back at the cold war, which Jane alluded to, I see that period as, of course, very important, a period of existential threat to the United States but, by comparison to today, kind of a formal dance party. Today's world is more like a moth pit. And to elaborate a bit, if we look at any indices of change in the world, whether it's the dramatic increase we anticipate in population around the world, which will put great strain, particularly on governments that are already under strain, to the rising demand for energy.

Over the next 20 years, energy demand in the world is projected to go up by about 50 percent compared to about 34 percent in the preceding two decades. Countries like China alone will require 150 percent increase in energy to maintain their growth rates.

All of this portends increased competition among great powers for energy resources and a continuing focus in parts of the world, like the Middle East, which still has 70 percent of the world's exportable oil.

Technology. I don't have to tell the people in this room with all of your cell phones and Blackberries and such that technology is changing at a rate and in ways that make technologists very hard pressed to project the future. We're on the verge of universal hand-held communication, and while the 20th century was dominated by physics and engineering, I think we're looking ahead at a century that will be dominated by things like information technology, biology, materials technology, nano-technology, and the integration of all of these things in ways that, for an intelligence officer, probably will find mischievous people thinking up ways to use these technologies and their integration in ways that the intelligence community is going to have to pay attention to in terms of technological surprise.

Finally, of course, as Jane and others have alluded to, we have new powers rising in

the world. One that comes to everyone's mind, of course, is China. India is another one. While China is not a threat at this point, explicitly or in any way that we can define in a short way, it's obvious that China has now displaced the United States as the number one destination for foreign direct investment. It's the third manufacturing country in the world. It's 25 years into a sustained military modernization. So, for the next decades or century perhaps, intelligence will have to maintain a riveting focus on a certain path of development until we understand where it's going.

These are all the over-the-horizon issues that Congresswoman Harman was talking about. These are the kinds of trends in which those issues are embedded. And the question that hangs over all of it, for me, thinking ahead over the century, is will this be an American century as the last one assuredly was. I think we can be concerned about that, those Americans among us, and we need to think as intelligence officers about what are the factors that jeopardize the position we've held in the world for so many years?

Well, how well prepared are we as an intelligence community to deal with all of this? The short answer would be better than most people think but not yet well enough. I say better than most people think, because if you look at all of the time devoted to intelligence in the print media, the broadcast media, and even by Hollywood over the last several years, I suspect the American public emerges from all of this with a kind of cartoon conception of the intelligence community. Thinking of Hollywood alone, for example, in my next to last job Harrison Ford played me in the movies. So, go figure. Didn't do me justice, but that's another matter.

When we look—when I say cartoon, I mean all of the things that characterize a cartoon, that is, lack of texture; lack of dimension; lack of complexity; and, particularly with what Mike Hayden called the focus on the archeology of failure, lack of appreciation for the many successes this community has had in contrast to the mistakes that have been well documented. I won't take time to walk through all of those now, perhaps later if you want, but suffice it to say that

it's a community that has had dramatic successes in the last several years, many of which are not understood broadly.

That said, there is much that remains to be done and much that must be done in order to make this the most effective community we can have looking ahead at the kind of challenges that the Congresswoman, John, and I have just outlined. Let me list four things that strike me as issues we ought to think about and be concerned about.

First, it's important, as we think about what to do with the intelligence community, not to be captured by the bumper sticker d'jour in Washington. As you know, Washington is very susceptible to pendulum swings of opinion, and when we set budgets and programs based on that, it usually leads to no good. If you went back 20 years you'd find that we practically gutted our human intelligence capability, because the mantra of those times was that we needed more technical intelligence -- satellites from space and so forth.

Now, today, the mantra on everyone's lips is we need more and better HUMINT -- human intelligence, classic espionage. And to be sure, this is true, but we need to be careful not to do that to the exclusion of all of the other pieces of intelligence, because at the end of the day intelligence consists of weaving together a lot of little pieces to get that picture. Frequently intelligence is like trying to solve a jigsaw puzzle without benefit of the picture on the box. So, we don't want to become so single threaded in our discipline that we can't do that.

Second, when we've talked about intelligence over the last several years, the focus has been almost exclusively on organization and structure, and in my judgment the challenges of our time for intelligence have very little to do with organization and structure and much more to do with things that are more prosaic, and, you know, boring for a long discussion, having to do, for example, with the acquisition and fusion of data.

