



LISTENING IN: EAVESDROPPING AND THE NATIONAL SECURITY AGENCY

PATRICK RADDEN KEEFE, JAMES RISEN, BOBBY RAY INMAN

AND JEFFREY ROSEN, MODERATOR

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JEAN STROUSE: Good evening, and welcome to the New York Public Library. I'm Jean Strouse, the Director of the Cullman Center for Scholars and Writers at the Library. We have what promises to be a terrific program here this evening and I'm only going to take about a minute of it. But I do want to thank everyone who worked to help make this happen, especially our cosponsors, LIVE from the New York Public Library and The Century Foundation, and of course the participants in the program, three of whom have come from out of town for this occasion. Patrick Keefe, who had to travel only from Brooklyn, wrote his book *Chatter: Dispatches from the Secret World of Global Eavesdropping* while he was a fellow at the Cullman Center two years ago. He made his other fellows extremely envious, since he started in September and turned it in in May, which no one else has been able to do. I should just quickly say that Admiral Inman is a hero to be here tonight because he's not been well, so if he makes a quick exit, it is not because of the content of the conversation, but because he is not feeling well. So I hope that took less than a minute and it's a pleasure to turn the evening over to Paul

Holdengraber, who is Director of the Public Programs for the Research Libraries, now called LIVE from the NYPL.

(applause)

PAUL HOLDENGRÄBER: Believe it or not, indeed my name is Paul Holdengraber and I am the director of Public Programs, now known as LIVE from the New York Public Library. It's been a pleasure collaborating with Jean Strouse on a number of programs recently. I had the pleasure of interviewing Edmund White here at the Library. I couldn't think of two events more different than the one we're doing today and having Edmund White here a month ago or so ago. And we will be doing another event with *Slate* magazine, that is celebrating its ten years of existence, in about one month.

It probably is my upbringing that makes me ask such questions. I was wondering, you know, "Where does the word 'eavesdropping' come from?" and I remembered that when I interviewed, in Los Angeles, Philip de Montebello I was asking myself the same question, not about "eavesdropping," but about blockbusters, where did the word "blockbuster" come from? And as you all know, blockbuster comes from the Second World War, where one busted a block, and the contrary of a "blockbuster" is a "bomb," a complete failure. But eavesdropping. The origin of the word "eavesdropping" comes from when people literally hide out in the eaves-drop, i.e., the lower edge of the roof, where water falls from the eaves, and listen in on a conversation.

Tonight we have the great pleasure of having a full room, which I could predict, we could all predict, and so there are people upstairs eavesdropping on this conversation, over monitors, and I want to thank all those people for being upstairs, and apologize for them not having room here, but I thought it was perfectly wonderful to have them up there, given the content of the conversation down here. **(laughter)** I've always been interested by the origins of words, particularly the word "secret." The word "secret" already secretes, it can't quite contain itself. It already is a word that in itself is breaking apart, as it were. I've always loved Thomas Jefferson's line that for two people to keep a secret, one has to be dead. **(laughter)** And that's why we have state secrets and leaks.

I highly encourage all of you to become Friends of the Library, to sign up on our e-mail list, you'll hear about all the events we're doing. In about two weeks' time, I'll have the pleasure of interviewing David Remnick, and then John Updike will be at the Library with Jeffrey Goldberg talking about his new book called *Terrorist*. And then a couple more events this year. After the event, there will be a book signing. And this event—I was asked, as is always the case, how long these conversations take place, and I always say they should last more or less as long as a psychoanalytical session, so, depending on your analyst, somewhere between fifty and fifty-nine minutes tonight, **(laughter)** followed by a Q and A, and I've asked Jeffrey Rosen to be extremely strict and not only not moderate the conversation tonight but instigate it, but also to make sure that when you ask questions tonight you ask questions, rather than make statements. So without further ado, let this conversation begin. And I hope that the Admiral will feel up to it. Thank you very much.

(applause)

JEFFREY ROSEN: Well, it's a great pleasure, ladies and gentlemen, to welcome you here this evening, and it's impossible to think of a better time and place to be discussing this particular topic. With its usual concern for the intellectual well-being of its patrons, the New York Public Library has arranged for the firing of Porter Goss **(laughter)** and his replacement with Michael Hayden. All of us are eager to know what to think of these momentous events, and you see before you a dream team of the surveillance world, which will enlighten us on these matters. Let me introduce them briefly—they're all well-known to you—and we'll start our psychoanalytic session. James Risen—it's a special pleasure to welcome him. He covers national security for the *New York Times* and he's recently been awarded the Pulitzer Prize for his path-breaking reporting of the very events that we're going to be discussing this evening. In its citation, the Pulitzer committee talked about his carefully sourced stories on secret domestic eavesdropping that stirred a national debate on the boundary line between fighting terrorism and protecting civil liberties. His most recent book is *Wrath of Angels and the Main Enemy: The Inside Story of the CIA's Final Showdown with the KGB*, but the most recent book, which draws on his reporting, is *State of War: The Secret History of the CIA and the Bush Administration*.

Admiral Bobby Ray Inman served as director of Naval Intelligence, Vice-Director of the Defense Intelligence Agency and, most important for our purposes, Director of the National Security Agency. His last major position was Deputy Director of the Central Intelligence Agency, making him especially well-situated to talk about our conversation this evening. Right now he's a tenured professor holding the Lyndon Johnson Centennial Chair in National Policy at the University of Texas at Austin.

And Patrick Keefe, whose wonderful *New Yorker* article you'll see outside, was a Marshall Scholar and a 2003 fellow at the Library. He's a graduate of Yale Law School and the London School of Economics, and has written for the *New York Review*, the *Yale Law Journal*, and *Slate*. I can't recommend highly enough his first book, the wonderful debut *Chatter: Dispatches from the Secret World of Global Eavesdropping*, which reveals him to be an intellectual sleuth of the first order.

I've been asked to just jump right in and begin in medias res as it were, so my first question is a simple one, a factual one to James Risen. What exactly is being eavesdropped on? As I understand it, despite your book and your reporting, there are conflicts about what exactly is revealed. As I understand it, before this surveillance scandal broke, under the Foreign Intelligence Surveillance Act, you needed a warrant from the secret FISA court to intercept communications if one of the parties was a suspected agent of a foreign power. And now, the administration suggests, conversations may be intercepted without a warrant as long as one of the parties is overseas and is reasonably connected to terrorism, so, in other words, do you actually have to have a suspected terrorist on one line? What's being eavesdropped, and how many conversations are involved? In your book you offer the number five hundred; others have suggested it may be as many as ten thousand. Tell us exactly what we're talking about this evening.

