

UNCLASSIFIED

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1 UNITED STATES FOREIGN INTELLIGENCE COURT OF REVIEW
2 Hearing on Docket No. 02-001
September 9, 2002
3 9:00 a.m.

4 PRESIDING JUDGES:

5 THE HONORABLE RALPH B. GUY, JR.
6 United States Court of Appeals
7 for the Sixth Circuit
200 East Liberty Street
Room 226
Ann Arbor, Michigan 48104

8 THE HONORABLE EDWARD LEAVY
9 United States Court of Appeals
for the Ninth Circuit
232 Southwest Yamhill Street
10 Portland, Oregon 97204

11 THE HONORABLE LAURENCE H. SILBERMAN
12 United States Court of Appeals
for the District of Columbia Circuit
3400 United States Courthouse
13 333 Constitution Avenue, N.W.
Washington, D.C. 20001-2866

14 APPEARANCES:

15 LARRY D. THOMPSON
16 Deputy Attorney General
Department of Justice
17 THEODORE B. OLSON
Solicitor General
Department of Justice
18 DAVID S. KRIS
Associate Deputy Attorney General
Department of Justice
19 MICHAEL R. DREEBEN
Deputy Solicitor General
Department of Justice
20 JAMES A. FELDMAN
Assistant to the Solicitor General
Department of Justice
21 JAMES A. BAKER
22 Counsel for Intelligence Policy
Office of Intelligence Policy and Review
23 Department of Justice
24
25

1 APPEARANCES:

2 MARGARET A. SKELLY-NOLEN
3 Deputy Counsel for Intelligence Operations
4 Office of Intelligence Policy and Review
5 Department of Justice

6 JOHN C. YOO
7 Deputy Assistant Attorney General
8 Office of Legal Counsel
9 Department of Justice

10 JACK GEISE
11 Principal Associate Director for Policy
12 Office of Enforcement Operations
13 Criminal Division
14 Department of Justice

15 JONATHAN MARCUS
16 Attorney
17 Appellate Section
18 Criminal Division
19 Department of Justice

20 MARION E. "SPIKE" BOWMAN
21 Deputy General Counsel
22 Federal Bureau of Investigation

23 DAVID S. ADDINGTON
24 Counsel to the Vice President
25 Office of the Vice President

SANTA THERESA ZIZZO
Official Court Reporter
U.S. District Court
Room 4800C
333 Constitution Avenue, N.W.
Washington, D.C. 20001

26 Computer-Aided Transcription of Stenographic Notes

1 P R O C E E D I N G S

2 JUDGE GUY: Good morning, everyone, and welcome to
3 the first ever meeting of the Foreign Intelligence
4 Surveillance Court of Review. Unlike a normal appellate
5 procedure where we keep people to rigid time limits and
6 whatnot, we're prepared to spend as much time today as is
7 necessary for you to fully develop the presentation that you
8 want to make to us and for us to ask the questions that we
9 need to ask of you. So within those limitations, I think it
10 might be helpful to us if each of you would identify
11 yourselves and then we could proceed.

12 SOLICITOR GENERAL OLSON: Shall I start with me?

13 JUDGE GUY: I think so.

14 SOLICITOR GENERAL OLSON: Theodore Olson. Very
15 nice to have you here.

16 MR. KRIS: I'm David Kris from the Office of the
17 Deputy Attorney General.

18 MR. BAKER: Jim Baker from the Office of
19 Intelligence Policy and Review.

20 MS. SKELLY-NOLEN: Peggy Skelly-Nolen from the
21 Office of Intelligence Policy and Review.

22 MR. THOMPSON: I'm Larry Thompson. I'm the Deputy
23 Attorney General.

24 MR. DAVID ADDINGTON: I'm David Addington. Counsel
25 to the Vice President.

1 MR. YOO: John Yoo from the Office of Legal
2 Counsel.

3 MR. MARCUS: Jonathan Marcus from the Appellate
4 Section, Criminal Division.

5 MR. GEISE: Jack Geise, Office of Enforcement
6 Operations, Criminal Division.

7 MR. BOWMAN: Spike Bowman, Deputy General Counsel.

8 MR. FELDMAN: James Feldman from the Office of the
9 Solicitor General.

10 MR. DREEBEN: Michael Dreeben, Deputy Solicitor
11 General.

12 JUDGE GUY: Thank you very much. Mr. Olson, are
13 you going to be the lead speaker for this group?

14 SOLICITOR GENERAL OLSON: I am, Your Honor. Thank
15 you very much. We have the other people here in this room
16 because there are questions that the Court may have that I
17 may not be able to answer, or areas in which additional
18 details or information concerning the procedures that the
19 Government operates under with respect to FISA may be more
20 fully explained by people who have actually done and been in
21 the process for a period of time. We're happy to proceed
22 under whatever procedure you want but it's certainly fine
23 with us if the members of the Court want to ask us any one of
24 us questions with respect to how this works. We want to make
25 sure that we address every part of it.

1 I have not prepared anything extensive to say at
2 the beginning because I understand the Court is familiar with
3 what the issues are and has spent time with the briefs and
4 the statutes and so forth. I will say this, we're here today
5 because the Foreign Intelligence Surveillance Court's May
6 17th Order as subsequently incorporated into and implemented
7 in connection with its July 19th, 2002 decision denying a
8 specific FISA application in Case Number 02-662 has
9 perpetuated a serious and increasingly destructive barrier
10 which has hamstrung the President and his subordinates in
11 utilizing the Foreign Intelligence Surveillance Act to
12 accomplish the vital and central purpose for which it was
13 created; that is to say, the protection of the United States
14 and its citizens from attack and from international
15 terrorism.

16 Unfortunately and sadly, two days from now the
17 entire nation will pause to reflect on how bad things can be
18 if our Government is not prepared with every lawful tool
19 available to protect our country and our people from the
20 immeasurable toll that international terrorism can inflict,
21 and to remember the 3000 lives that were taken from us that
22 day because the resources that we have been given to protect
23 us from such acts either did not work or were not being used
24 effectively.

25 To prevent this sort of thing from happening again,

1 which is why FISA was enacted in the first place, our
2 intelligence agencies and law enforcement personnel, the
3 President's principal agencies in the war against terrorism,
4 must be able to work together efficiently and effectively and
5 cooperatively. Sadly, that is not the condition in which
6 they operate today.

7 And the Foreign Intelligence Surveillance Court's
8 Order of May 17th is the most formidable, the most
9 inexplicable and the most easily removable obstacle to
10 achieving the goal for effective and efficient gathering of
11 intelligence to protect the people of this country and this
12 country itself from international terrorism.

13 The Foreign Intelligence Surveillance Act was
14 enacted for the central purpose of protecting against attacks
15 from foreign powers and terrorism. Its central purpose is to
16 enable the President to acquire foreign intelligence
17 information. It defines in the first section of the Act
18 itself foreign intelligence information and the terms of that
19 simple straightforward goal in language which is equally
20 simple, information from foreign agents or agents of foreign
21 powers which is necessary, and I'm speaking now in terms of
22 U.S. persons as opposed to foreign Governments themselves,
23 which is necessary to the ability of the United States to
24 protect against attack, hostile acts, terrorism from agents
25 of foreign powers.

1 The definition of foreign intelligence right there
2 in Section 1801 of the Act is defined in terms of getting
3 information necessary to protect against, and I'll speak in
4 terms of international terrorism, but I mean also those other
5 things that are specified in the Act.

6 The Act does not purport or attempt in any way to
7 constrain the methods by which the Executive will then use
8 that information to protect the citizens of this country and
9 the nation itself. It doesn't categorize different types of
10 uses. It says that FISA may be used to obtain information
11 which may be necessary to protect the people, but it doesn't
12 say or describe or limit the circumstances under which that
13 information will be used by the President or his subordinates
14 to accomplish those statutory objectives which are also
15 fundamental objectives for the President and his subordinates
16 under the Constitution, the protection of this country, its
17 sovereignty, its people from foreign attack, protect its
18 borders and faithfully to execute the laws. Those are all
19 part of the President's central mission.

20 FISA was enacted for the purpose of equipping the
21 President in a lawful way to use lawful means to accomplish
22 those constitutional objectives.

23 There are many many ways in which the information
24 that may be gathered under FISA may be used. The President
25 may use that, and his subordinates, when I refer to the

1 President I'm referring to the President and his subordinates
2 in the Justice Department or in the diplomatic community or
3 in the so-called intelligence community, they're all working
4 for the President to fulfill the President's objectives.

5 The President may use that information in
6 connection with communications with foreign Governments, to
7 elicit cooperation from other countries, to prevent people
8 who may be terrorists from moving place to place. The
9 President may use that information to install greater
10 security, to improve the nation's defenses, to put law
11 enforcement people in places where they may interdict someone
12 about to commit a crime. That information may be used to put
13 more guards in places to make them safer, to erect barriers
14 to protect public buildings, to put people in airports to
15 prevent airplanes from being hijacked. That information may
16 be used to disseminate false or fictitious information to
17 people who would do harm to this country. Misinformation.
18 It may be used to freeze financial resources under the laws
19 of the United States. It may be used to provide alerts at
20 the borders, warnings to the citizens, and it may be used in
21 the law enforcement realm to take potential terrorists or
22 prevent terrorists from actually acting, take them off the
23 streets. That is to say, the law enforcement or prosecution
24 function. But when the information is sought the President
25 doesn't need to decide and shouldn't need to decide how that

1 information will be used. It may be used in one way, in
2 another way or in a multiple or different ways, depending
3 upon the circumstances at the time the President chooses to
4 use it.

5 So the applications that are required under FISA
6 require the President and his subordinates to satisfy the
7 Foreign Intelligence Surveillance Court that indeed foreign
8 intelligence is being sought and the manner in which it's
9 being sought fits the description of FISA, but doesn't
10 require and should not require a description of how it's
11 going to be used, or put limitations on how it's going to be
12 used.

13 To use the words of Senator Leahy in connection
14 with the amendment to the Foreign Intelligence Surveillance
15 Act, this information, once acquired, should be put to any
16 lawful use necessary by the President to accomplish the
17 objectives of FISA.

18 Now, it is clear and it has been clear from the
19 outset that the Foreign Intelligence Surveillance Act
20 contemplated law enforcement and criminal prosecution as one
21 of the things that the President might do with respect to the
22 information acquired pursuant to FISA. The very definition
23 of international terrorism in the statute refers to the
24 criminal laws of the United States; as do other provisions in
25 the statute, and the history of FISA, when it was enacted in

1 1978. There are many many references to the possibility of
2 using law enforcement's criminal prosecution function to
3 accomplish the President's objectives.

4 Now, it may well be that in 1978 and indeed today,
5 most of the uses to which this information would be put won't
6 be -- won't involve criminal law enforcement or prosecutors
7 in the process. That's because there are so many different
8 types of information that will be acquired. Much of the
9 foreign intelligence information may have to do with
10 espionage and other activities that don't have anything to do
11 or won't necessarily have anything to do with prosecution in
12 many cases. And I should say before I go on that FISA
13 provides that, before any information may be used with
14 respect to a prosecution, the Attorney General, a precaution
15 must be attached to the information that if it's going to be
16 used by law enforcement officials in a criminal prosecution
17 itself the Attorney General has to approve it.

18 There are many reasons for that. One of which is
19 to make sure that the implementation and operation of the
20 statute is by the highest level of officials of the Executive
21 Branch. That is to say, accountability.

22 Another part of that is centralizing the
23 responsibility so that decisions can be made that make the
24 best possible sense with respect to the goals of the United
25 States and the achievement of those goals. But finally it is

1 also the case that that is a necessary precaution to make
2 sure that if a prosecution is going to be implemented, the
3 Attorney General, hopefully with all of the information at
4 his disposal will decide, yes, it makes sense to prosecute
5 that particular individual.

6 Even if an individual is prosecutable, even if the
7 Attorney General or law enforcement officials or prosecutors
8 may be convinced that a person can be taken off the street as
9 a result of a prosecution and put in jail someplace as a
10 result of a conviction, that may still not be the best answer
11 to the global problem of terrorism. That individual might be
12 turned into an agent of the United States Government. That
13 individual may be surveilled so that he may lead them to
14 other contacts or other agents.

15 So the decision with respect to a prosecution is
16 something that is part of the arsenal, so to speak, but is
17 not one that is always used or invariably used or necessarily
18 used to protect people of the United States from terrorism.
19 But it is one important tool because we know from events that
20 have occurred in the past, that disrupting a cell of
21 terrorists or disrupting a potential conspiracy by taking
22 people off the street, certain people off the street or some
23 people off the street, taking them into custody, may
24 interrupt or interfere with the contemplated act, thus
25 sparing the nation devastating consequences.

1 Now, what has happened since FISA was enacted as
2 the brief I think describes in detail, is that over the
3 period of time from 1978 up to the present period of time
4 there developed as a result, and it's difficult to say
5 exactly why it happened, I spent some time studying this and
6 there could be a multitude of reasons like there always is in
7 something having to do with Government, there are lots of
8 things that happen, a course of conduct or a way of doing
9 things that is set in motion and it becomes perpetuated, but
10 at some point a dichotomy was developed and I say it's a
11 false dichotomy, between the notion of foreign intelligence
12 and law enforcement purposes. And the reason I spent so much
13 time at the beginning about the purposes of protecting is
14 because that's the purpose for FISA itself, it doesn't -- may
15 include law enforcement and it may include other things; the
16 reason I spent so much time with that is that dichotomy
17 developed that somehow gave birth to the notion that if
18 information is going to be used by law enforcement officials
19 for prosecution purposes, it somehow is not what FISA is all
20 about.

21 Now, there are several things wrong with that, I
22 submit. In the first place it's very difficult for me to
23 describe who is a law enforcement official and who is
24 something else in our Government. Yes, it's true that some
25 people might sit in a room and simply collect information.

1 Other people process that information in various different
2 ways and use it. Other people go to Court and use grand
3 juries or the other tools that are available to prosecutors
4 to collect information, to put pieces together. Other people
5 go into Court and actually try cases before Judges in an
6 effort to achieve convictions. But law enforcement is the
7 function of the President to take care that the laws are
8 faithfully executed. That may include gathering information,
9 that may include giving various different instructions, that
10 may include, but is not limited to, prosecution.

11 JUDGE GUY: Isn't it clear that the Justice --

12 JUDGE SILBERMAN: I would like to ask exactly what
13 happened when? Maybe going back to Assistant Attorney
14 General in past administrations, but at what point did this
15 bifurcation, this false dichotomy that you described develop?

16 SOLICITOR GENERAL OLSON: Well, as I said, it's not
17 clear to me exactly, and I think that in the course of
18 history -- there's not a lot of written record or yes,
19 there's a decision here, it seems to me that the case that we
20 cited in the briefs which I have trouble pronouncing, from
21 the Fourth Circuit, Truong, T-R-U-O-N-G, I know there's two
22 other names, it's a 1980 decision of the United States Court
23 of Appeals for the Fourth Circuit, adopted that dichotomy
24 with respect to the use, warrantless use, warrantless
25 collection of intelligence information.