We have institutions now in the intelligence community, like the National

Counterterrorism Center, at which 25 or more databases arrive from around the government, from the Coast Guard, the CIA, the FBI, the military, and so forth, but we're still not in a position to integrate those in an information architecture that allows intelligence analysts, if you will, to Google through them and connect what some highway patrolman in Indiana or Maryland or Pennsylvania is learning about a group of mysterious strangers to what some CIA officer is learning in the backstreets of Karachi, Istanbul, or Jakarta or some other part of the world, because today what is learned about threat, particularly from terrorism in the domestic context, has to flow up to the national level, and what's learned at the national level has to flow down to the local level and be accessible to all if we're to protect the country. We're doing much better at that than we were before 9/11, but we're still not where we need to be. It probably deserves a Manhattan-type project to get that sorted out.

Third, I think it's important that we give Mike Hayden and John Negroponte the time required to rebuild this community. A few people realize that at the time of 9/11 we were just at the front end of a rebuilding process seeking to recover from debilitating resource cuts in the 1990s that reduced the community by 23 to 25 percent and nearly all of its capabilities. So, we're now at a point where we are at CIA graduating the largest classes in history, and it will take time to get the community to the point where it needs to be.

Sometimes, as complex as it is, success revolves around simple things like just having enough people in enough places to do the job. At any one time in the U.S. Army, for example, there are about 63,000 people offline doing something other than their main jobs, preparing for their next assignment or in training. There's no such thing in the intelligence community. It goes flat out 24/7. If you fought at Tora Bora chances are you were transferred to Iraq shortly thereafter without a break.

So, we need to get past that kind of posture in the intelligence community. It's going

to take time and patience and constancy in resources and support from the Congress to get there.

And, finally, I think we need to work for a better understanding on the part of the Congress and the American public and our policymakers about what is expected of intelligence. To be sure, everyone needs to have high expectations, and everyone needs to hold intelligence to a very high standard. But, at the same time, it needs to be understood that there's no formula for perfection in this business. That is to say, just as there is no concept of profit and loss, how can you weigh a hundred successes against one failure? It's one of the few professions where you can bat 8 or 900 and still not make it into the all-star game.

So, when we think about intelligence, it's important that our leaders not, on the one hand, encourage intelligence to take risks and to avoid being risk averse, while on the other hand beating it senseless every time it makes a mistake. And look it up in the dictionary. To take a risk involves the potential for a mistake. You can't have too many of them, but it's an inherent part of the business. So, we need to get that texture into our understanding of this difficult business.

MS. CROWLEY: Thank you. George Terwilliger, former Deputy Attorney General, spent 15 years with the Justice Department. Ten focused on terrorism cases. Currently a partner at White & Case International Law.

George?

MR. TERWILLILGER: Thank you, Candy.

And thank you to you, Richard, and to Brookings for putting this together and for inviting me to participate. As a private citizen, I don't get nearly the opportunity that I might wish to address these issues, so I appreciate the opportunity to be here today.

And, I'm happy to report, as a private citizen, that while a Republican I agree with much of what I heard from my Democratic colleagues who are here today, but not everything.

I do think it is incredibly important to underscore what Ms. Harman said about this

being a diffused enemy. What has happened since 9/11, as people who have expertise in the business tell me, is that that organization has indeed become diffused, and I had the opportunity to receive the benefit of a very good study of the bombings in Madrid, and what happened there was not the work of some ideological cell driven by some international cartel or organization but, rather, a rather ad hoc assembly of people who came together with the capability and intent -- some of them just pure criminals. That's very difficult to detect. Much more difficult to detect than some international organization that is communicating and operating in a coordinated international fashion. And, that does -- and again I agree with Ms.Harman about this—make this an intel war.

What bothers me, though, is how politicized this war has become, particularly in Washington, and I would like to focus in, if I might, in my few minutes on the latest flap over this alleged database at NSA. I've not been briefed on the program, so I have the advantage of ignorance about what they are really doing. On the other hand, using some of the experience that Candy mentioned, I think it's patently obvious what NSA is doing, why they're doing it, and why it's so important.

And I'm focusing on this, because I think what we need in our Washington dialog, particularly among the political leadership of the branches of government, is some reasoned analysis, and what that means is understanding what the facts are and applying the law to them in a rational way. We saw anything but, in my judgment, in the hours and days immediately following the breaking of the *USA Today* story. There was some incredibly overheated political rhetoric, some great overreaction, and I will say I think from people in both parties.

A political analysis certainly has a place in all of this, but it should be based on a reasoned analysis. A political commentary, I think, has been uninformed at best regarding the facts and rather ignorant of the law.

So, what are the facts as we understand them from the *USA Today* article and some of

the follow-on reports that we've seen? It appears that NSA has built or, perhaps more aptly put, duplicated a database that shows all the telephone numbers called from other telephone numbers on the telephone network, or at least parts of it. Now, we've all seen this same data. It comes in a little envelope to your house every month when the phone company sends you a bill and says here are the long-distance calls you made, here are the numbers that you called, and this is how long you were on the phone to that number. There is additional data that is captured by the wireless companies in terms of local calling. Most local calling is not captured on the traditional wire line SS7 network except in a few areas.

