

House Judiciary Committee Members' Questions for Attorney General Gonzales on the NSA Warrantless Surveillance Activity

Excerpted from April 6, 2006 testimony during the House Judiciary Committee General Department of Justice Oversight Hearing.

SENSENBRENNER: Thank you very much, Mr. Attorney General.

The chair recognizes himself for five minutes for questions.

Mr. Attorney General, in early February, I sent to you an oversight letter requesting detailed information on the NSA terrorist surveillance program.

The department's responses provided much substantive information on the legal basis for the program. However, there was one question at the center of this committee's jurisdiction over the program that was not answered adequately.

This question related to the legal debate preceding the implementation of this program, and was prompted by reports that some high-level officials involved in the discussion over the legality of the program who did not agree with its legal basis.

Your response in the letter was, quote, "The president sought and received the advice of lawyers in the Department of Justice and elsewhere before the program was authorized and implemented. The program was first authorized and implemented in October 2001." I'd like to ask you the question again today, Mr. Attorney General, so hopefully you can provide a more complete answer -- and there are five parts to the question.

First, please explain how the proposal for the program was reviewed before it was authorized and initiated.

Second, who was included in this review prior to the program going into effect?

Third, what was the timeline of discussions that took place?

Fourth, when was the program authorized?

And fifth, was the program implemented in any capacity before receiving legal approval?

Thank you.

GONZALES: Mr. Chairman, I don't know that I have all parts of your question. What I can say is that...

SENSENBRENNER: I can help you if you have forgotten.

GONZALES: All right. The program was not -- was not -- implemented before the president received legal advice regarding the scope of his authority to authorize this kind of program.

GONZALES: The program was authorized by the president in October of 2001.

Mr. Chairman, the program implicates some very tough legal issues. It implicates the requirements of the Fourth Amendment. It implicates FISA, which is a very complicated statute -- the Foreign Intelligence Surveillance Act. It implicates the authorization to use military force. And it implicates the president's inherent authority as commander in chief. And when you have these kinds of issues to be discussed and analyzed by lawyers, you're going to have good, healthy debate. We encourage good, healthy debate about tough issues. That's how you get to the right answers.

What I can say is that there was a great deal of debate and discussion about the program.

The disagreement -- and there were some disagreements. Some of the disagreements have been the subject of some newspaper publications.

What I've testified before the Senate Judiciary Committee was that the disagreements that have been the subject of newspaper stories did not relate to the program that the president disclosed to the public in his radio address in December of 2005. It related to something else. And I can't get into that, Mr. Chairman.

SENSENBRENNER: One of the questions that was asked was: Who was included in the review prior to the program being authorized?

GONZALES: Mr. Chairman, who is read into the program is a classified matter, so I can't get into specific discussions about specifically who was involved in reviewing the legal authorities for the president of the United States in authorizing this program. What I can say is that lawyers throughout the administration were involved in providing legal advice to the president.

SENSENBRENNER: Mr. Attorney General, how can we discharge our oversight responsibilities if every time we ask a pointed question we're told that the answer is classified?

Congress has an inherent constitutional responsibility to do oversight. We are attempting to discharge those responsibilities. And I think that saying how the review was done and who did the review is classified is stonewalling.

And if we were to properly determine whether or not the program was legal and funded -- because that's Congress' responsibility -- we need to have answers. And we're not getting them.

GONZALES: Respectfully, Mr. Chairman, our analysis as to the legality of the program is reflected in the 42-page white paper that was provided to the Congress.

Irrespective of who was involved in preparing that analysis, that analysis represents...

SENSENBRENNER: Respectfully, Mr. Attorney General, that's your white paper. We read the white paper. We have legitimate oversight questions and we're told it's classified. So we can't get to the bottom of this.

Maybe there ought to be some declassification involved.

CONYERS: There's no better illustration of the constitutional crisis we are in today than the fact that the president is openly violating our nation's laws by authorizing the National Security Agency to engage in warrantless surveillance of United States' citizens. And, with all due respect, sir, the department has made the situation worse by virtue of a series of far-fetched and constitutionally dangerous after-the-fact legal justifications that you have proffered.

Who can seriously expect members of Congress to believe that the use-of-force resolution that was authorized included domestic surveillance when you, yourself, admitted, and I quote, "It would have been difficult, if not impossible," end quotations, to amend FISA to provide the wiretap authority?

In terms of inherent constitutional authority, if the Supreme Court didn't let President Truman use his authority to take over the steel mills during the Korean War in 1952, and wouldn't let President Bush in 2005 use the authority to indefinitely hold enemy combatants, it is hard to credibly argue that the court would permit unauthorized domestic spying today.

Every member of this panel wants the Justice Department to listen in on communications by terrorists. That's why we created a special FISA court and created, in addition, a 72-

hour emergency exception to it, and made literally dozens of changes to FISA, at your request, over the last five years.

But don't tell us that you don't have resources to protect our citizens' privacy by completing the FISA paperwork, not when you have a budget of more than \$22 billion and 112,000 employees at your disposal.

And finally, Mr. Attorney General, if we're truly interested in combating terror in the 21st century we must move beyond symbolic gestures and color-coded threat levels and begin to make the hard choices needed to protect our great nation.

Let me suggest that if we really want to prevent terrorists from targeting our cities and our citizens, we need to stand up to the gun lobby and keep guns out of the hands of suspected terrorists.

If we really want to prevent bombings like those which have devastated London and Madrid, we need to challenge the explosives industry to help us regulate sales of black and smokeless powder.

If we want to protect our ports, our trains and railroads and other easy terrorist targets, we need to stop passing new tax cuts for the wealthy and start fully funding our homeland security needs and effectuate all of the 9/11 Commission's recommendations.

CONYERS: The reasons the terrorists hate us is because we respect the rights and liberties of all our citizens and cherish the rule of law.

If we really want to defeat the terrorists, we should support and honor these (inaudible), not cast them aside.

When we disobey our own laws, when our executive branch ignores Congress and thumbs its nose at the courts -- which we've seen in this domestic spying program and time and time again over the last five years -- we not only make our nation less free, we make it less safe.

And thank you, Mr. Chairman.

SENSENBRENNER: Does the gentleman want five more minutes now?

CONYERS: I would like to invite the distinguished attorney general...

SENSENBRENNER: The gentleman is recognized for five minutes.

CONYERS: ... to make any responses that he would like.

SENSENBRENNER: The attorney general's recognized.

CONYERS: Well, thank you very much.

Did you hear what I was saying over to the chairman, sir? I'd like you to feel free to respond to anything that I've said on which you may have agreement or disagreement.

GONZALES: Thank you, Congressman.

I, unfortunately, have much disagreement with what you said. But I hope today that we have the opportunity to have an open dialogue and discussion, not just with you but other members of the committee.

I do not think that we are thumbing our nose at the Congress or at the courts. With respect to the terrorist surveillance program, we do believe that the authorization to use military force is an example of Congress providing authority, providing input into what the president should do in responding to this threat.

Now we have to remember -- I've heard some members say, "I never envisioned that I was authorizing electronic surveillance when I authorized the president to use all necessary and appropriate force."

The Supreme Court, in Hamdi, the plurality written by Justice O'Connor and then, of course, the fifth vote to be provided by Justice Thomas, interpreted those words to mean that what the Congress authorized was all those activities that are fundamentally incident to waging war.

That's what the Congress authorized when it used those words: fundamentally incident to waging war -- all activities that are fundamentally incident. This is what you've authorized.

And in the Hamdi decision, the court said, "Therefore, you've also authorized the detention of an American citizen." Even though the authorization never used those words, "detention," Justice O'Connor said, "It is of no moment" -- those were her words -- "It is of no moment that we use those words. Congress has authorized the detention of an American citizen captured in the battlefield fighting against America because detaining the enemy captured on the battlefield is a fundamental incident to waging war."

We submit, sir, that the electronic surveillance of the enemy during a time of war is also fundamentally incident to waging war. It is an activity that was conducted by Washington during the Revolutionary War, by President Lincoln during the Civil War, by President Wilson during World War I, by President Roosevelt during World War II.

