

Center for Strategic and International Studies

The National Security Division at 10: Past, Present, and Future

Panel III: NSD's Role within the Three Branches of Government

Panelists:

**Hon. John D. Bates,
Judge, United States District Court for the District of Columbia; and former
Presiding Judge, United States Foreign Intelligence Surveillance Court**

**Rachel L. Brand,
Board Member,
Privacy and Civil Liberties Oversight Board**

**Hon. Michael J. "Mike" Rogers,
Former Representative for Michigan's 8th Congressional District and
Chairman, Permanent Select Committee on Intelligence**

**Frances F. Townsend,
CSIS Trustee and former Assistant to the President for Homeland Security
and Counterterrorism**

**Moderator:
Stuart J. Evans,
Deputy Assistant Attorney General, National Security Division,
Department of Justice**

Location: CSIS Headquarters, Washington, D.C.

**Time: 1:45 p.m. EDT
Date: Wednesday, September 14, 2016**

*Transcript By
Superior Transcriptions LLC
www.superiortranscriptions.com*

STUART J. EVANS: First, thank all of you for coming. We were happy to see so many people out there until one of my panelists backstage just mentioned that we're sandwiched between Jim Comey and John Brennan, so I'm sure that's all why you're here. (Laughter.)

But in listening to the other speakers today, there seemed to be a lot of common themes that have been elicited and discussed. And this next panel, we're going to focus probably on some of those same themes, but we're very fortunate to have perspectives from all three branches of government in this next panel. And we're very, very fortunate to have these distinguished speakers with us today. In particular I'm very happy to be here because it is a rare experience for me that I get to ask questions of a sitting federal judge and former Congressman – (laughter) – so I promise to be gentle.

And but first, by way of introduction, we have Judge John Bates, who serves as a United States District Court judge here in the District of Columbia, a position to which he was confirmed in 2001. And of particular relevance for today, he's very well known to many of us for his seven-year term on the Foreign Intelligence Surveillance Court from 2006 to 2013, and including serving as the presiding judge of that court. And then following that period, serving for two years as the director of the Administrative Office of U.S. Courts.

We also have with us Congressman Mike Rogers, who represented Michigan's 8th Congressional District in the House of Representatives from 2001 to 2015, and served as chairman of the House Permanent Select Committee on Intelligence from 2011 to 2015, a period which was very instrumental in the national security world.

Also with us is Fran Townsend. Fran served for a number of years in the Bush White House, including serving for four years as the assistant to the president for homeland security and counterterrorism, and prior to that as the deputy assistant to the president for combating counterterrorism. And also relevant for today, she held a number of positions in the Justice Department, including as acting assistant attorney general for the Criminal Division and as a counsel for intelligence policy, where she headed the Office of Intelligence Policy and Review, OIPR, one the predecessor organizations to NSD.

And also is Rachel Brand is with us. Ms. Brand serves on the Privacy and Civil Liberties Oversight Board, a position she's held since 2012. Prior to that, and again relevant to today, from 2005 to 2007, the period of NSD's creation, she served as the assistant attorney general in the Justice Department heading the Office of Legal Policy, and prior to that as an associate counsel in Bush White House.

So please join me in welcoming all of the panelists. (Applause.)

So Fran, I thought we would start with you. You served in the White House during the period of time in which the decision was made to endorse the creation of NSD and then during the initial standup and implementation phase. We've heard earlier from some folks about the perspectives within OIPR and within the Criminal Division at the time. I'd be curious from your perspective what it was like inside the White House at that time and the decision to move

forward with NSD.

FRANCES F. TOWNSEND: Sure.

Interestingly enough, during my time heading OIPR, and I think you heard from Jim Baker, who not only headed the office but had been my deputy, there had been a discussion about this inside the Justice Department during the Clinton administration. You might imagine, I was a career public servant heading OIPR, and we were advocating that with the rise of terrorism we were seeing this incredible increase in the number of FISA warrants during that period of time. And remember, you've got the East Africa embassy bombing, the Cole bombing. And so we're seeing the rise of this. We had advocated that, but there was no political patron who was supporting that, right? The Criminal Division was at the time headed by a political appointee who viewed it, as you likely heard, as a sort of somehow a diminution of their responsibility. And so frankly, not for any good or bad reason, the proposal fell by the wayside.

So when it – many years later, I'm sitting at the White House and it comes to me as the president's homeland security advisor, to me, it's kind of a shoulder shrug, right? I thought it was a good idea years ago; I think it's a perfectly good idea now. And so the White House didn't – the White House in many ways, I think you could describe it deferred to the attorney general and the Justice Department. Alice Fisher was the head of the Criminal Division, she was very supportive, she did not raise objections, at least that I was aware of. The attorney general supported it, and so there was not a big policy debate. There was kind of nobody on the no side at that point, and it moved forward pretty easily.

MR. EVANS: Congressman Rogers, I was struck earlier today, one of the panelists was talking about the fact that part of the impetus behind NSD was to promote information sharing, tear down the wall between law enforcement and intelligence, and the decision was made to do that by creating a new bureaucracy, the National Security Division. Congress itself isn't particularly known for endorsing additional bureaucracy or expanding the size of departments and agencies, and yet this seemed to be a fairly noncontroversial decision and fairly bipartisan within Congress. I'd be curious if you have any recollections or thoughts as to what – how Congress approached this problem.