The law is that this data, this kind of calling data, is not subject to Fourth Amendment protection, does not require a warrant for the government to obtain it, because it basically yields no content of the underlying communication.

How, over the years, has the government attained this information? I, like many line prosecutors when I enjoyed the privilege of holding that position, have probably obtained tens of thousands of records of such telephone calls in a variety of types of investigations utilizing a simple signature on a grand jury subpoena. Most law enforcement agencies today can obtain that information based on an administrative subpoena, which Congress has seen fit to give that kind of authority to the agencies, and the FBI and other members of the intelligence community have been able to access that kind of data using so-called national security letters for years.

Why is the government obtaining this information? Traditionally what is it used for? Well, it's obvious, and I'm sure, as John can tell you, it's the building block, a fundamental building block of putting together information about a cell or a network of any stripe, including a terrorist cell.

Back in the mid-1980s when I was an assistant United States Attorney, I was one of a small group of people that was brought into the Justice Department, because we had had some

experience in terrorism cases. Current FBI director Bob Mueller, a good friend of mine and a colleague at the time, and I were there, and one of the things that we learned that was amazing was how even then Middle Eastern and other terror groups had active working cells in the United States. I think today, rather than being divided by red and blue we are more divided publicly and politically, unfortunately, by those who understand what we are actually up against, who is actually here in our midst, and what it's going to take to defeat that kind of an enemy. We need information like these records, and I'm sure there is widespread agreement on that.

So, what is it that causes the upset with what NSA has apparently done? What they've done is taken that database wholesale rather than getting it in bits and pieces, and why would we think that that is important? Because they need real-time information. If they pick up a computer in Afghanistan and there are a number of U.S. telephone numbers on there, it could be critically important not to wait 30 days for the telephone company to give them toll records of the numbers in the United States with which that computer was in contact but to have it in real time and then to take that piece of information and branch out.

I was once part of a terrorism investigation, which I can't talk about in any great detail, but I will tell you that one single long-distance telephone call made from a pay phone to a number uncovered a network, but it took months because of going, getting the records, going back to the phone company for more records, and so forth. If this data—if this haystack of data, if you will, which may contain a needle—is not subject to Fourth Amendment protection and is something that is available to the government through an administrative subpoena, why the overheated political rhetoric and response to news that NSA has taken this database into its midst so it could be queried in real time?

I think the answer to why they need to do that has to account for what many of my fellow panelists here have talked about in terms of what we're up against, and we don't talk enough, I

think, about that. Among the cognoscente, there is an understanding of what we are up against.

But let's just review briefly for a second. What happened on 9/11 was an incredible operation when you think about the operational details of it. People came into our country using our very law as cover for their presence here, and in a coordinated fashion they turned ordinary instrumentalities of commerce into weapons of incredible destruction.

Do we need to remind ourselves that more people died on 9/11 than died at Pearl Harbor and that the level of casualties, the ratio of casualties between civilian and military, were nearly reversed -- and that the citadel of an American military was successfully attacked?

We should not underestimate those people, and when we are reacting politically to something that occurs, like the unfortunate, I think, disclosure of this NSA database, I think we ought to turn down the rhetoric, at least initially, and leave it to people who are on the intelligence committees, who are briefed, and who understand what's going on to review this.

The importance of intelligence to this fight I don't think can be underestimated. I do not think it is simply an intel war, and I don't think that intelligence is just one aspect of our defense. It may in fact be our only defense, and in an era of the availability of weapons of mass destruction of various stripe, I don't think there is anything more vital, not just to our security but to our future, than having a successful intelligence program, and we ought to take a much more measured approach to how we deal with this politically.

Thank you.

MS. CROWLEY: George, thank you.

Our last, but not least, of the men who put together the panel, Richard Falkenrath, who was the former Deputy Homeland Secretary and advisor to the President, a CNN analyst as well as senior fellow at Brookings.

MR. FALKENRATH: Thank you, Candy. Thank you for agreeing to chair this panel

and to my co-panelists for joining it.

I want to start by agreeing very strongly with Jane that the war on terror is primarily an intelligence war, with the possible exception of Iraq. I also want to agree with John Podesta when he says that politics needs to be kept out of intelligence to the greatest extent possible, and that's why—one of the reasons why I support Mike Hayden to be the next director of the CIA. This is a fundamental, apolitical person. He was appointed director of NSA by President Clinton, and if he is confirmed, I think all the major heads of the major intelligence agencies in the U.S. government will be career government officials. The head of the National Counterterrorism Center is an admiral; John Negroponte served as ambassador of many different presidents—and you sort of go down the list. I think that's good.