1 It's also true, Judge Silberman, that the United
2 States Supreme Court and other Courts both earlier than that
3 and subsequent to that, talk in terms of purposes with
4 respect to the collection and use of information. But it
5 is -- does seem to be that that decision, although it did not
6 involve FISA and it did not involve the application of FISA,
7 used -- because it came after FISA and because it used some
8 of the terms of FISA, became somewhat accepted, yes, within
9 the Judicial Branch but also within the Executive Branch, we
10 obviously acknowledged that, as somehow providing a basis for
11 this dichotomy.

12 Part of the basis for that dichotomy, and it is
13 contained in the Supreme Court's decisions and decisions of
14 other Courts, is that when one is gathering information for
15 the protection of the country one is less concerned, I guess,
16 and one might say this up to a point with the civil
17 libertarian implications of that Act.

18 If there's a high level of threat, that is to say,
19 terrorism or foreign attack, it's one thing for the Courts to
20 accept that that information is being collected so that the
21 President can do lawful things available to him. It's
22 another -- it may be another way that information is used in
23 a courtroom to take someone off the street. And so the
24 Courts are properly sensitive to that.

25 JUDGE SILBERMAN: Which Supreme Court cases are you

1 referring to?

2 SOLICITOR GENERAL OLSON: Well, we're talking --
3 I'm talking part of the Supreme Court case that in the sense
4 led to FISA, what we call the Keith case, but also recent
5 Supreme Court decisions involving -- recent Supreme Court
6 decisions involving use of drug-sniffing dogs by the City of
7 Indianapolis, warrantless drug testing of hospital patients
8 in the city of Charlotte in the Ferguson case, and there are
9 several other cases that are antecedent to that in analyzing
10 the use of information, mostly warrantless information, with
11 respect to accomplishing some objectives, and the Court seems
12 to be struggling with but not quite articulating completely,
13 something along the lines of this dichotomy.

14 If it is necessary to keep drunks off the street as
15 opposed to arrest people, the Supreme Court feels more
16 comfortable with it. If it is necessary to prevent students
17 in high schools from engaging in extracurricular activities
18 or athletic activities from injuring themselves or
19 preventing -- presenting a danger to the school community,
20 that may be one thing, but if it's going to be used for
21 prosecutorial purposes, it may be another thing.

22 Now, I submit, however, both in the context of FISA
23 and in the real world it's not a terribly usable dichotomy
24 when we're talking about -- especially when we're talking
25 about the collection of information that may be used and it

1 may be used in a way subject to the approval of the Attorney
2 General and subject to the review of an Article III Court, if
3 it is actually going to be used in connection with a
4 prosecution, a suppression motion and review of, subsequent
5 review by an Article III Court, but it seems clear to me
6 that, and we are talking, if I can say tangentially we are
7 talking in an area in which the Supreme Court recognized in
8 the Steel Seizure case where you have a coalescence of the
9 Executive Branch and the Legislative Branch agreeing that
10 this is authority that the Executive needs, and we're also in
11 an area where the responsibility of the President is at its
12 zenith, that is, to protect our citizens and our country from
13 attack. And as we've seen, devastating attack.

14 So we're talking in an area where the President's
15 responsibility is at its greatest, the damage that can be
16 done if the President is not able to act is at its greatest,
17 and where both the Legislature -- and where under certain
18 circumstances I'm sure the Courts would uphold the action by
19 the Executive without warrant, but here in this situation to
20 add additional level of protection, also, I submit, to
21 regularize the process, to make it both transparent and to
22 involve the judiciary at an early level so that there are
23 certain regular procedures and I think perhaps to help the
24 Executive to say, okay, here's what we're going to do, here's
25 how we're going to carry this off.

1 Now, to continue with my answer to your question,
2 Judge Silberman, yes, the Executive Branch when the FISA
3 Court started implementing that dichotomy by identifying
4 participation by law enforcement officials, and again I use
5 that term very loosely because I'm not sure who that is, in
6 the counter-intelligence section of the FBI, for example,
7 people are both collecting information and acting to utilize
8 it. So we can't make -- there's not -- as you know, there's
9 not these compartments that are recognized, nor should they
10 be recognized, that people are one thing or the other.
11 They're all subordinates of the President acting to fulfill
12 his various constitutional responsibilities which of course
13 include law enforcement, which includes the question of
14 information.

15 JUDGE SILBERMAN: For many years I've had the
16 impression that if a U.S. Attorney or his Assistants were
17 involved in what they thought of as a potential criminal
18 investigation rather than national security --

19 SOLICITOR GENERAL OLSON: Yes, and it's quite
20 devastating for the prosecutors who are officers of the
21 United States, who take the oath to defend and protect and
22 honor the laws of the United States, are regularly before
23 Judges who understand probably more than if not much as
24 anybody the limitations, constitutional limitations on the
25 powers of the United States, that those individuals should

1 somehow be thought of as typhoid Marys in connection with the
2 collection of information necessary to protect the United
3 States.

4 JUDGE LEAVY: I understand it was early on that the
5 dichotomy that you speak of having been institutionalized was
6 arrived at. Was that right off the bat?

7 SOLICITOR GENERAL OLSON: I have not been able to
8 assemble all the information necessary to answer that
9 question as well I would like to answer it for you. We
10 can -- in connection with preparation for this argument I
11 tried to collect information about. Going back historically,
12 not all of it is written, if you you'd like we can furnish a
13 supplemental analysis of it. It reached its zenith in July
14 of 1995 when Attorney General Reno formalized that so-called
15 dichotomy and institutionalized in a very severe way the --
16 this wall, the FISA Court refers to it as a wall between law
17 enforcement and foreign intelligence. And even uses words
18 that suggest that the conduct engaged in by people trying to
19 do this thing for the United States cannot either be actually
20 or even perceived as controlling the acquisition of
21 information by people on the prosecutorial side of the house.

22 Now, this is, it seems to me on its face,
23 unworkable, a recipe for disaster, inconsistent with the
24 purpose of the FISA.

25 JUDGE LEAVY: So I take it then that the Court

1 functioned and the Act was implemented for a number of years
2 before anything was established formally.

3 SOLICITOR GENERAL OLSON: Yes, that's my
4 understanding.

5 JUDGE LEAVY: For what, almost ten years?

6 SOLICITOR GENERAL OLSON: Well, it would be 17
7 years or so. Of course there is the start-up time for FISA
8 and there are Court decisions that sort of recognize this,
9 but it becomes officially formalized as Department of Justice
10 policy signed by the Attorney General in 1995.

11 JUDGE LEAVY: Now, I want help. I know what you're
12 here for is as an advocate and I appreciate that and I
13 appreciate the brief, but I'm going to share with you some of
14 the concerns I have with the hope that you'll kind of help me
15 out or somebody here will.

16 First of all, it sounds to me as if the Government
17 is talking about issues of purpose, repeatedly, and the
18 effect of the new Act as it deals with the purpose of the
19 application. And that the Court decided this all on the
20 proposition of minimization. And it seems to be a total
21 disconnect between what the Government is talking about by
22 way of what the new Act does and what the Court is talking
23 about by way of need for minimization. And I want to pose a
24 question with respect to minimization that probably is along
25 the lines of what you believe, but I want some assurances

1 that you think it's accurate. Now, I understand from the
2 legislative history that even Congress feels that the
3 substance of this Act is in the definitions.

4 SOLICITOR GENERAL OLSON: Yes.

5 JUDGE LEAVY: Now, I don't know whether that's a
6 fair view of it or not, but these definitions are rather
7 precise and sometimes hard to understand but, anyway, in
8 minimization procedures under (h) -- under 1801(h), and then
9 one, the first reference is "Specific procedures which shall
10 be adopted by the Attorney General." Now, that almost sounds
11 like it's self-executed, whatever the Attorney General
12 adopts, that's it. By definition. The only thing that
13 tempers that and would make it subject to some sort of review
14 is the use of reasonably designed in light of purpose, the
15 purpose, and techniques, to narrow the accumulation and
16 narrow the storage and narrow the publication or
17 dissemination. Now, what the Court is doing then is saying,
18 as I understand it, that minimization means maintaining these
19 compartments within the departments of Government. Am I, in
20 your view, focused?

21 SOLICITOR GENERAL OLSON: I believe that that is
22 correct, that that's what the Foreign Intelligence
23 Surveillance Court was thinking when it issued its May 17th
24 opinion. I can't -- I have not for the life of me been able
25 to extract that from the statute. The provision that you're

1 referring to goes on to say -- we also did another paper
2 actually in preparation of this in case the Court would want
3 that to compare the minimization procedures and other
4 procedures under Title III with the procedures and operation
5 of. I gather the Court would like us to submit that.

6 JUDGE SILBERMAN: The Chief Judge.

7 JUDGE GUY: I think that is something we would be
8 very interested in receiving and we may want to talk about it
9 some today also during this proceeding.

10 SOLICITOR GENERAL OLSON: We will finish this, but
11 I only mentioned that sort of in passing. The minimization
12 procedures in my judgment are designed to assure the Court
13 that the statute requires the Attorney General, in my
14 judgment, to make sure that information is -- once it's
15 collected, is not misused.

16 When you, as you know, intercept communications
17 they may include communications with people who have nothing
18 to do with the purpose of the accomplishment of the statute.
19 It may be -- and the Government and the Courts and the
20 Congress and the Executive for that matter, too have always
21 been concerned about abuse of information, storage of files
22 about people. And that sort of thing.

23 In my judgment the minimization procedures are
24 intended to accomplish that purpose and the Attorney General
25 is to make sure that record retention, record acquisition,

1 record use is not -- does not go beyond the scope of the
2 statute.

3 Now, how the Court got from that point to imposing
4 limitations on communications between Assistants to the
5 President with respect to the implementation of the statute,
6 I don't know. And the most important provision in that
7 (h) (1) to which you were referring is the last clause that
8 says, "Consistent with the need of the United States to
9 obtain, produce and disseminate foreign intelligence
10 information." Thus by which Congress was saying the number
11 one goal is right here, it says it over and over again in the
12 statute, but the acquisition of information necessary to
13 protect the United States and citizens from attack, develop
14 minimization procedures but keep that in mind.

15 JUDGE LEAVY: I take it that it's your view that
16 the Court in its opinion flipped that over and said, in
17 effect, that all of the dissemination -- for example, the
18 dissemination -- well, that the results of surveillance could
19 not be disseminated unless it was consistent with foreign
20 intelligence. And I have a reading of that that says there
21 would be no dissemination of it, that is, to law enforcement
22 if it diminished its value as foreign intelligence. Now, I
23 don't know whether I've put that very clearly or not but the
24 Court focused on this, too.

25 SOLICITOR GENERAL OLSON: The Court did, but I

1 submit that that is not A), in my judgment, a rational
2 reading of the minimization procedures. Once one takes -- as
3 you say, it's all in the definitions and the definition is
4 information necessary to protect. Now, we know now sadly
5 that when you build this wall between the people that have
6 information with respect to this terrorist group and -- the
7 phrase that's become so popular now in discussing the events
8 of September 11th and what went wrong, and I'm not saying
9 that anything here could have changed the situation, but the
10 one guarantee that if you keep the people that you're asking
11 to protect you from those kinds of things and then
12 compartmentalize their functions in such a way that they
13 cannot communicate with one another, the people that are
14 going to implement the procedures by which you're protected,
15 that people over here who might have information about
16 terrorists and people over here who might have information
17 about these same terrorists or connections between or bank
18 accounts that are being used or means by which they get into
19 this country cannot speak to one another, that is a guarantee
20 that you will have one or two hands tied behind your back
21 with respect to accomplishing these things. And the phrase I
22 was about to say that's been used so much in public and in
23 debates about this is connecting the dots. Well, of course
24 it's all connecting the dots because foreign intelligence is
25 zillions of dots out there, pieces of information. If you

1 can
2 connect -- the purpose of this statute and the purpose of the
3 community that we ask to protect us is to put that universe
4 of pieces of information together so that connected pieces
5 make a picture that you can understand and maybe do something
6 with. And we've prevented ourselves from doing that and I
7 don't -- I think I wanted to stay with your question is that
8 I don't think that there is anything implicit in any way in
9 the statute, including minimization procedures, that would
10 suggest that those minimization procedures are intended to
11 accomplish this.

12 One of the bases upon which I rely, I think I rely
13 on the statute itself and its history and all of these other
14 things and the common sense meaning of these words for that
15 conclusion but also paragraph three of (h) speaks in terms of
16 procedures, again minimization procedures that allow for the
17 retention and dissemination of information that is evidence
18 of a crime which has been or is about to be committed and
19 that is to be retained and disseminated for law enforcement
20 purposes.

21 JUDGE SILBERMAN: Do you think that refers to
22 non-foreign intelligence crimes?

23 SOLICITOR GENERAL OLSON: Yes, and the 1978 House
24 report which we've cited -- may I ask for the number of the
25 report? 1283, House Report 1283, and I'm referring to page

1 62.

2 JUDGE LEAVY: Now, that's on which Act?

3 SOLICITOR GENERAL OLSON: That's FISA itself.

4 JUDGE LEAVY: The original.

5 SOLICITOR GENERAL OLSON: Yes.

6 JUDGE LEAVY: Okay.

7 SOLICITOR GENERAL OLSON: That refers to (h) (3) and
8 why (h) (3) is in there. And there's a paragraph in the
9 middle of the page of that report which I've marked up for my
10 own purposes -- it's page 62. It's actually cited on page
11 ten in a footnote, I think it's page ten of the FISA Court
12 opinion itself as somehow supportive. It's either page ten
13 or footnote ten in the FISA Court opinion itself. So I went
14 to that provision to see what possible support the reference
15 to that provision and that portion of the legislative history
16 could have to what the Court was doing. And it seems to me,
17 if anything, it illustrates the position that we're taking
18 about here. That, Judge Silberman, makes it clear that to
19 the extent a FISA-approved surveillance uncovers information
20 that's totally unrelated -- let's say, that a person who is
21 under surveillance has also engaged in some illegal conduct,
22 cheating --

23 JUDGE LEAVY: Income tax.

24 SOLICITOR GENERAL OLSON: Income tax. What we keep
25 going back to is practically all of this information might in

1 some ways relate to the planning of a terrorist act or
2 facilitation of it.

3 JUDGE SILBERMAN: Try rape. That's unlikely to
4 have a foreign intelligence component.

5 SOLICITOR GENERAL OLSON: It's unlikely, but you
6 could go to that individual and say we've got this
7 information and we're prosecuting and you might be able to
8 help us. I don't want to foreclose that.

9 JUDGE SILBERMAN: It's a stretch.

10 SOLICITOR GENERAL OLSON: It is a stretch but it's
11 not impossible either. And again, that's what we believe
12 that provision is all about and allows that information to be
13 retained again and turned over to law enforcement officials
14 so that law enforcement officials might prosecute that
15 individual. But in the course of explaining that, the House
16 Report right in the middle says -- and you have to put this
17 in context, I'll read this sentence, it says, "Similarly,"
18 referring to information that is not in that category that
19 Judge Silberman just described, "Much information concerning
20 international terrorism would likewise constitute evidence of
21 crimes and also be 'foreign intelligence information'." So
22 the legislature, the House Report here is acknowledging and
23 recognizing and specifically articulating that information
24 that is evidence of crimes relating to terrorism is foreign
25 intelligence information. That is consistent -- I was going

1 to mention a point, I was going to go back to that Fourth
2 Circuit case but I didn't want to interrupt.

