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AN EXAMINATION OF THE CALL TO CENSURE THE PRESIDENT

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BEFORE THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

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AN EXAMINATION OF THE CALL TO CENSURE THE PRESIDENT

FRIDAY, MARCH 31, 2006

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 9:32 a.m., in room SH–216, Hart Senate Office Building, Hon. Arlen Specter, Chairman of the Committee, presiding.

Present: Senators Specter, Hatch, Sessions, Graham, Cornyn, Leahy, Kohl, and Feingold.

Chairman SPECTER. Good morning, ladies and gentlemen. It is 9:30. We will proceed with Senator Feingold's resolution to censure the President.

First, let me wish happy birthday to Senator Leahy.

Senator LEAHY. Thank you very much, Mr. Chairman. At a little after six this morning, Marcelle and I were down at the Tidal Basin taking pictures, walking around. But I wanted to get back especially because a classmate of mine from Georgetown, Mr. Dean, is here. But it was beautiful down there. A lot of people asked for you.

Chairman SPECTER. Excuse me, but why are you changing the subject from your birthday?

Senator LEAHY. Because 66 is older. But it was gorgeous down there. I realize you want to get to the hearing, but I talked to all of the pages yesterday, those wonderful young men and women who serve us all on the Senate floor, and I urged them all to go down along the Tidal Basin because this is something they will remember the rest of their lives.

With that, Mr. Chairman, I will hush and let you run your hearing.

Chairman SPECTER. Well, Senator Leahy, we do wish you a happy birthday. You have made the disclosure voluntarily that you are 66, and you have a lot to show for it. You are in your 32nd year in the U.S. Senate. Before that, you had an important job. You were district attorney of Burlington, Vermont.

Pat and I have known each other since D.A. days back in the late 1960s.

Senator LEAHY. We have, indeed.

Chairman SPECTER. You have had a very distinguished record here, and it has been a very satisfying experience to work with you as Ranking for the past 14 months and I think we have a fair amount to show for that, too.

Senator LEAHY. Thank you. You are a dear friend, Mr. Chairman, and I appreciate it. Thank you.

OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Chairman SPECTER. This is a very important hearing for several reasons. First of all, it will examine in some depth—in fact, in substantial depth, the scope of the President's wartime power under Article II of the Constitution. Second, it will examine the interrelationship of Congressional power under Article I, and also the courts' power under Article III, the interrelationship and the famous opinion by Justice Jackson in the steel seizure case about the strength of Presidential authority when backed up by the Congress and the weakness of Presidential authority when not backed by the Congress.

Although the President has extensive authority under Article I, the Congress has extensive authority in the premises under Article II. The point of the tradition of judicial review before the issuance of warrants for surveillance or search and seizure comes into play in this matter.

On the merits, I have already expressed myself on the floor of the United States Senate. Some would say that the resolution by Senator Feingold to censure the President is frivolous. I am not prepared to say that, but I do think that there is no merit in it, but it provides a forum for the discussion of issues which really ought to be considered in greater depth than they have been.

This is the fourth hearing that this Committee has had on this issue in March. That is a lot of hearings by the Judiciary Committee when we have to wrestle with confirmations and immigration. As we speak, immigration is on the floor, although not much will happen today because—well, we won't go into that.

We had the Attorney General, we had a panel of experts, we had former judges of the Foreign Intelligence Surveillance Court in a rather remarkable hearing, in my opinion. It wasn't easy for them to come forward and speak on this subject, but they did so out of a deep sense of patriotism and out of a deep sense of judicial responsibility to comment about warrantless searches and our effort to find some way to reconcile the issues of Presidential authority to protect this country, which is vital, from the terrorists with the rights of civil liberties. Those are big, big issues.

I thought they would attract more attention. One of the major newspapers carried an extensive story. Another major newspaper said nothing about it at all. Other papers gave it very scant coverage. But when those judges come forward and testify as to what the Foreign Intelligence Surveillance Court does and how there is an avenue for judicial review, recognizing the President's authority and recognizing the problem of leaks from the Congress, like there are leaks from the White House—it is a pretty even-stephen matter when it comes to leaks in this town, but the court doesn't leak and the Foreign Intelligence Surveillance Court could provide the judicial review which would be so important here.

