

Testimony of

# The Honorable James Woolsey

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Senate Committee on the Judiciary  
Wartime Executive Power and the NSA's Surveillance Authority II

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Mr. Chairman and members of the Committee, it is an honor to be asked to testify before you today on this important subject. By way of identification I served as Director of Central Intelligence, 1993-95, and have held Presidential appointments in two Democratic and two Republican administrations in a career that has generally been devoted to private law practice and, now, consulting. I have received no classified information about the NSA surveillance in question. I am testifying solely on my own behalf.

It seems to me impossible to evaluate the President's NSA electronic surveillance program that is the subject of these hearings without making some assessment of the enemy we face, so let me begin there.

The Theocratic Totalitarian Movements in the Middle East That Are at War With Us.

As a result of many factors -- including the turbulent history of the Middle East in the years since WW I, the impact of oil wealth on Saudi Arabia, Iran, and other states in the region, and the extensive influence of the ideology shared by al Qaeda and the Saudi Wahhabi sect within Sunni Islam and of the movement represented by President Ahmadinejad of Iran within Shi'ite Islam -- we face at least two fanatical theocratic totalitarian movements in the Middle East today. Both, with the sponsorship or assistance in some cases by regimes in the region, have attacked us in recent years. One explicitly states that it wishes to destroy us, the other that it wishes to drive us from the Middle East and ultimately to incorporate us in a world-wide caliphate, a theocracy operating under the movement's version of ancient Islamic Law.

Such totalitarian visions seem crazy to most of us; we thus tend to underestimate their potency. Yet these current theocratic totalitarian dreams have some features in common with both the secular totalitarian dreams of the twentieth century, e.g., the Nazis' Thousand Year Reich and the Communists' World Communism and with the one powerful twentieth century totalitarian movement that had a religious component, Japanese Imperialism. These twentieth century totalitarian movements produced tens of millions of deaths in part because, at least in their early stages, they engendered "fire in the minds of men" in Germany, Japan, Russia, and China and were able to establish national bases. This century's Shi'ite theocratic totalitarians in the Middle East have had such a national base for over 25 years in Iran and the Sunni totalitarians had one for the better part of a decade in Afghanistan. In addition Wahhabism, one variety of Sunni theocratic totalitarianism, has been the state religion of Saudi Arabia for some eight decades. None of these groups has attained the Nazis', Japanese Imperialists' and Communists' death totals yet, but this is principally due to lack of power, not to less murderous or less totalitarian objectives.

Shi'ite Theocratic Totalitarianism: Ahmadinejad's Movement and Hezbollah.

The Shi'ite theocratic totalitarian movement now represented by President Ahmadinejad of Iran and the government's cohorts in Hezbollah has been at war with us for over a quarter of a century, since its adherents seized our embassy personnel as hostages in Tehran in 1979. During the 1980's the representatives of this movement blew up our Embassy and Marine barracks in Beirut and kidnapped, tortured, and killed Americans. It seems clear that they were

chiefly responsible for the attack on Khobar Towers in Saudi Arabia and the death of the US military personnel there in 1998. Although this movement certainly represents a small minority of Shi'ites, it controls a government that has oil wealth and a nuclear weapons program, and has close ties to the world's most professional terrorist group, Hezbollah.

One of its stated objectives is, quite explicitly, to destroy us. At a large "World Without Zionism" conference recently in Tehran President Ahmadinejad stated that "a world without Zionism and America . . . surely can be achieved." President Ahmadinejad's expressed view is that it is his mission to help bring about, by mass killings, conditions for the return of the Mahdi and thereafter the end of the world. The chief of strategy for Ahmadinejad, Hassan Abbassi, has said: "We have a strategy drawn up for the destruction of Anglo-Saxon civilization . . . we must make use of everything we have at hand to strike at this front by means of our suicide operations or means of our missiles. There are 29 sensitive sites in the U.S. and the West. We have already spied on these sites and we know how we are going to attack them. . . . Once we have defeated the Anglo-Saxons the rest will run for cover."