3 JUDGE LEAVY: Go ahead.

4 SOLICITOR GENERAL OLSON: Judge Bell, then Attorney
5 General Bell, testified in connection with that Truong case,
6 and he said that, and it's cited in the Court opinion itself
7 and I'm paraphrasing it somewhat, but it's on page 47 of our
8 brief and note five of 629 F2d at page 916. It says, "Nearly
9 every one of these counter-intelligence investigations that I
10 have seen involves crime in an incidental way. You never
11 know when you might turn up something you might want to
12 prosecute." And so -- that's all consistent with the
13 legislative history and the definition of the statutes.
14 People who are planning to commit terrorism or attacks on
15 this country are almost invariably going to involve
16 themselves in the commission of some crime or another. They
17 may enter the country illegally. They may acquire resources
18 illegally. They may carry too much currency for a foreign
19 national.

20 JUDGE LEAVY: Well, I think that argument is
21 fortified also by the provision that in the event that an
22 emergency surveillance is authorized by the Attorney General,
23 if a crime is determined and it can be reported to law
24 enforcement, it can only be homicide or a threat -- a threat
25 to safety, so there is a restriction on the dissemination

1 under that section that I don't see in the one with respect
2 to dissemination of information acquired by Court Order.

3 SOLICITOR GENERAL OLSON: I haven't focused on
4 that.

5 JUDGE GUY: Not to --

6 SOLICITOR GENERAL OLSON: I agree.

7 JUDGE GUY: Not to change the topic we're
8 discussing but to approach it from a slightly different
9 angle, right at the beginning of your presentation you
10 mentioned that you were here today in effect appealing from a
11 denial of an application and you devote some time in your
12 brief to that and those present on the FISA Court might say
13 that you didn't get a denial of your application, you got a
14 modification of it.

15 Speaking only for myself to the degree that that
16 raises a jurisdictional issue, I'm comfortable with the fact
17 that you're properly here before us today as a result of that
18 modification, however it is described. But the question that
19 I'm leading up to is that for years, 20-some years after the
20 FISA Court was established the Government operated with that
21 Court without ever the necessity of an appeal. This is, as I
22 said at the outset, our first appeal. So along comes the
23 Patriot Act which clearly and I think beyond peradventure
24 expands Government's powers, not contracts it. And here we
25 have the first appeal. So there's kind of a touch of irony

1 in that and that leads to my first question. The FISA Court
2 in effect modified your, if you will, generic procedures for
3 minimization. That was one approach. What Judge Baker could
4 have done in this particular application without the Court
5 doing that as a unit is simply saying I will only approve
6 this application if in this particular case you modify your
7 minimization procedures accordingly.

8 So I guess my first question is do you challenge
9 the right of the FISA Court to do anything with minimization
10 procedures since nobody knows until the investigation
11 proceeds exactly what you're going to run into. In other
12 words, is it within the jurisdiction of the FISA Court to
13 even lay down the perimeters of minimization.

14 It strikes me it's a little bit like Brady material
15 in a criminal case. The Court doesn't tell the Government
16 what they have to do but if the Government doesn't do what
17 they have to do, they proceed at their peril. And that
18 traditionally in Title III applications was the way it was.
19 We always assumed -- as a District Judge I assumed that the
20 Government knew its minimization responsibilities and it was
21 at their risk if they didn't proceed in accordance with them.
22 It seems to me we have a fundamental question, should FISA be
23 saying anything prospectively before minimization?

24 SOLICITOR GENERAL OLSON: Well, I thought about
25 that and I think that the right answer is most of what you've

1 said, but I think I have to concede, and I will think about
2 this some more, but to the extent that FISA itself in 1805 --
3 this is the issuance of the Order, 1805(a), necessary
4 findings, the Court, it seems to me, does have to make a --
5 part of (a)(4) of 1805, that the minimization procedures have
6 to be part of the application, and then the Court has to find
7 that the proposed minimization procedures might alter the
8 definition of 1801.

9 So it seems to me that the Court can say, well, the
10 minimization procedures that you've set forth in your
11 application are not sufficient under the definition. But
12 having said that, when one looks at the definition and
13 especially that last clause of the definition, and refers to
14 consistent with the goals of obtaining foreign intelligence
15 which I say then incorporates the need to protect the United
16 States, that there's got to be a great deal of deference to
17 the Attorney General's decision with respect to what must be
18 kept, maintained and so forth with respect to these
19 minimization procedures. But at minimum the Court went
20 vastly beyond that in imposing limitations on how the -- it
21 isn't just Judge Leavy, it isn't just what they do with the
22 information, it's how they can collect the information,
23 because the provision says in the Order which was engrafted
24 and I think had to be engrafted by Judge Baker in a
25 subsequent application, because that's what the Court sitting

1 en banc decided was a minimum requirement when it rejected
2 what the Attorney General said it was going to do, said any
3 communication, any suggestions, recommendations I think is
4 the word of the Order, with respect to the initiation,
5 expansion, implementation or whatever, of a FISA application
6 by a prosecutor is ipso facto controlled and ipso facto
7 prohibited.

8 JUDGE SILBERMAN: Excuse me. Perhaps I
9 misunderstood, but I took that to be exactly Judge Guy's
10 point. The minimization procedures deal with what you do
11 with the information as you get it. And maybe it's case
12 specific rather than how you develop it in the first place.
13 That's what I thought you were getting at.

14 JUDGE GUY: Absolutely.

15 JUDGE SILBERMAN: You're quite right under 1805
16 that the FISA Court has authority to approve it but you're, I
17 think, answering yes to his question, it doesn't focus on how
18 you develop the information, rather what you do with the
19 information.

20 SOLICITOR GENERAL OLSON: Well, it does say in
21 (h) (1), procedures designed -- adopted by the Attorney
22 General reasonably designed in light of the purpose blah blah
23 blah, to minimize the acquisition and retention, and so
24 forth. So it's there, but -- so that's why I sort of wanted
25 to give a 95 percent yes to that question but then they took

1 it just totally to a different level.

2 JUDGE GUY: But do you view -- isn't it partially
3 your position that the FISA Court by, in effect, packaging
4 its opinion in terms of minimization was indirectly
5 reinserting the primary purpose standard back into the whole
6 process?

7 SOLICITOR GENERAL OLSON: Exactly. And they said
8 so. On page -- the opinion -- I'll pull this out. On page
9 22 of the FISA Court's opinion, the second full paragraph.
10 The Court said, "Given our experience in FISA surveillance
11 and search, we find that those provisions," the Attorney
12 General's revised procedures which were then before the
13 Court, "Sections (2)(b) and (3), particularly those which
14 authorized criminal prosecutors to advise FBI intelligence
15 officials on the initiation, operation, continuation or
16 expansion of FISA-intrusive seizures are designed to enhance
17 the acquisition, retention, dissemination for law enforcement
18 purposes instead of being consistent with the ability of the
19 United States to obtain, produce, and so forth, foreign
20 intelligence information." So the Court actually said that
21 that's what it was doing and basically said we liked what the
22 Attorney General did in 1995. Not only do we like it, we're
23 going to insist that this Attorney General follow those
24 procedures even if this Attorney General finds that they
25 don't make sense, even if the statute has been amended to

1 make it as Judge -- Chief Judge Guy said, more easy for the
2 Executive to accomplish his responsibilities. And even for
3 Congress in adopting 1806(k) specifically said that the
4 intelligence-gathering people consult with and coordinate
5 with law enforcement, and that such coordination would not
6 undermine the certification by the people preparing these
7 FISA applications, that it was for foreign intelligence
8 purposes, nor shall it prevent the granting of the Order.

9 What the Court did here on May 17th and then in the
10 subsequent rejection of the FISA application was ignore, read
11 1806(k) out of existence and just override all of these other
12 things. Now, this process he -- we got to this point in
13 history because of the false start after the Truong case in
14 19 --

15 JUDGE SILBERMAN: Let me stop you for a moment on
16 the Truong case because you're absolutely right, that is the
17 touchstone of the bifurcation that you described and it was
18 as you correctly pointed out, a case which interestingly
19 enough came up after FISA but dealt with facts before FISA.
20 So it was not a FISA interpretation and the Court therefore
21 doesn't deal with the question of seeking foreign
22 intelligence information but deals instead with the notion of
23 foreign intelligence reasons. It doesn't use the term at
24 all. It has a premise which I wonder whether you are
25 prepared to disagree with, the premise is that the Executive

1 should be excused from securing a warrant in such a situation
2 only when the surveillance is conducted primarily for foreign
3 intelligence. It goes on to explain why and that is,
4 "Because once surveillance becomes primarily a criminal
5 investigation, the Courts are entirely competent to make the
6 usual probable cause determination and because, importantly,
7 individual privacy interests come to the fore and Government
8 foreign policy concerns recede when the Government is
9 primarily attempting to form the basis for a criminal
10 prosecution." That's the premise.

11 SOLICITOR GENERAL OLSON: And I couldn't disagree
12 more and, in fact, what we've been talking about in terms of
13 the definition by Congress of foreign intelligence
14 information is inconsistent with that. It's also
15 inconsistent with the ability of the Executive to use one of
16 the -- however infrequently used in the foreign intelligence
17 context -- one of the most potent and effective mechanisms,
18 that is to say, and law enforcement can mean more than
19 prosecution.

20 JUDGE SILBERMAN: But remember, Truong is a
21 constitutional case.

22 SOLICITOR GENERAL OLSON: And it's a warrantless.

23 JUDGE SILBERMAN: Yes. Do you think of FISA as
24 warrantless or not?

25 SOLICITOR GENERAL OLSON: No, I don't think of FISA

1 as warrantless but I just simply mention that the Court there
2 was talking about warrantless searches.

3 JUDGE SILBERMAN: Well, insofar as the Justice
4 Department sort of slid in over the years into this
5 bifurcation, is not part of the reason constitutional
6 concern?

7 SOLICITOR GENERAL OLSON: I think that concerns
8 about the constitutionality of the Government's behavior are,
9 let's say, part of the atmosphere under which these issues
10 are being considered. I would say that on the other side,
11 and I'll come back to, if I can, to part of your question, is
12 that we have very significant constitutional concerns when an
13 Article III Court or FISA Court tells the President that it
14 must have a unit within the Executive Branch through which
15 all communications between people working for the President
16 must operate. That they can't talk to one another. That you
17 have to schedule meetings.

18 One of the things that I also did, Judge Silberman,
19 is look at a memorandum by the Assistant Attorney General for
20 the Criminal Division a few months ago attempting to
21 implement this wall and providing instructions as to how
22 every communication must go through the Office of
23 Intelligence Policy and Review before people can talk to one
24 another. And it is madness. It is like that chart that they
25 made when it was being proposed that the health care system

1 be revamped, where all you have to do is look at it and
2 realize that can't work.

3 With respect to the part of your question about the
4 competence of the judiciary to make these decisions, yes, I
5 understand and I respect --

6 JUDGE SILBERMAN: I'm not raising the question of
7 whether the FISA Court exceeded Article III limitations by
8 seeking to administer the Justice Department, which is a
9 separate question itself which I may very well come back to,
10 but I'm now focusing on the primary purpose test in *Truong*.
11 That is a constitutional opinion, you're quite correct, it's
12 pre-FISA. We have to explore today how much FISA deviates
13 from the classic warrantless crime. It certainly deviates in
14 the particularity aspects and how significant that is
15 constitutionally.

16 Incidentally, although your brief is very useful it
17 doesn't have an awful lot focusing on the constitutionality
18 of the amendment to the statute which adopted the significant
19 purpose test.

20 SOLICITOR GENERAL OLSON: Well, in part I
21 understand that's true. And we'll be happy to address in
22 greater detail any aspect of that that the Court is
23 interested in, but the reason --

24 JUDGE SILBERMAN: Don't we have to decide that
25 incidentally?

1 SOLICITOR GENERAL OLSON: The FISA Court
2 specifically articulated that it wasn't concerned with the
3 constitutional question. It doesn't get into the
4 constitutional question. It didn't address the
5 constitutional question. It didn't think it needed to. I
6 don't think that that issue is before the Court at this
7 point, but --

8 JUDGE SILBERMAN: Wait a minute. Stop for a
9 second. Remember this is a strange situation where we don't
10 have an adversary. If we thought the District Court, the
11 FISA Court, was in error, even posing through the guise of --
12 excuse me, guise is the wrong word, through the procedure
13 of -- minimization procedures, the primary purpose test, and
14 if we thought the primary purpose test was not consistent
15 certainly with the Patriot Act, wouldn't it be necessary for
16 us to consider the question whether the Patriot Act
17 amendments were constitutional?

18 Senator Leahy when he proposed this explained to
19 the Senate that the Courts were going to have to decide
20 whether the significant purpose test is constitutional.

21 SOLICITOR GENERAL OLSON: I understand that if I
22 were on that side of the table I would feel that it would be
23 appropriate to consider the constitutionality of what I was
24 being asked to do. I don't think that it's a close case at
25 all. Because of the reasons that have been articulated by

1 the Supreme Court, for example, in the Keith case.

2 JUDGE SILBERMAN: Keith has a footnote saying --
3 incidentally, you should know that the Chief Judge actually
4 tried the Keith case as an Assistant U.S. Attorney.

5 JUDGE GUY: Justice came in and took care of it,
6 for better or worse.

7 JUDGE SILBERMAN: Then lost it.

8 SOLICITOR GENERAL OLSON: That sometimes happens.
9 But there is a body of law that we're prepared to deal with
10 in greater detail if it will assist the Court with respect to
11 the issues that I was addressing before, that the paramount
12 interest of the Executive in this area because of the degree
13 of the threat, because of the nature of foreign in -- the
14 foreign power, the foreign -- the powers of foreign powers,
15 their ability to work in secret, their ability to frustrate
16 normal law enforcement mechanisms, the responsibility of the
17 President to the people, and all of those categories of
18 reasons which might well justify warrantless activity in this
19 area but which when combined with Congressional endorsement
20 of these procedures, and I would say that --

21 JUDGE SILBERMAN: Is it your view the Government's
22 motivation in constitutional terms, not statutory, but in
23 constitutional terms the Government's motivation, the degree
24 of interest in the Government seeking criminal prosecution is
25 wholly irrelevant in constitutional terms?

1 SOLICITOR GENERAL OLSON: Well, I hate -- whenever
2 I'm faced with that kind of a question, wholly irrelevant, I
3 hate to say so because I don't know how we can conceive --

4 JUDGE SILBERMAN: Excuse me, Mr. Olson, your brief
5 actually says that motivation is irrelevant.

6 SOLICITOR GENERAL OLSON: And I believe that that
7 is the case. Whether one could come up with a conceivable
8 concept in which someone is out to get someone, or something
9 like that, I don't know but I believe that with respect to
10 FISA the motivation needs to be to collect information to
11 protect the public and to protect the Republic. That's what
12 the definition of foreign intelligence is.

13 JUDGE SILBERMAN: I'm talking constitutional.

14 SOLICITOR GENERAL OLSON: I understand that and I
15 agree with what is said in the brief and I can't conceive of
16 a situation in which, especially in this context --

17 JUDGE SILBERMAN: Suppose you had a case of a
18 fireman going into a house and finding drugs. As I
19 understand it, there's nothing to prevent the fireman from
20 telling the police about the drugs even though the fireman
21 didn't have a search warrant, assuming the fireman is
22 proceeding under typical firefighter's modus operandi. But
23 if the firefighter's motivation was to find the drugs, that
24 would be unconstitutional, wouldn't it?