JAMES RISEN: I mean, one of the problems is this program is so highly classified and the details of it are still secret, that it's difficult to get into the real weeds on what's going on. The best information we have now about what they're actually doing is that, as you suggested, there

was a legal process in place for the last thirty years under FISA to conduct electronic surveillance of American citizens at home and in their international calls. After 9/11 the Bush administration decided to secretly skirt FISA, go around FISA, and just start to eavesdrop on Americans without search warrants, without going to courts, or without changing the law, and they began—the program began with a focus in the immediate aftermath of 9/11, on Afghanistan, with surveillance of calls in and out of Afghanistan, including between the United States and Afghanistan. At some point later it was broadened to cover virtually all international calls going in and out of the United States. What happened was the NSA began to create its own procedures, in which they would decide themselves on what probable cause existed to determine whether someone was a terrorist or a suspected terrorist who should be monitored. The problem, of course, with this was that they—it was up to the NSA to decide, there wasn't any legal process they had to make that determination. For the first couple years of the program, they were doing it more or less in the blind, as far as we can tell. It wasn't until about 2004 that some senior Justice Department officials became so concerned about the process that they began to impose some checklists for the NSA on how to operate, gave them some kind of rudimentary legal probable-cause checklist, but up until that point, there was really no oversight whatsoever. Over the last couple years they were doing this essentially just with that checklist. There had been, as far as we know, only one audit of the program by the Justice Department prior to our story running in December, and they had briefed a few members of Congress about the existence of the program, but they had kept the briefings so limited that as far as I know no-one from Congress ever went out to the NSA to look at what they were doing.

They basically have—so you have to kind of take them at their word that they've limited this to terrorism suspects and what we were told at the time was that they were focusing on about five hundred people at any one time in the United States and about seven to ten thousand people overseas. The bulk of the program was still focused overseas, but there was some slippage into the domestic arena that they don't really like to talk about very much. One of the programs they had that they've acknowledged to us, we've written about, was that international cell phones are difficult to tell exactly where they are when they're monitored. And so there were some cases in which there were two people inside the United States with international cell phones. It turned out that they thought they were overseas but they were eavesdropping on purely domestic phone

calls in those cases. They call that “inadvertent domestic-to-domestic surveillance” and so that’s the kind of the basic facts of it, is that there is virtually no oversight, or hasn’t been until very recently, of what they were doing. And so you kind of have to trust them when they say that they’re focused only on terrorists, that they’ve got some good ideas on how to identify people who are suspects of terrorism, and that they are focused purely on domestic-to-international phone calls.

JEFFREY ROSEN: That’s very helpful. Admiral Inman, is this a good idea? The administration says “Why shouldn’t we be able to listen in without a warrant if one person is related to terrorism?” Is this necessary?

BOBBY RAY INMAN: Let’s put this into some context. For thirty years, presidents signed warrants authorizing the National Security Agency and its predecessors to collect information on foreigners, on entities, on individuals inside the United States. When I became the Director, I became acquainted with the process. A lot of people claim authorship of FISA, and this is how it really came about. The first set of warrants were due to be renewed, so I sent them down for approval and instantly got back, “Oh, they’re trying to trap the President.” So I let the warrants expire and we stopped the surveillance and within two weeks, I got, “Where’s the product? That’s very valuable.” And I said, “You didn’t sign the warrants authorizing—I’m not going to proceed.” “Well, get them down here,” and they were signed quickly and coverage was resumed and at that point I went to see two members of the Senate and said, “There has to be a better way so you’re not caught in, when administrations change, the issue of whether this is some kind of political trap, as opposed to valuable requirements.” Out of it came the FISA Court. Six, in the initial days, six judges, who were from the appeal court of state selected by the Attorney General. All of the hearings, everything about the warrants, done in closed session. They were tough. For both, “What is the purpose, what are you going to get, what is its intended use?” and they always focused on, “What if you inadvertently collect on U.S. citizens?” Because that first word of the FISA Court, Foreign Intelligence Surveillance was what drove it, so a whole series of processes were put in place.

I did not have the vision in 1978 to think about a world where people would come to this country on legitimate visas and spend weeks, months, training, planning, and then executing attacks. Nothing in the whole process of the court was structured to think about that kind of a target in the process. It was a totally different approach for criminal activity, new criminal activity, which you didn't go to FISA Court initially, you went to normal judges. The other thing I didn't envision was the dramatic shift from analog to digital communication—speedup—and what both meant in enabling surveillance. Notwithstanding all of the good movies and television programs, computers still in overwhelming (**inaudible**) cannot sort voice communications. Only people can. But digital activity, computers can sort and identify in incredibly short time frames, and that means what numbers are being dialed, how they are being dialed, suddenly could be accessible in the kind of time frame, that you can do warning, preventive attack. My understanding—and happily I have no access to the program. My understanding is I have tried to track and understand and candidly much of my understanding comes from those members of Congress who have had access, who still occasionally consult. In the immediate aftermath, the White House asked the NSA, “Are there any other prospective attackers out there?” And I don't have a problem, on an emergency basis, of going to scan and say are there other, because it turns out that there were a lot of phone calls back and forth between those who conducted the attacks, moving money, other things in the process, which could have been tips for warning, if you had known what you were looking for, if you understood it, and had gotten it in a timely way. My problem is in not going through the Congress to revise the statute to deal with the issues that I simply wasn't smart enough to think about in '78. We can come back to that later. I think there are a number of ways you could have done it. But here, he said it publicly, so the Vice President, who was Chief of Staff to President Ford when the president still authorized this and said, “We don't need law. The president has authorized these in the past and can authorize them now,” and that's why no activity moved forward to pursue changing the law, to do it in the courts.

JEFFREY ROSEN: That's very helpful, and I will ask you later what a statute regulating this program might actually look like. But I want to ask Patrick Keefe. The Admiral has offered an extremely modest defense of the program. On an emergency basis, it might be useful. So what's the problem with allowing for warrantless surveillance on an emergency basis? Civil libertarians

give lots of hypothetical nightmare scenarios but no concrete examples of abuses. Why should we actually care about this program from a privacy perspective?

PATRICK KEEFE: Well, I think that the—it's interesting that the Admiral mentioned that one of the things that was going on was not so much necessarily listening in on particular calls as looking at who was being called. And I think that it's easy, when we say wiretap or eavesdrop. There's a misconception which is that you have kind of 50s-era G-Man in a trench coat tapping a particular wire and listening to all of the phone calls that are happening there, and I think what is going on quite possibly in this program and certainly in others that the NSA is employing, is more of a sort of a mile wide and an inch deep in terms of the approach, so it's not necessarily that you have actual agents or even computers sifting through the actual conversations and correspondences of tens of thousands of people, a lot of the time it's what they might call "link analysis" or "data mining" so in fact what you're looking is traffic patterns and the aggregate patterns of who's calling who. So there's a threshold question, which if you're working for the NSA, you have to answer, which is, "Who in fact should we be listening to?" And one of the ways that they're going about that, we know, is through these various sophisticated software algorithms, that say you have, in the President's effective if slightly disingenuous phrase, "If Al-Qaeda is calling you, we want to know why," so say you have Al-Qaeda calling you, it's not just that we want to know why, we want to know who else are you calling, and you move out a degree of separation, and "Who are those people calling?", and you move out a degree of separation, and "Who are those people calling?", and I think when you look at it in those terms it actually becomes fairly understandable why you couldn't apply for FISA warrants for each of these instances, because you're talking at two or three degrees of separation, you're talking about tens if not hundreds of thousands of people. Having said that, from a privacy point of view, I'm not sure that that's as unsettling as it might initially seem, because I'm personally less upset at the notion that somebody might look at what they call the metadata on an e-mail of mine, so to, from, subject, date, time.