REPRESENTATIVE MICHAEL J. "MIKE" ROGERS (R-MI): Sure, well, it was really about unity of effort. So we had just gone through the creation of another bureaucracy called the DNI, right, so, like, apparently we've gotten pretty good at that in Congress to create these.

But I do think we saw some value in the unity of effort to try to corral some of the hurdles from up above the structure, because under the old system, the DCI, it was large and in change. The president's daily brief was produced through there, there was always this tug and pull from other agencies trying to get their work in the product, on the – on the PDB. And so when we went through that exercise, it was a logical extension to most of us to do this because it did present an opportunity to have a unity of effort for what can get really complicated in a hurry. And so I thought it made – it was next logical step in trying to make sure we're corralling all of our intelligence efforts in one space with a streamlined command and control, if you will.

MR. EVANS: And Rachel, again, we heard the Criminal Division perspective, the OIPR perspective. You were in a different seat at the time; you were at OLP at the time, which also played a role in policy, kind of writ large, including the national security space. How do you think the creation of NSD was viewed in other components of the department from your seat?

RACHEL L. BRAND: Well, I don't think anybody really opposed it. But I will say, so I started at the department in 2003 and then was – became head of OLP in 2005, and especially in the '03, '04, early '05 time frame, I spent almost all of my time on national security issues, so I was working closely with the Criminal Division, OIPR, ODAG, the FBI, other intelligence agencies. And I frankly didn't perceive some big problem to be solved by NSD. I didn't think OIPR wasn't functioning well, I didn't think CTS or CES wasn't functioning well.

I will say that what I've heard today about the physical manifestation of the tearing down of the wall, that is compelling. You know – and from my seat in OLP, we were doing every policy issue you can think of from drugs to guns, to terrorism to everything, so we operated at a pretty high level. So I wasn't witnessing those operational problems that I think NSD has solved.

Now, I can also tell you from having been involved in some other organizational changes in the government that sometimes creating a new bureaucracy causes more problems than it solves. So for example, I was – when I was in the White House, I was on point to write the executive order that created the Office of Homeland Security in the White House. You cannot imagine what a turf battle that was. Now, I think with NSD, that didn't happen, really. It went – it went pretty smoothly, and I think it's worked out pretty well and it's functioned pretty well. So in retrospect, I think it's been a good development.

MR. EVANS: Fran, I saw you smiling, no doubt based on your White House experience with the Office of Homeland Security. Do you have thoughts on that?

MS. TOWNSEND: Well it's interesting, right, because what Rachel's talking about had happened by the time I arrived. I don't get there until the spring of 2003, but I kind of – it's sort of walking face first into the buzz saw.

Unaware of the turf battles that had transpired, I walk in and they're not resolved. There's still this tension about what is the role and responsibility of the department vis-à-vis the Homeland Security Council. I had worked – remember, when I get there in 2003, I had originally joined the White House as Condi Rice's deputy. So the turf battles to the extent they had existed between the NSC and the HSC go away because she and I, we've worked together for a year, we know each other well, we respect each other, and so that kind of dissolves because we share certain staff and some responsibilities internationally. But it remained to work out the kind of relationship with the department.

That kind of resolves itself. Part of that is Tom Ridge had been in the office and then went over to run the department and had a very clear idea in his own mind about how he thought that should work. Tom is a good friend and I respect him tremendously. Mike Chertoff and I, our relationship went back to our time in the Southern District of New York U.S. Attorney's

Office. And so when he comes in, he comes in without a preconceived notion and I think it kind of works its way through during Chertoff's period.

MR. EVANS: Now, any organization has a number of different constituencies that they have to deal with. For NSD, we deal with the U.S. attorney's offices, we deal with the intelligence community, the White House, Congress and the judiciary. Judge Bates, you assumed a role on the Foreign Intelligence Surveillance Court in early 2006 after the decision had been made to create NSD but before it had been stood up formally. Be curious if you have thoughts from your perspective as to whether the creation of NSD changed the Justice Department's interactions with the FISC at all?

JUDGE JOHN D. BATES: I think it did change it quite a bit, now, mainly in positive ways in the long run, although any time there's a dramatic change, there are some adjustments to get used to. A large bureaucracy was in the making; it didn't get created overnight, but certainly grew, and grew, and grew. And with the bureaucracy comes less personal relations between the legal advisers and members of the court and those from the Department of Justice working on matters.

Perhaps there was a risk of little less political accountability with an assistant attorney general now having, quite frankly, the primary role and the attorney general having much less of a role, whereas before that, the attorney general and deputy attorney general were more involved in reviewing applications and in various matters that came up. But I think it's allowed more focus on applications, and that's a good thing. It probably led to initially at least many more applications coming to the court that were, shall we say, the backlog that needed to be addressed that hadn't been approved within the Department of Justice before that. And some of those needed careful scrutiny. But I think in the long run it worked out very well.

I will say that the creation of NSD is not in a vacuum. As Mike said, other things were going on: the DNI, you had the NCTC being created, you had changes in the – in the FBI both structurally and in terms of focus, you had the growth of NSA and you had the movement of the court. The court was located in the Department of Justice, and it was about two years after the creation of NSD that we moved the court out of the Department of Justice over to the courthouse for not just appearance's sake but we thought it was a necessary step. My predecessors, a presiding judge and myself thought that that was something that just had to be done to ensure the independence of the court.