Sunni Theocratic Totalitarianism: Salafist Jihadis (al Qaeda) and Salafist Loyalists (Wahhabis)

Within the tent of Sunni Islam, along with several more moderate schools, there are also several strains of theocratic totalitarianism. The two most relevant in the current context are both Salafists, believing that only a literal version of the model of rule implemented in the seventh century in Islam has ultimate legitimacy. Both have the objective of rule by a unified mosque and state; for some this theocracy is personified by the caliph. Different individuals in these movements emphasize different aspects, but generally the common objective is to unify first the Arab world under theocratic rule, then the Muslim world, then those regions that were once Muslim (e.g. Spain), then the rest of the world.

Sunni Salafists of both jihadist and loyalist stripe, e.g. both al Qaeda and the Wahhabis, share basic views on all points but one. Both exhibit fanatical hatred of Shi'ite Muslims, Sufi Muslims, Jews, Christians, and democracy, and both brutally suppress women. They differ only on whether it is appropriate to carry out jihadist attacks against any enemy near or far now, i.e. to murder Iraqi Shi'ite children getting candy from GI's, people working in the World Trade Center, etc. -- or whether to subordinate such efforts for the time being to the political needs of a particular state, i.e. Saudi Arabia. The two are bitter enemies, but not about underlying ideological beliefs. The relationship between the Salafist Jihadists such as al Qaeda and Salafist Loyalists such as the Wahhabis is thus loosely analogous in one way to that between the Trotskyites and the Stalinists of the 1930's, although the Saudi State is of course a very different creature than Stalin's USSR. The point is that doctrinal agreement and bitter enmity are not incompatible, in the 1930's or now. Nor are doctrinal differences incompatible with alliances of convenience. Shi'ite totalitarians such as the Iranian regime have no difficulty supporting Sunni Salafist Jihadis such as al Qaeda and Zarqawi. Stalin reversed course and embraced the Russian Orthodox Church during WW II just as during the Gulf War Saddam embraced radical Islam with the same degree of cynicism. The totalitarian opportunism that gave rise to the Hitler-Stalin Pact in the 1930's is alive and well in the Middle East today. Understanding our enemies requires us to understand that ideology is only a sometime-guide to alliances and betrayals -- both can shift as fast as the desert sands.

Al Qaeda launches attacks in Saudi Arabia and the Saudis work with us to capture and kill al Qaeda members who threaten them. In this sense both Saudi government officials and probably even Wahhabi clerics are willing to "cooperate with the U.S. on counter-terrorism." But this cooperation with us does not counter at all the Wahhabi spread of what is, essentially, their and al Qaeda's common underlying Salafist totalitarian theocratic ideology. This spread has been financed by at least \$3-4 billion/year from the Saudi government and wealthy individuals in the Middle East over the last quarter century -- and Salafism has invaded the madrassas of Pakistan, the textbooks of Turkish children in Germany, the mosques of Europe, and some mosques and prisons (via Wahhabi clerics selected as chaplains) in the U.S. Alex Alexiev, senior fellow at the Center for Security Policy, testified before Congress on June 26, 2003, that this sum is approximately three-to-four times what the Soviets were spending on external propaganda and similar "active measures" at the peak of Moscow's power in the 1970s.

The underlying Salafist ideology being spread by the Wahhabis is fanatical and murderous, indeed it is explicitly genocidal with respect to Shi'ites, Jews, and homosexuals. The president's "Islamofascist" term is thus perhaps understated -- the Italian fascists were horrible, but not doctrinally genocidal. "Islamofascist" would be more accurate. For example, the BBC reported on July 18 of last year that a publication given to foreign workers in Saudi Arabia by the Islamic cultural center, which falls under the authority of the ministry of Islamic affairs, advocates the killing of "refusers" (Shia). The imam of Al-Haram in Mecca, (Islam's most holy mosque), Sheikh Abd Al-Rahman al-Sudayyis, was barred from Canada last year after the translation of his sermons calling Jews "the scum of the earth" and "monkeys and pigs" who should be "annihilated." Materials distributed by the Saudi government to the Al-Farouq Masjid mosque in Brooklyn call for the killing of homosexuals and converts from Islam to another religion.