I'm less bothered by the idea that a computer might sift through that, looking for patterns, than I am by the notion that somebody might actually listen in on my conversations or read the substance of my e-mail. That said, the problem with this, I think, and it's both a problem from

the privacy point of view and also from a pragmatic point of view if you are trying to figure out who Al-Qaeda is calling, is the problem of false positives. That, say you do have that call from Afghanistan to New York City, and you do start working out by degrees of separation, it just stands to reason that, even if you have a terror cell in the United States, a lot of these people are going to be communicating with people in a perfectly innocent way. It could be the person you rent your apartment from, it could be somebody that you know on your job, and once you start working out, people get kind of ensnared in that associational web, and I think that that *is* a real danger and we know, for instance, there have been pieces in both the *Times* and the *Post*, saying that that the NSA would use this program to generate tips, that's how you basically have leads, and in many cases those leads would be given to the FBI, and the FBI would actually send people to chase down these leads and find out where the substance was. And the vast majority of these leads ended up being dead-ends to the point where it was actually a joke at the FBI that when they would get a new batch of tips from NSA, they would say, "More calls to Pizza Hut." **(laughter)** Which to me, if you're the guy at Pizza Hut, and Al-Qaeda's not calling you, that's troubling from a privacy point of view.

BOBBY RAY INMAN: This really does let us zero in on why this whole new world of international terrorists, which are not often state-controlled or state-supported, has become much more complex, when we worry about attacks inside the country. I spent twenty years of my life out supporting operating forces, looking for indications and warning possible attack, and you sort through hundreds to thousands of fragments, looking for any lead that might—and, frankly, your intuition to connect them is often the difference. It doesn't surprise me at all that the FBI thought that these were useless. They've never been in the indications and warning business. They're a wonderful part of our judicial system to carefully assemble evidence, to protect it from being tainted, leading to indictment, prosecution, jail. Nothing in that talks about warning. And suddenly they have this flood of the kind of tips that military intelligence people have been accustomed to working with in an entirely different light for years and it's a lot of work to run down and discover that maybe one or two have some utility, but if those one or two turn out to be a Mohamed Atta and the rest of it, then it will have been worth the time.

JEFFREY ROSEN: Isn't that a good response to the problems with false positives? You can have remedies for people who are wrongly identified, if you catch one or two terrorists, that's fine. It's not a privacy objection, though. What about the problem of privacy? The most concrete criticism I've seen of the program is that it might raise something along the lines of the Nixon effect. Basically, just as President Nixon wanted to retaliate against his critics by auditing their tax returns, so this administration could, and some suggest, have, looked at the data of its critics and threatened them with retaliatory prosecution. Is that a danger separate from the problem of false positives?

PATRICK KEEFE: Yes, I think so. I mean the—well, certainly, it's almost the opposite, right, it's not that you're getting somebody accidentally caught up in the web, it's that the program is being co-opted to go out and do this sort of thing. And I think actually even before the big story about this program, there was some indication that that was happening. The one funny instance of this which we found out about last summer, though it didn't raise much of a, it didn't raise many eyebrows, was in the John Bolton hearings, in his confirmation hearings, I mean, again, another problem with the "if Al-Qaeda is calling you" line, is that it's actually, if Al-Qaeda is calling you, and we are listening to somebody in Afghanistan, and they make a call to New York, it was always fine to listen to them, you never even needed to apply for a FISA warrant. What you did was when you got the intercept of that conversation, and you developed a report on it, and distributed that report, you redacted the name of the American.

So, if somebody in Al-Qaeda who we're listening to in the course of their business calls me, it's not that they would say, "Look, he's calling somebody in New York, we have to stop listening." What they would do is in reporting that up my name would be redacted, and you would get "U.S. Person," it would always say "U.S. Person." And, in the John Bolton hearings, it emerged that on a number of occasions when he was at the State Department, he would get one of these reports, one of these kind of cleaned-up reports, in which you have the redacted name. And he would basically call over to the NSA, if I understand, and basically say "Yeah, that U.S. Person, who was that?" and without any process of review or any showing of evidence—in fact, they said the legal standard—a former general counsel for the NSA said that the legal standard would be if it would help him better understand the intercepted conversation to know who the other party was.

So that was the standard, which I think he tended to satisfy it, it turned out they had done this on ten thousand occasions over an eighteen-month period between 2004 and 2005, and in that case the worry with somebody like Bolton, a sharp-elbowed Washington player, is that you could actually be in some cases listening in to various Beltway adversaries or people that you had preexisting relationships with. And we know that on at least one occasion, he got one of these reports about some colleague of his, of a conversation the colleague had had with someone that the NSA was listening to, and he actually went up to the colleague and congratulated him on his performance in this phone call. To me, if you're talking about a Nixon effect, yeah, that, to me is a troubling possibility.

BOBBY RAY INMAN: Just a slight correction.

PATRICK KEEFE: Please. **(laughter)**

BOBBY RAY INMAN: These are not all conversations. A lot of them are messages back and forth, and those in fact, were from the legitimately approved process FISA collection in this case. But it doesn't lessen the rest of the point. All I'm trying to get the audience to understand is that a lot of this isn't just conversations. Some is printed text, some of it emails, and the rest of it, and so you've got, depending on the accession approach, they may be a whole variety of different ways that these discussions, as opposed to conversations—somebody is reporting home a conversation they had with an Assistant Secretary of State, and an undersecretary doesn't like what he's seeing, the NSA cannot report, if they report the text, they cannot identify the individual, who's there. It's then them going back to say, but I need to know that to understand the context. I would have told him “no” after about the third one.

JEFFREY ROSEN: This is helpful and we now understand that you can have Nixon effects even with warrants, they're not a protection against this at all. Good, well we now understand the facts of the program, we've had a tepid but sportsmanlike moderate defense and we have two big problems, which are the danger of false positives and the Nixon effect. James Risen, let's talk about the reaction to the program. I would have thought that after the publication of your path-breaking articles a grateful nation would rise up in indignation and ensure that this never ever

happened again, but that's not quite what happened. In Congress, there was a stark polarization; Republicans defended the program, Democrats questioned it with some exceptions, the polls also suggested a partisan split, and now the leading defender of the program has been nominated to run the agency that will administer it. Tell us more about General Hayden and more about whether you were surprised by the reaction to your scoop.

JAMES RISEN: Actually, I've been surprised that the reaction has been this big. You know, when Eric Lichtblau and I wrote this story, that I remember the night before we ran it, we were wondering if anybody would even notice it. We thought it was a good story, but we didn't think it was this big. So, from my standpoint, the reaction has been much bigger than I expected. You've got a national debate going, which from a reporter, as a reporter, all you want is for people to notice your stories and, to me, that is the real danger of what was going on before, was not that—we don't know if there was any abuse of this program for political purposes. But, to me, when you do these things in secret, the way they were doing them, whether they start out being abused, or being used for political purposes, if they stay secret forever they're bound to be abused and that, to me, is the importance of having this reported on, because we've, you know, taken a lot of hits for reporting on it. Is that now we can have a debate and people can decide for themselves whether they like it or not, and we've got a split on that. From my standpoint, that's fine. I just think now we can talk about it, and that's the important thing.