And all those changes, I think, have made for a better process, but NSD in particular. With a large bureaucracy come some problems, but I think those have all worked out.

MR. EVANS: You touched on an interesting point there about the role of other agencies and, you know, today being about the NSD 10-year anniversary, we've obviously focused on NSD. But I want to touch on the FBI for a minute.

Congressman Rogers, you served as an FBI special agent earlier in your career, and then in your role on HPSCI conducted significant oversight of the FBI during the period in which it was transforming itself from a law enforcement-driven agency to an intelligence agency. I'd be

curious for your thoughts on how NSD has really complemented that change that the FBI has made and how significant that was.

REP. ROGERS: Yeah, and before we do that, I just want to compliment the judge. When we were going through some interesting times on the committee, the judge was very gracious to come down and provide some insight for us to get it right. The NSA contractor issue may come up – may come to mind for someone. That's a year of my life I'd like back, by the way. (Chuckles.) And the judge was very good about coming up. Didn't have to do it, but they agreed to come up and walk through some of the processes so that when we were trying to reform it, we got it right. And I don't know if I ever had the public opportunity to thank you for that. You've invested that time and didn't have to. I told him I'd give him a subpoena, but he said, you have Capitol Police, I have Marshals, don't worry about it. (Laughter.) So he won that fight. But hey –

JUDGE BATES: And he's not mentioning all the times that either I or others declined to come. (Laughter.)

REP. ROGERS: Yeah, I figured. There was a lot of those. So that's why I was so thankful when you did show up. (Laughter.) It was great.

You know, the FBI did go through some very significant cultural changes. And you know, some for the better, some I think there's still some – a question mark about where they're at. And they took a tremendous amount of resources from criminal work and shifted it to the counterterrorism mission. A lot of them, and it happened fast. And so when it happens that fast, by the time I became chairman, it was time to maybe get out the screwdriver and try to adjust that back a little bit because they had just – threw everything that they had at the problem. And I don't disagree with the decision to do that, but there comes a point when you have to right that ship a little bit. So we were going through that whole thing. I think the relationship now is so much better between the agencies.

We also applied an analyst role that was real and meaningful to the FBI that didn't exist before. And that is a cultural change. If someone would've told me as a young case agent working a case in Chicago that I had an analyst that was going to help me plan my day, I can't even use the terminology I would have used – (laughter) – back then, right? It was just unheard of. We wouldn't have done it. It was case agent and everyone else. And that needed to change. If you were going to get a better product from the FBI, you had to have that analyst integration. And they did that, and it had some fits and starts.

And with the creation of the division, I think that it helped tremendously refocus the FBI in how they conduct those investigations, where they go, and it developed a level of expertise that you sometimes don't get in a U.S. attorney somewhere. That's not a bad – that's not a negative, it's just what it is. They may be working an organized crime case and somebody walks in with a counterterrorism case, the elements are different. And so having the NSD I think was very helpful in getting that cadre of people focused and the level of expertise to help those investigations.

So at the end of the day, it was bumpy. We hit some bumps along the way, but I think that was a very worthwhile process. And now because of that, agents know who to call, they know who to talk to, the prosecutors know who to call, they know who to talk to, and I think that in and of itself is a huge value in those what can be very quick investigations sometimes.

MR. EVANS: You know, Judge, I'd be curious for your reactions to that. In your role, you're charged often with looking at the thoroughness of the investigation and how the facts are coming together. Is that something that you've seen a change in from your optic looking at the investigations?

JUDGE BATES: Well, I think there's been a change. It's not like a night and day change, but as has been said by others, any time there's a greater group of people, they're able to focus particularly on the area and on the matter, and I think that that enhances the quality both coming from the FBI or another intelligence community agency and then adds to the scrutiny that is applied with the Department of Justice at NSD. And all we need is, you know, to increase the size of the court by the couple of factors and add legal advisers and we'll be able to handle the work with no problem.

But yeah, I think it's improved things. But that's not to criticize the job that was done in the past.

MR. EVANS: There's been a lot of focus today I think on the tearing down of the wall and NSD being the physical manifestation of that. I wanted to shift gears a little bit to some of the other benefits that NSD brings.

You know, Fran, from a policy perspective, you spent many years sitting around the Sit Room table dealing with weighty decisions. Do you feel as if the existence of NSD has brought something different to that table, to the interagency, to the White House policymaking process?

MS. TOWNSEND: So again, I can only compare it to my time during the Clinton administration. I was in the Justice Department. Oftentimes when the attorney general, at that time Attorney General Reno, would get prepared, there were a number of people around that table to prepare her. It was at the time the assistant attorney general for the Office of Legal Counsel, there was probably the assistant deputy attorney general for national security, and then there was the Council for Intelligence Policy. And so all those people brought different pieces to that preparation before she'd go to the White House.

It was clear to me when I was in the White House, at the time Attorney General Ashcroft would turn to once – after the creation of the National Security Division that assistant attorney general. That was somebody I came to interact with and know. That was someone in homeland – as the assistant for homeland security advising the president that I interacted with. And it was a much more integrated, seamless process. That person has a real role in terms of advising the attorney general on positions to be taken at the – at the Homeland Security and National Security Council.

MR. EVANS: You know, I'm – to hear you say that, I'm struck by the fact that two of

your successors in that role at the White House, Ken Wainstein and Lisa Monaco, both of whom were former assistant attorney generals, were here today. Well, what does it tell you that there have been a trend of, including yourself, three folks who've come out of that Justice Department mold who've held that position at the White House?