Saudi education is turning toward, not away from, Wahhabi influence and Salafism. In February of 2005 a secularist reformer, Muhammad Ahmad al-Rashid, headed the Saudi Education Ministry. As he was beginning to respond to

internal criticism of curricula that incited hatred of non-Muslims and non-Wahhabi Muslims, he was replaced by Abdullah bin Saleh al-Obaid, a hard-core Wahhabi. Controlling 27 percent of the national budget, al-Obaid will have a substantial effect on the views of the next generation of Saudis. His views are illuminated by aspects of his background. From 1995 to 2002, al-Obaid headed the Muslim World League (MWL). According to the U.S. Treasury the MWL's Peshawar office was led by Wael Jalaideh, "one of the founders of al Qaeda." Moreover, the main arm of the MWL is the International Islamic Relief Organization (IIRO). The Egyptian magazine, Rose al-Youssef, describes the IIRO as "firmly entrenched with Osama bin Laden's al Qaeda organization." In March 2002 the U.S. headquarters representing both organizations was raided and closed by federal authorities. One of the officers of the closed branch in Herndon, Virginia, was al-Obaid. The Wall Street Journal describes him as "an official enmeshed in a terror financing controversy."

Salafist ideology is also totalitarian to a unique degree in its repression of women. In 2002 the world press carried stories of an extreme example: Religious police in Saudi Arabia forced some young girls fleeing a burning school back inside to their deaths because they were not properly veiled. This is a fanaticism that knows no bounds. Words and beliefs have consequences, and totalitarians are often remarkably clear about what they will do once they have enough power. Many brushed aside Mein Kampf when it was first written but it turned out to be an excellent guide to the Nazis' behavior once they had the power to implement it. We should not ignore the Wahhabis' teaching of Salafist fanaticism.

The Consequent Demands on the Intelligence We Must Collect.

The nature of the enemy that we face today and will face for many years, represented by these movements, suggests some factors we should keep in mind when assessing the President's NSA intercept program.

I would freely admit that there are important considerations on both sides of the debate over this intercept program - it enhances security at, to some extent, the expense of privacy. On the other hand banning the program and relying solely on FISA (even, in my view, an amended FISA) in order to more protect privacy would lead to a reduction in security. This is, in short, a debate in which both sides are giving primacy to an important value and each side has a point. I will do my best to offer my own rationale for the reason I strike the balance as I do and for my recommendation to the Committee.

Our View of the Nature of War in the Latter Half of the 20th Century.

During the Cold War and for a few years into the post-Cold War era, we developed and became accustomed as a nation to a set of assumptions about war - some have been better understood in the Cold War's aftermath. These Cold War assumptions include at least the following elements:

- Our overarching struggle with our principal enemy - the Cold War vs. the USSR - was an effort to outlast a very rigid and bureaucratic empire that restively ruled much of Eurasia. Our principal strategy was deterrence and containment of this empire until it collapsed, and this strategy proved effective.
- Our enemy proved to be economically inept and its relative poverty helped our strategy succeed.
- We could afford to pay comparatively little attention to the our enemy's ideology since it had few believing adherents, within their empire anyway, after Stalin's crimes became common knowledge following WW II and ideology had rather little influence on their behavior. It was mainly a confusing theory derived from Hegel that had only one important role - to provide them with a rationalization for their dictatorship. By the Cold War era ideology was no longer a matter of religious-like fervor for the enemy as it had been in part during the 1917 Revolution and the inter-war years.
- Other than the unlikely event of a major nuclear exchange - to which we may have come close during the Cuban Missile Crisis -- there was no real likelihood of our enemy attacking the American homeland, via terrorism or otherwise, and the enemy generally saw to it that their client states were similarly constrained. We were able to reduce the likelihood of a nuclear exchange by conducting arms control negotiations and signing treaties with the enemy, treaties which could be verified and which they would generally, although not universally, observe.
- Since any hot wars that occurred during this long Cold War occurred overseas, our intelligence activities could also be located there and the only principal need for intelligence collection in this country was to track traditional spies, ordinarily a deliberate and slowly-developing process involving thorough and careful investigation of a small number of individuals.
- Terrorism was like other crimes and could effectively be dealt with by traditional law enforcement means. Terrorists were to be prosecuted and imprisoned and these steps would deter further terrorism.
- There was little need (once the early 50's were over, with "duck and cover" drills in schools, fall-out shelters, and Senator Joe McCarthy) for the Cold War to affect Americans' daily lives in any substantial way by requirements to limit privacy or liberty, or in any other regard.
- Developments in electronics were led in the main by the needs of the US Department of Defense and NASA but these did not revolutionize our lives during the early part of the Cold War. The electronic systems commonly used by the average citizen at, say, the end of the seventies - telephones, radios, television sets -- were on the whole only

somewhat updated versions of those of a quarter of a century earlier. The Internet, for example, was nothing much more than a gleam in the eyes of some scientists at DARPA.