I begin in some detail because of its importance with the scope of the President's power under Article II. In 1972, in the Keith case, the Supreme Court took up the issue of warrantless domestic

surveillance and specifically left open the issue of the Presidential authority for foreign intelligence gathering without warrants.

The Court of Appeals for the Fourth Circuit in 1980, in the case of *United States* v. *Truong*, made some very cogent statements on the policy underlying this issue. The Fourth Circuit said this: "The needs of the executive are so compelling in the area of foreign intelligence, unlike the area of domestic intelligence, that a uniform warrant requirement would unduly frustrate the President in carrying out his foreign affairs responsibility. First of all, attempts to counter foreign threats to the national security require the utmost stealth, speed and secrecy. A warrant requirement would add a procedural hurdle that would reduce the flexibility of executive foreign intelligence initiatives."

The court went on to say, "The executive possesses"—my staff underlined it in blue, so it is hard to read. "The executive possesses unparalleled expertise to make the decision whether to conduct foreign intelligence surveillance, whereas the judiciary is largely inexperienced in making the delicate and complex decisions that lie behind foreign intelligence surveillance. The executive branch, containing the State Department, the intelligence agencies and the military, is constantly aware of the Nation's security needs and the magnitude of external threats posed by a panoply of foreign nations and organizations."

One of the most impressive statements in this area was a memo which President Roosevelt gave to his Attorney General on May 21, 1940, which said, quote, "You are therefore authorized and directed in such cases as you may approve, after investigating the need in each case, to authorize the necessary investigation agents that are at liberty to secure information by listening devices directed to the conversations or other communications of persons suspected of subversive activities against the Government of the United States. You are requested, furthermore, to limit these investigations so conducted to a minimum and to limit them insofar as possible." A pretty forceful statement by a well-respected President in a time of national emergency. We weren't at war yet, but World War II was in process.

Then the Foreign Intelligence Court of Review said in In Re Sealed—referring to the fact that two other circuits besides the Fourth Circuit have upheld warrantless searches by the President under Article II, the Foreign Intelligence Court of Review said, "All other courts to have decided the issue have held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence. FISA could not encroach on the President's constitutional power," close quote.

Of course, a statute cannot limit constitutional authority. The Constitution trumps a statute, but that is not the end of the process. The evaluation of whether the President is authorized under Article II to conduct the surveillance in issue is something we don't know because we don't know what the surveillance in issue is. So it is an open question.

I believe that there is a need for a lot more public consideration and public concern about this issue than we have had, and that is why this Committee has had four hearings and this Committee intends to pursue it. It is true that if we pass a statute over the

President's veto, which I suppose he would, the legislation which I have proposed to give the FISA court authority to review the program—he might ignore that, but he didn't ignore the 89-to–9 vote on the torture issue and we may find a political solution to this issue. Some progress has been made with the Intelligence Committee subcommittee.

But I feel very strongly about the issue and I believe that the question of judicial review is rockbed Americana. I want to be sure the President has the authority he needs to protect America, but that is up to the court to decide.

I am going to yield now to the distinguished Ranking Member and then I am going to yield to Senator Feingold, if he cares to make an opening statement.

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Well, thank you, Mr. Chairman. I do agree we can do laws, but we are almost like Hotspur in calling them from the depths. Will the President follow the law? You spoke of the law on torture, a great deal of fanfare, signing ceremony and all, and then we found out afterwards, of course, the President wrote on the side that he did not intend to have it apply to people he didn't want it to apply to. In other words, you may have passed a heavy torture law, but I don't intend to follow it.

This is the fourth hearing to consider the President's domestic spying activities. Mr. Chairman, you are to be commended for actually holding hearings, which is something not happening in the Republican-controlled Congress. After this hearing, we will have heard from a total of 20 witnesses, but out of those witnesses only one witness—only one—had any knowledge of the spying activities beyond what they witnessed and read in the newspapers. That witness was Attorney General Gonzales, who flatly refused to tell us anything beyond, quote, "those facts the President has publicly confirmed, nothing more," close quote.