It is fundamentally incident to waging war. And, therefore, we believe that when Congress used those words "all necessary and appropriate force" that it authorized the president to engage in electronic surveillance.

CONYERS: All right. Let me ask you one other question.

CONYERS: Please indicate on the record, since the beginning of the Bush administration, whether our government has engaged in any domestic warrantless surveillance outside of the emergency surveillance provisions of FISA and outside of the so-called terrorist surveillance program.

GONZALES: Well of course, Congressman, the United States government is engaged in surveillance under three baskets: one, under Executive Order 12333, which is classified. It's been fully briefed to the Intel Committee. There are procedures governing the collection of electronic surveillance. And that, also, has been fully briefed to the Intel Committee.

Collection is also under FISA, and collection under the terrorist surveillance program. Those are the ways that collection of electronic surveillance is ongoing today, as I understand it, to my knowledge.

CONYERS: And that is the extent of the surveillance that is going on?

GONZALES: Again, I can only comment as to what the president has confirmed, and that's the 12333 and that's the collection under FISA.

CONYERS: Let me try for one other question here within our time. Numerous members of the Bush administration, including the vice president and General Hayden, have asserted that had warrantless surveillance been in place before September 11th, the attack could have been avoided.

Give what the 9/11 Commission has reported about this event, and the FBI Agent Samit's recent testimony regarding the disarray at the FBI, do you support their assertions -- those of the vice president and General Hayden?

GONZALES: I've got, of course, a great deal of respect for General Hayden and for the vice president. I'm not going to dispute their assertion.

CONYERS: I return my time, Mr. Chairman. Thank you.

SCHIFF: Mr. General, welcome to the hearing today. I appreciate all the time you're going to be spending with the committee.

My question is really the same question that the chairman posed at the outset, and that is: How can we discharge our oversight responsibilities given some of the positions that the Justice Department has taken in terms of the information provided to us?

But let me give a little more content to the specific questions I have.

A year ago, you testified before the committee urging Congress to reauthorize the Patriot bill. You discussed at length how important -- crucial -- various activities and authorities were to our national security. These included provisions relating to wiretapping and other electronic surveillance.

You went a great length to describe the safeguards that were in place.

SCHIFF: For example, in discussing multipoint wiretaps, you stated that the provision, quote, "contains ample safeguards to protect the privacy of innocent Americans."

In addition, you stressed the fact that an independent court had to find probable cause to believe that the target was either a foreign power or a foreign agent. And, finally, you argued that the federal courts have found these authorities consistent with the Fourth Amendment.

You also discussed how other sections might implicate personal records of Americans -- also had specific language designed to protect First Amendment rights of Americans.

You concluded your testimony with the admonition pointing out the existence of thorough congressional oversight, saying, quote, that you "must fully inform the appropriate congressional committees with regard to authorities under the Patriot Act." However, we've now learned that the administration was engaging in activities that touched on the Patriot Act and FISA, but were wholly outside any statutes that occupy this field without informing the very individuals that you cited in your discussion of congressional oversight.

And so we've now come to realize that a debate that we had over FISA and the Patriot Bill, complete with the pledge that you and others at the department were, quote, "open to any ideas that might be offered for improving these divisions," and, quote, "would be happy to consult with us and review our ideas," was somewhat meaningless or duplicitous, or worse.

In the Senate, for example, an administration witness -- when a Senator asked whether we needed to amend FISA said, "Do we need to change the standard? Are you having problems with FISA?" The response was, no FISA's just fine the way it was.

SCHIFF: In fact, the answer to our committee and the answer to the Senate committee might as well have been: You don't need to change FISA because, in fact, we don't feel bound by FISA or we interpret the authorization to use military force such that whatever you do here we don't feel bound by.

Moreover, even if it's not in the authorization to use military force, it's within our inherent authority as commander in chief to disregard what you do on the Patriot bill or FISA.

And so it comes back to: How do we do our job? And why should we, when you come back to this committee and ask for further authority, why should we give the benefit of the doubt to the DOJ when it may very well be that, even without our authority, you're conducting surveillance that we know nothing about?

And I guess I have a couple specific questions. I've introduced legislation with Representative Flake, the NSA Oversight Act, that says basically: When we passed FISA in Title III and we said these were the exclusive means of domestic surveillance, we meant what we said; that the authorization to use military force didn't create an exception to that; and that if you need to change it -- and there might be reason why you need to change FISA -- you should come to us and make the case for an amendment.

I still think that's the right policy.

I have two questions -- one of which I asked the chief of the Office of Legal Counsel when he briefed our committee and really couldn't get an answer from -- and that is: Do you believe, under Hamdi, under the authority incident to waging war or under your inherent authority as commander in chief, that you can surveil a purely domestic call between two Americans?

The concern I have is that there's no limiting principle to the one you've established for doing what you need to do in the war on terrorism.

And the second question I have is: When you testified before this committee last year, were you aware of the NSA program?

GONZALES: When I testified before the committee last year, I was aware of the NSA program. Yes, sir, I was aware. I don't believe that I said anything in that hearing that was not completely truthful.

GONZALES: And your question was...

SCHIFF: Whether a purely domestic call -- whether the circumstances in which you could conclude you don't have to go to court to tap a purely domestic call -- even though it's not within the program we have now, could you later decide on the basis of the authorization to use military force or your inherent legal authority as commander in chief that you have the authority to tap a purely domestic call between two Americans?

ACTING CHAIRMAN: The gentleman's time has expired, but you may respond, Mr. Attorney General.

GONZALES: What I will say, Congressman, is that that, of course, is a different question than what the president has confirmed to the American people that this program includes. The question is whether or not, given what the Supreme Court has said the authorization to use military force allows. The Supreme Court in Hamdi -- again, Justice O'Connor writing for a plurality -- said that the authorization to use force was Congress saying to the United States, "You can use or engage in all those activities that are fundamentally incidental to waging war." That's what the Supreme Court says that the Congress meant when it used those words "necessary and appropriate force."

And then the question becomes whether or not the activity that you're asking me about -- is that something that is fundamentally incidental to waging war against this enemy. And that's something that I'd want to look at, but that's the question we would have to answer, is domestic surveillance of Americans who have some relationship to Al Qaida -- let's just make it a little bit easier question, because I think it's a tougher question if it has no relationship to Al Qaida, because then if you can't tie it to the authorization to use military force.

However, if the conversation is one that's domestic and involving conversations relating to Al Qaida or affiliates of Al Qaida, then you have to ask the question, is the electronic surveillance of that kind of communication -- is that something that is fundamentally incidental to waging war?

And you would look at precedent. What have previous commanders in chief done? We know that previous commanders in chief have certainly engaged in electronic surveillance of the enemy during a time of war, and they've gone beyond that.

GONZALES: President Wilson authorized the interception of all cables to and from America and Europe without any limitation, based upon the Constitution, his inherent authority as commander in chief, and based upon an authorization very similar to the one passed by this Congress.

SCHIFF: So you can't rule out purely domestic warrantless surveillance between two Americans?

GONZALES: I'm not going to rule it out, but what I've outlined for you is the framework in which we would analyze that question.

JACKSON LEE: Under FISA, many different questions have been asked or many different statements have been asked about whether or not this abuse of power has been used on Americans. That is our fear.

I lived through, as a member of the Select Committee on Assassinations, the investigation into the assassination of Dr. Martin Luther King.

I read FBI files on the COINTELPRO program that suggested that Mr. King -- Dr. King was a communist, of which we've find that it was, of course, with no basis whatsoever. And so can you say with absolute certainty, under oath, that no purely domestic communication are intercepted in connection with the warrantless surveillance program, and can you give us details that that is the case.

JACKSON LEE: And respectfully, General, my time is short: Could you answer the question of whether there's domestic surveillance and what happened with the re-districting case?

GONZALES: I appreciate it. I thought I heard your question to be whether or not can you assure us that there has not been domestic surveillance.

What I can confirm is what the president disclosed to the American people. This is what he authorized.

Can I tell you that mistakes have not happened? I can't give you assurances that the operation has been operated perfectly. What I can tell you is that we have had the inspector general of the NSA involved in this program. We have had the Office of Oversight and Compliance out of NSA reviewing this program -- this is from the inception.