MS. TOWNSEND: In some ways, I think the general public ought to take comfort from that, right? These are – all three of us were people who were – have enormous love and regard for the Constitution, understood American constitutional rights and the role the Constitution plays in a very serious and sort of dangerous area. But I – and I also think we brought with it the fact that you can't be in that job and not be very familiar with both the legal authorities and the capabilities of the FBI, the CIA and the NSA, all of which play a critical role in the counterterrorism area. And so you've been exposed to all the necessary tools in the toolkit, and it gives you a different perspective in terms of advising the president.

MR. EVANS: Another area where NSD really contributes in addition to kind of legal advice and collection authorities is in the oversight realm. And oversight is something that the Justice Department has always conducted with respect to intelligence activities, but the creation of NSD has really enabled economies of scale and additional resources that can be brought to bear on that.

You know, Rachel, in your capacity on PCLOB, oversight is a key function of what you do there. I'd be curious for your thought as to how NSD fits in into the overall oversight regime of the intelligence community.

MS. BRAND: Well, it has an interesting perhaps unique role. So I'd – you know, I spent a lot of time thinking about how to do oversight right and your big picture is that you've got oversight of intelligence programs by all three branches of the government. But it has to start in the executive branch, because if there aren't serious compliance and oversight mechanisms in the executive branch, then – no offense to Congressman Rogers or Judge Bates – but no amount of oversight by Congress or the judiciary would be sufficient, because they are not in the day-to-day operation of the agency so they don't have resources to do that, although they carry very big sticks in terms of authority to shut things down.

And then within the executive branch, you have oversight within agencies and then you've got sort of quasi-independent oversights. So PCLOB being independent, general counsel's office in the agency being within the chain of command. And you have to have a mix of both because there are upsides and downsides to both.

But NSD actually is both at the same time, in a way, because it's within the president's administration so it's much more comfortable for NSD to be really in the day-to-day business of the overseeing agencies in a way that doesn't violate privileges and that where the president, the White House can enforce that interaction. And at the same time, NSD is part of the attorney general's apparatus, which has always been viewed to have that independent role. And I, you know, think back to working with Jim Baker when he was head of OIPR. I assume it's still similar, but there were – there was a quasi-antagonistic relationship between – maybe not just quasi – antagonistic relationship between OIPR, and the Bureau and other agencies, where

although it was within the department and within the administration, it was – it did have that kind of independent check aspect to it, so.

MR. EVANS: So a slightly tougher fallout for you, speaking of quasi-antagonistic relationships. PCLOB is somewhat of the new kid of the block for oversight coming into a well-established oversight regime. How have you found it dealing with the intelligence community and kind of establishing PCLOB's role in the oversight process that you just outlined?

MS. BRAND: Well – (chuckles) – it's gone pretty well. We've had really good relationships with most of the agencies most of the time.

There have been growing pains; we have not always gotten what we wanted and we continue to work through that. But there's – I think PCLOB is a good idea. It has promise. I think we'll get there. But when you're dealing with classified intelligence programs where you are squarely within the president's core constitutional authorities are to act as commander-in-chief and to run foreign policy and so forth, it is a little strange to have what is sort of – what is a semi-independent agency, right? The president controls classified information; we're supposed to have access to classified information, and yet we don't actually have a legal authority to get it if an agency refuses. And so we have to work with the agencies somewhat collaboratively to get what we need. And I – like I said, it's going pretty well, but, you know, we're working on it.

JUDGE BATES: So can I add a word on oversight from the judicial perspective? From the – for the judiciary, which is not the primary body to have oversight over the process, but it does have a role with respect to compliance, which is a fairly substantial part of oversight. And that has increased over the years. I think NSD has been a very valuable contributor and has been able to focus more on compliance – and by compliance I mean mainly compliance with the law and with court orders in the FISA process before the Foreign Intelligence Surveillance Court. But the court has been very engaged in that, and it's an important part of what the court does.

We get – nowadays, many, many compliance issues are raised. They're raised by NSD, which informs the court; it's obliged to inform the court. Many of them disappear fairly quickly, but some are much more substantial. And indeed some of the most substantial opinions of the court that have been released publicly over the past few years are really compliance opinions. They're decisions addressing problems in the compliance arena that came up with the FBI, with the NSA or whatever agency. And I think that's a part of oversight that the court plays an important role in. And NSD plays a fundamental role in bringing those matters to the attention of the court and working with the intelligence agencies to examine, develop and improve.

MR. EVANS: There are – there are many on the outside who've not seen the inner workings of the process who are, I think, skeptical of the executive branch's ability to self-identify and self-report problems to the judiciary. As someone who has seen that process work, do you have thoughts on the effectiveness of it?

JUDGE BATES: I would say it's not perfect at all times, but I think it's pretty good. I think there are now compliance offices – substantial compliance offices within the agencies that make up the intelligence community. They take their role seriously. NSD has a substantial

compliance office, if you will, and it works very hard. So I think the process works, but it's going to be imperfect. It's a very complex area and there's lots that goes on, and identifying where there are compliance problems takes quite a bit of effort. And as I said, it will be imperfect. But I think it works pretty well, and the court certainly takes it seriously as well.