25 SOLICITOR GENERAL OLSON: It may well be. What

1 we're talking about and what Senator Leahy to whom you
2 referred, specifically said in addressing this issue or part
3 of this issue, and this is on page 41 of our brief, and this
4 is the position that we take here, is that the protection
5 against these foreign-based threats by any lawful means is
6 within the scope of the definition of foreign intelligence
7 information and the use of FISA to gather evidence for the
8 enforcement of these laws was contemplated by FISA.

9 JUDGE SILBERMAN: You're responding to my
10 constitutional questions by coming up with very good answers
11 from FISA, but I'm raising the question whether I'm inclined
12 to think it's necessary for us to address the constitutional
13 arguments. It surely can be argued that the Congressional
14 adoption of or even the original statute or its adoption of
15 significant was unconstitutional. And I for one would like a
16 brief on the constitutionality question. I don't see any way
17 to avoid grappling with that issue.

18 SOLICITOR GENERAL OLSON: We have no problem
19 whatsoever in providing that brief. We would want a few days
20 to put it together but I think it's entirely legitimate and
21 of course it's legitimate and it's something that we'd be
22 happy to address. We think that, and I think to answer here,
23 that to the extent that a motivation for the gathering of
24 information is -- to the Executive, the Attorney General, is
25 contemplated for the use of this information is properly

1 acquired under the provision of the statute to prosecute that
2 person and therefore take that terrorist off the street
3 because he entered the country illegally, or let's say
4 individual rather than terrorist, is using funds illegally or
5 using the funds to blow up a building, to the extent that the
6 Attorney General ultimately decides I want to use that
7 information for that purpose because that's the most
8 effective way and the most effective legitimate way to
9 protect the public, then having that motive early on isn't a
10 prohibitive motive and can't be a prohibitive motive and
11 shouldn't be a prohibitive motive.

12 JUDGE SILBERMAN: I understand your argument. I
13 would like to see it developed in terms of Supreme Court
14 cases on the Fourth Amendment question.

15 JUDGE GUY: Certainly we would welcome a brief on
16 that. I would say this, however, that, and I would ask
17 anyone present to disabuse me of this notion if I'm wrong on
18 it, before the Keith case and after the Keith case the power
19 of the Executive to use procedures outside the Fourth
20 Amendment for the development of information involving
21 foreign intelligence was never thought to implicate the
22 Constitution. And that after the Keith case which sort of
23 brought to light, to public light, some of the things that
24 law enforcement was doing, in my view FISA was passed not as
25 an implementation of the executive powers but as a

1 restriction on the executive powers. And as a result of that
2 it sort of makes the issue a little different because nobody
3 ever maintained, that I know of, never successfully
4 maintained, or there's a Court decision that challenged
5 successfully the President's right, for example, to do this
6 kind of warrantless activity in terms of true foreign
7 intelligence. And the concern that the FISA Court I think is
8 wrestling with is to keep FISA from swallowing Title III.
9 That's the concern. And in that regard, and Mr. Kris is
10 here, in the transcript of the hearing, near the end Judge
11 Baker in the colloquy of Mr. Kris says, "But in brief and in
12 summary, you do by these minimization procedures seek to
13 allow the criminal division to direct, expand and initiate
14 FISA procedures, FISA operations, right?" And Mr. Kris
15 responds, "The answer is yes." And although I wasn't present
16 to see the expression on Judge Baker's face my hunch is that
17 he thought that that was the smoking gun in terms of your
18 answer.

19 Now my question is if the Attorney General sought
20 to have as his chief implementer of FISA matters as far as
21 proceeding to go before the FISA Court and whatnot the
22 Assistant Attorney General in charge of the Criminal
23 Division, would that violate anything?

24 SOLICITOR GENERAL OLSON: Well, may I answer that
25 and then Mr. Kris may want to expand on what he was thinking

1 when he gave that answer, but my answer is that if the
2 Attorney General decides that the Assistant Attorney General
3 for the Criminal Division or the Deputy Attorney General or
4 the General Counsel for the Federal Bureau of Investigation
5 is the best one to coordinate all of these activities, to
6 collect this information and determine the best way to use
7 it, that is constitutional. And that the Courts, with all
8 due respect, don't have the power or authority or expertise
9 or constitutional legitimacy in making such decisions. And
10 to the extent -- I don't think, I do not think that any
11 decision at the application stage is going to necessarily
12 result in a prosecution, even if there is someone that we,
13 the Government, knows has done something, and we'd like to
14 have, the Government would like to have the information
15 necessary to implement a prosecution.

16 At the end of the day the Attorney General, himself
17 or herself, is going to have to approve that, and it may make
18 sense at the time that particular trigger is pulled or not,
19 but to the extent that that information and to the extent
20 that we're talking about Title III, FISA itself says,
21 specifically says notwithstanding any other provision of law.
22 FISA was intended not to replace Title III but to provide the
23 Executive with authority, aside from and in addition to Title
24 III. Yes, it may have been to restrict but it was also meant
25 to authorize.

1 To the extent that Congress was imposing procedural
2 constraints and a process which Congress at the time thought
3 was beneficial, yes, there may have been -- there certainly
4 are certain restrictions that if they -- but it doesn't mean
5 that the Executive can't proceed, as you suggest, in a
6 warrantless capacity entirely consistent with the Fourth
7 Amendment if the exigencies exist to justify that. And it
8 doesn't mean that an individual who is suggesting a
9 particular FISA application may be in his or her mind
10 paramount at the time we've got someone that we can prosecute
11 and desperately need to do that to stop these terrible events
12 from happening I don't think constitutionally undermines
13 FISA, the application or the implementation of the statute.

14 JUDGE GUY: Doesn't the statement by Judge Baker --
15 it at least suggests to me that's a conflating of origin with
16 purpose. You don't determine purpose by origin.

17 SOLICITOR GENERAL OLSON: No, I agree with you, and
18 that is what is the problem fundamentally with the FISA
19 Court's decision, that that -- there's two things. One, the
20 purpose, the FISA Court felt if the purpose has to do with
21 law enforcement it's a bad purpose or possibly potentially
22 impermissible purpose. And then the next step is that
23 anybody who has a hat that says prosecutor, plays on the
24 prosecutors' softball team, is a bad person because that
25 means that that person will have a bad objective. And that

1 is why this wall, and the Court frankly talks about this wall
2 as such an insidious thing because prosecutors often make
3 decisions not to prosecute, prosecutors working with
4 intelligence people may say, fine, we don't need to prosecute
5 this person.

6 But the one way to frustrate the effect is
7 illustrated in this very application that was before Judge
8 Baker, there are two efforts going on here. One was a
9 prosecutorial effort, one was an intelligence-gathering
10 effort, and somehow the Executive finds himself in the
11 position that you have to pursue one and abandon the other,
12 or pursue the other and abandon the other one when the two
13 should work together.

14 And the reason why we submitted last week the Los
15 Alamos report, and I hope we got it to you, is that these
16 pages of that report illustrate how this process broke down.
17 It is a disaster, I submit, that these people attending --
18 intending to accomplish an objective of protecting our lives
19 as required under the Constitution and the statute can't talk
20 to one another, and this communication setup that we have is
21 utterly dysfunctional.

22 JUDGE SILBERMAN: 1804 says it requires the
23 identity of the federal officer making the application. And
24 that that person -- and also the approval of the Attorney
25 General. At what level is the identity of the federal

1 officer making that application, how high is that?

2 SOLICITOR GENERAL OLSON: I'd like Mr. Kris and Mr.
3 Baker to help me answer that.

4 JUDGE SILBERMAN: I'll tell you the reason I ask
5 this question, it follows on Judge Guy's question, because if
6 anybody's purpose is relevant it's the Attorney General, I
7 would think. And I'm really troubled by the notion of the
8 Court reaching down into the bowels of the Justice Department
9 to determine who initiated what. But I was curious who is
10 the -- at what level does the Attorney General assist?

11 SOLICITOR GENERAL OLSON: May I?

12 MR. KRIS: A FISA application that would go to the
13 FISC would have an application document that would be signed
14 by one of Jim Baker's lawyers from OIPR and it would have a
15 declaration, an affidavit of facts signed by a supervisory
16 special agent from FBI headquarters. It would have a
17 certification under 1804(a)(7) in the case of electronic
18 surveillance signed by typically the Director of the FBI but
19 there are other officials designated to do so, and then a
20 written approval and a signature from the Attorney General,
21 the acting Attorney General or the Deputy.

22 JUDGE SILBERMAN: It can be the Deputy.

23 MR. KRIS: It can, yes.

24 JUDGE SILBERMAN: So whose purpose is involved?
25 When the Court -- the Court must determine whether the

1 purpose of a surveillance is dependant upon foreign
2 intelligence information.

3 SOLICITOR GENERAL OLSON: It must accept the
4 certification that is provided with it unless it is clearly
5 erroneous.

6 JUDGE SILBERMAN: Yes, but my point in asking the
7 question, whose purpose is relevant? Is it the line
8 attorney? Is it the Deputy Attorney General? Is it the
9 Attorney General, the FBI Director?

10 SOLICITOR GENERAL OLSON: The Attorney General
11 ultimately is certifying that the application and the
12 components of the application are correct and meet the
13 definitions of the statute. I would submit to you that under
14 the statute it is therefore the Attorney General's ultimate
15 authority, but of course from a constitutional standpoint the
16 Attorney General is working under the auspices of the
17 President of the United States.

18 JUDGE LEAVY: The application has to be made by a
19 federal officer. A postal inspector conceivably. It says,
20 "Application for Court Order: A. Each application under
21 this shall be made by a federal officer in writing under
22 oath." Okay? Then the Attorney General, as I read it under
23 1804-2 has to certify that it conforms to the Act. He's the
24 lawyer that says this thing conforms to this Act. This thing
25 is lawful under this Act. Then under (a) (7) you have to have

1 another certification by an Assistant to the President for
2 national security affairs or some other executive officer who
3 is appointed by the President and confirmed by the Senate.
4 And that's where purpose comes in. We don't even have to
5 talk about purpose until we get to this guy. And he's the
6 one who tells us what the purpose is. If I understand it
7 correctly. And the Attorney General has nothing to do with
8 the decision on what the purpose is. It's the administrator.
9 And in this case I take it it's the Director of the FBI.
10 Now, it might be more healthy if that were another executive
11 officer. Do you follow me?

12 SOLICITOR GENERAL OLSON: Well, I'm not sure that I
13 do but -- so let me ask you to --

14 JUDGE LEAVY: All right. Let's just walk through
15 the application.

16 SOLICITOR GENERAL OLSON: I understand what you
17 said with respect to the identity of the persons in this
18 package that goes to the Court.

19 JUDGE LEAVY: Yes, but nothing do I see with
20 respect to the certification of the Attorney General.

21 JUDGE SILBERMAN: Actually to make your point, the
22 Section Two, (a) (2) calls for the approval of the Attorney
23 General to make the application. (7) calls for a
24 certification. And then (7) (A) and (B) refer to the -- well,
25 it's not clear whether (B) does, I guess. (B) is a little

1 ambiguous. But (A) says the certifying official deems the
2 information sought to be foreign intelligence information and
3 the certifying official, as Judge Levy suggested, is in
4 Section Seven.

5 SOLICITOR GENERAL OLSON: Right.

6 JUDGE LEAVY: And that's the one that was amended
7 by the Patriot Act.

8 JUDGE SILBERMAN: Yes, by adding (b).

9 SOLICITOR GENERAL OLSON: A significant, yes.

10 JUDGE SILBERMAN: So his question is, and I think
11 it's a good question, is it the certifying official, the
12 Assistant to the President for national security affairs, or
13 a person designed by the President? And my impression is
14 that it's the FBI Director. So is it the FBI Director who
15 certifies that the information sought is foreign intelligence
16 information and a significant purpose is to obtain foreign
17 intelligence?

18 SOLICITOR GENERAL OLSON: That's my understanding.
19 And I've seen that signed by the Director of Central
20 Intelligence as opposed to the Director of the FBI, but I
21 also understand and I will be corrected, I am sure, by my
22 colleagues, as I understand it, the last person to look at
23 this package who signs the approval, the Attorney General
24 reads everything in that package and asks questions about any
25 part of it because the Attorney General is taking

1 responsibility for that application and everything in it.

2 JUDGE LEAVY: But he would have to have a
3 certification of purpose from somebody else?

4 SOLICITOR GENERAL OLSON: Yes, he would have to.
5 Which as I read the statute the FISA Court, the FISC, then
6 must accept unless it's clearly erroneous.

7 JUDGE LEAVY: Oh, yes, I follow that. I'm just
8 talking about the mechanism. We're talking about who can
9 apply. You tell me why a postal inspector couldn't apply.

10 SOLICITOR GENERAL OLSON: I'm not saying a postal
11 inspector couldn't apply provided --

12 JUDGE LEAVY: He can get the Attorney General to
13 say this conforms to the law and he can get somebody to say
14 this has to do with national security, and he's home free.

15 SOLICITOR GENERAL OLSON; I understand. And from a
16 constitutional standpoint it would not make sense for a Court
17 to say it has to be this official or that official.

18 JUDGE LEAVY: Now, if you were writing on whole
19 cloth you would simply repeal all the Attorney General's
20 Order on this subject and just say we will tell you on each
21 application as required that we have these minimization
22 procedures, would you not?

23 SOLICITOR GENERAL OLSON: Well, probably that's a
24 good suggestion. However, I wouldn't foreclose the Attorney
25 General giving guidance to his subordinates with respect to

1 how regularly these things are handled, assembled and so
2 forth. There is value from the standpoint of the Attorney
3 General of --

4 JUDGE LEAVY: For internal purposes.

5 SOLICITOR GENERAL OLSON: For internal purposes of
6 making sure that this I is dotted and this T is crossed and
7 it presents itself in a certain format.

8 Now, these applications -- again, I have limited
9 experience, but my experience has been frequently if they're
10 describing a particular so-called presumed-to-be terrorist
11 organization or a nation or there are reapplications for --
12 or an application for an extension which contain some of the
13 same language about some of the same organizations, but to
14 regularize the process, and that's I think at least some of
15 the Attorney General guidance, at least this Attorney
16 General's guidance is intended to do.

17 The 1995 -- I agree with you, that if I were
18 writing --

19 JUDGE SILBERMAN: Well, may I go back to past
20 history. For one, your brief argues the original FISA
21 statutes never adopted the bifurcation between primary
22 purpose and a criminal law purpose. However, it is fair to
23 say, is it not, that the first time the Justice Department
24 presents that argument it is before this Court. It never was
25 presented before.

1 SOLICITOR GENERAL OLSON: That's correct.

2 JUDGE SILBERMAN: And indeed the Justice Department
3 went along with the bifurcation for many years. Not only
4 went along but endorsed it in the letter to Congress asking
5 for modifications of the FISA statute and the Patriot Act.

6 SOLICITOR GENERAL OLSON: It endorsed it as a
7 reality that the Department was dealing with. Whatever the
8 words that were used, Judge Silberman. And I'm here to say
9 that we do not -- we do believe today and after having
10 studied this as intensely as I could possibly have done, I
11 believe that it is correct that that bifurcation based upon
12 purpose is inconsistent with FISA and it was accepted as a
13 matter of accommodation by the Justice Department over the
14 years.