Re-thinking the Cold War Assumptions.

None of the above assumptions accurately characterizes this century's Long War, one that I believe will last for decades, with the Middle East's theocratic totalitarians.

-- Far from constituting a single rigid empire, our enemies have a variety of shifting types of relationships to governments. Totalitarian Shi'ite theocracy as reflected in the Ahmedinejad regime, its nuclear weapons program, and the regime's close ties to Hezbollah constitute one type of problem. But far from being under a state's control, Al Qaeda has twice had a kind of "terrorist-sponsored-state" relationship with poor nations (Sudan and Afghanistan) and is now fighting hard for a home base in Iraq's Sunni triangle. The Wahhabis constitute the religious infrastructure of a state, Saudi Arabia, that has some reformers in its government who from time to time contend against the Wahhabis' allies. A containment strategy has very little to do with movements driven by religious fervor. And concerning deterrence, what would one hold at risk (as we held at risk the Soviets' military forces and cities) in order to deter an al Qaeda attack with a suitcase nuclear weapon, or a similar one planned secretly by Ahmedinejad, possibly together with Hezbollah, in order to hasten the return of the Mahdi and the end of the world?

-- Our enemies are fabulously wealthy, almost entirely from the sale of oil. Indeed in a sense this is the first war the United States has fought in which we pay for both sides. This will be the case as long as we continue to borrow a billion dollars every working day, about \$250 billion per year, to import oil and the Middle East holds two-thirds of the world's proven reserves.

-- Our enemies' ideology is religiously rooted and is thus central to their behavior. Many adherents of these movements have no fear of death - indeed they welcome it - and it sustains them in both hatred and patience. I would judge that their next attack on the US will be larger than that of 9/11 (each al Qaeda attack on us has been, in an important sense, larger and more audacious than the one before), and that they care very little whether it is this year or next - the key thing is that they be as sure as they can be that it will damage us badly and, among other things, lead us to withdraw from the Middle East.

-- Far from being safe behind our shores we have already been invaded, albeit not occupied, and we live on the battlefield. Our enemy has already attacked New York and Washington, and in the case of the Ahmedinejad regime, quite possibly augmented by Hezbollah, its Chief of Strategy has said that the "29 sensitive sites" in the US and the West have already been "spied out" and that he knows how he will attack them. As for negotiations, sometimes even during periods of major tension between our governments during arms control negotiations in Vienna or Geneva, I would take my Soviet counterpart out to dinner, treat him to a nice bottle of wine, and end up trading jokes with him. President Ahmedinejad, Osama bin Laden, and Saudi Arabia's most senior Wahhabis would, to put it mildly, be unlikely to agree to such tension-reducing conviviality with any representatives of their movements.

-- Hot wars may occur overseas during this Long War, but it is at least as likely that important combat in the form of major terrorist attacks will occur here at home and consequently our battlefield intelligence requirements will include such steps as discovering terrorist cells exerting great effort to blend in to our population. Intelligence collection focused entirely overseas will not be likely to help us learn the contents of a future Moussaoui's computer or anything about the telephone calls of a future al-Mihdhar or al-Hazmi from the US to a terrorist communications relay in Yemen.

-- Although domestic terrorism - e.g. of the sort alleged in the January arrests of arsonists with a radical environmental beliefs -- should be dealt with by, and under the procedural protections of, the criminal law, we need to ask whether the same should be true for suicidal fanatic operatives of a foreign totalitarian movement. The penalties imposed by criminal law are not an effective way to deter a fanatic determined to die while killing thousands of us.

-- In a war of the sort embodied in the 9/11 attacks it is unfortunately the case that sometimes being able to thwart such attacks - security - comes into conflict with liberties to which we became accustomed in the pre-9/11 era - entering public buildings and airplanes, e.g., without being searched.

-- Moore's Law, the doubling every eighteen months of the capability of basic electronic components such as computer chips, has changed our world in fundamental ways. Throw-away cell phones and Internet web sites and chat rooms are now available for use by a huge share of humanity, including terrorists.