MS. TOWNSEND: Yeah, I would just add, I mean, for folks that don't really appreciate the history, OIPR, I arrived there I want to say it was in 1998, somewhere in there, and I don't think I had six or eight lawyers, right? There was not a computer system – an independent computer system. When I got there, they were doing it on the old legal sized paper that they had literally requisitioned and put in pallets in the basement because it didn't make it any more; the legal profession, every other court had done away with it. They were working on Selectric typewriters; you took the, you know, the ball out and the tape out at night.

I mean, this was a very small office that – I tell you that because compliance, as the judge has described it, was an ancillary duty. It was one other assignment that they had to fit in in addition to processing the FISA requests from the FBI. And so with the creation of the National Security Division, you have a staff now. It's been not – institutionalized, and there are people devoted whose full time responsibility it is to do this. And that was another – frankly, that's another benefit to the resources and the creation of the division.

REP. ROGERS: I would just add as well, I mean, I – for people who don't know the insides, there is lots, and lots and lots of people of looking over shoulders. You think they've compliance office, you have the court, you have the IGs in each agency, the IG for the intelligence community, you have – each program manager in my committee was charged with oversight and compliance review, and then you have the NSD looks at it, the PCLOB looks at it. So some notion that there's a bunch of freewheeling intelligence – matter of fact, they would argue if you – if you really get them in the bar with a drink that enough already, right? Let us do something, for God's sake.

And so we have really beefed up all of our ability to try to catch something early, and that's really that whole idea here. It's not they're doing something wrong, but you want to catch that train coming off the rail early so you can get it back on the rail and continue to work. And I just – there's lots going on in that.

MS. BRAND: Because I think that fact is one of the many aspects of intelligence programs that is not understood by the public. I think there really has been a public perception that the IC is the wild west operating without rules, which could not be further from the truth for the reasons you say. So, you know, something that I've spent a lot of time doing since I've been on the PCLOB is talking about that, including in Europe with European governments explaining the extensive system of oversight that we have in the United States. And I think that needs to be better understood in the public than it is now.

MR. EVANS: So, a follow-up question to that back to any of you: What more do you think we can be doing to accomplish that? You know, we do panels like this, we do other things where we talk about the acronyms – OIGs, PCLOBs, things like that. Is there a way that the executive branch can be better explaining, better messaging the rigorousness and robustness of

the oversight to the public to give them that confidence?

MS. BRAND: I think it has to be done by people who are not in the government, to be completely honest, because there is an understandable perhaps reluctance in the public to just take the government's word for it. The government says the government's great; that's not necessarily all that persuasive. But there are a lot of – I think a lot of other voices that could be talking about it more.

REP. ROGERS: Or you could have one of these conferences every year.

MS. BRAND: (Laughs.) Yeah.

REP. ROGERS: Advertise it to the public that way.

MR. EVANS: I think the organizers would resist that. (Laughter.) It was a lot of work.

REP. ROGERS: I do think there's a bit of a double-edged sword here, because we talk a lot about all of the oversight, so you think, well, they must be – my gosh, they have 18 hall monitors between the classroom and the restroom. Something's going on. And so there's this double-edged sword to this, because A, I do think those functions actually work and they work well, and there's mechanisms to get it from compliance hopefully not to the IG but if it needs the IG, it's there, or up, program managers in our committee or the NSD. There's lots of mechanisms to get it out to try to correct it before it gets a problem. And it sounds like so much, and it is, you worry sometimes about talking about how much it is thinking, my God, what were they doing all this other time?

So it is the double-edged sword, and I – and most of the intelligence agencies I work with do understand the value of it and they did finally come around to the notion that this is good for you because it allows you to do your job knowing that you have the full weight and support of both legal authorities and the moral support of your government when you're doing this work. To me, that was the most important accomplishment in all of this, and to do that, you had to build in enough redundancy to make it accurate. But there's that double-edged sword.

MR. EVANS: Speaking of oversight, one of the most heavily overseen and publicly discussed intelligence programs out there is the Section 702 program of the FISA Amendments Act, the FAA, which comes up for re-authorization by Congress at the end of 2017.

Congressman Rogers, I know you were heavily involved at the last reauthorization. And, Rachel, I know PCLOB conducted an extensive oversight review of the program back in 2014, so I'd be curious for your thoughts as to where you see the reauthorization discussion heading in the coming year.

REP. ROGERS: Well, I mean, every time it comes up, it's going to be a political hot potato, just in their – and part of the problem was – and we noticed this when the NSA contractor stole information and disclosed it in a way that I thought was harmful to our national security – is that the political narrative, or the narrative on the conversation got way ahead of what the facts

were. And that became fact; it became real, and so you were always out trying to explain why no, no, that's not really the way it works; no, there was oversight; no, there was legal review; no, there – and it was really difficult because, as you said, we were – you know, I'm here, I'm with the government, I'm here to help you, you know, trust me, the program's great, was just a terrible narrative for us to try to catch up on. And I don't think we're over that hangover yet, candidly.

I think, you know, there's the – when you look at all of the challenges we face in cyberspace today and, you know, we're making it this new domain of warfare. Coming up, I think the president is probably going to separate from the NSA and Cyber Command, and I think that's the right decision to do that. So you had this new warfare domain, lots of mystery in it. So when this comes up, they're thinking, you know, there is a Hoover sucking up everybody's personal information, and I type in a keyword and I know what you had for breakfast this morning.