Time after time, Attorney General Gonzales, who knew about the program, when he was asked questions said I am not going to answer. So to this date, we have not had a hearing where somebody actually has come forward and said here is what happened.

What the President has publicly confirmed is that for more than 4 years, he has secretly instructed intelligence officers at the National Security Administration to eavesdrop on the conversations of American citizens in the United States without following the procedures set forth in the Foreign Intelligence Surveillance Act.

After its secret domestic spying activities were revealed, the administration offered two legal justifications for its decision not to follow the law, not to follow FISA. First, the administration asserted a broad doctrine of Presidential inherent authority to ignore the laws passed by Congress in prosecuting the war on terror. In other words, they say the rule of law is suspended and this President is above the law for the uncertain and no doubt lengthy duration of the undefined war on terror.

Second, the administration asserted that in the authorization for the use of military force, which makes incidentally no reference to wiretapping—this was the authorization that said go get Osama

bin Laden. We all agreed with that. Unfortunately, the administration gave up on that attempt and decided to go into Iraq instead, and so Osama bin Laden is still loose. There was no reference to wiretapping.

The administration claims now that Congress unconsciously authorized warrantless wiretaps that FISA expressly forbids even in wartime. This is "Alice in Wonderland" gone amok. It is not what we in Congress said and it certainly was not what we in Congress intended.

Because of the exception I have already noted, because the Republican-controlled Congress has not conducted real oversight, and because the attempts that this Committee had made on oversight have been stonewalled by the administration, we don't know the extent of the administration's domestic spying activities. But we know that the administration has secretly spied on Americans without attempting to comply with FISA, and we know that the legal justifications it has offered for doing so, which have admittedly evolved over time, are patently flimsy.

I therefore have no hesitation in condemning the President for secretly and systematically violating the laws of the United States of America. I have no doubt that such a conclusion will be history's verdict. History will evaluate how diligently the Republican-controlled Congress performed the oversight duties envisioned by the Founders. As of this moment, history's judgment of the diligence and resolve of the Republican-controlled Congress is unlikely to be kind.

Our witnesses today will address whether censure is an appropriate sanction for these violations. I am inclined to believe that it is. If oversight were to reveal that when the President launched this illegal program he had been formally advised by the Department of Justice it would be lawful, that kind of bad advice would not make his actions lawful, but at least might provide the color of an excuse.

If, on the other hand, he knowingly chose to flout the law and then commissioned a spurious legal rationalization years after he was found out, then he should bear full responsibility. To quote Senator Lindsey Graham from an earlier point in his Congressional service when he bore the weighty role of a House manager in a Presidential impeachment trial, "We are not a nation of men or kings, we are a nation of laws."

I have said before that this Committee needs to say any formal legal opinions from this administration that address the legality of NSA practices and procedures with respect to electronic surveillance. The American people have a right to know whether or not their President knowingly chose to flout the law when he instructed the NSA to spy on the American people. That is why our next step should be to subpoena the opinions. We know the President broke the law. Now, we need to know why.

Thank you, Mr. Chairman.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Chairman SPECTER. Senator Feingold.

STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. Mr. Chairman, first, thank you for scheduling this hearing and for giving me the opportunity to make an opening statement. I know you recognize that this is a serious issue, and I thank you for treating it as such.

I want to wish the Ranking Member a happy birthday, especially after that eloquent and powerful statement of where we are at this point.

[Applause.]

Chairman SPECTER. We are not going to have any applause or any demonstrations or any expressions from anybody in the hearing room. This is a serious matter and it is a matter for the Senators to speak to, and the witnesses, and no showing from the audience.

Senator FEINGOLD. Mr. Chairman, I assume that was for the Senator's birthday, the applause. But, Mr. Chairman, thank you.

Chairman SPECTER. It is as good as your other assumptions, Senator Feingold.

[Laughter.]

Senator FEINGOLD. Fair enough.