NSA Surveillance of Contacts Between these Theocratic Totalitarian Movements in the Middle East and US Persons or Visitors

In view of the above change in assumptions about the war with which we must now live - a war driven by our enemies' decisions about how to make war on us, not by ourselves - I would focus the discussion about the authority for the NSA intercepts at issue on the President's inherent powers under Article II of the Constitution, derived from his rights and duties as Commander in Chief.

I do not propose to deal with the rationale for the NSA surveillance program that has been advanced by the Justice

Department deriving from the Joint Resolution that passed Congress shortly after 9/11, the Authorization for Use of Military Force ("AUMF"). In my view the President's powers under Article II make it unnecessary to rely on the AUMF for this surveillance as long as it is, essentially, mapping the electronic battlefield. The legal arguments for and against relying on the AUMF Resolution relate to the President's being authorized thereby to conduct the NSA surveillance program pursuant to using "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks of September 11, 2001 . . . ." If the Resolution is read narrowly it could be argued that even if Hezbollah was working to "spy out", as President Ahmedinejad's strategy chief, Hassan Abbassi, put it, the 29 sites in the US and the West that he believes could, if destroyed, also destroy "Anglo-Saxon civilization", but it did not assist in the attacks of 9/11, then a Resolution-based rationale might not authorize the President to approve NSA's intercepting, say, communications between Hezbollah members and individuals in the US. As I noted above, the relationships between several terrorist organizations and governments can be fluid and can be the object of deception as well. Since I believe monitoring dangerous terrorist organizations beyond al Qaeda, such as Hezbollah, is one of several important needs for intelligence collection in the Long War in which we are engaged and that it is authorized under the President's inherent (but not plenary) Article II powers, I will deal only with that rationale.

I believe it is clear that the President has some authority, even in the face of contrary legislation, to conduct warrantless foreign intelligence surveillance: the question is the extent of that authority. All federal appellate courts which have addressed the issue, including at least four circuits, have so held. See, e.g., *In re Sealed Case*, 310 F.3d 717, 742 (FISA Ct. of Review 2002) ("[A]ll the other courts to have decided the issue [have] held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information . . . . We take for granted that the President does have that authority . . . .") Every President since 1978 when FISA was passed has asserted that he retained such authority. In short, conducting warrantless foreign intelligence surveillance is not like taxation. Even to defend us the President may not tax us, at all, on his own authority - prior Congressional action is essential under the Constitution since the President has no authority to tax under Article II. But the President does have, to some extent, independent authority as Commander-in-Chief under Article II that Congress may not take away. In order for his actions in conducting warrantless foreign intelligence surveillance to be fairly labeled "illegal" or in "violation of law", it is not sufficient for them to violate FISA - they must, in the circumstances, also not be justifiable under his independent powers as Commander-in-Chief. Statutes must fit within the Constitution, not the other way around.

I realize that under some famous language in a concurring opinion by Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring), where the Supreme Court declared unconstitutional President Truman's seizure of the steel mills during the Korean War (to prevent their being shut down in a strike), the President's authority is "at its maximum" when their powers may conflict and Congress has authorized his action, and at a minimum when in such a case it has acted to restrict them. I will forgo the complex debates over the history of FISA, its interaction with the AUMF, and the subsequent history of *Youngstown*. If the President's Commander-in-Chief authority under Article II permits this type of warrantless foreign intelligence surveillance program even when his authority is at its minimum reach (because, arguably, of contrary Congressional action in passing FISA), then the surveillance is constitutional and hence legal without regard to FISA or the AUMF.

Reasons for Recognizing the President's Inherent Article II Authority for Mapping the Electronic Battlefield

I believe that the President has the inherent authority under Article II for the type of surveillance that is now, as described, being conducted for the following reasons:

First, the country was invaded, albeit of course not occupied, on 9/11. Being able to defend against invasions is the heart of the reason the President was given independent authority by the drafters of the Constitution under Article II.

Second, we stand in serious risk of being attacked here in the U.S. again. This is due to the ideologically-driven nature of the enemy, discussed above, and is evidenced by specific threats recently by bin Laden and by Ahmedinejad and his chief of strategy, Abbassi. Bin Laden has also recently made explicit threats and has obtained a fatwa from a Saudi cleric approving the use of a nuclear weapon against the U.S.