15 JUDGE SILBERMAN: You said flatly to the Congress
16 and your Assistant Attorney General said, "On the other hand,
17 it's also clear that while FISA states the purpose of a
18 search is for foreign surveillance, that need not be the only
19 purpose. Rather, law enforcement considerations can be taken
20 into account, so long as the surveillance also has a
21 legitimate foreign intelligence purpose."

22 SOLICITOR GENERAL OLSON: I would have used
23 different words to describe that for the reasons I described
24 here, but I think what has to be understood in the context of
25 this situation that the Justice Department was facing an

1 emergency and made an effort in a short period of time to
2 obtain the best possible relief --

3 JUDGE SILBERMAN: I don't mean to be critical. All
4 I mean to do is try to make sense out of the present
5 legislation. Judge Guy is absolutely correct, that the
6 Patriot Act was designed to loosen restraints, but one of the
7 restraints which the Justice Department told Congress it was
8 suffering was the primary purpose test which it told Congress
9 came out of FISA.

10 SOLICITOR GENERAL OLSON: Which it had been told in
11 turn by the FISA Court that that's where it came from, and
12 that was a reality that it was dealing with.

13 JUDGE SILBERMAN: Well, that's true. Now I'm
14 trying to figure out what it means when Congress adds the
15 phrase in (B) that a significant purpose of the surveillance
16 is obtain foreign intelligence information. Doesn't that
17 necessarily mean -- and indeed that goes to the second
18 argument, the alternative argument in your brief, does that
19 mean that a primary purpose can be criminal prosecution? If
20 you accept the bifurcation.

21 SOLICITOR GENERAL OLSON: I only accept it in the
22 context that those words are used in the context of the
23 reality that had evolved as a result of the 1995 Attorney
24 General decisions, decisions of the --

25 JUDGE SILBERMAN: I'm just trying to figure out

1 what is that significant purpose.

2 SOLICITOR GENERAL OLSON: And I believe if you take
3 a significant purpose and the two principal changes to the
4 extent that they're before us today are that change and
5 1806(k).

6 JUDGE SILBERMAN: Coordination.

7 SOLICITOR GENERAL OLSON: Yes, coordination and
8 consultation. If you take those together against the
9 framework of the awful reality that the Department and the
10 President was faced with as explained in the Los Alamos
11 report and in the General Accounting Office report that we
12 also submitted to this Court is that the Department was
13 attempting to be free from the shackles of having to quantify
14 what it was motivated by or who was interested in what
15 information provided, that the information -- that a
16 significant purpose was foreign intelligence as defined by
17 the statute. That it wouldn't have to say that that was 80
18 percent of the reasons or 60 percent of the reasons or 49
19 percent of the reasons and two percent this and five percent
20 this. It was intended to make it easier for the Justice
21 Department if it said not a primary purpose but a purpose.

22 JUDGE SILBERMAN: Isn't it clear as well though
23 that Congress had to mean that the other purpose would be
24 criminal when it said that if a significant purpose of
25 surveillance is to obtain foreign intelligence information,

1 it had to mean that the other purpose would be criminal.

2 SOLICITOR GENERAL OLSON: Well, I don't accept that
3 because I don't accept the notion that -- well, you see, the
4 problem with that, Judge Silberman, that I have, and I
5 understand we're not dealing with perfect clarity here and
6 we're dealing with legislation that was passed without the
7 full panoply of hearings and reports and so on and so forth,
8 and we're dealing with legislation that was designed to deal
9 with the crisis that had become stark as a result of 9-11 and
10 because of these reports, so it isn't perfect, but the idea
11 that a criminal prosecution -- that law enforcement and
12 prosecution are the same thing, I can't bring myself to
13 accept.

14 JUDGE SILBERMAN: Certainly because you studied the
15 FISA statute, and it seems to me that's a perfectly
16 legitimate reading, but unfortunately that was not the
17 reading of the Justice Department and that's not what they
18 told Congress. And what interpretation would you have us
19 give to the language of (7)(B) now?

20 SOLICITOR GENERAL OLSON: I would insist that
21 (7)(B) simply means that a certification by the appropriate
22 officials at the Department, that the acquisition of foreign
23 intelligence as a significant motivation for what was being
24 sought here is enough and that the Department need not negate
25 law enforcement prosecution or any of the other reasons that

1 the Government may have to seek this information.

2 JUDGE SILBERMAN: Suppose the FISA Court had before
3 it a case in which the application makes clear that the only
4 methodology that the Justice Department contemplates is
5 criminal prosecution, they wish to get this target and
6 criminally prosecute him, not to prevent something happening
7 in the future because of something he or she did in the past.
8 And they are adamant on that. Would the FISA Court be
9 authorized to say since the only purpose suggested or
10 indicated in the documents before us is criminal prosecution,
11 under (B), (7) (B), we deny it?

12 SOLICITOR GENERAL OLSON: Well, I think that that
13 would be still a legitimate application because we cannot go
14 away from the definition in the statute. I don't believe
15 that there is enough history of significance that changed a
16 significant purpose to repeal the central definition in the
17 statute as enacted in 1978.

18 JUDGE SILBERMAN: You would have us give no meaning
19 to (B), it means nothing?

20 SOLICITOR GENERAL OLSON: No, I do believe that it
21 does, provided that the certification by the appropriate
22 officials which can only be reviewed on a clearly erroneous
23 standard must be accepted and that the FISA Court does not
24 have to start quantifying what the purpose is. You see,
25 under the statute the Attorney General is not going -- this

1 information however it's acquired or whatever the motivation
2 of that attorney, the Attorney General might be at the time
3 the application is submitted to the Court, that motivation
4 may change later on. The Attorney General has to decide
5 later whether or not that information once acquired will be
6 used for a prosecution. And it seems inconceivable -- you
7 posit something that's theoretically possible but in the real
8 world I do not think it's possible. I do not think it is
9 possible that once this information is obtained if it has to
10 do with terrorists and it has to do with agents of foreign
11 powers who are deemed under the definitions of the statute to
12 be violating or could be violating or might be violating the
13 criminal laws of the United States, that that information
14 would then be put in a box someplace that could only and
15 exclusively and invariably be used for a criminal
16 prosecution. The Attorney General might decide to go forward
17 with that prosecution, but would that information be
18 discarded? I don't think so. I think that information would
19 still be a part of the information that is acquired with
20 respect to a threat from people that want to violate the
21 criminal laws who are agents of a foreign Government.

22 In other words, I still don't buy the dichotomy,
23 however persuasive it might be packaged in terms of, well, if
24 you have only this in mind and only this and you can only do
25 that, I don't think that's realistic. And I think also that

1 that -- the focus on that amendment to the statute has to be
2 informed by the circumstances, the history and 1806(k) which
3 means that the consultation is permissible and the
4 consultation and coordination, whatever it might be, can't
5 preclude -- cannot be used as justification to preclude the
6 issuance of the Order.

7 JUDGE SILBERMAN: Isn't it a general proposition
8 that you do not look to an existing Congress to interpret the
9 language of a prior Congress except under one exception, when
10 the new Congress amends a statute, and then its understanding
11 of an old statute becomes relevant even if the understanding
12 is incorrect?

13 SOLICITOR GENERAL OLSON: Under certain
14 circumstances, yes, but also that repeal or alteration by
15 implication is disfavored, and we've got a statute where it
16 is not by any means clear that Congress was A), doing that or
17 B), making it more difficult. It is inconceivable to me that
18 the Court would accept an explanation that Congress was
19 intending to validate something that was creating a serious
20 difficult problem for the Executive to do that job, the
21 responsibility given to it by the statute in the
22 circumstances which we're all facing at that particular
23 point.

24 JUDGE SILBERMAN: Did you testify before Congress?

25 SOLICITOR GENERAL OLSON: No.

1 JUDGE SILBERMAN: Did Mr. Kris testify before
2 Congress on this legislation?

3 MR. KRIS: Yes, yes, I did.

4 JUDGE SILBERMAN: May I ask him a question?

5 SOLICITOR GENERAL OLSON: Yes, of course.

6 JUDGE SILBERMAN: Mr. Kris, when you testified
7 before Congress in support of the change to a significant
8 purpose did you ever indicate to Congress the argument that's
9 being presented to us, that the original FISA statute did not
10 require a primary purpose?

11 MR. KRIS: Only in passing. I was testifying, I
12 think, on September 24th in the Senate Intelligence Committee
13 about our proposal which at that time was "a purpose" which
14 was later pushed back to "significant purpose." So I was
15 focused on that and a number of other provisions in the bill.
16 I do recall from my testimony and reviewing the transcript
17 which is available on Westlaw, a very quick passing reference
18 to this idea that prosecution of a spy and terrorist is also
19 a protective method within the ambit of --

20 JUDGE SILBERMAN: Is it not fair to say that
21 Congress was certainly under the impression that the primary
22 purpose test stemmed from FISA, which is one of the reasons
23 they amended it. That is the reason they amended it.

24 MR. KRIS: I don't know if it stems from FISA. As
25 Mr. Olson was saying, I am saying it is the reality of the

1 Court decisions.

2 JUDGE SILBERMAN: No, Congress thought it stemmed
3 from FISA, whether or not it's true. I read the statements
4 of Senator Leahy, Senator Wellstone, Senator Feinstein. They
5 all seemed to believe that the primary purpose test is in
6 FISA.

7 MR. KRIS: Yes, at least as interpreted by the
8 courts, but I'm not sure, I think what Mr. Olson is saying is
9 that when you have two legislative amendments to a statute,
10 one of which comes from the Executive Branch, another one of
11 which is proposed by Congress itself, I don't think it's
12 correct to read them as nullifying each other the way you're
13 suggesting.

14 SOLICITOR GENERAL OLSON: Well, the other thing
15 that I would add is that I don't think it is advisable to
16 assume that this Congress was unfamiliar with the history and
17 the reports and the ample explanation that was given by the
18 1978 Congress and I will refer, if I may, to the House
19 Report, I think it's the same one that I referred to earlier
20 which is quoted on page 37 of our brief. In 1978. Judge
21 Silberman, the legislative history is replete with
22 understanding as is -- as is the Patriot Act, understanding
23 that foreign intelligence may be used in a variety of ways.
24 The last sentence, the last two sentences of the quote on
25 page 37 of our brief to which I'm referring which is from

1 page 49 of the House Report, 1978, the House said, "Obviously
2 use of foreign intelligence information as evidence in a
3 criminal trial is one way the Government can lawfully protect
4 against clandestine intelligence activity, sabotage and
5 international terrorism. The bill therefore explicitly
6 recognizes that information which is evidence of crimes
7 involving those things can be sought, retained and used
8 pursuant to this bill."

9 JUDGE SILBERMAN: What about the Attorney General's
10 own report? I have a copy of one of the reports going back
11 to, I think, May, 2000, and Congress would have had this, I'm
12 sure. The statute does not require the sole purpose of the
13 FISA coverage is to obtain foreign intelligence information,
14 although it seems clearly somebody obtaining foreign
15 intelligence information cannot be "a purpose". Instead, the
16 cases suggest that the primary purpose of FISA intelligence
17 must be primary purposes information as opposed to criminal.
18 Certainly the Justice Department seems to have accepted these
19 judicial opinions and told Congress it did.

20 SOLICITOR GENERAL OLSON: There's no question about
21 that. And the Circuit Court decisions you referred, the
22 Ninth Circuit Court decision, goes in the other direction.

23 JUDGE SILBERMAN: They just reserved the issue.

24 SOLICITOR GENERAL OLSON: Yes, none of those are
25 conclusive one way or the other on this subject. So there is

1 no Federal Court of Appeals law that should guide you or
2 constrain your decisions with respect to it. The Court --
3 yes, the Justice Department regrettably, in my opinion, went
4 along with where the FISA Court was taking -- maybe they were
5 hand in hand, there's no point in saying someone was wrong,
6 where someone was responsible for this, but the outcome was
7 wrong. The very report which you just referred to describes
8 in tragic detail how an intelligence investigation can go
9 wrong when the people who are working to accomplish these
10 objectives do not talk to one another.

11 At one point I was talking about -- in preparation
12 for this argument, and I talked about the concept of a
13 surgeon and the anesthesiologist not communicating with one
14 another except through the hospital administrator about the
15 condition on a moment-to-moment basis of a patient who is on
16 the operating table. And someone said you've got it a lot
17 more easy than it is, if that operation is taking place in
18 Los Angeles and the person that has to be consulted and
19 scheduled for a consultation is in Washington and there are
20 only certain times during the week when that can happen.
21 Instead of a manic exchange of information when people who
22 are attempting to accomplish a result have in the way of
23 communication, we have made it virtually impossible.

24 As I said earlier, in order to be able to connect
25 the dots someone has got to have knowledge of those various

1 different dots. We can't say that the constraints under
2 which we're operating now caused what happened or failed to
3 prevent what happened or what happened on September 11th
4 could have been prevented had we done this the right way, but
5 we do know, I have no doubt whatsoever, if one would want to
6 make it difficult for us to detect and prevent another
7 September 11th, this is the way I'd go about doing it. I
8 would allow people that have intelligence from here not to
9 talk with people who are experienced here. I would allow
10 people that gather intelligence not talk to people who have
11 the resources of a grand jury or immunity who can obtain
12 other information. I would not allow knowledge with respect
13 to a terrorist ring be brought to the attention of someone
14 who can put legal pressure on someone to come over to the
15 other side. All of these things, each of you know as Judges
16 who have dealt with the criminal justice system, there are
17 resources that are available to prosecutors that aren't just
18 prosecutorial. That law enforcement, law enforcement,
19 broadly speaking, the Federal Bureau of Investigation, is
20 engaged in law enforcement and collects this information, law
21 enforcement people are engaged in intelligence gathering.
22 There is no rational bifurcation by which Government can
23 operate in this fashion. It blinks reality to suggest that
24 people can't communicate with one another.

25 Therefore, yes, we have ourselves in this dilemma

1 that makes us ineffective and inefficient and unable to deal
2 with threats against our people and our country because of
3 the acceptance by the Court of this false dichotomy and the
4 acceptance of the Executive Branch with it.

5 When FISA was passed, the nature of the threat to
6 this country was different than it is today. Most
7 intelligence matters were Government to Government. We had
8 people that were operating on behalf of a Government and
9 prosecutions weren't maybe as often, although they were
10 certainly contemplated by the statute. Because espionage and
11 others acts could be dealt with Government to Government.
12 People could have been sent out of the country. That sort of
13 thing could take place. But yet the statute did contemplate
14 international terrorism. I don't think it contemplated it
15 quite the way we see it now, but it enacted the tools
16 necessary for the Government to protect its citizens against
17 that kind of threat. And because of the history that got us
18 into this dreadful box that we're in today it was realized at
19 the time this Patriot Act was being considered and amendments
20 to FISA weren't the only things that were being considered,
21 but because the terrible dilemma was recognized by Congress
22 and to change "the purpose" to "a significant purpose" made
23 it presumably easier for the Government to do what we know
24 the Government needs to do and we know what the Government
25 was intended to do when FISA was passed, and because the

1 Congress went on and enacted 1806(k) to make it clear that
2 consultation and coordination was not something that could
3 prevent the certification or the granting of the Order.

4 What the FISA Court did on May 17th is flatly
5 inconsistent with 1806(k) and flatly inconsistent with the
6 purpose.

7 JUDGE GUY: Let me ask this, they did announce that
8 no one is supposed to leave the room, but maybe this is a
9 good time to give everybody an opportunity to leave the room
10 and we'll take a ten-minute recess.