And I think that frankly the legislative action has been quiet, but it's actually taking some steps forward. The Senate Intelligence Committee has created a special subcommittee, after a lot of gnashing of teeth, to start formal oversight of the program. It's got both Democrats and Republicans on it. The House subcommittee, the House Intelligence Committee, is attempting to do some oversight of the program, as well, and you've got the Senate Judiciary Committee has held some hearings and there's several attempts within the Senate now to fashion some legislation to bring this within FISA. I think my newspaper's editorial was, "It's as if you got caught speeding and then the state legislature's changed the speed limit to accommodate you," but then that's part of politics. So I think that then essentially the Bush administration made a political mistake in 2001 by not going to the country with this in the first place because I think, I

remember I've told this to the people in the Bush administration, "If you had asked for this you would have gotten it." And I think that was their big mistake.

BOBBY RAY INMAN: But the advice they got from a very senior Democrat, was that he couldn't get it through. Now, that wasn't from the Bush administration, that was from the director...

JAMES RISEN: Right. Right. No, I know, I know they've said that, but I—

BOBBY RAY INMAN: ...and the very senior Democrat, their response was, in this current climate, I could not get it approved without running the risk to the entire program. I don't happen to think that's valid...

JAMES RISEN: I don't either—

BOBBY RAY INMAN: ...because when you look through the details, we never had a public hearing on what the FISA court was going to cover, it was all done within the select committee, and the rest of Congress accepted.

JAMES RISEN: You know better than I do that Congress deals with secret issues all the time...

BOBBY RAY INMAN: Absolutely.

JAMES RISEN: ...and there is no reason, even if what they could have done is to generally discuss this publicly, saying we are now modifying FISA, we are going to broaden our scope of surveillance, they didn't have to get into all the details. They could have changed the law, and nobody would have had a problem with it.

JEFFREY ROSEN: Admiral, tell us about General Hayden. Everything.

BOBBY RAY INMAN: He's from a working-class family in Pittsburgh. Small college. Went to the officer training, OTS, for the Air Force, I went to OCS in the Navy. He early on got assigned to strategic-planning activities, had a gift for it. It was not a traditional Air Force career. He ended up being National Security Council staff for a period. He was actually, he got promoted up to three stars without the normal command tours, and he was out in Korea as the Deputy United Nations Commander when they were desperately looking for a successor, and they didn't have anybody then functioning in any of the intelligence jobs that they thought could do the job, so he came back, and I think he would even agree, he had a rough first year, but he did prove over time to be somebody who could transform a large organization. Not without some bumps along the way. Even his biggest critics, by the end of his tenure, gave him pretty good marks as the director of NSA. Why he would be willing to undertake this task, I don't comprehend. He's, the attacks are already underway from multiple sources, but the ones that catch my eye are the ones who focus on "Well, gee, he doesn't have any human-intelligence background"—neither did Mr. McCone, neither for that matter did Stansfield Turner, in the process, so that is not automatically disqualifying. I guess one of the reasons I have some confidence in him—I loved one of the papers today talked about the worry that he was too close to Secretary Rumsfeld. Rumsfeld can't abide him, because he didn't support him on the legislation, and in fact, made the judgment, testified to the committees, he and Jim Clapper, who both became non-persons in Defense, so if you were looking for somebody who wasn't going to be a captive op, at least for that reason, it was a good choice, but still, it's an impossible task.

JAMES RISEN: I think what it shows, though, is the CIA is now permanently a back-bencher. It's kind of formalizes what's been going on the last couple of years is the CIA—the Bush administration and the White House in particular hates the CIA, with a passion for, really the wrong reasons. They came to the—the Vice President and Rumsfeld and a number of other people at the White House came to the conclusion a few years ago that the CIA was filled with liberals who hated—who were antiwar, and they just really never understood the CIA and they never really tried to understand it, I don't think. And they managed under Goss to essentially break the spirit of the place, and now what really, I think what Hayden's—as the Admiral said, Hayden and Rumsfeld hate each other, but really Hayden is Negroponte's person, Negroponte the DNI, this consolidates the view now, the position now, that the CIA is essentially a deputy to

the DNI, and it helps consolidate Negroponte's standing while he then has to have a fight with Rumsfeld.

BOBBY RAY INMAN: And just for the record, testimony I gave in January of '96, I proposed exactly this kind of change, except I would have gone much further, and that was because I was persuaded at that point that CIA was already a broken agency, and unless you separated the collectors from the analysts, you would never get an honest analyst approach because they were always under pressure to make the clandestine collectors look good.

JEFFREY ROSEN: Patrick Keefe, we've heard that General Hayden was crazy to want to take the job and that the administration should have followed the admiral's excellent advice and changed the structure of intelligence gathering long ago. Hayden's gotten into the most trouble for his vigorous and robust defense of the legality of the NSA program. You're a recent graduate of Yale Law School. Using the dispassionate objectivity that only Yale is capable of, **(laughter)** tell us, is this a close question about whether or not the program is illegal. If it is illegal, tell us why, and if it's not, why not.

PATRICK KEEFE: I would really be struggling to be objective here. I don't think it's close. That said, I think in some respects, what happens in the Justice Department in this administration is not dissimilar to what happens with intelligence, where you essentially have a kind of stove-piping. If you order up a legal opinion from the top down, if you say, "This is what we want to do, can one of you make it play, legally?" you will always get some ambitious junior lawyer who will make it happen, who will write you a rationale, and I think that particularly we know in this Justice Department what happens is that those who, when confronted with that request, say, "Actually, I think that might be a little out of bounds," are squeezed out, and stop getting cc'd on the correspondence, and that those who are willing to find a rationale, no matter how far-fetched, are promoted. There are a number of different arguments that have been thrown out by the administration in support of the legality of this program. The argument tends to be that the FISA wouldn't apply, it's not necessarily that this would happen within the context of the FISA system, but that it wouldn't apply.

You have a number of arguments, the principal one being that when Congress authorized the use of force shortly after September eleventh, that acted as effectively a carte blanche and that implicit in that broad authorization was a whole laundry list of different authorities that the president had in order to protect the country. One of the things that's kind of interesting is that they've, the Supreme Court decided eventually that in fact yes, implicit in that broad grant of authority was the ability to designate enemy combatants, and this is something that's been thrown out as a justification by the administration, though, in fact, the Supreme Court didn't decide that issue until several years after the operation in question had been going on at the NSA.

I don't buy that argument. I don't buy it for a number of reasons. I think, first of all, you very clearly have the FISA, you have a statute passed by Congress which says, "These are the only circumstances in which you can do this kind of eavesdropping," and so the notion that you would trump that very specific congressional provision with any kind of a broad, generic grant of power by Congress, to me, that doesn't survive any kind of—the first level of scrutiny. Second, from a pragmatic point of view, and I think a number of congresspeople are worried about this. Say you let this stand as a precedent, and you say, next time the country's attacked, Congress immediately gives a broad grant of authority to the president. Are we going to be in a situation where they need to append to that grant a very long laundry list of all the things that aren't implicit in that broad grant? That, I think, would be quite a dangerous outcome of this situation.

JAMES RISEN: I think that one of the, just on the legal thing, I'm not a legal expert, the lawyers I've talked to on this have made one interesting point, which is that the legal basis—the legal problems facing the administration on this are more serious than, say, on the torture issue or the detainee issue, which for the most part in my understanding deal with international law, treaties, the Geneva Convention, those kind of issues. That there's some—I guess, some legal history about giving the President greater latitude on dealing with treaty obligations, whereas this is a domestic statute by Congress that is very clear, and that that carries a greater force of law than, say, our obligations under treaties.