And they – there is this fundamental belief in that, not understanding all the rigors of all of the review, including judicial review on these activities and reoccurring judicial review plus committee legislative review automatically on this programs plus NSD review. I mean, there's lot of review on this to make sure we don't – that our intelligence services don't get it right, but I'll guarantee you, you watch this thing going into that, and the things that they say the intelligence community are doing with that information – and I always thought, boy if we were ever that really good, well, we wouldn't have a problem. And the problem is we just didn't; they didn't have access to it. So I think, again, you're going to watch it happen. Again, I think there's a movie coming out; that's going to cause a misperception of what's happening.

I'll tell you this quick story: I go home during that whole thing, I have a town hall meeting, I explain it stem to stern and I go right up to the line on classified information so that people have a good understanding because I was the chairman of the time – it was a little uncomfortable, as you might imagine. So I go through the whole thing, I explain it in great detail, take questions for an hour and a half and at the end of it, they said, well, we trust you, but we know they're still doing it, all right? (Laughter.) I thought, I don't – I don't know – I give, I don't know what to do. And so that's the problem. There is this perception that it's happening, and that perception has become reality. You watch the fight that happens, I think, coming up. And debate is good, but based on facts. If we could all agree on the same set of facts, it would be a great debate. We never quite agree on the same set – (chuckles) – of facts.

MS. TOWNSEND: Yeah, I agree with the Congressman.

One of the things that really struck me after the leaks was the – just the really pervasive misunderstanding of facts in the public. And in part that happened, I think, because of the way the leaks were conducted, which was over time and, you know, not every aspect of the program was leaked and the good parts were not disclosed until later. And also, these things are really complex, as Judge Bates was saying. So it's hard for any even educated, informed, interested person to understand, right?

So there were the factual understandings about the program itself, but then something

that's really struck me today listening to one of my old friends here on the previous panels, there's been a lot of discussion about information sharing, taking down the wall. These are things that – the importance of these things are obvious to almost everybody, or if not everyone in this room. They are not obvious to people outside this room. I think people either never understood or have forgotten the fundamental paradigm shift that happened in the intelligence community after 9/11 to improve information sharing.

I think also people – there is a lack of understanding of some really basic aspects of how the intelligence community does work. I think there is a perception out there, for example, that, you know, counterterrorism is about catching known bad guy after a terrorist attack happens. People don't understand that it's actually a preventive, long term, forward looking enterprise and that skews perceptions. People also don't understand what foreign intelligence is for. They think it's just the known bad guy terrorist. They don't realize it's for a whole range of other purposes including cyber, and counterintelligence and so forth.

So if the public reads stories that – or, you know, 500 words and don't have an understanding of a lot of those bigger themes, it's not that surprising that they'll come away with a skewed perception of what's going on. So whether it's the administration or folks on the outside, I think there does need to be an effort to help the public understand the broader context of the debate.

MR. EVANS: Judge, given, the extensive role that the FISC plays in the 702 program, do you have thoughts on this area?

JUDGE BATES: Well, I don't have any thoughts on what the substance of the debate will be or should be, or what any legislative changes might be. It does seem to me 702 has changed a little bit with respect to the court. The court has a slightly more enhanced role, shall we say, in terms of what it is reviewing and doing. And that seems to be working well. I'm an outsider; I'm not on the court now. So I don't see it in any official or day-to-day capacity, but it seems to be working well.

I'm sure the debate will be an interesting one, whether the country or the Congress has the stomach to make any significant change to another aspect of the Foreign Intelligence Surveillance Act remains to be seen. Last time, though, when that happened, culminating in the USA Freedom Act, it took a long time and a lot of debate, and I was involved somewhat from the judiciary's perspective. But in commenting on operational things, not in commenting on the substance of legislative proposals or consideration, that was the only other time that I actually did agree to appear on the Hill in a classified context, to which all senators were invited, and about 50 senators showed up for it. But hopefully that will not happen on my watch again.

REP. ROGERS: That no one shows up?

JUDGE BATES: No. (Laughter.) That I show up. (Laughter.)

REP. ROGERS: I'm kidding.

MR. EVANS: You mentioned the USA Freedom Act and the changes that were made. The changes to the FISA process made by the USA Freedom Act were some of the most significant ones we've seen since FISA's original enactment, namely the provision of the possibility of the appointment of an amicus in certain cases. There were opinions on both sides of that; there were some in the privacy and civil liberties community that felt that that authority didn't go far enough, and there were some within the executive branch and Congress who thought that that authority went too far. Without commenting on any particular matters, from the perspective of a judge, how do you feel that law shook out in terms of giving a judge the authority he or she may need to bring in outside expertise where appropriate?

JUDGE BATES: I think the judges on the Foreign Intelligence Surveillance Court and the Court of Review have both utilized that process in the year-and-a-half or so that it's existed and I think are pretty satisfied with the occasions where they've utilized it. And it was, as you say, somewhat of a compromise. It wasn't the creation of a permanent advocate either within the executive branch or within the court, but this opportunity for the appointment of an amicus and the creation of a panel of amici who were cleared, and qualified and ready to take on that responsibility. So I think – I think that the sense of things is that it's worked pretty well. I think we need a little more time to see.