11 (Recess)

12 JUDGE GUY: Now, let me just say that for the
13 balance of the proceedings -- I just was talking to my two
14 colleagues and we wanted to make sure that we did not
15 discontinue this until the three of us had answered any
16 questions that we might have but conversely we certainly
17 don't want to discontinue it until you've had any opportunity
18 to present anything to us that you haven't presented as yet.
19 So does any of what has transpired to this point suggest to
20 any of you that there's something that you need to say
21 affirmatively and not in response to a specific question?

22 SOLICITOR GENERAL OLSON: I may say thank you, Your
23 Honor. Because we got you the so-called Los Alamos report
24 which is also referred to as the Attorney General report,
25 relatively late in the day, I would simply add that I believe

1 we supplied you with sufficient copies but to the extent that
2 we can amplify that, we'd be happy to do that. We submitted
3 those when we did because as I was preparing that I thought
4 what additional information this Court would want to have as
5 we perceived the magnitude of the problem. Those two
6 documents we wanted you to have.

7 What has come up here so far is we can provide you
8 with an additional discussion of constitutional questions at
9 whatever schedule would be comfortable to you. We can
10 probably do it within a week. And before you respond to
11 that, I would say that the other thing we would supply is a
12 comparison of FISA and Title III which is interesting, I
13 thought, both with respect to the issue of probable cause and
14 the minimization issue and then thirdly, I thought that it
15 might be helpful which we've done in our brief but which we
16 could amplify briefly, a brief comparison of the two
17 principal changes, the 1806(k) and the "a significant
18 purpose" change and the sense of how it could be reconciled.
19 I would say if today is the 9th if we could have a week from
20 tomorrow maybe to provide those.

21 JUDGE GUY: That's fine. Really we don't need to
22 set limits because you feel the sense of urgency of this, and
23 so without us telling you we know you'll submit something
24 that is only constrained in time, by your wanting to put the
25 best product forward that would help us.

1 SOLICITOR GENERAL OLSON: Exactly. We very much
2 are concerned that we get everything to you that we can as
3 quickly as possible.

4 JUDGE SILBERMAN: The memorandum on
5 constitutionality should assume arguendo your second argument
6 rather than your first, your second alternative argument that
7 the significant test is relaxation of the primary purpose
8 test. That's your second alternative argument in the brief.
9 I recognize that you don't like to be driven back to the
10 second argument but that's where the constitutional question
11 would come. Otherwise it would be a question whether FISA as
12 initially passed was constitutional. What you would view, I
13 suppose, as a similar kind of issue insofar as it did not
14 require a primary purpose. Insofar as it did not follow
15 *Truong*. Either way. Or another way of putting it is *Truong*
16 constitutionally compelled.

17 Now, let me ask you this question. This is an
18 ex-parte proceeding after all. If we conclude that it is
19 constitutional, is it not fair to suggest that our opinion
20 would be better for the Government if it specifically
21 analyzed it and so concluded?

22 SOLICITOR GENERAL OLSON: Yes.

23 JUDGE SILBERMAN: Because it seems to me eventually
24 as a parallel question or corollary we expect to get some
25 amicus briefs. Do you have a view what we should do with

1 amicus briefs?

2 SOLICITOR GENERAL OLSON: Our position is we have
3 no objection to the Court receiving amicus briefs. In fact,
4 I think it's probably good that the Court receive amicus
5 briefs.

6 JUDGE SILBERMAN: That sets a precedent for this
7 process which worries me a little bit.

8 SOLICITOR GENERAL OLSON: I understand that. I
9 think that this is an unusual situation because it would not
10 typically have occurred that this opinion would become public
11 or that this appeal would have been taken or that it was
12 going to be scheduled on a schedule -- I don't think a Court
13 deciding in a particular case to accept or not accept an
14 amicus brief has ever been done as requiring the Court to
15 always do that or invariably do that, but because this is a
16 special issue and it is important and for the very reasons
17 that you imply when you say that it might be good to address
18 and resolve the constitutional questions, I think it's good
19 for the process.

20 We would like, again with the constraints that we
21 want, to get this -- this is one of those cases where we can
22 say it's a potential matter of life or death and so,
23 therefore, we want to get it done, we want to make sure we
24 get to you everything we can as quickly as we can but I would
25 like to once we saw those amicus briefs have an option within

1 two days or so, again we'll go as fast as we can, to respond
2 to those.

3 JUDGE SILBERMAN: We have a letter that the ACLU is
4 going to file a brief sometime around the 20th, is it?

5 JUDGE GUY: I have not seen that.

6 THE COURT: Have we seen it?

7 MS. RYAN: Yes, it's the 20th.

8 SOLICITOR GENERAL OLSON: If I had a preference, it
9 would be that they would do it more quickly, but that's not
10 for me to say.

11 JUDGE SILBERMAN: That's ten days. Yours would be
12 a week. About the same time. But then you would get a week
13 and you would want time to respond if you thought there was
14 something of importance.

15 SOLICITOR GENERAL OLSON: We'll accept whatever the
16 Court decides with respect the scheduling and we will work
17 very very fast. We appreciate the fact that the Court
18 scheduled this hearing so quickly, and because things are
19 occurring that we know are occurring that concern us with
20 respect to this subject we want --

21 JUDGE SILBERMAN: There are two areas that I'd like
22 to ask questions on if the Chief would indulge me. The first
23 of which is you did not specifically explicitly at any time
24 in the brief make an argument that the relative intrusiveness
25 of the District Court's -- FISA Court's opinion had itself

1 constitutional implications or even proprietary implications
2 with respect to the limits of judicial power. I am familiar
3 with a case, as you are, where Justice Rehnquist in the
4 opinion once said in another context this would be a
5 bureaucratic success story but in this context it has
6 constitutional implications. Do you recall the case?

7 SOLICITOR GENERAL OLSON: Yes.

8 JUDGE SILBERMAN: We are an Article III Court.
9 Insofar as the FISA Court set forth certain procedures for
10 the Justice Department to follow in the gathering of
11 information, set forth barriers to discussions between
12 various divisions of the Department and went so far as to
13 require a chaperone, does that have Article III implications.

14 SOLICITOR GENERAL OLSON: Well, I -- yes, it has
15 Article III implications and it has Article II implications.
16 And the last two points on my notes are things that I wanted
17 to say, although I touched on them earlier, address those two
18 related points. That to the extent that the statute as it's
19 being implemented hasn't invited the FISA Court into making
20 substantive judgments about what's the right motivation or
21 what are the right circumstances under which the President
22 can or should or may seek to develop information necessary
23 for the President to perform his function, that raises
24 Article III implications and Article II implications, and to
25 the extent that the FISC is purporting to reorganize the

1 Executive Branch, the so-called chaperone function, I don't
2 think Congress could constitutionally tell the Executive or
3 the Attorney General that he could not talk to this
4 subordinate without involving that subordinate. And I
5 certainly don't think the Court can do so.

6 I think it is -- it was -- it originated in part
7 with the Attorney General's I think misconceived 1995
8 protocol, but I think the Court -- and the Court was
9 certainly well intended because I think in one sense the
10 Court is receiving applications, and a regular litigant
11 before the Court is the Office of Intelligence Policy and
12 Review and that may be a matter of good Government as far as
13 the Court is concerned and it may be a matter of good
14 Government as far as the Executive Branch is concerned, but
15 it does raise very serious constitutional questions in my
16 judgment.

17 We did not focus on that in the brief and we may
18 include a discussion of that in our constitutional brief that
19 we file, but Judge Silberman, the idea that the Court can
20 interdict the free flow of information that the Attorney
21 General or the President needs to save the lives of people in
22 this country where there's no requirement in the statute or
23 anyplace else that gives the Court the power to do that, I
24 think is very very serious.

25 JUDGE SILBERMAN: My next question has to do with

1 how we should look at the FISA application in constitutional
2 terms. Should we look at it as a warrantless process?
3 Should we look at it as a modified warrant? And how -- what
4 are the differences that we should focus on between the FISA
5 application and let us say, a Title III. It's fair to say,
6 is it not, the biggest difference is that under Title III you
7 have a particularity requirement of the Fourth Amendment
8 which we do not have here. Is that correct?

9 SOLICITOR GENERAL OLSON: Yes.

10 JUDGE SILBERMAN: Does that mean that we should
11 look at this as a non-Fourth Amendment warrant or a warrant,
12 if you wish.

13 SOLICITOR GENERAL OLSON: That's a very good
14 question and perhaps we can include some of that in our
15 constitutional issue because I think I can give a better
16 answer in writing than spontaneously here, although I've
17 given it some thought. It seems to me that the Fourth
18 Amendment collectively in terms of its reasonableness
19 requirement and its warrant requirement and what we have here
20 with respect to the systems in advance based upon probable
21 of --

22 JUDGE SILBERMAN: A different kind of probable
23 cause.

24 SOLICITOR GENERAL OLSON: A different kind of
25 probable cause, but the Constitution doesn't specify any kind

1 of probable cause.

2 JUDGE SILBERMAN: Precisely.

3 SOLICITOR GENERAL OLSON: And it's a probable cause
4 shaped by the need. And the reason why we wanted to give you
5 this analysis of Title III and FISA side by side is that
6 there is a great deal of ultimately similarity in the
7 standard in that the definition of an agent of a foreign
8 power includes references to violations that the individual
9 not only has connections with the foreign Government or a
10 foreign power but that is engaged in activities that involve,
11 could involve or may involve the violation of the criminal
12 statutes of the United States. So to that extent there's a
13 lot of similarity here. The difference is that it is taking
14 into consideration the nature of the threat that's being
15 addressed by the President, the nature of the circumstances.
16 That is to say, a foreign power engaged in criminal
17 activities might be different, the level of threat might be
18 different, the level of resistance to information and
19 barriers to information since we're talking about --

20 JUDGE SILBERMAN: And the key to the reasonableness
21 of any search is the exterior threat.

22 SOLICITOR GENERAL OLSON: Yes. And so, therefore,
23 I think those issues have to be looked at in that context,
24 and I think that we will satisfy you that --

25 JUDGE SILBERMAN: There are two ways to look at

1 this. One can say this is not covered by the Constitution
2 altogether because it's inherent executive power. The second
3 way is to say, well, it's a reasonable search because the
4 threat is so great even if it was constitutionally covered.

5 The difference between -- is it fair to say the
6 difference between a Fourth Amendment, classic Fourth
7 Amendment search and a FISA application, on the one hand a
8 FISA application is a little more searching because you have
9 to establish the individual you're targeting but you don't
10 have to under Title III if you know the facility is being
11 used to commit a crime and you don't know who the individual
12 is committing the crime and you don't have to identify him.
13 You do have to identify the target here and you have to
14 identify the agency of a foreign power. You do not have to
15 identify the facility used. Therefore you don't have the
16 particularity requirement of the Fourth Amendment.

17 SOLICITOR GENERAL OLSON: I agree with all that you
18 said. There also is a certification with that application
19 that's being filed and the means that are suggested to
20 implement that application are reasonably calculated to
21 obtain foreign intelligence, and that other methods are
22 insufficient or inadequate, I can't remember the statutory
23 term, to obtain that information.

24 JUDGE SILBERMAN: But do you not have to show that
25 it is likely the particular facility that you're searching,

1 phonetapping or whatever, is likely to produce anything?

2 SOLICITOR GENERAL OLSON: I think that's correct.

3 And I will be corrected immediately upon leaving the room if
4 I'm not.

5 JUDGE SILBERMAN: Now, if that were done on a
6 domestic case, if this procedure was used domestically, it
7 clearly would be unconstitutional.

8 SOLICITOR GENERAL OLSON: Well, I haven't made that
9 analysis. I'm not quarrelling with it.

10 JUDGE SILBERMAN: Yes. I thought that would be an
11 accepted proposition. So, therefore, you start with that and
12 then you figure what do we have here? Do we have the
13 President's inherent executive authority so it doesn't really
14 matter what procedure you use, or are the procedures tailored
15 to the threat and therefore it's a reasonable search even
16 under the Fourth Amendment since the particularity of the
17 Fourth Amendment would have to somehow be relaxed, given the
18 nature of the threat.

19 SOLICITOR GENERAL OLSON: Yes, I agree that both of
20 those issues are informed by how the Court approaches it and
21 how we approach it because we do have those characteristics.
22 I don't want to put it as I sit here today in any particular
23 box because I think that the Fourth Amendment to the extent
24 it limits something, and the Court can say the Fourth
25 Amendment doesn't apply and the Constitution doesn't apply,

1 yet the Constitution applies to everything that the Executive
2 does. That's why I'm resisting that analytical framework.

3 JUDGE SILBERMAN: I'm a little puzzled exactly how
4 to look at that.

5 SOLICITOR GENERAL OLSON: We'll address that.

6 JUDGE SILBERMAN: Could we see some of the people
7 who actually filed applications for FISA? What do they
8 typically have that would not be in a Title III and what does
9 a Title III have --

10 SOLICITOR GENERAL OLSON: We talked about that
11 because we anticipated that. We're prepared to respond to
12 that question. I can't remember who is the best person.
13 It's a combination of people.

14 JUDGE GUY: I thought you were submitting a
15 document or had submitted it that does the comparison between
16 Title III and --

17 SOLICITOR GENERAL OLSON: Yes, that's what we
18 intend to do.

19 JUDGE SILBERMAN: The documents will answer my
20 question better than anyone?

21 SOLICITOR GENERAL OLSON: I believe so. And what I
22 did in connection with this is compile illustrative Title III
23 applications and illustrative FISA applications which we
24 could attach to that brief which I think would answer it
25 better than anything that we could do here today.

1 JUDGE SILBERMAN: That's fine.

2 JUDGE LEAVY: Now, I'm -- the first one question I
3 have is once again under 1802 I think it is, that's the one
4 where surveillance is undertaken without a warrant.

5 SOLICITOR GENERAL OLSON: Yes.

6 JUDGE LEAVY: Or without an Order of the Court.
7 That (2) speaks of minimization procedures and under
8 (a) (1) (c) requires an Attorney General report such
9 minimization procedures and changes thereto to the House
10 Permanent Select Subcommittee on Intelligence. Has anything
11 been done under that Section?

12 SOLICITOR GENERAL OLSON: May I inquire?

13 JUDGE LEAVY: Yes. Reporting minimization
14 procedures to the House Permanent Select Subcommittee on
15 Intelligence.

16 MR. BAKER: There are standard minimization
17 procedures both for the regular FISA surveillance that we've
18 been talking about as well as the 1802 surveillance, and I
19 believe those were submitted to Congress when they were
20 adopted.

21 JUDGE LEAVY: Okay. So not only has the Justice
22 Department adopted the procedures that we are talking about
23 and reported them to the Foreign Intelligence Surveillance
24 Court but it has also adopted procedures and reported them to
25 the Committee for the purposes of 1802.

1 MR. BAKER: I believe that's correct, Your Honor.
2 I can check to verify for the record that we actually
3 submitted those because they date back sometime.

4 JUDGE LEAVY: And do we know whether they are the
5 same or different?

6 MR. BAKER: They are different to some degree,
7 Judge. I did not review those this morning before coming in
8 but they are different to some degree because of the types of
9 information that they focus on.