BOBBY RAY INMAN: And the extra sentence was put in the bill that said, "You can't do anything that's not authorized by this bill." And at the time, I was perfectly happy to have that.

This is in the wake of the Church and Pike Committee times and I was eager to be able to persuade audiences that in fact NSA was not doing anything that was not authorized by the courts, in the process.

JAMES RISEN: I think that's to me one of the great problems Hayden has politically now is his credibility. As you pointed out, he was in Korea before he took the NSA job, and one of the things he told me years ago was that right about the time he got the word that he was going to take over NSA, near the end of the Clinton administration, the movie with Will Smith, *Enemy of the State*, came out, which is I think the first movie really about the NSA, and maybe there were some others, I don't know, and it made the NSA look like a bunch of murderous thugs who were out to destroy the republic, basically. And he, I remember he was very eloquent on the fact that that appalled him, that that image was out there of the NSA and he realized that the problem the NSA had was that nobody really understood it and so in this vacuum you could say all these horrible things about NSA. And when he came into Fort Meade, I think he was one of the—maybe you did this when you were there—but he was one of the first NSA directors to really make an effort to get to know the press corps in Washington and to really give the NSA a public face, and he constantly was out there saying, you know, “We don't spy on Americans, we never would spy on Americans, we follow the law.” His, one of his favorite phrases was, you know, “We know that NSA always has two strikes on it and so we're afraid to go for a third.” And of course after 9/11 he stopped giving those public speeches and he left the impression out there that that was still the case, and I think that that's one of his problems, he's got a credibility issue.

PATRICK KEEFE: There's one quick footnote to this. Specifically with this idea of flying in the face of a very specific act of Congress, I probably don't share your optimism, if we go back a few minutes, about the congressional response to this. I think that this was a, in some respects, I think that this story is part of a larger story about the transformation of presidential and executive power in this administration and I think to some extent Congress has abdicated its role here and that you in fact have this great insult, which is that the FISA is—that we've gone around it. And I think you bring this out really beautifully in your book, that the big debate that we had in the fall of 2001 about the Patriot Act, all of the back and forth about the provisions of this big law and the fighting over the details, was a charade. All the while, behind the scenes, you had a

completely different agenda that was moving along. This to me is a sign that Congress has been completely, it's a gut-punch to Congress, and so it's amazing to me that whereas during the Church and Pike Commissions, you actually had a Congress, a very muscular Congress, go out there and basically strike back against the executive and assert itself and sort of create the FISA era as we know it. Here we have a total abdication and I thought that rather than a kind of strong response that you would expect, instead Congress just folded.

JAMES RISEN: That's because you've got the same party controlling it, I mean, that's the problem.

BOBBY RAY INMAN: I think you also have a factor here of when you had Church and Pike committee, you had the history of Vietnam, and you had the history of Watergate, and therefore there was a broad public support for constraining the imperial presidency. I watched for thirty years the opinion polls and whatever the issue, a smaller federal government role in our lives always was at the top of the polls. Suddenly after 9/11, it dramatically shifted, in weeks, and it stayed pretty high—the federal government has to act, the federal government has to do something—and I think that, if they do nothing else, they read the public-opinion polls, and I think that that encouraged a shift, and you already had—he's been public about it—the Vice President's view that much too much was given away back in the earlier eras.

JAMES RISEN: I do think that that's starting to wear off. Now, one of the things that strikes me is that there's now been more time between today and 9/11 than between Pearl Harbor and the end of World War II. So after five years, I think we can start to have a debate about how much of these emergency measures and the whole color-coded world that we had, how much we want to keep that as a permanent infrastructure.

BOBBY RAY INMAN: My worry, Jim, is the next attack, and what the nature of that attack is and where it is and that that could propel us ever further than this one does.

JAMES RISEN: But I think that Iraq has kind of poisoned the well on the political side of that.

BOBBY RAY INMAN: Anything overseas. But another attack inside the country, I have some worries about where it might take the country.

JEFFREY ROSEN: Well, this debate, that James Risen and Patrick Keefe are having raises the central question: who will save us? Will it be Congress or the courts? Who is more likely to impose the kind of oversight that it sounds like all of you agree is necessary? So I'll ask all of you. I guess I'll start with you, Admiral. You are in Congress now. You are a solon of moderation, you run the Senate Judiciary Committee. What bill would you propose? And could it realistically be adopted in this political climate?

BOBBY RAY INMAN: I believe you can get a modification to FISA which delegates, whether it's to the director of national intelligence or the director of NSA, under a very clear set of circumstances, surprise attack, other things, that you have the authority to initiate surveillance and you must come to the court in ninety days and show exactly how you used it and what you got. But the most important part for this conversation is what inadvertent collection of U.S. citizens did you get and what did you do with it? And so it's obvious to you, I'm more comfortable with the courts. I just think the nation is stronger when you have the balance of the three parts.

JEFFREY ROSEN: Do you think that the suggestion that you've offered should be imposed by the courts?

BOBBY RAY INMAN: The courts can't do it. Congress has to enact it...

JEFFREY ROSEN: Congress enacts it and the courts administer it?

BOBBY RAY INMAN: ...and then the courts administer it. And there are some people in Congress who are attracted to the idea.

JAMES RISEN: Don't you think, though, that one of the problems the administration now has is that if they don't work with Congress to modify FISA anytime soon and if the legislative work

stalls, that the courts will have no choice but to deal with this as being outside FISA and that there will be legal challenges that will then be more damaging to the administration than it would be if they dealt with Congress on this?

BOBBY RAY INMAN: Absolutely, and this is really going to ultimately attest whether the President walks away from the Vice President on this issue. If they elect to work with Congress it's because he finally decided he needed to move into . . . **(laughter)**

JEFFREY ROSEN: Patrick, there are lawsuits pending. The ACLU has filed one, joined by such luminaries as Christopher Hitchens and James Bamford and other legal scholars of that ilk claiming that the program is unconstitutional, and lower courts have been asked to reexamine convictions of terrorists and to throw them out on the grounds that they were tainted with illegal evidence. Are these lawsuits likely to succeed, and are they a useful avenue of oversight?

PATRICK KEEFE: I mean, I don't know that they'd necessarily be a useful avenue of oversight. There is one case, the Electronic Frontier Foundation has a case in which there's kind of an interesting back and forth where they've been in fact been—they were given some, and check me if I get this wrong, but they were given some documents from an AT & T employee who had been, I don't even know that he had necessarily been working on the program, but he had been working in proximity to it, and those documents are now the subject of some dispute, with the government wanting to get those documents back. I wouldn't call that oversight, but if it adds to our aggregate knowledge of this program, that might be effective. I think, having said that, that the ACLU suit and the EFF suit are—they're provocations. I'm not sure that they're going to succeed. The ACLU suit I think already they've sort of changed the language where it's no longer that the parties to suit believe they were being listened to it's that they can't know for certain that they weren't, which is I suppose easier to prove. **(laughter)** These things leave no fingerprints and there's a great loophole when it comes to the secrecy surrounding this. I'm not sure that they'll get anywhere. The cases in the lower courts that are being reexamined in light of the evidence brought to bear against terrorists, I think, are one of the really interesting and kind of perverse outcomes of this, that again, should have been anticipated because in fact what you can see there is . . .

JAMES RISEN: Actually, they were anticipated, I can tell you that in our conversations with the government about whether to print the story.