There are monthly due-diligence meetings involved where the senior officials out at NSA get together and talk about how the program is operating in order to ensure that the program is operating in a way that's consistent with what the president has authorized. That's their objective.

And I've been told by the lawyers at NSA and others at NSA: There has never been a program at NSA that has had as much oversight and review than this program has.

BERMAN: Thank you very much, Mr. Chairman.

And thank you, Mr. Attorney General, for being here.

I'm distressed by the administration's positions and your answers on this issue of this electronic surveillance program that has come out.

I noticed, in response to Mr. Conyers' question, you talked about the healthy debate within the Justice Department. Mr. Delahunt found an article in Newsweek magazine which describes that healthy debate.

BERMAN: A group of Justice Department lawyers involved in a rebellion basically against lawyers centered in the Office of the Vice President, and with the acknowledgement of the deputy attorney general at the time, led resistance against a president who wanted virtually unlimited powers in the war on terror, demanding that the White House stop using what they saw as far-fetched rationales for riding roughshod over the law and the Constitution. These lawyers fought to bring government spying and interrogation methods within the law.

The results of this was -- ostracized, denied promotions and otherwise retaliated against for taking their positions.

GONZALES: So the story says, sir.

BERMAN: That's what the story says.

In response to Mr. Schiff's question, explain to me why my thinking is wrong here. You're doing these things incidental to war. Mr. Schiff poses a question, if the president at his discretion concludes that electronic surveillance of two persons in the United States is incidental to the war on terror that we are fighting -- and that Congress would like to be your partner on, and not simply a potted plant in this fight -- if the president decides in his discretion that this is incidental to war and without simply, perhaps by informing a few members of Congress, does he have the power, under your argument -- does he have the authority under your argument to engage in that kind of surveillance...

GONZALES: Congressman...

BERMAN: ... without a warrant?

GONZALES: ... respectfully, we could spend all day talking about hypotheticals. What I've outlined is...

BERMAN: Well, but your argument...

GONZALES: ... the framework that we would use in analyzing that question.

BERMAN: But the question isn't whether you're doing it, the question is whether you have the authority to do it.

GONZALES: Well, again, you're asking me to provide a legal answer to a question, and what I've given for you is the framework in which we would analyze...

BERMAN: The framework you've given -- there is a law about detention of people.

GONZALES: 4001-A.

BERMAN: Yes, there's a law about detention. The authorization for the use of force trumps that law because the president feels that he has the powers incidental to engaging that war to trump that law.

GONZALES: You're mischaracterizing...

BERMAN: To cite President Wilson -- what he did before the Supreme Court ever said that surveilling conversations between private parties constituted an unreasonable search and seizures, and before there was a FISA law -- is not an argument.

You should have at least the intellectual honesty, it seems to me, to explain why the intervention of both the Supreme Court decisions on electronic surveillance and the passage of a FISA law don't affect what President Wilson might or might not have done or how he did it.

No one wants you -- as Mr. Conyers said -- no one in this Congress wants you not to be able to surveil even domestic parties who are suspected or for whom there's any reasonable belief that they may be engaged or planning or participating in some way in terrorist activities.

We want you to have that power.

We do think that part of this is having some third party check whether there's some reasonable relationship between what the facts are and what you want to do.

BERMAN: That's all we're asking about.

And I just -- I find your notion that this is somehow solely within the executive's prerogatives based on being incident to a war -- it makes the whole debate about the Patriot Act ridiculous.

What are the standards? You come in and you admit last year that relevance should be a standard for seizing business records. Why? If it's incidental to war in the mind of the president, why are we spending time here playing around in something like a Young Democratic or Young Republican convention with resolutions that have no meaning when you have this inherent power that incidental to the power of the commander in chief during war?

GONZALES: But, of course, sir, in that discussion about business records, we were talking about business records of everyone for different circumstances. We were limited - - focused on records relating to Al Qaida, our enemy in a time of war. So it's a much different debate -- much, much different debate.

I don't what your -- your question.

WASSERMAN SCHULTZ: Mr. Attorney General, welcome to the Judiciary Committee. My question also deals with the terrorist surveillance program. The Bush administration has stated that the congressional war authorization after September 11th provided a legal justification for the administration to begin the NSA wiretapping. And in your essentially non-answers to both the majority and the minority's questions that we provided to you in writing, you have further indicated that you think that that's where your authorization is derived from.

Yet in a December 19th, 2005, press briefing, you were asked why the administration decided not to come to the Congress and amend the FISA law so that you could have express authorization for this program. And I'll read you what your answer was to that question.

You said, "We've had discussions with members of Congress, certain members of Congress about whether or not we could get an amendment to FISA, and we were advised that that was not likely to be, that that was not something we could likely get, certainly not without jeopardizing the existence of the program and therefore killing the program. And so a decision was made that because we felt that the authorities were there, that we should continue moving forward with this program."

Now, Mr. Attorney General, when my kids, as a mom, tell me that the reason that they did something without asking me is because they thought I would say no, that's really not an acceptable answer to me when my kids try to do it, so it's not an acceptable answer when the administration tells Congress or indicates that they have not asked for our express authority in changing the law, that the answer is that you didn't think we would say yes.

This is a really disturbing program, Mr. Attorney General, and I'm really confused, because you also on the one hand say that you have the authority, expressly granted to you in the war authorization, yet you say the reason that you didn't ask us to amend the FISA law to give you that express authority is because you thought we'd say no. So which is it?

GONZALES: Well, you say it's a disturbing program. I have heard very few people say this is not a program that's important to the national security of this country.

GONZALES: In fact, most of the people on both sides of the aisle, virtually all, everyone who is aware of the parameters of this program say this is an essential program to the protection of the national security of this country.

WASSERMAN SCHULTZ: Mr. Attorney General, it's a disturbing program when you don't have express -- when there's a question that has not been answered about whether you have the express authority to engage in it. That's what's disturbing. Not the program itself. If you have been given that express authority, that's one thing. So if you could answer my question...

GONZALES: We believe that the authority does lie within the authorization to use military force, and that that supplements the president's constitutional authority as commander in chief to engage in electronic surveillance of the enemy during a time of war.

We believe that that authority is there under the Constitution. We also believe that that authority is supplemented by the authorization to use military force.

And whether or not the words electronic surveillance are included in that authorization is of no moment, to quote Justice O'Connor. The Congress authorized all those activities that are fundamentally instant (ph) to waging war.

WASSERMAN SCHULTZ: Mr. Attorney General, with all due respect, I've heard you say and read all those specific comments about your's and the Justice Department's opinions.

But on December 19th, 2005, you specifically said that the reason that you did not come to Congress to amend the FISA law to specifically give you that authority is because you didn't think we would say yes and you thought that that would jeopardize your ability to continue and move forward with this program.

GONZALES: That was related to a conversation that we had with the leadership of the Congress. And it wasn't just my judgment that legislation was impossible without compromising the program, it was the collective judgment of everyone there.

WASSERMAN SCHULTZ: Well, I understand that that might be who you spoke to, but that's irrelevant who you told that to. There are many members of Congress that believe that you should have come to the Congress. There are many people in the general public that think you should come to Congress and expressly ask for that authorization.

So if you were given the opinion by some members of Congress that we would say no if you asked for that authority, then why didn't you explore that possibility with other members of Congress? I generally believe that if you think you don't have the authority, and you don't ask for it because you think you'll be told no, that that means you think you don't have the authority.

GONZALES: Well clearly, Congresswoman, in a time of war, it's always best, in my judgment, to have both the executive branch and the legislative branch working together and to be in agreement. On the other hand, the president is commander in chief, and even

Congress in the authorization to use military force recognized in that authorization that the president does have the constitutional authority to deter and prevent attacks against America.

And we believe that, again, that we do have the authority. Obviously we were aware that there may be questions about the president's authority, and that's why there were discussions about seeking legislation and there was a collective agreement that that process of pursuing legislation would compromise the effectiveness of this program.

WASSERMAN SCHULTZ: Thank you.