Third, since the battlefield is in part, sadly, here at home collecting intelligence on the enemy's contacts in this country is an essential part of serving as Commander in Chief. Shifting patterns of cooperation among terrorist groups and governments make attacks harder to detect, more likely, and more effective. They also make up-to-date intelligence essential. It is far from impossible for a government to supply a terrorist group with, say, anthrax - we still do not know the source of the anthrax that was used in the attacks of late 2001, including here at the Capitol. Iran has a nuclear weapons program and Ahmedinejad just visited personally various terrorist groups, Shi'ite and Sunni, in Syria. The fluid nature of these alliances, cases of assistance, training, safe harbor, and other types of collaboration between totalitarian movements and some states in the Middle East makes it imperative for us continually to track and map their planning and their contacts in order to keep track of the threat of against us. This difficult task is the sort of undertaking which those who collect and analyze signals intelligence understand and can accomplish - similar

missions by collectors and analysts of electronic communications have been at the heart of warfighting for many decades.

Fourth, Moore's Law has undermined the framework of FISA in providing an oversight mechanism for surveillance of foreign and terrorist entities, who have easy access to modern electronics. This, not ill will, is the reason why the pre-9/11 history of FISA as a framework for intelligence collection against terrorism is so poor. There has been much written recently about the importance of "connecting the dots". There has been a complete reorganization of the Intelligence Community to that end. Yet to connect the dots one must first see them, and today this means seeing what the enemy is doing with disposable cellular phones and in chat rooms. As Debra Burlingame has put it (a former attorney whose brother was the pilot of, and was killed during, the hijacking of, Flight 77 on 9/11): "it was the impenetrable FISA guidelines and fear of provoking the FISA court's wrath if they were transgressed that discouraged risk-averse FBI supervisors from applying for a FISA search warrant in the Zacarias Moussaoui case. The search, finally conducted on the afternoon of 9/11, produced names and phone numbers of people in the thick of the 9/11 plot . . . ." And NBC News reported in 2004 that al-Hazmi and al-Mihdhar, who participated in hijacking flight 77, received more than a dozen calls from an al Qaeda switchboard in Yemen which was also receiving calls from bin Laden; NBC stressed that "NSA had the actual phone number in the US that the switchboard was calling," . . . but feared "it would be accused of domestic spying." Yet the government officials who made these decisions not to look at the dots provided by Moussaoui's al-Hazmi's and al-Midhar's behavior were not trying to make things easy for terrorists - they were trying to apply an obsolete statute to an electronic world that could never have been envisioned when the FISA framework was established a quarter of a century earlier.

Awaiting a case-by-case decision about a warrant - whether one by the Attorney General for a duration of 72 hours or a longer-term one by the FISA Court - is not consistent with the need for what General Michael Hayden, Deputy DNI and former NSA Director, calls "hot pursuit of communications entering or leaving America involving someone we believe is associated with al Qaeda". However reasonable a framework FISA may be for overseeing and approving the sort of one-spy-at-a-time surveillance needs of the Cold War, it is not at all suited to managing the tasks being undertaken by the current NSA intercept program as publicly described. Much of modern intelligence development has related to finding ways to shorten the time and to speed up the link from "sensor to shooter". Yet courts are designed to deal with individual cases, to deliberate, and to pass judgment case by case -- not to manage fast-moving battlefield electronic mapping. If a captured al Qaeda or Hezbollah computer contains (like Moussaoui's) a substantial number of email addresses and phone numbers and we have only hours before the capture is known -- during which time we must check out those numbers and addresses, and others with whom they may have been in contact, before their owners throw away their phones and change their email addresses -- how can either an Attorney General or a FISA Court, even with amended procedures, make those decisions sufficiently quickly? The FISA Court considered and deliberated about only 1,758 requests for warrants in all of 2004 (and asked that 94 be modified before they were granted). And for each FISA warrant application:

- a warrant request form is filled out by the FBI;
- the target (an individual) is identified;
- facts are set out establishing that there is probable cause to believe that the individual is involved in terror or spying;
- details of the facilities and communications to be monitored are supplied;
- procedures are set forth to minimize the collection of information about people in the U.S.
- a Field Office Supervisor then verifies and approves the request;
- FBI Special Agents and Attorneys at Headquarters ensure that the form contains all required information and finish the form;
- The Director of the Agency certifies that the information being sought is necessary to protect the U.S. against actual potential attacks, spying, or international terrorism and cannot be obtained by normal investigative techniques;
- At the Justice Department, lawyers in the Office of Intelligence Policy and Review draft a formal application based on the request;
- The Attorney General reviews and approves the application.