There are the – even though it's been utilized, the number of times still is pretty limited because it really focuses on novel changes in the law, or approaches to the law or in even technological issues, and they don't come up every day. Most applications do not involve that kind of unusual legal issue or technical issue that would require an amicus. So I think it will take a little more time, but the operational effects on the court have not been negative as far as I can tell. We could – you know, they have to look at things a little more carefully to make that decision initially whether to appoint an amicus, but I don't think that's been too burdensome

REP. ROGERS: I would just – being involved in that entire process, there was – based on misinformation, they really wanted to go after the court by institutionalizing certain activities in the court that now a judge would have full discretion over. I just thought it was a little bit ridiculous. And that's again was based on misinformation about how the court worked, what the court's function was, and you were working against yourself because it was a secret court, right? That already, you go, mmm hmm, secret court – (laughter) – uh-huh, I know what's going on in there. (Laughter.)

And the problem was that we were – we had our – we were handcuffed a little bit, and that's why the judge came in and walked us through operational details of the court so that other members might understand that as an FBI agent, it may take me 10 drafts of my affidavit, maybe 15. DOJ used to drive me crazy as a young agent, right? I wanted to get in there and get in front of the judge yesterday and go, whoop, you got to actually prove your point. And I would go, I – you know, who would have think that? (Laughter.)

And so agents now have a pretty self-regulated event to make sure that those affidavits are right. So if you go in and you get it kicked out by the judge, trust me, that's about the worst day of your life because that thing has spot inspect a lot, both internally to the FBI or the agency that was making the submission, right, and the DOJ, and the attorney who's working on it and a

collection of FBI agents at the coffee shop in the morning who just want to give you their opinion on what you ought to put in there. It is a really, really tough document. So by the time it reaches the judge, this is a thoroughly, thoroughly reviewed document. So if you get kicked out at that point, you have done something probably pretty wrong, candidly. Matter of fact, a lot of people in the community argue, hey, you're self-regulating too much, you know? Let the judge make that decision. And a lot of people make this argument.

So that was all happening all at the same time, and then because it was a secret court, people want to heap on these requirements on you would do on no other judge in any other criminal matter. I mean, that's the judge's purview, in my mind. And so that was the public debate that we had both internally and publicly about hey, we need to make sure that the judge that can be the judge. And we've continued to do what we do and try to explain why there isn't this rejection rate. They all wanted to measure it by the rejection rate, which is really a crazy statistic for a FISA warrant. I mean, it really makes – it's no basis in the reality on the rejection rate because of all the activities that happen leading up to it.

JUDGE BATES: Let me just expand on that a little bit. Mike's absolutely right in – absolutely right in terms of the care that is taken. Statistically in the last couple of years, there – statistics have been kept with respect to FISA applications to the court, and I would be remiss if I didn't mention that. And it basically has shown that somewhere in the 20 to 25 percent usually of applications are modified in some significant way. I don't mean typos, but I mean deleting a target, rejecting a legal theory, but there may be more than one legal theory in the support of an application, requiring more facts, either further explanation provided factually or the development of further facts before an application is approved.

The last statistics I saw, which do not include 702 applications, I think showed that in the second half of 2015, something just over 17 percent of applications were significantly modified or rejected. Now, it's only a small number that were rejected. I think it was five for that period. And rejection means either the court rejected them or the court told NSD it was going to reject them and NSD decided not to go forward with the application.

Just for comparative purposes, Title III of course is the law enforcement analog, where applications for wiretaps come before federal judges. There have been years where by the statistics reported, not a single Title III application was denied nationally. The process for FISA applications is much more thorough. Not to fault the Title III process, but the process for FISA applications is much more thorough than the Title III process.

MR. EVANS: You can feel free to fault the Criminal Division here. That's OK.
(Laughter.)

I see we're getting a little close on our time. I wanted to shift gears a little bit. When we started this discussion, Congressman, you described NSD as the next logical step following the post-9/11 reforms in our fight against terrorism. You in particular I know have been very vocal about the cyber threat that we now face as a nation as we transition to that. What do you see as the next logical step the government needs to take in fighting the forthcoming cyber threat?

REP. ROGERS: Yeah, I – we haven't quite got cyber sharing right just yet. And some of that was, again, a little bit of hangover from the NSA contractor about what that cyber sharing bill looked like. A couple of key components of that: liability. We have to give companies liability protection if they're in a – in a legitimate way sharing information to stop bad things from happening to all of us. We had some of that. I argue we need to strengthen that.

And we need to get – it needs to be a machine-to-machine in real time. I think there was an artificial carve-out on where that information should go, and I always argued, why would we take our best player off the field, which was the NSA? And I understand the concerns; it has a Department of Defense leaning. I think that's going to go away here pretty soon if you get those two divisions. I would argue it – get them in the loop. They don't have to control it, they shouldn't collect it, they – we should – that should be overseen vigorously. But we should allow that machine-to-machine real time sharing because they can see things overseas that even some of the best cyber guys in the world can't see, right, because it's their mission to go find bad things somewhere.

And when they bring it back, these artificial hurdles – we still have a few – of getting that int in a classified way so that companies don't get burdened with that malicious source code. And the sad part is you just kind of watch it happen. I mean, it was always my biggest frustration, because of legal hurdles, to watch an attack vector coming in and the intelligence community had to say, whoop, that looks bad, call the FBI. And by the FBI – gets there, they knock on the door and go, guess what, clean up on aisle nine, right? It's already there; the damage is done. And so what we are trying to do is can you intercede with that earlier?