PATRICK KEEFE: So anticipated, so I see, anticipated only in the sense that if the story came out. . . . I mean, well, when you institute the program itself, when you come up with this alternative, this sort of end-run around the FISA, the idea that that would not have procedural consequences in our criminal-justice system is astonishingly naïve.

JAMES RISEN: Right...the big issue that is standing, from what I understand, and those people have standing.

BOBBY RAY INMAN: The real lesson for us here in all of this. In carefully crafting legislation, you should leave the prospect of an emergency situation, and a limited response to that emergency situation, to then be followed by getting it—because we—just as I didn't envision in '78 some of the things that popped up, that might happen again. What you want is to get away from this idea that they can continue doing it. I suspect there are not all that many people in the country who would have objected to seeing, in the week after 9/11, were there other prospective hijackers in the country, getting on the phones, talking to somebody in Afghanistan.

JAMES RISEN: To me that was the question when I was reporting on this story that I kept asking the White House and other people: why didn't you go to Congress with this? They gave us that one story that you've, you know, but they never had an adequate answer to that. And because, as someone told me after our story ran and I think it's true, he said, "You know, in October 2001 you could have set up guillotines on the public streets of America and . . ."

BOBBY RAY INMAN: It's back to attitudes about dealing with Congress.

JEFFREY ROSEN: But James Risen, you remain optimistic that Congress finally will assert itself. What sort of regulatory regime do you think—

JAMES RISEN: Well! (laughs)

JEFFREY ROSEN: You were inspiring on the question, actually. (laughter)

JAMES RISEN: I didn't mean to be that optimistic. I think, well, look, they have to do *something*. Something has to give here. As I said, they can't just say, "Okay, this is illegal but we're going to let it keep going," because the courts will force the issue at some point, I think. And so it may be slow motion, it may take a long time, but I think my own gut would tell me that what will happen is that they'll find a way to adapt FISA to accommodate this program and maybe they'll adapt the program a little bit to accommodate FISA. Maybe there will be some compromise on both sides. I just can't see how they would *not* do that at some point.

JEFFREY ROSEN: Will they wait for the courts to force their hand? If they do, it will be a very long time.

JAMES RISEN: That'll be a mess, that'll be a mess if they do that. They seem to be, in fits and starts, moving down this path. Something could break down, I don't know. They need people like the Admiral here to push them. But that's actually one of the problems, frankly, is that there aren't very many people like him in government right now, it's very poisonous, and there aren't very many people who kind of are willing to split the difference.

JEFFREY ROSEN: Patrick, you've expressed pessimism that Congress will save us and ultimately that the courts will save us. Who will save us?

PATRICK KEEFE: Oh no, I'm not necessarily pessimistic about the courts. I think that if we would allow them to do so they would, what's troubling to me is that the suggestion that we're going to have oversight of this program be managed by a congressional panel is just sort of laughable. A congressional panel in which we'll, as its currently formulated, you'll have three Republicans and two Democrats, right? Part of the joke of this is that the FISA prior to this story

coming out, was itself a sort of a laughable rubber stamp. Over the years it was not hard to get a FISA warrant, and you'll please correct me, but so my understanding of the numbers is that . . .

BOBBY RAY INMAN: You got told early, "Don't come to the Court unless you've got all these elements there," and therefore they were very clear, "If you go forward with these, you will not get approval," so you didn't go forward with them, except the FBI, who did some, and you know the case here where eventually the judge said, "Don't ever send that guy back to appear before the Court," in the process. But it did enforce a discipline from the very beginning. Make sure you've got exactly the case, what it is you're going to collect, why you're doing it, what purpose does it serve.

JAMES RISEN: One of the things that, I don't know whether to be optimistic or pessimistic about this, but this is kind of the reaction I got while I was reporting the story on all the of the professionals in the government who I talked to about this and almost none of them who dealt with FISA on a day-to-day basis knew about this program. And whenever you would talk to them, it was like you were talking about something that was going on on Mars; they just couldn't imagine that this was happening, and they thought I was wrong, they all said, "No, no, you're wrong, you're wrong." And so my own sense is that—maybe I'm just being optimistic today—that those people will find a way, that that professional core will find a way, to say wait a second, this is wrong, we've got to figure out a way to make this work.

BOBBY RAY INMAN: I felt much better about my time there with the attitudes of the workers when I had an occasion where a proposal had come up to do something that I thought was not only ludicrous but probably would have violated the Act. I had a delegation of senior NSA employees who came to get on my calendar to tell me I absolutely shouldn't do that, that it would be disastrous for the Agency. I was initially offended that they thought I would agree to such a cockamamie scheme but on the other hand I really felt good about the fact that it was deeply ingrained that you operate within the law and you get the law changed if you need to do. You can do what the country needs to provide it the information it needs within the law if you work with the Congress to craft the legislation you need. I still believe it.

JAMES RISEN: I just think that now that it's public, it's going to be very difficult for them, it's much harder for them to abuse it. That to me is, I feel like, we did our jobs, now everybody else can talk about it.

BOBBY RAY INMAN: All those people inside who are now aware, who will be looking for the signs.

PATRICK KEEFE: Do you not wonder . . . I mean, again I guess I'll play the cynic, but what I worry about is I feel as though for the most part people just don't care. I don't think this issue is getting a lot of play in Congress. I think there was a brief suggestion shortly after the story came out that there would be real hard-hitting investigations, but I mean in fact if you look at the witnesses called, it struck me as largely perfunctory. I think that you might have had an opportunity, the Democrats might have had an opportunity, to raise this issue again in the Hayden confirmation hearings, but my bet is that it's not something we're going to push too hard. We'll take it as a fait accompli that Hayden will be appointed so politically it's not going to be to anyone's advantage to chase this down as an issue. What's strange to me is that you don't actually have any kind of a groundswell of support and the idea that even, for instance, the measure to censure the President ended up being such a politically foolish move because nobody was there to back that up.

JAMES RISEN: I don't know. I go back and forth. Today I'm optimistic. Tomorrow I might be pessimistic, but I just I think part of it is that the Democrats have made a calculation that the Republicans are committing suicide, let's not get in their way, and so they're not going to say anything. And the other thing on the Republican side, you've seen quite a bit of splits on this and if you talk to senators and congressmen in private they are furious with the President over this. They are in a very difficult position trying to—it's an election year, they're trying to figure out which way to jump. And so, I don't think we've heard the last of this issue. I think the legal process and the legislative process will go slowly, but something will happen.

BOBBY RAY INMAN: Definitely. I take us one step further on the privacy issue. And ask the three of you which are younger and in this computer generation. Every time you get on your

computer and go browse the Web or elsewhere you leave a trail. A variety of people for business reasons know exactly where you've been, which sites you've visited, they keep records of it to come back. What is it a cookie that they put on to track? I wonder has this younger generation, simply knowing that that takes place, are they less sensitive on this issue of privacy than some of us old guys?

JEFFREY ROSEN: There are some very interesting polls suggesting that young people like to be naked much more than older people. **(laughter)**

JAMES RISEN: You may know this, but I heard, I did hear one of the things that was interesting. I've never confirmed this, but I've heard that within the NSA, among the very few people who knew about this program, there were some concerns, serious concerns, some people considered resigning, some people refused to participate in the program, and what I heard was that the people who were the most concerned were the people who had lived through the whole Church Committee period. And that it was the young people who said, "Oh yeah, let's do that," you know?