GOHMERT: But anyway, I did want to go back to 50 USC 1861, the provision of Section A-1. I'm going to ask you if you have a problem with a revision of this nature. You've indicated that only domestic surveillance that is connected to a foreign agent or a known terrorist have been surveilled.

But under the provision of 501, there is something that nobody has seemed to have pointed out that I picked up on, especially in view of discussion about domestic.

But under A-1, it says, "for an investigation to protect against international terrorism or clandestine intelligence activities."

Now it's not under your administration or President Bush's administration that that has ever been used -- that clandestine intelligence activity has ever been used without a foreign nexus.

And that's my understanding: You only pursue that if there is a foreign nexus. Is that correct?

GONZALES: Congressman, you know, I'm not sure that I understand the question. And I apologize. It's not...

GOHMERT: OK, my terminology is exactly from Section 501. It says: "You can pursue an investigation to protect against," A -- the "A" is mine -- "international terrorism" or, B, "clandestine intelligence activities."

Now there's no requirement in that provision that there be a foreign connection. And my understanding is that your office interprets that to mean -- or at least you don't pursue it unless there is a foreign connection.

GONZALES: Congressman, I apologize. I don't know the answer. I can't confirm that. I think that's probably right, but I...

GOHMERT: And I'm not trying to trap you.

GONZALES: No, I understand, but...

GOHMERT: But from your prior testimony, that was my understanding, that there had to be a foreign terrorist connection or you didn't pursue it.

GONZALES: What the president has authorized is the collection of communications, where one end of the communication is outside the United States and where we have reasonable grounds to believe -- determined by a career professional out at NSA who knows about Al Qaida tactics, about Al Qaida communications, about Al Qaida aims -- that that person believes there is reasonable grounds to believe that one party to the communication is a member or agent of Al Qaida or of an affiliated terrorist...

GOHMERT: And, obviously your answer -- that is better.

GOHMERT: I've seen your answers, and I understood that from your answers. And that's why this is not a trap and it's not something to bully you at all. But I would like to make sure Section 501 is better clarified so that in a subsequent administration -- that

somebody doesn't come in and say, "You know what, we're worried this church over here may be involved in intelligence activities in the community that could be clandestine, never mind there's no foreign link. Therefore, under 501 we think we can go in and start surveilling them."

And so I was interested in protecting against future administrations abusing 501 in an interpretation that has not ever been done before and adding something like "foreign" to that provision. Would you have a problem with clarifying that for future use for future administrations?

GONZALES: Be happy to work with you on that.

GOHMERT: All right. Thank you.

SCOTT: Thank you, Mr. Chairman.

Mr. Attorney General, I have several questions, but one quick question on the wiretaps, because the debate has gotten into the question of whether or not the wiretap is a good idea. The real question is whether or not a wiretap ought to be done with a warrant or without a warrant. And that's what we'd like to debate.

The basis of your rationale suggests, as the gentleman from California mentioned, would cover just about anything without limitation. And a problem we have is that we really don't know because of the answers you've given exactly what the program is all about.

GONZALES: Can I interrupt you and just say that the limitations that I would offer up would be the Fourth Amendment. Search must be reasonable. And of course limitations that the Supreme Court outlined in Hamdi, and that is that the activity must be fundamentally incidental to waging war.

So there are limitations.

SCOTT: OK. And that decision is made without any checks and balances of a warrant. And that's what the question is.

GONZALES: Well, the Fourth Amendment, sir, doesn't require necessarily a warrant. It requires the search be reasonable.

SCOTT: OK. And once the president determines that it's reasonable, then that's the beginning and the end...

GONZALES: And the courts have long recognized that there are special needs outside...

SCOTT: Let me just ask the question. When you do a wiretap, is the target selected on an individualized basis with individualized consideration?

GONZALES: You mean in connection with this program?

SCOTT: Right.

GONZALES: As I indicated, and I cannot get into the operation of this, but I can confirm that there is a determination, case by case, by a career professional at NSA that a party to the communication is a member or agent of Al Qaida or an affiliated terrorist organization.

(CROSSTALK)

SCOTT: ... consideration is made on an individualized basis for an individual wiretap?

GONZALES: In connection with an individual communication. Yes, sir.

SCOTT: OK. And are there any wiretaps that you're doing that you would not be entitled to get a wiretap warrant for? If you'd gone to get a warrant, could you have gotten a warrant?

GONZALES: I can't promise you that a warrant would be approved in every case, because obviously it's going to depend on the circumstances, whether or not you can satisfy the probable cause standard. So I can't answer that question.

VAN HOLLEN: Thank you, Mr. Chairman.

And welcome, Mr. Attorney General.

Our colleague Mr. Berman, in his remarks, characterized part of the administration's legal argument with respect to the wiretapping debate as a lack of intellectual honesty.

And I got to tell you, reading the 43-page report and legal analysis, I think that's an apt characterization.

Let me just...

GONZALES: Can I interrupt you?

VAN HOLLEN: Yes, you may.

GONZALES: OK.

VAN HOLLEN: But, Mr. Chairman, you may -- if it comes out of my five minutes, I really can't. You can...

GONZALES: Well, go ahead.

VAN HOLLEN: All right, because I only get five minutes, Mr. Chairman. Your response -- I'm fine.

But let me ask you this: Ms. Wasserman Schultz asked you a question regarding what you characterized as a collective agreement between yourself, the administration and certain leaders in Congress that it would be difficult to get this authority, this express authority, through Congress.

Now let me ask you -- you would agree...

GONZALES: Without compromising the effectiveness of the program.

VAN HOLLEN: You would agree with me that if you don't have that authority, an agreement between yourself and leaders of Congress doesn't make it OK to go ahead, right?

GONZALES: Absolutely. And whether or not FISA works or not, it wouldn't matter. I mean, that's not the question. The question is: Does the president have the authority?

VAN HOLLEN: Well, let me ask you this -- if you could tell us, this collective agreement, what members of Congress made this agreement with you?

GONZALES: What I can say is that they were the leadership.

VAN HOLLEN: I don't think this is a question of executive privilege. I mean, this is a discussion with members of Congress. There is this collective agreement. Who was it?

GONZALES: Certain members in the House and certain members in the Senate.

VAN HOLLEN: And you're not willing to tell us who made the collective agreement.

GONZALES: I can say that the leadership of the Congress and the leadership of the Intel Committees.

VAN HOLLEN: Democrat and Republican, both?

GONZALES: Both sides of the aisle.

VAN HOLLEN: Let me ask you -- I'm trying to understand the extent to which the authorization to use force in Afghanistan is essential to your argument, so let me give you a hypothetical: If you had an organization out there that was not related to Al Qaida in any way, under your analysis would the president still have the legal authority to intercept electronic transmissions, if they believed they was someone who wanted to do

harm to the United States or involved in some activity or plot to do harm to the United States, under your analysis, could the president use the NSA program to intercept those communications?

GONZALES: Well, I need to go back and look at the specific language with respect to Afghanistan. You're talking about the authorization to use force?

VAN HOLLEN: Yes.

GONZALES: And again, your question? Congressman, I'm sorry.

VAN HOLLEN: My question goes to what extent does your argument hinge on the authorization to use force? So if you had -- under the authorization, the president has to make a finding that the organization is somehow related to Al Qaida, OK?

Let's say you had an organization out there, we consider it a terrorist organization, but it had no relationship to Al Qaida. We suspect they're involved in a plot against the United States. Can you use the NSA wiretapping?

GONZALES: Look, in evaluating that question, I refer to Justice Jackson and the Youngstown analysis in terms of whether or not -- what is the scope of the president's power versus congressional power. And so, we believe that it's a three-part test, as you know, and we believe that with the authorization to use force you are, in the first part, the president is taking action consistent with the express or implicit approval of Congress. And there his authority is the greatest.

If you don't have the authorization to use force, that doesn't mean that the president taking action is unlawful, it simply means you move into the third part of the Jackson analysis, where you have the president taking action, exercising his constitutional authority minus whatever constitutional authority Congress might have in the area. And so, we would have to make that evaluation, as to whether or not -- could Congress constitutionally limit the president's authority under the Constitution as commander in chief to engage in electronic surveillance of the enemy? That's the analysis that we would...