We're going to have to get this right. We haven't quite gotten it right yet. I do think the split will help, and that's what I would do. Cyber sharing is going to be the single most important thing that the government can do to beat back cybercrime, and economic espionage as well and destructive attacks. Other than that, it's fine. Don't worry about it. Use your device right now.

MR. EVANS: Fran, 30 to you on that question. You know, you've been in the private sector now for a few years. From the private sector perspective, what are we doing wrong, what do we need to do more of in the cyber area?

MS. TOWNSEND: So in this – I don't disagree with what Mike said. I would add a footnote, however, the perception in the private sector is when the government doesn't know what to do next, they look to reorganize, right? They're going to change the org chart when what they really need to do is tackle the difficult legal policy questions about who's got the authority to do what and when, and then to communicate that clearly so that the private sector knows who am I supposed to talk to, what are my liability, exposure and protections. And the government's not been clear about that.

The one example I'll point to quickly is the dedicated denial of service attacks in the lead-up to the decision about Iran negotiations. The financial community in New York went to – came to Washington and said, we are getting killed. You've got to act or we've got to act, and of course the government's answer was, oh, no, no, we're not going to, and please don't you,

because you may trigger some retaliatory action that will screw up the bilateral discussion.

Well, that's unacceptable. I sit on three public boards. Public directors on boards have a fiduciary responsibility. And so the government kind of doesn't get that or doesn't care, and that's a problem. Understanding what the rules of the road are, when the government's going to act and when the private sector can act and to what extent is really important. And I think as opposed to we're currently focused on the organization inside the government, what the private sector needs is a better and clearer articulation of roles and responsibilities.

MR. EVANS: So with that, think we'll go ahead and open it up to questions for a few minutes if there are folks who have questions. For the panelists, not for me, to be clear. (Laughter.)

MS. TOWNSEND: We'd prefer you ask him. (Laughter.)

Q: Yes, thank you.

As a – oh, thank you – as the former Assistant Attorney General Brand previously mentioned, a common theme amongst several of the panelists and keynote speakers today has been the concept of using information jointly among the intelligence and law enforcement communities. Just to go one step further, I'd be interested to hear your opinion in regards to the issue of how to I guess most appropriately determine the best use of that information once it's shared. So for example, in the intelligence community, that necessitates a great deal of anonymity and secrecy in regards to the human sources of that information, whereas in the law enforcement community, to facilitate and effective criminal conviction, that information would then have to convert to testimonial evidence and subject to the confrontation clause.

First of all, is there tension in that regard between both communities? Has the establishment of the National Security Division alleviated some of those tensions, and which methods have you seen either directly or indirectly that are most appropriate to navigate that issue?

MS. TOWNSEND: OK. So I would say to you, yes, there is a natural tension between the two communities. I do think that the FBI, with their counterterrorism division and national security capabilities – and I kind of had a front row seat, right, to that transformation in the FBI – has come to grips with how do you deal with the most sensitive information, right? We went from a period in the intelligence community of access based on need to know, and then there – we transformed ourselves to the other end of the spectrum. There was inevitably going to be a balancing about need to share, and then you have a Robert Hanssen, right? And so you understand that some secrets absolutely must be protected.

The tension to me came up most poignantly with the establishment of the Department of Homeland Security. And I was always accused by Secretary Ridge of always siding with the FBI because I had originally come from the Justice Department –

REP. ROGERS: It's always a good decision, Fran. (Laughter.)

MS. TOWNSEND: – because the FBI couldn't risk in a sensitive investigation if they shared it with DHS of having a leak, and there had been in the early going that history.

So it's a long way to say to you, I think that the Bureau actually is the man in the middle who understands best how to share information, particularly based on your experience in the Joint Terrorism Task Forces with state and locals to get the information to a tactical level where somebody can deal with it while protecting your most sensitive sources. And I think that you – the FBI's earned the credibility with the CIA that it's a much more – you know, you just heard Jim Comey talk about having CIO officers embedded in the FBI as a counterterrorism capability. I think as a result of your ability to bridge that and prove yourselves to protect the most sensitive secrets, the FBI's really become the bridge there.

MR. EVANS: I would add in response to that, just from an NSD perspective, I think one of the other benefits to the wall coming down and the creation of NSD is that in the prior era, when prosecutors needed to deal with these evidentiary issues, they were perhaps met with a little bit of suspicion or perhaps distrust by the intelligence community who may have felt as if they didn't understand or fully appreciate intelligence sources and methods. And now having those prosecutors and the intelligence lawyers all under one roof in NSD enables us to work with the FBI and go to the intelligence community and kind of advocate that we understand all of those avenues, and are looking for the right approach that balances them.

JUDGE BATES: And that's certainly been my experience from the judicial perspective. Those tensions exist, but NSD has helped. And I don't really mean as a FISA judge. I mean, as a regular federal district judge, with criminal cases that may have FISA information or other classified information. There's a process, of course. The Classified Information Procedures Act is largely the process that helps get everyone through that difficulty and tension. Sometimes – and I've had this in civil cases as well – sometimes the involved agency is really insistent on revealing information in some civil cases.

I would say probably the most acute examples personally that I can think of were not just human sources, but foreign governmental human sources. And those are very difficult situations, but everyone just has to put their shoulder to wheel and get through it.

MR. EVANS: Well, thank you all. And appreciate your time. And a big round of applause for our speakers. (Applause.)

(END)