After the above steps are completed, the Attorney General may authorize an emergency order for a 72-hour period if he determines that there is a "factual basis" to believe that the order would be consistent with FISA, but if a FISA Court order cannot be obtained within that time the information obtained from the surveillance may not be used. Once the application is before the Court it must determine that there is probable cause to believe that the targeted individual is involved in terrorism or spying, that the information sought is necessary to protect the country against terrorism, and that the minimization procedures are appropriate.

Applying the understandably case-by-case deliberative tool of the FISA Court to the need very rapidly to map the electronic battlefield of the current war is even more of a misfit than applying the rules of sailboat racing to a race between aircraft traveling several times the speed of sound. In my view it is not that an amended FISA procedure is

necessary, it is that the case-by-case deliberation for which courts are designed and well-suited is not the right tool for providing a check on the type of electronic surveillance that is the subject of these hearings. Neither the Attorney General nor the FISA Court can usefully deliberate and decide almost instantaneously whether there is probable cause to believe that an individual is an agent of a foreign power or terrorist organization if the government does not even know the name associated with a cell phone or email address. More basically, this issue of probable cause is a law enforcement question, not an intelligence question. We may learn at least as much of importance if the individual being called from an al Qaeda site overseas is a dupe or the subject of a false flag operation by terrorists and is not their agent at all. And if one tries to fit this battlefield electronic mapping operation into the FISA warrant process, then as Judge Posner has pointed out (WSJ Feb. 15, 2006) - e.g. if one lowers the warrant requirement to one of only "reasonable suspicion" or even whether an intercept "might yield useful information" -- then one rapidly approaches the point where the warrant process ceases to be a filter and judges have no basis for refusing to grant applications. It is not just that rapid mapping of the electronic battlefield doesn't fit the FISA warrant process well, it does not fit it at all.

One Possible Formulation for Checking and Balancing the President's Authority.

Having said that I believe that present program as described publicly by General Hayden is within the scope of the President's Article II powers and that the FISA Court is not an appropriate tool with which to regulate it, there is still an important issue for the long run regarding oversight of this program. It is summed up, Mr. Chairman, by your statement on this subject that "[t]he whole history of America is a history of balance" and by Senator Graham's observation that we stand at the edge of a fundamental test for our Constitution. We are indeed in a Long War, one to be fought in part in this country, and we will have to take some steps - such as this surveillance program - to protect our security. But we cannot forget that we may have to live with the system that is now being devised for decades. We should try to ensure that there is oversight of the program by Congress and that it occurs in an agreed and reasonable manner to guard against abuses. But we should also ensure that the method of oversight does not widely disseminate, even within the Congress, extremely sensitive material that if leaked could severely endanger not only our ability to fight this war but our very existence.

In this context I find a great deal of merit in the interesting proposal recently set forth in the opinion piece by Judge Posner noted above. It includes:

- a statutory declaration of national emergency (I would suggest that this cover terrorism from more potential sources than does the AUMF of September 2001) and authorization of "national security electronic surveillance" outside FISA, in which "national security" is narrowly defined;
- a Presidential declaration that such surveillance is necessary;
- a bar against using information obtained under such national security electronic surveillance as evidence or leads in cases involving crimes other than terrorism;
- a continued requirement for FISA warrants under a probable cause standard for physical searches and for the type of electronic surveillance for which FISA was designed;
- an annual certification from the executive branch that there have been no violations of the statute during the previous year;
- a bar against lawsuits challenging the legality of the national security electronic surveillance; and
- a five-year sunset provision.

The only point on which I would depart from Judge Posner's proposal is his concept that reports about the national security electronic surveillance be submitted twice a year by NSA to the FISA Court. I would instead suggest that those reports be submitted to the Steering Committee for National Security Surveillance that he also proposes creating: the Attorney General, the DNI, the Secretary of Homeland Security, and a senior or retired federal judge or justice appointed by the Chief Justice. One might reasonably require periodic meetings between this Steering Committee and the eight senior members of the House and Senate (including four Intelligence Committee members) who serve a similar oversight function regarding some CIA covert actions; the eight might also meet periodically on the program with the Director of NSA. I would suggest that the FISA Court not be asked to oversee or make any judgments about a warrantless intelligence collection program. Foreign intelligence collection is not where courts' expertise lies.