VAN HOLLEN: Let me just ask you, with respect to that issue, do you think FISA -- I mean, part of your argument under the authorization of use of force is...

GONZALES: I think it would raise serious, serious constitutional concerns. And I go back to Judge Silberman's statement in *In re: sealed* -- the 2002 case of the FISA Court of Review, where he looked at -- he canvassed the court's decisions about the present-held (ph) authority, and said, all the courts that have looked at this issue have found that the president of the United States has the inherent authority under the Constitution to engage in electronic surveillance of the enemy for intelligence purposes, and assuming that to be true, FISA cannot encroach upon that authority.

HOLLEN: Let me ask the last question here, which is that -- what is it under the FISA statute, if anything -- what kind of standards or criteria in that statute that would make you unable to get the authorization from the FISA court to do the kind of intercepts that are being done now?

GONZALES: I'm not suggesting that we wouldn't get the authorization.

(CROSSTALK)

HOLLEN: Let me ask you -- could I give you a hypothetical?

GONZALES: It's a question of timing.

HOLLEN: Let me just give you a hypothetical. If we were to take the FISA justices and put them over at the NSA, in your opinion, is there any intercept that you are receiving now that they would not authorize under the current FISA statute?

GONZALES: That's an impossible question for me to answer.

What I will say is that the question is not whether or not a FISA court would approve the application, the question is the time it would take.

We're not talking -- with respect to FISA, in a straightforward case, you may be able to get approval from the court within a matter of hours or days, or maybe weeks, but under FISA it could be days, weeks, months.

And so when you're talking about fighting an enemy that we're fighting today, where information is critical, in certain circumstances, that's the problem we have under FISA. But let me just emphasize, FISA, in my judgment, has been a wonderful tool, it really has been. And we utilize it all the time. What people need to understand, though, is FISA -- we use FISA not just for -- we use FISA for collections here within the United States, we use FISA against foreign powers beyond Al Qaida, and we use FISA even during peacetime.

And so because of those circumstances, I think the restrictions that we have in FISA probably make sense when you're talking about domestic collection in peacetime.

And when people start talking about amending FISA, I think people need to understand that FISA covers much more than simply international communications involving Al Qaida.

FRANKS: Thank you, Mr. Chairman.

And thank you, Mr. Attorney General. I have to applaud your patience and attitude here in the face of some impertinent comments from some of the committee members here. I think you've done a great job.

And just for the record, you don't need my permission to come to my district, but you're welcome any time. And we would be glad to have the attorney general of the United States promoting justice in Arizona.

Having said that, I know you've faced a lot of questions today related to the terrorist surveillance program by the administration. And I would be numbered among those, sir, that believe that the president's designation as the commander in chief of the United States of America not only empowers him in this particular program, but certainly, I think he would have a duty to do some of the things that I think the program is going. I think it's very important, what you're doing.

It occurs to me that if the president has the constitutional power and even the authority from this Congress to hunt down terrorists, to ferret them out and kill them, that he probably should also -- that should encompass his power to listen to them on the phone before he proceeds.

And having said that, I know that the questions have been focused on the FISA Court and the FISA issue here.

And incidentally, I think you would have been also derelict to try to change the law in the FISA Court in the face of some of the demagoguery that's in this body right now. I think you would have probably, as you say, worked against the national security, in bringing that issue before the Congress.

Having said that, the FISA Court has on two occasions made clear indication that the president or that presidents were within their constitutional authority to surveil foreign terrorist communications in our country. Do you know of any case where the FISA Court has ever ruled to the contrary, in any way?

GONZALES: Not only the FISA Court, but I'm not aware of any court ever saying that the president does not have the inherent authority under the Constitution to engage in electronic surveillance for foreign intelligence purposes. And all those cases were in a peacetime context.

And so I think it's even more true that in a wartime context one could make certainly a stronger argument that the president has the authority under the Constitution.

FRANKS: Thank you, Mr. Attorney General.

LOFGREN: Thank you, Mr. Chairman.

And I welcome the opportunity, Mr. Attorney General, to ask you several questions about the NSA program that has been the subject of so much of the questioning in the morning session.

Before I do, I think that it's important to clarify the concern here. I would guess that we would have a unanimous conclusion among the members of this committee and I would say probably among the Congress that if someone in the United States is talking to an Al Qaida member, that we want to know about that, that's not the problem.

The problem, or the concern, is whether -- it's really more an Article I concern than a Fourth Amendment concern. And whether the rule of law -- whether laws that are duly enacted are going to control the executive branch.

This isn't about President Bush. It's about the executive branch and about the legislative branch.

And so, I'm seeking to understand exactly what the administration has done, why they have done it. And I think a good outcome would be to regularize this in a way that preserves the rule of law, frankly.

You testified in the Senate that the Department of Justice was establishing probable cause that a party to the communication is a suspected foreign agent. Is there probable cause as to both parties of the communication being suspected foreign agents? And if not, is that the primary reason why the FISA warrants would be unavailable?

GONZALES: I don't believe I testified that DOJ was determining probable cause in the Senate Judiciary Committee hearing. If I said that, then I misspoke.

I hope that what I said was that it is career folks at NSA...

LOFGREN: All right, let me amend the question, then. Would that be a primary reason why a FISA warrant would not be available?

GONZALES: We never suggested that it wouldn't be ultimately available. I've never suggested that if an application were completed and submitted to the FISA Court that it wouldn't be approved.

LOFGREN: You're saying, if I can -- I don't want to be rude, but we only have five minutes, you're saying that you could get them, but you decline to do so.

GONZALES: I believe -- I haven't done an itemized inventory of the actions taken under the program and whether or not they would satisfy all the applications under FISA, that's something that is hard to do after the fact.

But again, the problem is not that we couldn't get approval under FISA. The problem has been that because of the procedures in place under FISA, it takes an extraordinary long period of time in certain cases to get approval under FISA.

LOFGREN: So if I may?

GONZALES: Yes, ma'am?

LOFGREN: If I'm hearing you correctly, the administration has decided not to comply with FISA as an alternative to streamlining the FISA processes?

GONZALES: Congresswoman, I would characterize it differently. I would say that the administration has decided that it is going to use all the tools that is lawfully available to it to deal with this threat.

LOFGREN: Well, let me just ask: Does every individual intercepted communication have a suspected foreign terrorist overseas as at least one party to the communication? And does your answer apply only to the so-called terrorist surveillance program, or would it apply to all of the administration's intelligence programs?

GONZALES: When we're talking about the terrorist surveillance program, there is a determination -- and I answered this in response to an earlier question -- With respect to the terrorist surveillance program, there is a determination by a career official out at NSA that one party to the communication...

LOFGREN: Is overseas?

GONZALES: ... that one party is overseas and that there's reasonable grounds to believe that one party is a member or agent of Al Qaida or an affiliated terrorist organization.

LOFGREN: If that is true about the terrorist surveillance program, can you make that reassurance to us relative to the other programs that are ongoing in the administration?

GONZALES: No, I can't because, for example, under FISA, we're allowed to collect certain communications that may not be overseas. So long as we meet the requirements of FISA, however, you know, then we're obviously permitted to do so under the FISA act.

LOFGREN: Let me ask: Once a nonprobable cause party has been identified in a communication with a party who was a suspected foreign agent, are the first party's communications subsequently intercepted even where the suspected foreign agent is not a party to those communications?

GONZALES: Congresswoman, you're asking me now to get into details about the operation, how this program operates, and I can't answer that question.

LOFGREN: I would hope...

SENSENBRENNER: The time of the gentlewoman has expired.

The gentleman from New York, Mr. Nadler?

LOFGREN: Mr. Chairman, could I just ask that we explore a classified briefing for the parts of the answers that the attorney general cannot give us?

SENSENBRENNER: We can explore that, but there are upsides and downsides to that, and this is not the place to discuss them.

FLAKE: Thank you, Mr. Chairman.

Thank you, Mr. Attorney General.

I want to follow along with the questioning that Adam Schiff started with regard to the warrantless wiretaps, the NSA program.

I just want to understand your answer. I wasn't here when he questioned, but I was briefed by him.