I want to talk about the culture of the intelligence community for just a minute, and that came up in General Hayden's hearings, and I do think it's important. It's important particularly in this respect. Is the intelligence community primarily seeking a risk averse? Is it extremely aggressive in carrying out its mission, or is it passive and reactive and looking for reasons not to do things?

One of the things that the 9/11 commission really excoriated the U.S. government for was this risk aversion, and it's especially pronounced when you're dealing with a transnational threat that requires a transnational response. Terrorism is a transnational threat. It is both abroad and at home.

Abroad, the rules for collection and use of intelligence are extremely liberal. It's governed primarily by Article II of the Constitution, the President's authorities as commander-in-chief, and to collect information abroad against non-U.S. persons we don't really need a permission slip from anyone. We have license to do that if we're able to do it.

At home the rules are very different, and appropriately so, but the difficulty for

policymakers and lawmakers is in that scene, the scene between foreign collection and domestic collection. And it is incredibly complex and hard to work through.

The FISA statute is one of the really important statutes that governs this process and I think works very, very well, but let's not think that FISA is the only statute that's relevant here. There are a lot of different statutes, some of them going back to the '30s. There's the Privacy Act, the Stored Communications Act, the Coleah(?), the Electronic Communications Privacy Act. There's a bunch of different court rulings. One from 1979, *Smith v. Maryland* said—defined what George Terwilliger just said, which is transactional data is not covered by the Fourth Amendment privacy right. There's a very important ruling by the FISA Court of Review that governs this. There are regulations by various administrative bodies like the FCC—Executive Orders like 12333—so this is an incredibly complicated area that you need to work through and you need to be ready to work through, and how you work through it I think defines a lot about your culture.

And, the most important figures in any agency for defining the culture, aside from the top-most leadership, are the lawyers, the ones who write the rules about what you can do, and it's very important to think what is their attitude when they show up at work?

Are they basically showing up at work to minimize risk and to avoid problems or snafus or a glitch or a rejected application to a court or whatever it may be? Or are they showing up to find a way to accomplish the mission one way or the other and utilizing all the incredibly complicated authorities that have been conferred upon the Executive Branch and all the laws I just mentioned in court rulings and other documents.

One historical footnote. We talked a lot about the wall between foreign intelligence and domestic intelligence pre-9/11, and this was essentially an administrative barrier between handing information between—domestically collected information and handing it over to foreign collected information and getting a fused analysis of a threat. The 9/11 Commission is very critical

of this.

Very interesting that the FISA quarterly review, which has only met once and has issued only one opinion, found that the wall, this administratively erected device, was not necessary under the law. It was done because the people who were writing the laws, the regulations, internally were being very cautious and risk averse, and they criticized that and they said this is puzzling. Now that wall is history because of that court opinion and because of the Patriot Act. I hope it never comes back.

But what I worry about is a return to those days as a result of some of the flaps that we've seen recently with NSA. I worry about coming back around to a point where the internal operators are so afraid of going right up to the boundary of what is permissible under an aggressive interpretation of the law, which must be obeyed at all times, that they are so afraid of going right up to it that they hold back voluntarily and they slip back and that over time that slippage, that backsliding, gets affirmed in new court opinions or new statutes or new internal rulings and we get back into the old days of not utilizing all the authorities that have been granted to the Executive Branch.

So that for me is the biggest concern that I have about these recent revelations, these programs, and in particular I think a rather visceral and ill-informed response to them.

Last point I'll make about congressional oversight. I do think there are some legitimate criticisms of the way the administration has worked with Congress in the area of congressional oversight. It may well have been that this NSA program, the warrantless wiretap, needed to be briefed to more people than just the gang of eight. It was not a covert op; it was a collection programs and perhaps the administration made a misstep there. But, if the members of Congress who are briefed on a program in detail come to the view that it's illegal, or they have grave concerns about its legality, I think they have an obligation to pursue that to the end. And then I

think it's untenable to take the position that a particular action being carried out by the Executive Branch is illegal but then to do nothing about it.

And, at a minimum what you should try to do—if you really think something is illegal, you should try to stop the program until you have either the law that makes it legal or a court determination that says it's legal. And Congress has a lot of ways to do that—a restriction-of-funds amendment under the Appropriation Bill.

So, there are problems, I believe, with Executive Congressional relations in this area. Both sides I think stand to improve in how they've worked on that, and I hope that happens, and I hope it happens in a way that will permit a very aggressive and risk-seeking posture from the many U.S. government personnel who are engaged in this long war against the terrorist threat we face.

* * * * *