I want to welcome and thank our witnesses, some of whom—Mr. Fein and Professor Turner—were with us just a few weeks ago, and one of whom, Mr. Dean, last appeared before a congressional committee in 1974, as so many of us remember. I am grateful for your participation, particularly given the short notice that you were given of the hearing.

There is a time-honored way for matters to be considered in the Senate. Bills and resolutions are introduced. They are analyzed in the relevant Committee through hearings. They are debated and amended and voted on in committee, and then they are debated on the floor. We have now started that process on this very important matter and I look forward to seeing it through to a conclusion.

Obviously, I believe the proposal for censure has substantial merit, and I am pleased that we now have the issue of accountability of the President here back to the foreground. In fact, Mr. Chairman, I waited three months after attending the Judiciary Committee hearings, the Intelligence Committee hearings—I also serve on the Intelligence Committee—before I came to the conclusion that censure would be an appropriate step in this matter. I was very deliberate in my thinking about that.

Mr. Chairman, I have looked closely at the statements you have made about the NSA program since the story broke in December. We have a disagreement about some things, but I am pleased to say we are in agreement on several others. We agree that the NSA program is inconsistent with FISA. We agree that the authorization for use of military force did not grant the President authority to engage in warrantless wiretapping of Americans on U.S. soil. We agree that the President was and remains required under the National Security Act of 1947 to inform the full intelligence committees of the NSA program which, of course, the President has refused to do.

Mr. Chairman, I think it is not irrelevant or insignificant with regard to the merits of censure that such bogus arguments have

been advanced in favor of this program. Where we disagree, apparently, is whether the President's authority under Article II of the Constitution allows him to authorize warrantless surveillance without complying with FISA. You have said this is a close question. I do not believe he has such authority and I don't think it is a close question. We will continue to debate that, I am sure.

But I think the very fact that you have proposed legislation on this program tends to undermine your argument that such Presidential authority exists, because if it does exist, then nothing that we can legislate, nothing, no matter how carefully crafted, is worth a hill of beans.

For starters, your proposed bill may or may not cover what the NSA is now doing. You and I have no way of knowing because we have not been fully briefed on the program. I am also, as I said, a member of the Intelligence Committee, where I didn't get to learn about the details there either.

But, regardless, if the President has the inherent authority to authorize whatever surveillance he thinks is necessary, then he surely will ignore your law just as he has ignored FISA on many, many occasions. If Congress doesn't have the power to define the contours of the President's Article II powers through legislation, then I have no idea why people are scrambling to draft legislation to authorize what they think the President is doing.

If the President's legal theory which is shared by some of our witnesses today is correct, then FISA is a dead letter. All of the supposed protections for civil liberties contained in the reauthorization of the PATRIOT Act that we just passed are a cruel hoax, and any future legislation we might pass regarding surveillance or national security is a waste of time and a charade. Under this theory, we no longer have a constitutional system consisting of three coequal branches of Government. We have a monarchy.

We can fight terrorism without breaking the law. The rule of law is central to who we are as a people, and the President must return to the law. He must acknowledge and be held accountable for his illegal actions, and also for misleading the American people both before and after the program was revealed. If we in the Congress don't stand up for ourselves and for the American people, we become complicit in the law-breaking. A resolution of censure is the appropriate response, even a modest approach.

Mr. Chairman, the presence of John Dean here today should remind us that we must respond to this constitutional crisis based on principle, not partisanship. How we respond to the President's actions will become part of our history. A little over 30 years ago, a President who broke the law was held to account by a bipartisan Congressional investigation and by patriots like Archibald Cox and Elliot Richardson and, yes, John Dean, who put loyalty to the Constitution and the rule of law above the interests of the President who appointed them. None of us here can predict how history will view this current episode, but I do hope that 30 years from now this Senate will not be seen to have backed down in the face of such a grave challenge to our constitutional system.

Mr. Chairman, I look forward to hearing from our witnesses, and I again do appreciate the opportunity to make an opening statement.

[The prepared statement of Senator Feingold appears as a submission for the record.]