10 JUDGE LEAVY: And do they go along the same lines
11 of this attempt to isolate segments of the investigative arm
12 of the Justice Department?

13 MR. BAKER: They're different procedures and they
14 break it down and they go through the acquisition, retention
15 and dissemination.

16 JUDGE LEAVY: But they're ostensibly minimization
17 procedures and that's all I'm interested in.

18 MR. BAKER: They're clearly minimization
19 procedures.

20 MR. KRIS: Both the 1802 minimization procedures
21 and the ordinary minimization procedures really don't address
22 coordination between intelligence and law enforcement. The
23 coordination issue is addressed in the separate procedures
24 that were adopted in July, 1995 and the ones adopted in 2002
25 by the Attorney General.

1 JUDGE LEAVY: Under the banner of minimization.

2 MR. BAKER: We do have provisions in there where
3 you talk about dissemination of information that implement
4 the minimization standard that we were talking about before.

5 JUDGE LEAVY: Now I have some questions that may
6 sound very basic, so bear with me. The Office of Policy
7 Review --

8 SOLICITOR GENERAL OLSON: The Office of
9 Intelligence Policy and Review.

10 JUDGE LEAVY: And Review is constituted to include
11 lawyers only?

12 SOLICITOR GENERAL OLSON: Let me ask Mr. Baker to
13 address that.

14 MR. BAKER: I'm Counsel for Intelligence Policy, so
15 I'm the head of the Office of Intelligence Policy and Review
16 and we have approximately 30 attorneys on staff as well as
17 support people, secretaries, paralegals and so on as you
18 would in any sort of legal office.

19 JUDGE LEAVY: And what role does that office play
20 in each application?

21 MR. BAKER: With respect to each application we
22 both prepare the applications and then present them to the
23 Court in this room. So we are the attorneys on behalf of the
24 United States who appear before the FISA Court.

25 JUDGE LEAVY: And what decisionmaking goes on at

1 that level with respect to minimizations?

2 MR. BAKER: Well, we prepare the applications, we
3 include in them a description of the minimization procedures.
4 There are standard minimization procedures that have been in
5 existence for some time that tell the FBI how to operate its
6 business. So those are included by reference in every
7 application by saying we will follow the standard
8 minimization procedures.

9 SOLICITOR GENERAL OLSON: If I might interject.
10 Those procedures are intended to avoid the acquisition,
11 retention, utilization of information that is beyond the
12 purpose for which the FISA -- it isn't intended to do what
13 the FISA Court was talking about in the May 17th Order. It's
14 intended to limit the acquisition of intelligence in a manner
15 which is inconsistent with the statute to avoid misuse of the
16 information that is collected incidentally in connection with
17 that.

18 JUDGE LEAVY: Has that office ever done in any
19 case -- was the Court's Order a brand new thing to the
20 office? Had you done anything that you would say conformed
21 to that Order or anticipated it or anything like that?

22 MR. BAKER: Normally we include in every
23 application a statement that the procedures that would apply
24 are the standard procedures. And the procedures I'm talking
25 about go back to 1997, there are various versions of it, but

1 there are current standard minimization procedure is for
2 U.S.-person FISAs, for non-U.S.-persons FISA, for
3 foreign-power FISAs.

4 I believe -- if you want to look historically, I
5 believe that the first applications that we filed with the
6 FISA Court after the enactment of the Patriot Act, the Court
7 issued supplemental Orders saying that in addition to the
8 standard minimization procedures we were to also follow the
9 July, 1995 Attorney General procedures which were, in the
10 Court's view, minimization procedures. So starting I believe
11 back in about November of last year we were ordered to follow
12 those as well.

13 JUDGE SILBERMAN: Were the '95 regulations
14 described as minimization procedures?

15 MR. BAKER: Yes, Your Honor.

16 SOLICITOR GENERAL OLSON: Described by the FISA
17 Court.

18 JUDGE SILBERMAN: No, by Justice when they issued
19 the '95 regulations which pursued the primary purpose
20 demarcation, were they described as minimization procedures?

21 MR. BAKER: No, I believe the first time they were
22 described as minimization procedures was by the FISA Court.
23 What happened was in the Orders in November we were told
24 basically put those in all your standard Orders because
25 that's what we want.

1 MR. KRIS: Just so the Court is aware, those Orders
2 with the handwritten annotations by the FISA Court are part
3 of the record in this case. They're tab eight in our
4 appendix that we filed in the FISC with this application.

5 JUDGE SILBERMAN: I have one question.

6 JUDGE GUY: Excuse me, I wasn't sure you were done,
7 Judge Leavy, in the sense that I thought you were asking
8 about the so-called chaperone requirement.

9 JUDGE LEAVY: That's what I was trying to get to.
10 To what extent did this office have anything to do with
11 assigning tasks within the FBI as to who should be
12 investigating crime and who should be investigating foreign
13 intelligence purpose? Did you do anything by way of
14 administering, if you will, the collection of information?

15 MR. BAKER: Well, the FBI is responsible for
16 running its own show and we don't have authority to tell the
17 FBI what to do in that sense. However, we have implemented
18 the -- we have been part of implementing the 1995 procedures
19 since they were set forth by the Attorney General, and so we
20 have been involved in that entire process of interactions
21 between the FBI and the Criminal Division.

22 JUDGE LEAVY: But no administrative authority.

23 MR. BAKER: We're a separate component.

24 JUDGE GUY: Before the FISA Order you never told
25 anybody don't get together and talk about this unless one of

1 my attorneys is present. Or did you?

2 MR. BAKER: Judge, I'm trying to remember if in any
3 particular case -- that may have come up. Because in
4 implementing the 1995 procedures I think those kinds of
5 conversations may have been had. The AGRT Bellows report has
6 a lengthy discussion about the history of all this and the
7 interaction and makes an assessment about the relationship
8 between the various components.

9 SOLICITOR GENERAL OLSON: What Mr. Baker is
10 referring to is the document which I have been referring to
11 as the Los Alamos report, it's volume four, the Attorney
12 General Review Team. I think that's very illuminating on
13 that point because it demonstrates the extent to which that
14 was done and the extent to which, in my judgment, grave
15 damage to the ability of anybody to accomplish anything was
16 done as a result.

17 JUDGE LEAVY: Okay. So my specific question will
18 probably be answered when I get around to reading it.

19 SOLICITOR GENERAL OLSON: At least in part.

20 JUDGE LEAVY: All right.

21 JUDGE GUY: Judge Leavy, I'm still not sure what
22 the answer to the question is and now I'm interested in it in
23 the sense did the FISA Court institutionalize what you were
24 already doing with the chaperone requirement, or did they
25 superimpose that requirement out of thin air on you?

1 MR. BAKER: The trouble I'm having, Judge, is that
2 we work on thousands of cases a year and I'm just trying to
3 give you an honest answer, and maybe it's one that we need to
4 reflect upon and come back and address it in writing as part
5 of the other submissions. I'll just trying to remember in
6 every case -- we've worked on a lot of cases over the years,
7 I just don't remember.

8 MR. KRIS: I think I can say something in the way
9 of an answer. The July 1995 procedures do contemplate
10 informing OIPR when there's going to be a consultation
11 between the Criminal Division and the FBI intelligence
12 section. And the August 6, 2001 memorandum from Mr. Thompson
13 also contemplated that OIPR will be invited.

14 Now, there's a certain amount of I guess what can
15 be called inside baseball here in terms of our relationship
16 with the FISC and indeed the August 6th memo was promulgated
17 by the Deputy only following a conversation with the
18 presiding Judge of FISC at that time, Judge Lamberth. And so
19 there is a less rigid so-called chaperone requirement of
20 sorts in predecessor documents but, number one, I think, and
21 this is something that Mr. Olson has been talking about,
22 sometimes the Department will propose something because we
23 know what is needed in a particular instance to get past go
24 with the Court. And because we understand what the law is as
25 interpreted and implied by the Court. Also, the chaperone

1 requirement I think takes on much more significance once the
2 range of consultations that are permitted is expanded. If
3 they can't give advice anyway, the prosecutors can't give
4 advice anyway because of the primary purpose, then fewer
5 consultations will occur. As you have more of them it
6 becomes more significant.

7 JUDGE GUY: But anyway initially the requirement
8 was self-imposed, albeit perhaps anticipating what would
9 please the audience that you were presenting it to.

10 SOLICITOR GENERAL OLSON: Well, I think the correct
11 answer is that plus. I think that there was a substantial
12 encouragement that was coming from the Court and concern by
13 the Attorney General in 1995 that there was a slippage in
14 terms of whether all that dialogue was taking place in the
15 right context and concern, as again explained in this report,
16 that possibly if there was too much communication between the
17 intelligence gatherer and the potential prosecutor, that that
18 might adversely affect the success of a criminal prosecution
19 and so forth. So it evolved in that fashion, became
20 formalized in July of 1995 with the Attorney General's Order,
21 and then continued to evolve until we got to the May 17th
22 Order of the Court which then made it even more
23 institutionalized and added some very very severe
24 restrictions which hadn't existed at least in prior concerns
25 of it up to that point. So it kept getting worse up to May

1 17th.

2 JUDGE LEAVY: When did the word chaperone come into
3 use in connection with this arrangement?

4 MR. KRIS: I believe that that word came into use
5 when the brief was being drafted.

6 JUDGE LEAVY: So it's not something that -- and
7 when did the --

8 SOLICITOR GENERAL OLSON: I would have used the
9 word straightjacket.

10 JUDGE LEAVY: All right. And when did this concept
11 of a wall, the so-called wall, when was it visualized as
12 that?

13 MR. KRIS: Well, at least as far back as the
14 millennium cases.

15 MR. BAKER: I believe there were walls as such
16 separating the intelligence investigators and criminal
17 investigators in other cases dating back a number of years,
18 at least to the early nineties.

19 JUDGE LEAVY: All right. And in the mechanical
20 aspects of presenting these applications to the Court what
21 does Mr. Kornblum have to do with that? At what point is he
22 involved in any of the decision making?

23 MR. BAKER: Mr. Kornblum is currently the legal
24 advisor to the FISA Court. He works for the judiciary. He
25 does not work for the Department of Justice.

1 JUDGE LEAVY: And for how long.

2 MR. BAKER: For two years or so. He used to have
3 Ms. Skelly-Nolen's job and then was Senior Counsel.

4 JUDGE SILBERMAN: He was Deputy Counsel and then he
5 was Senior Counsel.

6 MR. BAKER: Yes, I replaced him as Deputy Counsel
7 and I've now become the Counsel.

8 JUDGE LEAVY: Back to the Office of Intelligence
9 Policy and Review, now, is there some sort of group review of
10 each application or is that done as lawyers would do it, one
11 will take a look at an application and make judgments about
12 what's needed, what's there, and you look at that or is there
13 some sort of a consultation among all of the office as to
14 whether or not all the motives are in place and all of that?

15 MR. BAKER: I'll describe how it currently works.
16 We assign one attorney to work with the FBI to prepare an
17 application.

18 JUDGE LEAVY: In a single case.

19 MR. BAKER: In a single case such as the case you
20 have in front of you. One attorney was assigned to that
21 case. An application was drafted, the application, the
22 declaration, certification, the proposed Orders. All that
23 was put together. It was then reviewed within our office.
24 We have an assistant counsel that reviews it and then Ms.
25 Skelly-Nolen reviews it, and in most cases I review it as

1 well. And it is also reviewed across the street. We refer
2 to the FBI as physically across the street. It's reviewed by
3 the substantive case agents at headquarters and in the field
4 offices to make sure that it's accurate and so on. And it's
5 also reviewed by the FBI General Counsel's Office.

6 JUDGE LEAVY: Okay. And that's reviewed for
7 legality as well as the policy that goes into the
8 decisionmaking as to whether to ask for it in that case.

9 MR. BAKER: It's reviewed in all its totality
10 because at the end of the day our office makes a
11 recommendation to the Attorney General whether or not to sign
12 this application.

13 JUDGE LEAVY: And at what point in all of this is
14 the certification of purpose made?

15 MR. BAKER: Those are prepared as part of the
16 package and they're sort of prepared along with the other
17 things that you're working on, and then the whole package is
18 reviewed in its totality as it goes through the process by
19 all these different players.

20 JUDGE LEAVY: And that certification is always made
21 by the Director of the FBI?

22 MR. BAKER: It's made by the Director of the FBI or
23 some other senior official. If it's not the FBI Director,
24 it's the Secretary of State, the Deputy Secretary of State,
25 the Director of Central Intelligence, the Deputy Director of

1 the CIA.

2 SOLICITOR GENERAL OLSON: And that occurs
3 immediately before or shortly before it then comes to the
4 Attorney General.

5 MR. BAKER: That's correct.

6 JUDGE GUY: Not to interrupt Judge Leavy, he wasn't
7 done, I'm sure, but in these applications over time a certain
8 amount of boilerplate gets developed, doesn't it?

9 MR. BAKER: Certainly.

10 JUDGE LEAVY: And then typically how much
11 interaction is there in presenting the application to the
12 Judge? Is it typically a yes-no answer on that or tinkered
13 with?

14 MR. BAKER: Typically we now have a Court session
15 scheduled every week and so what we will do, with all the
16 different Judges coming in, one Judge per week, we will file
17 the applications ahead of time so the Judge has time to read
18 the materials. And sometimes the Judge will call us in and
19 ask us questions or we'll wait until the session of the
20 Court, and at that point the attorney from OIPR, the FBI
21 agent will be present and then the Judge can ask them
22 whatever questions he or she may have.

23 JUDGE LEAVY: Does it frequently or very often
24 focus on the question of purpose? That is, the certification
25 of purpose?

1 MR. BAKER: Questions about purpose do come up. We
2 include -- we try to present to the Court ahead of time
3 obviously anything that we think the Court may ask about that
4 or be concerned about. Obviously all the material facts, and
5 so you will see in the applications, related criminal
6 matters. A section that describes in the declaration all the
7 related criminal matters and the certifications will refer to
8 those.

9 SOLICITOR GENERAL OLSON: If I may amplify in part,
10 you know, the Order that was issued in connection with May
11 17th has this new rule, Rule 11 which is part of the record
12 that is before you which requires "All FISA applications
13 shall include informative descriptions of any ongoing
14 investigations of FISA targets, as well as the substance of
15 any consultations between the FBI and criminal prosecutors at
16 the Department of Justice or the United States Attorney's
17 Office." That's part of what we're here objecting to, but
18 that was added as a part of this process.

19 JUDGE LEAVY: Now, I can't get my hands on it
20 immediately but it's that portion of the decisionmaking by
21 the FISA Court that goes to you and you must accept that
22 unless you find it's clearly erroneous, am I right?

23 MR. BAKER: That's correct.

24 SOLICITOR GENERAL OLSON: If the purpose is for
25 intelligence, foreign intelligence, that the Court, unless

1 I'm mistaken in reading the statute, must accept it, unless
2 it's clearly erroneous. The certification of purpose being
3 foreign intelligence.

4 JUDGE LEAVY: So now my reading on that is that
5 that is akin then to a purely factual finding, that here is a
6 factual assertion by the person whose mind set -- is the only
7 one who can tell us what the purpose is, right? And he says
8 the purpose is foreign intelligence. The Court then has to
9 simply decide whether or not he's telling the truth. Is that
10 a fair characterization of it or have you viewed it as
11 something else?