For the duration of what may be a very long war I believe it is important both that the President be free to conduct warrantless national security electronic surveillance and that the Executive branch see some institutionalized Congressional check on his exercise of that power. I think this would be useful in deterring any abuse should such ever prove tempting to an Executive branch official. Adopting Judge Posner's approach (with or without the change I suggest) might well still leave the Executive and the Congress at odds over the question of how far the President's inherent Article II powers reach; certainly a veto of a bill embodying such an approach is imaginable. But it is also possible that each of the two branches might be satisfied with less than a full loaf in practice even while each holds a different view in principle regarding the reach of the President's Article II authority. That is, after all, where the

founders left the issue: that with regard to Executive and Congressional roles regarding war powers our Constitution is "an invitation to struggle". The objective should be for both branches to handle this current issue in such a way that, to the extent possible, both our security and our privacy are protected and we ensure that the struggle continues.

#### R. JAMES WOOLSEY

R. James Woolsey joined Booz Allen Hamilton in July 2002 as a Vice President and officer in the firm's Global Resilience practice, located in McLean, Virginia. Previously Mr. Woolsey served in the U.S. Government on five different occasions, where he held Presidential appointments in two Republican and two Democratic administrations. He was also previously a partner at the law firm of Shea & Gardner in Washington, DC, where he practiced for 22 years in the fields of civil litigation and alternative dispute resolution.

During his 12 years of government service Mr. Woolsey was: Director of Central Intelligence from 1993 to 1995; Ambassador to the Negotiation on Conventional Armed Forces in Europe (CFE), Vienna, 1989-1991; Under Secretary of the Navy, 1977-1979; and General Counsel to the U.S. Senate Committee on Armed Services, 1970-1973. He was also appointed by the President as Delegate at Large to the U.S.-Soviet Strategic Arms Reduction Talks (START) and Nuclear and Space Arms Talks (NST), and served in that capacity on a part-time basis in Geneva, Switzerland, 1983-1986. As an officer in the U.S. Army, he was an adviser on the U.S. Delegation to the Strategic Arms Limitation Talks (SALT I), Helsinki and Vienna, 1969-1970.

Mr. Woolsey is currently Co-Chairman (with former Secretary of State George Shultz) of the Committee on the Present Danger. He is also Chairman of the Advisory Boards of the Clean Fuels Foundation and the New Uses Council, and a Trustee of the Center for Strategic & International Studies and the Center for Strategic & Budgetary Assessments. He also serves on the National Commission on Energy Policy. Previously, he was Chairman of the Executive Committee of the Board of Regents of The Smithsonian Institution, and a trustee of Stanford University, The Goldwater Scholarship Foundation, and the Aerospace Corporation. He has also been a member of The National Commission on Terrorism, 1999-2000; The Commission to Assess the Ballistic Missile Threat to the U.S. (Rumsfeld Commission), 1998; The President's Commission on Federal Ethics Law Reform, 1989; The President's Blue Ribbon Commission on Defense Management (Packard Commission), 1985-1986; and The President's Commission on Strategic Forces (Scowcroft Commission), 1983.

Mr. Woolsey is presently a managing director of the Homeland Security Fund of Paladin Capital Group. He also serves as Vice Chairman of the Advisory Board of Global Options LLC, and as a member of VantagePoint Management, Inc.'s Cleantech Advisory Council. He has served in the past as a member of boards of directors of a number of other publicly and privately held companies, generally in fields related to technology and security, including Martin Marietta; British Aerospace, Inc.; Fairchild Industries; Yurie Systems, Inc.; and USF&G. He also served as a member of the Board of Governors of the Philadelphia Stock Exchange.

Mr. Woolsey was born in Tulsa, Oklahoma, and attended Tulsa public schools, graduating from Tulsa Central High School. He received his B.A. degree from Stanford University (1963, With Great Distinction, Phi Beta Kappa), an M.A. from Oxford University (Rhodes Scholar 1963-1965), and an LL.B from Yale Law School (1968, Managing Editor of the Yale Law Journal).

Mr. Woolsey is a frequent contributor of articles to major publications, and from time to time gives public speeches and media interviews on the subjects of foreign affairs, defense, energy, critical infrastructure protection and resilience, and intelligence. He is married to Suzanne Haley Woolsey and they have three sons, Robert, Daniel, and Benjamin.