You mentioned that you would not rule out wiretapping solely domestic calls, domestic-to-domestic calls, under the inherent authority that the president received under the war resolution that we passed here. Is that correct?

GONZALES: I can't rule it out.

But let's remember the framework in which I've outlined, and that is, is that we are at war with Al Qaida. There is a long history of presidents engaging in electronic surveillance of the enemy during a time of war.

I don't think anyone can argue that the electronic surveillance of an enemy during a time of war is a fundamental incident of waging war, which the Supreme Court says the authorization to use military force is what Congress provided to the president of the United States.

And so the question is: If you're talking about domestic surveillance involving Al Qaida during a time of war, when we're at war with Al Qaida, it's not something that I would rule out.

FLAKE: But the context in which...

GONZALES: But that's not what the president has authorized. I want to emphasize that.

FLAKE: Can we be confident that there are no ongoing programs or no programs that have been started and stopped that have used solely domestic-to-domestic, that have connected surveillance on domestic-to-domestic communications?

GONZALES: Congressman, I can't comment on anything beyond what the president has said.

Although, I will say that in terms of what the activities of the program have been and are, have been briefed to certain members of Congress.

FLAKE: Let me just say that we -- all of the discussions we've had with regard to the Patriot Act have been during the time at which we are at war.

And what I seem to be hearing is that these are, you know, maybe interesting or fun, but they're irrelevant.

GONZALES: Not at all.

A lot of the changes in the Patriot Act, even those changes related to FISA, are changes that were necessary, quite frankly, and would have been necessary irrespective of our conflict with Al Qaida.

GONZALES: And you have to understand that the tools of the Patriot Act go well beyond our conflict with Al Qaida. They apply in the domestic context for threats to our communities that go beyond Al Qaida...

FLAKE: I understand that, but...

GONZALES: And they apply in the peacetime context.

FLAKE: I understand, but with regard to domestic surveillance of communications, solely domestic -- domestic to domestic -- you're saying that you don't rule out or you see

it as still in the president's inherent authority to go ahead and do that, without regard to the strictures of either FISA or in this case the Patriot Act.

GONZALES: Well, again, every court that has looked at this issue has determined that the president does have the inherent authority under the Constitution to engage in electronic surveillance for the purpose of gathering foreign intelligence.

SCHIFF: Mr. Attorney General, I wanted to follow up a bit on our earlier dialogue on the NSA issue.

You mentioned, both in reference to my question and Representative Flake's, on the issue of whether you have the authority to do purely domestic eavesdropping between two Americans, that where there was an Al Qaida link you can't rule out the inherent authority to do that without going to court.

The question I have is, we're talking about between two Americans. Now, I realize that it's certainly possible that one of those Americans could be affiliated with Al Qaida, much as I hate to think of the prospect.

The question I have, though, is, where you have a call between two Americans on American soil, who outside the executive branch would ever oversee the executive branch's decision to use its inherent authority to eavesdrop on that call?

SCHIFF: Who would be able to provide any oversight of that?

GONZALES: Well, of course, Congressman, we do communicate with certain members of Congress about what we're doing here.

People at the NSA take very seriously their obligations and the limitations that have been imposed with respect to the collection of electronic surveillance.

SCHIFF: Mr. Attorney General, I don't doubt that.

The problem is that they're not incapable of error anymore than we are.

GONZALES: Well, of course, even the Fourth Amendment doesn't expect perfection. So long as a mistake...

(CROSSTALK)

GONZALES: ... is made that's reasonable, then that's permissible.

SCHIFF: The Fourth Amendment does expect that there is a system of checks and balances, where the courts have a role in overseeing the legitimate expectation of privacy of Americans.

And in a situation where the executive ergates (ph) to itself the power to eavesdrop on a purely domestic call between two Americans without any court review before, without any court review after, or can't rule it out, there is no outside oversight of that. We can't do it.

You mentioned today the problem with FISA is -- and you mentioned some problems with FISA. You said it could take days, it could take hours, take weeks or months to get approval. It may be the first time anyone has come before our committee, other than minor changes to FISA, and said there was a problem with FISA.

Indeed, as I mentioned earlier, in the Senate the testimony was there isn't a problem with FISA.

The question I have, you have to acknowledge that even in the best of circumstances, with the best white paper you've drafted, the legal questions are still very problematic. And if that's the case, why not come to the Congress? Why didn't the Justice Department come to the Congress and ask us to change FISA?

If you couldn't do what needed to be done to protect the country, why not come to Congress? Why not come to this committee?

We can have classified hearings just as the Intel Committee can have. We are no less bound by the oath to maintain the confidentiality of classified information than the Intel Committee is.

But we have a slightly different mission than the Intel Committee, in that we have a primary responsibility to make sure that what the executive does meets the requirements of the Constitution. That's a slightly different focus than the Intel Committee, which also has that obligation but not in the same way we do.

Why didn't the Justice Department come to the Congress and ask us to amend FISA?

GONZALES: Congressman, I think that I've already answered that question.

There was some consideration about doing that. And ultimately, there was a collective agreement that, that would not be possible without compromising the effectiveness of the program.

Now, the circumstances are different now. People now know...

SCHIFF: Does that mean because you couldn't trust committee members to keep the information classified?

I mean, why -- Al Qaida shouldn't care whether you have to go to court or not. But we care whether there's some oversight.

We all agree that the eavesdropping should take place if it's necessary to do so. The only question is whether there isn't some outside review of your decision-making to make sure that it's being done properly.

I still don't understand. Yes, you have answered the question. But I still don't really understand the answer. I don't understand why you couldn't have come to Congress and asked us, change the law, as you have.

Why didn't it compromise our national security to ask for the changes you did ask for in the Patriot bill?

GONZALES: Well, but, again, because what we asked for in terms of changes for the Patriot Act were changes that would apply not just to Al Qaida, not just during a wartime situation, this was generally to respond to threats to our communities, to our neighborhoods around the country.

And so to come into the Congress and say, OK, we need this changed in the Patriot Act because we're doing this against an enemy we're at war with, I think it's a much different story.

GOHMERT: Thank you, Mr. Chairman.

I know you love seeing me back over here, General, but anyway, you know the president. I know the president. We know the president's heart. We know that nobody has done more than this president in fighting a war on terror abroad. And we know his heart. We know he wants to protect America.

And some of us realize that he wasn't the first one to use this surveillance program.

Nobody is screaming about Clinton and nobody is screaming about people of the past.

But we know that this president is doing enough to fight the war on terror that 30 years from now he's not going to be some embittered president that regrets, subconsciously, all he didn't do 30 years before and therefore feels the need to lash out at some nice president 30 years later at somebody's funeral, instead of paying credit to the deceased.

We know this president won't have to do that. He's got this battle ongoing. But I think would like to ask a few questions about the program itself. As a former judge and chief justice from Texas, and you've been there, you understand what goes on, I'm curious about the probable cause that's utilized in this surveillance program.

Do you use a probable cause standard in that program in deciding which ones to go after? And if you could address that, please.

GONZALES: Congressman, it is a probable cause standard. We refer to it as reasonable grounds to believe. But it is the same kind of standard.

GONZALES: The difference is it's not a probable cause to believe that someone is guilty or that someone has committed a crime. It is probable cause to believe that a party to the communication is a member of Al Qaida or an agent of Al Qaida or of an affiliated terrorist organization.

We use the word "reasonable grounds to believe" because that is a more layman's-like term, because the decision is made not by lawyers; it is made by career professionals out at NSA in connection with a military operation. And that's what we consider this.

This is not a criminal law operation; this is a military operation against our enemy in a time of war made by military professionals out at NSA who have experience dealing with Al Qaida.

GOHMERT: Thank you.

There appears to be, under the 1806-J, the FISA Court can have an ex parte process for disallowing the notice. I'm curious how effective that process is -- if you could comment on that.

GONZALES: I'm afraid I don't understand the question.

GOHMERT: When you're pursuing records, surveillance, and you're going before the FISA Court, there is a provision that allows -- I mean, the process allows you to do it ex parte rather than having the other party there.

Well, in most of our jurisprudence history, you know, it's an adversary system where both are there. In this system, you're going just one side going there...