12 SOLICITOR GENERAL OLSON: How they have viewed it
13 in the field, I'll let them answer, it seems to me that
14 because the definition requires a finding by that official
15 that there's a foreign agency, and foreign agency in
16 connection with terrorism or some of those other acts
17 requires the concept of the possibility that the activity
18 engaged in may involve or could involve federal criminal
19 activities, that that sort of equation might conceivably
20 contain some partial legal analysis as a part of them, but
21 the clearly erroneous standard it seems to me --

22 JUDGE LEAVY: Refers only to purpose, does it not?

23 SOLICITOR GENERAL OLSON: Yes, but purpose of
24 obtaining foreign intelligence information as defined.

25 JUDGE LEAVY: Okay.

1 SOLICITOR GENERAL OLSON: Have I stated this
2 correctly?

3 MR. BAKER: Yes, I think that's right.

4 JUDGE LEAVY: Those are all the questions I have.
5 I hope that I haven't suggested a total misunderstanding of
6 all of this but, anyway, that's as much as I have in mind.

7 SOLICITOR GENERAL OLSON: The same sort of
8 questions we've been asking.

9 JUDGE SILBERMAN: I'm a little confused by the last
10 answer to Judge Leavy's question. I understood the clearly
11 erroneous test would also include whether there's probable
12 cause to believe the target is an agent of a foreign power.
13 Is that not true?

14 MR. BAKER: No, the Court makes a finding that
15 there's probable cause to believe that the person is an agent
16 of a foreign power and reviews the certification, in the
17 U.S.-person cases to determine whether or not the
18 representation made is clearly erroneous.

19 JUDGE SILBERMAN: I see, but in the determination
20 of whether it's probable cause would there also be any of the
21 facts asserted to suggest probable cause, are those facts
22 reviewed under clearly erroneous?

23 MR. KRIS: No. I'm sorry. I mean under 1805 the
24 Judge enters an Order if he finds that under 1805(a)(3)(a)
25 there is -- if he finds that there's probable cause to

1 believe that the target of the surveillance is a foreign
2 power or agent of a foreign power, and I think that
3 determination of probable is made in the usual way, but under
4 Subsection 1805(a)(5) that's where the clearly erroneous
5 standard comes in with respect to reviewing not the assertion
6 of facts going to probable cause but rather the certification
7 in 1804(a)(7).

8 SOLICITOR GENERAL OLSON: Which is, "Deems the
9 information sought to be foreign intelligence information,
10 that a significant purpose of the surveillance is to obtain
11 foreign intelligence information that cannot be reasonably
12 obtained by normal investigative techniques," et cetera.

13 JUDGE SILBERMAN: So that includes the type of
14 foreign information designated. That has to be judged under
15 the clearly erroneous standard.

16 MR. BAKER: If it's part of the -- yes.

17 JUDGE LEAVY: The certifications are not clearly
18 erroneous. And one of those certifications is for the
19 purpose, that only the person who tells us his purpose can
20 possibly know, unless -- and we would take his word unless we
21 think he is lying, right?

22 SOLICITOR GENERAL OLSON: Yes, unless it's clearly
23 erroneous. I think that connotes on the face of it.

24 JUDGE SILBERMAN: I have one more question.

25 JUDGE GUY: Absolutely.

1 JUDGE SILBERMAN: Mr. Olson, we'd like you to
2 answer a question that assumes arguendo that which you do not
3 wish to assume, that is to say, that you're reduced to your
4 second alternative argument, that the amendment to the
5 statute caused by the Patriot Act relaxed the primary purpose
6 test to a significant purpose test. But that therefore
7 implies that the other purpose would be criminal. If that's
8 the reading of the statute and that's your second alternative
9 argument, that's the appropriate reading of the statute, how
10 does one go about -- how does the Court go about determining
11 as part of the review that we've just been describing whether
12 there is a significant purpose or not? You have made the
13 argument that it is no longer a comparative question, but how
14 does the Court go about determining whether this is
15 significant purpose of seeking foreign intelligence
16 information as opposed to criminal prosecution?

17 SOLICITOR GENERAL OLSON: That goes back I think to
18 Judge Leavy's question, is that the official who has the
19 expertise and so forth and has reviewed the materials,
20 certifies that that is indeed the case. And that unless that
21 is clearly erroneous the Court must accept that.

22 JUDGE SILBERMAN: Give me an example of a clearly
23 erroneous certification?

24 SOLICITOR GENERAL OLSON: Well, I think if the
25 application itself disclosed that it involved a behavior by

1 the target of an investigation and someone who was manifestly
2 not connected with any foreign agency or something like that.

3 JUDGE SILBERMAN: A criminal prosecution that did
4 not relate to foreign intelligence.

5 SOLICITOR GENERAL OLSON: The problem I have with
6 the premise is that -- I have to say that I think that the
7 problem that we have with the premise informs the answer to
8 that question because the range of information, and I don't
9 know whether -- you used the words criminal alternative that
10 appear throughout this is law enforcement which was even more
11 generalized than the notion of criminal prosecutions that are
12 in the statute, information that relates to the conduct,
13 activity, behavior of a person who engages in a conspiracy to
14 bomb a building, the Capitol or something like that, may very
15 well be, however it might relate to a criminal prosecution,
16 might also at the same time have very valuable significance
17 aside from the prosecution.

18 JUDGE SILBERMAN: I understand. Help me out. Give
19 me an example of one that would fall outside of the
20 significant purpose, assuming Congress meant --

21 SOLICITOR GENERAL OLSON: Well, I have trouble with
22 that, Judge Silberman --

23 JUDGE SILBERMAN: So do I. That's why I'm asking.

24 SOLICITOR GENERAL OLSON: That's right. That's why
25 I think a construction of the statute that requires that box

1 is very difficult because the definition, even assuming what
2 you're talking about to the extent we're talking about a
3 United States person is that information necessary to
4 protect -- necessary to the ability of the United States to
5 protect against international terrorism.

6 Now, if that information in a particular case,
7 whether it involved a wife beater or a child pornographer or
8 someone who cheated on their taxes 15 years before gave the
9 President or those acting in his behalf the ability of
10 walking in and taking that person off the street because of
11 the other activities of the person, would that be necessary
12 to protect against the attack? It might be.

13 So that's why it's difficult for me to come up with
14 an illustration that accepts the premise which I think is
15 such a unworkable premise, especially if one considers what
16 the statute meant in the first instance, what the language of
17 the statute clearly means, and the desire of Congress to make
18 it easier, certainly not more difficult, for the President to
19 do the job which is the fundamental job, that is to say, to
20 protect against the terrorists.

21 JUDGE SILBERMAN: You can't think of any
22 hypothetical?

23 SOLICITOR GENERAL OLSON: What we will do, if we
24 can collectively come up with something that will more --

25 JUDGE SILBERMAN: In your brief you suggested only

1 that the face of the application indicated something was
2 wrong. I don't quite understand what would be wrong though.
3 The face of the application, suppose the face of the
4 application indicated a desire to use foreign surveillance to
5 determine strictly a domestic crime, that would be -- but
6 then you wouldn't have an agent, you wouldn't have an agency.
7 You must have some substantive requirement here if
8 significant purpose is given its literal meaning, you must
9 have some logic to the interpretation of that section which
10 falls outside of the interpretation of an agent of a foreign
11 power.

12 SOLICITOR GENERAL OLSON: And I suppose if the
13 application itself revealed that there was a purpose to take
14 personal advantage of someone who might be the subject of an
15 investigation, to blackmail that person, or if that person
16 had a domestic relationship and that person was seeing
17 another person's spouse or something like that, if that would
18 be the test on the face of things.

19 In other words, I'm suggesting that the standard is
20 relatively high for the very reason that it's difficult for
21 the judiciary to evaluate and secondguess what a high level
22 executive branch person attempting to fight terrorism is
23 attempting to do.

24 I thought the description of the process that Mr.
25 Baker gave is quite illuminating because it requires -- not

1 only does the statute require, but the manner in which the
2 statute is being implemented aside from these dysfunctional
3 aspects of it, puts responsibility squarely on top-level
4 Governmental officials to sign their name.

5 JUDGE SILBERMAN: I'll try one more time and I'll
6 give up. What other purpose is contemplated besides the
7 purpose of obtaining foreign intelligence information? By
8 stating significant purpose must to be obtain foreign
9 intelligence information necessarily implies there's another
10 kind of purpose.

11 SOLICITOR GENERAL OLSON: It could be revenge, it
12 could be extortion. It could be vindictiveness.

13 JUDGE SILBERMAN: Under your alternative
14 argument -- your alternative argument is you can have a
15 primary purpose of seeking criminal prosecution. That's your
16 alternative argument in the brief. Nonetheless, a
17 significant purpose is to obtain foreign intelligence
18 information. That's the alternative argument in the brief in
19 which you accept the bifurcation.

20 SOLICITOR GENERAL OLSON: For the purposes of
21 dealing with it.

22 JUDGE SILBERMAN: Exactly. That's my problem. So
23 that if you had then a total purpose of criminal prosecution,
24 does that mean you violate (B)?

25 SOLICITOR GENERAL OLSON: I don't think so, Judge

1 Silberman, for the reason that I explained before.

2 JUDGE SILBERMAN: We're going around in circles.

3 SOLICITOR GENERAL OLSON: We're going around in
4 circles but we're going around in circles because the real
5 world, the use of that information even if it is used for a
6 prosecution, it's impossible as I sit here for me in good
7 faith to imagine a situation and I think it would be
8 irresponsible for me to do so, imagine a situation where that
9 might not also be useful in something that comes out in
10 another FISA situation that might have come out six months
11 ago, given that we're dealing with an agent of a foreign
12 Government, to preclude that, that's something that won't
13 have importance to the President in a purely intelligence
14 context?

15 JUDGE GUY: Don't you use the Timothy Mc Veigh
16 situation as one that wouldn't allow you to get a FISA
17 warrant?

18 SOLICITOR GENERAL OLSON: But that's not
19 necessarily for the purpose of being law enforcement. It's
20 because it's purely domestic. To the extent that answers
21 Judge Silberman's question, I was speaking of the law
22 enforcement dichotomy as opposed to the domestic dichotomy
23 which we do acknowledge exists.

24 JUDGE GUY: Anything else?

25 JUDGE LEAVY: No.

1 JUDGE GUY: Let me just ask one last question or
2 perhaps two questions. One, is there a third area that
3 doesn't concern us that still is ongoing? For example, if
4 the CIA wanted to search the apartment of an Iraqi diplomat
5 stationed in Brazil, I take it they wouldn't go before the
6 FISA Court to get an application.

7 MR. KRIS: They would not.

8 JUDGE GUY: That's the implication of U.S. person
9 to some degree as one of the very significant portions of the
10 FISA statute, is it not?

11 SOLICITOR GENERAL OLSON: Yes. That's why I said
12 at the very beginning I was focusing on that because I know
13 this Court is concerned with the application of the statute
14 as far as U.S. persons are concerned which is (b)(2) rather
15 than (b)(1) which relates to any person other than a United
16 States person.

17 JUDGE GUY: Then let me close, and -- unless my
18 question triggers something on behalf of my colleagues. This
19 is a strange proceeding because it is not adversarial. It is
20 ex parte. And if one were to just read the transcript of
21 this hearing today one might think that the adversary, if
22 there was one, is what the insiders refer to as the FISC, the
23 lower body in this matter. And I want to say, first of all,
24 that to the degree that our questions have contributed to
25 that, they're intended for the purpose of gathering

1 information and that's all. But in that same vein, I used to
2 think as a District Judge that sometimes when a case of mine
3 went to the Court of Appeals, that I'd love to be there as
4 amicus and also be able to argue and in that vein putting
5 just for the purposes of argument sort of an advocate for the
6 FISA Court, if they were here today I suspect that they might
7 say something like the difficulty with the change in the
8 statute going to significant purpose is that the standard is
9 no longer quantifiable in any reasonable means, that any fool
10 who has done this for years can prepare an application that
11 would set forth prima facie material to indicate that there's
12 a significant purpose because significant purpose, like the
13 substantial evidence standard, doesn't foreclose the fact
14 that there is substantial evidence on the other side.
15 Similarly, the fact that a significant purpose may be the
16 gathering of foreign intelligence doesn't foreclose the fact
17 that a significant purpose might also be a criminal
18 prosecution. And given the fact, I'm now speaking, as you
19 know, the FISC representative, given the fact that we have
20 this situation and given the fact that we see our charge
21 partially to be to protect U.S. persons, to extend to them
22 the same protections they would have under Title III and the
23 Fourth Amendment except insofar as those protections would
24 intrude on the foreign intelligence gathering ability, we
25 feel that these procedures that we've put in place to the

1 best of our ability are the only things that we can think of
2 to guarantee that there will still be some meaningful
3 requirement that this really be a foreign intelligence
4 matter, significant though it may be.

5 SOLICITOR GENERAL OLSON: May I address that in
6 this way? There are several protections and the Congress was
7 aware of them. One, by making the Attorney General and a
8 high level official, either a national security advisor level
9 or someone who otherwise is appointed by the President,
10 confirmed by the Senate, to sign their name. That is one
11 assurance. Another one is that to the extent that this
12 information is going to be used at all in a criminal
13 procedure, the Attorney General must approve that. Number
14 three, notification is appropriate at that point to an
15 Article III Judge who is in charge of that. And there may be
16 suppression motions and legitimate -- and proceedings with
17 respect to the application of those individual rights under
18 those circumstances, and then there can be a review up the
19 line from the District Court's decision. But because they're
20 dealing with national security and international terrorism,
21 the Congress approved executive authority in an area where it
22 is even without Congressional approval, at its zenith. And
23 this process here by which the Court is going to regularly
24 receive these applications, it's going to see how they're
25 done, it's going to see the people that are applying them and

1 is going to see the Attorney General's signature, we submit
2 both of them from a constitutional standpoint and from a
3 statutory standpoint, that those protections exist.

4 I would also say that with respect to this Court,
5 we have great respect for the Judges on this Court. We
6 respectfully disagree with where we have come and we think
7 it's a very serious, very serious problem that the Executive
8 is dealing with at this juncture to where we have come, but
9 certainly the Court got to it because it was being
10 conscientious and serious about both its responsibilities to
11 the country and also for citizens, United States persons, who
12 were the subject of surveillance.

13 So I think that this process has been up to this
14 point very very effective, and to the extent that those --
15 this may be an ex-parte procedure, but the Court and the
16 members of this Court are asking very very difficult, hard
17 questions, the same kind of questions I think that someone
18 who was an adversary, if there were one, would be asking the
19 Court to ask.

20 JUDGE GUY: There being nothing further, the Court
21 would thank all of the persons who appeared today. They've
22 been very helpful. And we assure you that we recognize that
23 there is some time urgency to all of this, and within the
24 constraints of preparing something meaningful we will do our
25 best to get a decision to you as soon as possible.

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SOLICITOR GENERAL OLSON: Thank you.

JUDGE GUY: With that we're in recess on this matter.

SOLICITOR GENERAL OLSON: Thank you.

JUDGE GUY: You may be excused.

SOLICITOR GENERAL OLSON: Thank you.

(Proceedings concluded at 11:55 a.m.)

CERTIFICATE OF OFFICIAL REPORTER

I hereby certify that the foregoing is a true and accurate transcript to the best of my ability.

Santa Grijze