JEFFREY ROSEN: Patrick, our generation has been issued a challenge to defend the purposes of privacy. Take it away.

PATRICK KEEFE: Well, I do think that the—there is a sense in which technology definitely plays a different role in one's life. During the Church Commission there might be a possibility that someone was intercepting your phone calls, or your international cables, but one lives so much of one's life online now. This actually gets to what you were saying earlier about the idea that it's not just conversations. It's everything. It's paying your bills, it's your health insurance, it's your work communications, it's the music that you download. It's all there, it's all available, and in some respects I would think that that would make people more worried.

But I certainly, I'm just thinking actually I gave, in this building, I gave a talk to a bunch of high-school kids about six weeks ago and gave them a very simplified version of this spiel and they all looked at me with sort of dead, uninterested faces and eventually I figured better to draw this to a

close and get into some Q and A, and the Q and A didn't really go anywhere. And then eventually, I just said, "You guys just really aren't worried, are you? I mean, are you worried, you're all on the Internet all the time, you're IMing each other, you're worried that the government's going to spy on you?" And total silence, and then this one girl raises her hand and says, "I'm worried about my *parents* spying on me," **(laughter)** and this chorus of people agree, and suddenly we're having this totally different, unanticipated version of the privacy conversation in this context of parents kind of looking over their shoulders at what they're browsing on the Internet.

JAMES RISEN: Well, I think it gets back to that issue that you were talking about earlier about the metadata that's available and I think that, to me, is the real danger here for the potential for abuse is that because people see that as being benign, that there are so many ways to manipulate that digitally, as you said, that we are in the process of creating a Big Brother that right now we think is benign but it's—and it's not just the government, you've got all these, you know, private data-mining organizations for commercial purposes—and if you combine all of that, it's really difficult to foresee a way in which we can avoid kind of a Big Brother-type thing.

PATRICK KEEFE: And part of what's unexpected about that and interesting is that the contest in a way, the sort of tradeoff that I always think of as between privacy and security, where you give up a little bit of privacy in order to get a little bit of security, I think that increasingly it's actually a contest between convenience and privacy, that in order to live your life as a kind of fully developed digital person you're willing to barter away all kinds of little privacies, not in the name of greater security at all but because it means you don't have to keep reentering your password on the *New York Times* website.

(laughter)

JEFFREY ROSEN: Well, we've come to about the end of the fifty-nine minutes that we're allocated for a therapy session. We've aired our hopes and fears and anxieties. Some are optimistic, others are guilty of false consciousness. For myself, my parents are in the front row, and I'm afraid that they're going to talk to Admiral Inman afterward and get me messed up. But

this is the time ladies and gentlemen for me to ask for your questions, so please approach the microphones, which are being held up helpfully on the sides, and yes, ma'am.

Q: This is for Mr. Risen. Do you feel that it was appropriate for the *New York Times* to be bullied by the administration to sit on an explosive story during an election year and really only published your findings because they didn't want to be scooped by your book, and therefore helped elect a person who is not fit to be President of the United States?

(applause)

JAMES RISEN: Well, I've never gotten *that* question before. **(laughter)** Which one of my five pat answers do you want? Well, I just think it was a great public service by the *New York Times* to publish this story.

Q: (inaudible)

JAMES RISEN: Well, I'm not sure about that, I think that the public was much—Well, I think one of the—I've thought a lot about this, and I think the real interesting thing is that the attitudes of the country have changed dramatically in the last year and a half, two years, and we are right now in the midst of a national debate, rethinking the war on terror, the war in Iraq, a lot of different issues, civil liberties. At the time of the invasion of Iraq, you know, everybody now says, well, why didn't the *New York Times* rein in Judy Miller? Everybody after the fact has all these great questions to ask, and we in the press are now in the position of being the subjects of every at-home media critic and the truth is that we do our best every day. We try hard. And in this case I think the public reaction to this story was much greater when it appeared than it ever would have been before, because the country was ready for this debate and I'm not sure it was ready before. And so I think that the premise that the critics have had about that is just false. I don't think it would have influenced anything particularly before. I don't think that people were ready for a debate about 9/11.

JEFFREY ROSEN: Very good, sir, here, toward the front.

Q: The panel hasn't addressed—sorry—the question of whether this surveillance is actually effective. Terrorists today surely can use high-level encryption and all kinds of other tools that they can download from the Web very easily or other techniques. Does this stuff actually work?

JEFFREY ROSEN: Excellent question. Perhaps Admiral Inman could enlighten us.

BOBBY RAY INMAN: I really don't know, is the answer. A lot of—if people know they're being listened to, the narcotics dealers, they go buy the latest encryption and use it to cover their flow. People who think they can talk around the issue don't think they need encryption. My key for people who were listening to voice communications—look for the one where they're trying to talk around an issue and you probably have something that's interesting in that process. Mistakes...encryption is not a complete answer. Human failings in how it's used can end up making it very vulnerable for a quick computer attack. The best systems ought never to be broken, but they are broken from time to time purely because of human error in their use.

JAMES RISEN: I can tell you one other story of a similar thing. About a year and a half ago, two years ago, in 2003, you may remember there were stories that said that Ahmed Chalabi had revealed to the Iranians that the NSA had broken the Iranian code and was listening to their messages back and forth between Baghdad and Tehran and other places, and I wrote that story, along with other reporters, and that was when I first heard from Mike Hayden. He was still at NSA and he asked us not to write that story, too, but we wrote it anyway, and the thinking was “Well, the Iranians will surely stop using those codes as soon as the stories come out in the *New York Times* and CBS and elsewhere.” But a funny thing happened was that months later people at the CIA told me they're still using those damned codes, and Chalabi was still talking in them. And the reason was it was really hard to change all your codes, it's really hard to change your behavior, and the Iranians, I think, also didn't believe Chalabi and they didn't believe the American press either, so.

BOBBY RAY INMAN: I released all the World War II Japanese codes to be available to historians when I was the director. I did not release the materials that are called Venona, which

was where the evidence came that found the Meeropol brothers' parents. I didn't because KGB was still occasionally using those systems with brand-new agents. They eventually finally discontinued it, and that's why the materials were made available about five years or so ago, which give a whole different picture on the Rosenberg case than we'd known earlier. But it is a reality that sometimes they'll continue using a system, even though they know it's compromised because they're not sure they trust the new agent of not possibly being a double agent so they don't want to give him the most recent, most sophisticated encryption capability.

PATRICK KEEFE: Just a quick word about encryption, too. Encryption could function as a bit of a double-edged sword here. If you are a terrorist and you are communicating and you want to go unnoticed, one way would be to encrypt your communications and another way would be to realize that the NSA intercepts several hundred million communications every day and that the sheer volume of the white noise may be safe enough to hide you. One interesting little footnote here is that the NSA actually took out a patent several years ago, which you can read online, for a technology that actually sorts through vast flows of information looking for stuff that's encrypted, because think about it, I mean, one way to zero quickly in on what you're after is to look for anything that comes across and is in code, to pick that out and it could very well be interesting and try and break it.

JEFFREY ROSEN: Sir, in the back.