GONZALES: The FISA process, that is correct. I mean, it is a process where it is the federal government that is appearing before the FISA Court. And we understand very much what our obligations are under the FISA act in terms of the standards that have to be met.

And we have a good record before the court. And the reason that we have a good record before the court in terms of getting our applications approved is not because the court isn't doing its job, it's because we look very carefully at the requirements of the FISA law.

And that's why it takes us a little bit longer, quite frankly, in getting these applications ready to go and for me to approve them and submit it to the FISA Court is because we work very hard to know that, when we submit that application, it is going to be approved. There is discussion -- sometimes with the court, a judge on the court -- about an application. And we can get an idea whether or not there may be problems in the application. So there may be modifications in the application.

But it is an ongoing process of relationship...

GOHMERT: And these are district judges that are reviewing, is that correct?

GONZALES: These are Article III judges that are appointed by the chief justice of the United States to serve on the FISA Court.

GOHMERT: I think a lot of people do not understand that, and they hear that it's a one-sided process and think, "Oh, this is wrong because it should be adversary" -- not realizing that, whether it's in state court, federal court, FISA Court, if you go for a warrant, you're looking for documents, you're looking for a warrant; it's always -- nearly always -- an ex parte, one-sided proceeding as a judge.

GOHMERT: And I understand my time has expired.

Mr. Chairman, I appreciate it.

SCOTT: OK.

I asked you before -- you know, we don't know what this NSA wiretap thing is, so we're kind of playing 20 Questions here. We know there are no checks and balances.

I asked you if the wiretap target was individually considered and individually selected, would that rule out mass recording of calls where there may be law-abiding citizens who are tapped as part of the operation?

GONZALES: Congressman, what I can say is there's a lot of misinformation and disinformation in the media about the scope of this program.

And I'm only going to comment on what the president's confirmed is what this program includes, and I've discussed...

SCOTT: Well, we know it includes some things.

We're trying to play 20 questions back and forth to figure out what it also might include.

My question was, would it rule out mass recording of calls where there may be law-abiding citizens who are tapped as part of the operation? And you are not denying that that may be a possibility?

GONZALES: There is not mass recording of phone calls.

SCOTT: Is it possible that whatever operation you got going, that innocent law-abiding citizens who, if you individually considered the situation, you would not tap their phones?

GONZALES: Well, each communication that is surveilled is considered on an individual basis based upon information judged by a career professional out at NSA that -- again, who is an expert in Al Qaida communications, aims and tactics, and believes that someone on this call is a member or an agent of Al Qaida or an affiliate terrorist organization.

SCOTT: And why couldn't you get a wiretap warrant? Why couldn't you get a warrant through FISA if that was the situation?

GONZALES: I didn't indicate that we couldn't get a warrant from FISA.

What I indicated was is that we may be interested in the communication that may be about to happen in a matter of hours, and it may not be possible because of the strictures of FISA...

SCOTT: Well, no, we've been through that -- because you can get an after-the-fact warrant.

GONZALES: But that's not -- sir, that is a misconception that people have about FISA and the emergency authorization under FISA.

It is true that I could authorize electronic surveillance for a period of 72 hours before we submit an application to the FISA Court. But I have to be satisfied, when I give that

authorization, that every requirement under FISA is going to be satisfied and is satisfied at the time I give my oral authorization.

VAN HOLLEN: Let me just move on, because I want to pursue Mr. Scott's line of questioning and what I asked you a little bit earlier with respect to the standards that apply under the NSA electronic surveillance and the FISA Court -- because as I understand, what you're saying is that the legal standard you apply, in your opinion, is the same.

GONZALES: But we have to remember something: This is not probable cause that a crime has been committed or probable cause that someone is guilty. And, of course, even under FISA, that's not the standard.

I mean, the standard in FISA is that there's probable cause that the target is a foreign power or an agent of a foreign power and if it's probable cause to believe that the facility which is being used or about to be used is being used or about to be used by a foreign power or agent of a foreign power.

VAN HOLLEN: Right. I understand that. So FISA doesn't require showing that probable cause about a crime to be committed -- I understand that.

But that's why I'm saying, you don't require that in electronic surveillance, you want to have probable cause or reasonable basis to believe that one party to the phone conversation is a member of Al Qaida or affiliated with Al Qaida, right?

GONZALES: Yes.

VAN HOLLEN: All right.

I guess if -- and as I understood your statement, you know, the court is somewhat time-consuming, you've got to sign off and be 100 percent sure that you meet that standard in advance, and sometimes you need rapid response time.

And my question is this: We know that, before 9/11, there were communications between Al Qaida agents here in this country. If the time is the question, if the rapid response is the question, then for the security of the American people, why wouldn't we want to capture those conversations?

Why when it comes to conversations between two Al Qaida folks in the United States are you willing to take the extra time required and the extra risk to the security of the country required of going to the court? If it's just a matter of time, why aren't you taking this action?

GONZALES: Well, we do use FISA with respect to those kind of communications.

VAN HOLLEN: But why? That takes you longer. According to your testimony, that takes longer. And the added time, as I understand it, the reason you've got to have this quick turnaround is for security reasons -- to be able to act quickly.

And so if security is the issue, why for God's sakes would we want to take greater risks for communications within the United States than outside the United States?

GONZALES: That's simply the decision that was made to limit this program to foreign communications where we believe one party was a member of Al Qaida, and that we would rely upon other authorities like FISA to surveil communications such as domestic communications here within the United States.

I can't give you a better answer than that, sir.

VAN HOLLEN: Well, let me just say, because this gets back to the question of whether this program's been authorized, and I'm trying to figure out how -- as you said earlier, it

was this collective decision -- how people came to the decision that Congress wouldn't authorize exactly what we're talking about?

I mean, what was the debate back and forth? I think, on a bipartisan basis, you have a vote if people had reason to believe -- probable cause to believe -- that one party to the phone conversation was Al Qaida or a member of Al Qaida, that we would allow an expedited process.

GONZALES: What I said was is that it wouldn't be approved, we wouldn't be successful in that effort without compromising the effectiveness of the program.

The very fact that we're talking about this and have been talking about this for months, the intelligence experts say that Al Qaida -- they can already see changes in the way they communicate with each other, because they now know we have this capability.

GONZALES: And so we can all agree: This is a great program; we need to be doing it -- but because we're now talking about it and because the legislative process is such that people are going to be talking about what the legislation should or should not be, it informs our enemy about the tactics that we use to engage...

VAN HOLLEN: If I might, Mr. Attorney General, as I understood your testimony here, there's not additional communications that we're now able to intercept, because that was just a question of timing on the FISA Court. In other words, they're not different in nature. And so it seems to me that anyone operating as an Al Qaida member had to presume, prior to the disclosure of this information...

GONZALES: There's one thing about...

VAN HOLLEN: ... that their phone conversations were being recorded.

GONZALES: There's one thing -- you can assume this is a...

SENSENBRENNER: The gentleman's time has expired.

You can answer the question.

GONZALES: This is a very patient and very smart enemy. However, we know that from their conversation that they sometimes get lazy and they sometimes get careless. They're less likely to be careless and less likely to be lazy if, every day, they are hammered by the fact -- in the press -- that we're doing this.

LOFGREN: Thank you, Mr. Chairman.

And, Mr. Attorney General, I'd like to return to the NSA discussion. Well, before I do, let me just make an observation -- it's something that you said earlier in response to a question that the Patriot Act wasn't just about our fight against terrorism and the war; it was even in times not a war.

And I couldn't help but remember being in this very room in the days after the 9/11 attack, sitting at the table where you're sitting now with Viet Dinh and working through this.

And I'll tell you, everything that we were told at that time and everything we've been told since was that the motivation and the reasons for the Patriot Act was the fight against terrorism, not a general crime statute.

So I just think that statement struck me as extremely odd.

But I want to talk also about the rule of construction.

LOFGREN: We passed the authorization for the invasion of Afghanistan. I voted for it. But the FISA statute has a specific provision that discusses how to proceed after the Congress has declared war.

And it seems to me as an ordinary rule of statutory interpretation, the specific takes precedence over the general. I don't want to get sidetracked on that, because I have some specific questions.

First, under CALEA, communications providers are required to provide standard interfaces to law enforcement agencies for wiretapping. Are these the same interfaces NSA is using to conduct surveillance under this program?

What other interfaces or accesses has the NSA been provided by communications providers? Or if that is a classified matter, could you just say so and we'll pursue it in a proper format?

GONZALES: Respectfully, Congresswoman, that is an operational detail that I cannot discuss.

LOFGREN: All right. Let me talk about -- it's my understanding, and all the committee really knows is what we read in the newspapers, which I think is actually a pretty sad commentary on the lack of a partnership that we should have on this fight, the legislative and the executive branch together on this.

But in any case, it's my understanding from press reports that, in 2004, the FISA Court insisted on a process where information from warrantless NSA intercepts would be tagged so as to not leak into the FISA warrant process.

The press reports further indicate that because of problems with this tagging process, some intelligence, nonetheless, did leak through to the FISA Court's warrant process.

What processes do you have in place to sequester information gathered under this program and to keep it from being used to develop warrant requests?

GONZALES: Again, Congresswoman, that is information that I'm not at liberty to discuss -- certainly not in this setting.

But I can tell you...

LOFGREN: That strikes me as very odd.

GONZALES: Let me just say this: We have a very good relationship with the FISA Court, and it is important for us that the FISA Court have confidence in what we're doing, that they have confidence in the applications that we submit, that they have confidence in the representation that we make to the court.

And so despite all the revelations that have occurred, and of course now I'm speaking on behalf of the court -- and maybe I shouldn't be doing that -- but to my knowledge, I think the court is comfortable with what the department is doing.

LOFGREN: Well, I don't know, and apparently we can't discuss that.

But I'd like to know -- if you're able to tell us -- this: How many prosecutions have involved intelligence gathered under this program, either directly or indirectly?

GONZALES: I'm sorry, I can't...

LOFGREN: You won't tell us that either?

GONZALES: But let me say this, and I think this is important, and hopefully will be helpful to you -- let me just quote for you...

LOFGREN: My time is almost up, so you can give me what you would quote and I promise I'll read it. I just would like to mention that under -- you said that

whatever is incident to conducting war, the president can do under his war powers authority without regard to statute.

That's essentially what you've said...

GONZALES: That's what the Supreme Court said.

LOFGREN: ... and in your 43. So which of the following things would be incident to conducting war: shooting people, capturing them in their homes or on the street, putting them in POW camps? Are all of those things incident to war?

GONZALES: I think we'd have to look at what has occurred in the past in connection with conflicts.

And let me just say -- well, nevermind.

LOFGREN: Just a final thing, I do appreciate your being here. This is a long day for you as well as for us. But I have a great deal of frustration. You have a job to do, but the Congress has a job to do and we have been denied the opportunity to do it.

And I thank you.

NADLER: Mr. Attorney General, the president has stated repeatedly, and you have, too, that we are using warrantless wiretaps only to wiretap the conversation where one party is a terrorist or suspected to be a terrorist abroad.

Given that, can you assure us that no warrantless surveillance is being done in cases where, if you had all the time in the world, you could not get a warrant -- in your opinion, you could not get a warrant -- from a FISA Court?

GONZALES: I don't have that information.

NADLER: Thank you.

Number two, can you assure us that there is no warrantless surveillance of calls between two Americans within the United States?

GONZALES: That is not what the president has authorized.

NADLER: Can you assure us that it's not being done?

GONZALES: As I indicated in response to an earlier question, no technology is perfect.

NADLER: OK.

GONZALES: We do have minimization procedures in place...

NADLER: But you're not doing that deliberately?

GONZALES: That is correct.

NADLER: Thank you.

Now, despite the efforts of many members of Congress, as you know there is no public reporting requirement of the number of national security letters issued every year, and there has not been an official accounting from your department on their use.

In November of last year, we learned from The Washington Post -- they said that about 30,000 national security letters are issued every year. Are they within the ballpark? Is this approximately true?

GONZALES: Quite frankly, sir, I don't know.

We do send classified reports to Congress regarding our use of national security letters.

NADLER: Can you get back to us and unclassify it as to roughly how many are issued?

GONZALES: I'll be happy to consider your request, sir.

NADLER: OK.

Is there any reason why you couldn't make public the number of NSLs that have been issued every year or two?

GONZALES: I can't think of a reason off the top of my head.

NADLER: OK.

GONZALES: But there's a reason they're classified, and...

NADLER: Well, if you can't get back to us with those numbers, could you get back to us with a reason why you can't?

GONZALES: That's fair enough.

NADLER: Thank you.

SENSENBRENNER: The gentleman's time has expired.

I yield myself the last five minutes.

General Gonzales, I'd like to ask some follow-up questions relative to the timeline on the NSA terrorist surveillance program that I talked about at the beginning of the Q&A period when I yielded myself some time.

The response that you gave to the oversight letter which I sent indicated that the program was first authorized and implemented in October of 2001.

My recollection indicates to me that the first time that the leadership and the chair and ranking members of both Intelligence Committees were briefed was some time in 2003. And Senator Rockefeller sent a hand-written letter expressing his concern to the vice president.

Were there briefings before 2003?

GONZALES: I'm fairly certain, Mr. Chairman, that there were briefings that began in early or the spring of 2002. But I'm not 100 percent certain. But I'm fairly certain. It started well before 2003.

SENSENBRENNER: Well, you know, according to your recollection, the program was authorized and implemented well before the first briefing took place with the leadership of the two Intelligence Committees.

GONZALES: I don't want to quibble with you over the word "well," but certainly the program was initiated before there was a briefing with the congressional leadership.

SENSENBRENNER: You know, the problem is that this committee has been completely in the dark, even though this committee has got jurisdiction over the FISA law.

And maybe the problems that exist today would not have occurred had we been brought into the loop -- and an amendment to the FISA law would have been advisable.

I'd like to ask another question: Also from press reports, it indicated that somebody from the administration went to former Attorney General Ashcroft while he was in the hospital to obtain his sign-off on something after then-Deputy Attorney General James Comey refused to do so.

My question is: Is this a program that is significantly different than that which was previously authorized and implemented on October 2001?

GONZALES: That is a difficult question for me to answer, Mr. Chairman. And I can't answer that question.

What I can say is that the members of the Intel Committee know the answer to that question.

SENSENBRENNER: Why was a new sign-off required?

GONZALES: Well, there's a new sign-off required every 45 days or so, Mr. Chairman, and the reason for that is because we are limited by the Fourth Amendment and that this search has to be reasonable, which requires an examination of the totality of the circumstances.

GONZALES: And so, within every 45 days, there is an analysis by the intelligence community about the threat to America. And so there is a periodic sign-off.

SENSENBRENNER: Well, I am fully aware of the 45-day requirement. And that is a reasonable requirement. But it seems to me, if the circumstances had not significantly changed, then the position of the Justice Department in the sign-off should not have required someone who had previously signed off to change their mind.

GONZALES: Mr. Chairman, what I can say -- and I'm sure it will not be acceptable; but let me say it anyway -- is that I have testified before that the disagreement that existed does not relate to the program the president confirmed in December to the American people.

SENSENBRENNER: Well unfortunately, General Gonzales, I am afraid that you have caused more questions to be put out for debate within the Congress and in the American public as a result of your answers that you've just given, as well as the answers to my questions this morning.

Now that concerns me. And I think I can speak in a bipartisan manner that we're your partners in this area. We have not been treated as partners, for whatever reason. I think that that's been a mistake, and a lot of future problems in this area could be eliminated if you bring us into your trust and confidence.

We all strongly support the war against terrorism. It was this committee that worked twice to enact the Patriot Act and then to extend the Patriot Act. Both of those were on a bipartisan vote.

And, you know, I'm really concerned that the Judiciary Committee has kind of been put in the trash heap after we have been able to pass some really significant legislation. And if this continues, the debate is going to continue on the NSA program.

You had a chance today to put some of these questions to rest, and I'm afraid that there are more questions that will be posed out there because of the answers that you have not given.

Having said that, let me thank you for coming.