Q: I'm wondering why the panel's been so diplomatic about the question of whether or not the President committed a crime. He broke FISA law. That is apparently a felony and I haven't heard the word "crime" by the panelists. It would be very refreshing to hear that.

PATRICK KEEFE: Crime. (laughter)

JAMES RISEN: Clearly this is, this program is, there's a fairly broad consensus I think of legal scholars that this is in violation of FISA. When impeachment is a political act, as much as it is a legal act, and so if you have enough senators and enough congressmen who believe that oral sex

in an impeachable offense you can call it an impeachable offense. There are not enough senators and congressmen right now who are willing to call this an impeachable offense. It's politics.

BOBBY RAY INMAN: It also, you've never had a test yet of the War Powers Act. There are scholars who still think that if ever became a case to the Supreme Court it would in fact be overturned, as an encroachment on the executive powers. And I think there's some reluctance on some cases here. In my own view, this activity was not authorized by a resolution, "Use whatever force you need to do." There clearly was a line in the FISA statutes which says you couldn't do this. Was that a smart law, in retrospect? Well, throw the question back to you: If you had detected another terrorist, or somebody spreading anthrax, a week later, would you have considered that a crime?

Q: (inaudible)

BOBBY RAY INMAN: The court does not authorize warrants for this kind of collection activity. There was no provision in the bill we're dealing with, we're right at the thin edge here of the whole sources- and-methods issue. The fifteen-day didn't apply.

JAMES RISEN: I think that the issue is that this is a potential constitutional crisis, because to declare that the President has committed an illegal act, Congress or the courts have to do that. I think he has, as you said before, he has confronted them with an act in violation of the law. Now, politically—it's a political act for Congress to then stand up and say, "You are a criminal, you've committed a criminal act." And that political act hasn't happened yet.

PATRICK KEEFE: There was kind of a terrific moment, actually, in the hearings on this, the Judiciary Committee hearings, where the implacable Alberto Gonzales was asked by someone, "So, what *couldn't* the President do? Is there anything that wasn't authorized in this sort of broad grant?" and he said, "I'm not going to get into hypotheticals."

JEFFREY ROSEN: Yes ma'am, in the front row.

Q: I mean, none of this is new, USSR, Franco, Spain, Chile, they all start with this issue. Data collection, surveillance, on the one hand, and making themselves, those who are doing the surveillance, secret on the other. It's the combination of the two that, "We are spying on you while we do everything we do secret," is what's troubling. The first thing that Anthony Pellicano does, the detective in Los Angeles, when he is hired, he bugs his employers. The perversity of surveillance is in the existential act of surveillance and we know that, intuitively, and that's why all countries that ever went through that struggled with that. The reason they can do it is because names are not tied to the deeds. Gentlemen, you, when you speak, you speak of it as if it's a tsunami. This is not anonymous. They are specific people, with specific agendas, that are behind it.

BOBBY RAY INMAN: But you seem to be attacking any kind of surveillance, under any circumstances.

Q: No. I am attacking the combination of them being secret and spying on us, all people down below. You, Admiral, seem to be advocating transparency minimal of a process, am I correct?

BOBBY RAY INMAN: I believe that we should have the judicial check based on congressional action of the executive branch's operations, all across government, and that there's no reason intelligence shouldn't be a part of that. But on the other hand, putting all drama aside, I have saved lives by surveillance activities that were undertaken. So any premise that all surveillance is somehow threatening to our society, or would put us in the same condition of a Franco or a Pinochet and the rest of it, I just can't buy.

Q: But the thing about a dictatorship is it is not a set point. It's a process. It starts somewhere small and then it progresses and the way that it becomes a dictatorship is because the checks are being thrown out.

BOBBY RAY INMAN: Well, because you don't have the checks and balance, and this is what Jim was arguing for earlier—

Q: It's a slow process.

JAMES RISEN: No, I agree with you, that if this program had stayed secret and if the existence of CIA secret prisons around the world stayed secret, if the rendition flights, the torture, the enhanced interrogation techniques, if all of that stayed secret, that we would be on our way to a police state, and I think you're absolutely right that one of the ways a police state is created, or a tyranny is created, is by creating a sense of fear in the public that, you know, "We are protecting you," and so I think that you are absolutely right and if these things are unchecked, we will transform the American society and so I think that is what we are talking about, is how do we check that power, and how do we do that in a society in which one party now controls all the levers of government?

PATRICK KEEFE: One thing to add to that is that the—we don't want to think of people in government as monolithic. You're absolutely right. We do want to talk about *people*. I take a certain amount of comfort, sounding an uncharacteristically optimistic note, that in knowing the way Jim writes these stories and the way people do bring out the stories about the secret prisons, the stories about the rendition flights, is that people leak to them, and that leaks, actually, at this point, we've gotten to a stage where leaks have a very important—they're kind of a safety valve for us, I'm sure with a whole series of risks attached. But those are individuals, individuals in the government who see that things are going in a direction that they cannot abide. There aren't necessarily procedures in place for them to act on their objections, and so they leak, and so that is actually comforting to me.

BOBBY RAY INMAN: But I remember an earlier era, when you resigned. You left and you resigned, as opposed to staying in the job and keeping all those comforts but leaking the story elsewhere, but there are not very many who do that, unfortunately.

JEFFREY ROSEN: We have time for one more question. The gentleman in the back.

Q: Thank you. So Patrick described this four, five, six degrees of separation process of data mining. So my question has two parts. Can you draw a warrant for a thing like that? You're not

saying “I’m going to eavesdrop on the pizza guy,” you say, “I’m gonna do data mining on hundreds of thousands,” what kind of warrant is that and what good is that warrant for us? What protection does it give us?

BOBBY RAY INMAN: The key is what you can do with the information that’s mined.

Q: (inaudible)

BOBBY RAY INMAN: Well, there are long-established minimization procedures that go back to the original, even before the original FICA act that specify if you come across information and you identify that one of the parties is a U.S. citizen or a green-card holder, then you cannot publish it, process, you suppress it from the files. There are exceptions. Agent of a foreign power. Clear criminal activity. Threat to loss of life. I had the misfortune of getting one of those on the president’s brother. I took it to the attorney general as the way to deal with it, in the process, and then Ben Civiletti dealt with it in a very straightforward and admirable approach, even though he got sort of torpedoed by one of his own underlings at a later stage. So you do have to count, and it’s going to be much more so in the world out ahead of us, as large volumes are in all kinds of databases. That for the government’s use, you have minimization procedures that are tracked, and here you count on the committee’s tracking.

JAMES RISEN: I think the real question that we’re going to have to — that the Congress and the government are going to have to face—is how do you bring—I mean, the devil will be in the details—how you bring this within FISA. Because the issue is you can’t go to the FISA Court and get a warrant with an algorithm.

BOBBY RAY INMAN: It’s going to have to be, as I tried to say earlier, after the fact, how did you use it, what did you intercept, what did you do with it. If you accidentally got anything on American citizens, what’d you do with that? So it’s going to have to be a judge examining *after the fact* what you got. It’s not going to be . . .

JAMES RISEN: And I think in order to do that they're going to have to slow down this program, because I think one of the things they have objected to, why they argued they didn't want to go through FISA, was because it was so large and so that's a real question. Can they do this, what you just described, in a timely way?

JEFFREY ROSEN: Ladies and gentlemen, please join me in thanking the panel.

(applause)