Chairman SPECTER. Senator Hatch has requested some time for an opening statement and you may proceed.

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. Well, thank you, Mr. Chairman. Let me just say I am one of two sitting Senators that I know of who has had the privilege of sitting twice on the Intelligence Committee. I might also add that I am one of the seven bipartisan members of the committee on the subcommittee who have been chosen to review the warrantless surveillance program, and we have been doing that.

I will just add that I believe the President was not only within his inherent powers to do this—I think there are some people around here who don't believe there are any inherent powers in the executive branch. I believe there are, and I think that history and case law shows that there are.

I personally find that the President did much more. He certainly did not break the law. He had to reauthorize this program every 45 days. They informed the FISA chief judge. They informed the FISA chief judge's replacement. They informed eight leaders of Congress—the two leaders in the House and the Senate and the vice chairmen and chairmen of the intelligence committees.

I strongly oppose Senate Resolution 398, the resolution purporting to censure President Bush during the foreign intelligence surveillance program. Now, let me just briefly mention three reasons for my opposition.

First, I do not believe that the Constitution authorizes the Senate to punish the President through a mechanism other than impeachment. Make no mistake, censure is punishment, and this censure resolution aims to punish the President. Senator Feingold has repeatedly stated his belief that the President has broken the law and must be held accountable. This is done by punishment.

The last time a Senator introduced a resolution to censure a President was in 1999, directly on the heels of the Senate voting to acquit President Clinton on the charges for which he had been impeached by the House. It was offered as a form of punishment because censure is punishment.

I do not believe that the fundamental principle of the separation of powers and our written Constitution built on that principle authorize the Senate to punish the President, other than by means of impeachment. In 1800, the first time either House considered a resolution to denounce a President's actions, Representative William Craik, of Maryland, argued that the House had the power of impeachment, but not censure. The resolution failed.

Many claim historical precedent for punishing the President through censure in the resolution introduced by Senator Henry Clay—I have got a copy of that—passed on March 28, 1834. That resolution addressed President Andrew Jackson's actions regarding the Bank of the United States. I have that resolution right here, copied from the original journal of the Senate. It is one sentence long. It states the Senate's opinion that President Jackson, quote,

"has assumed upon himself authority and power not conferred by the Constitution and laws, but in derogation of both."

I know that nearly everyone refers to this as a censure resolution, but it says nothing of the kind. This resolution, unlike the one before us today, never uses the words "censure" or "condemn." It expresses the Senate's opinion about the President's action, but does not even purport to punish the President. Three years later, the Senate voted to reverse itself and to expunge this resolution from the record.

The official U.S. Senate website describes this 1834 resolution and while it does, I think, mistakenly refer to this as a censure resolution, our own Senate website states unequivocally that this resolution was, quote, "totally without constitutional authorization," unquote. I have that page right here in my hand, printed directly from the Senate website, stating that the 1834 resolution was totally without constitutional authorization.

Now, if a resolution not even purporting to punish or censure the President is without constitutional authorization, how can one which would explicitly punish the President by censuring him and condemning his actions have constitutional authorization?

There are other constitutional objections to such an effort to punish the President through censure. I ask unanimous consent to submit for the record an article by Victor Williams, law professor at the University of Tampa, arguing that the attempt to censure President Clinton was unconstitutional.

Is that OK, Mr. Chairman?

Chairman SPECTER. So ordered.

Senator HATCH. Mr. Chairman, even if this serious constitutional concern did not exist or can somehow be waved aside, my second concern is with the content of this censure resolution. The statements offered to support the conclusion of censure are not established facts at all, but at best highly debatable propositions, and some of the statements made here today are highly debatable.

This resolution states as fact propositions about which there is very real and very public debate. These include the legal basis President Bush has claimed for his foreign intelligence surveillance program, including the extent of his inherent constitutional authority and the effect of Joint Senate Resolution 38, the authorization for use of military force.

The resolution asserts that a statute, the Foreign Intelligence Surveillance Act, trumps the President's inherent constitutional authority as commander in chief. In addition, this resolution makes very serious claims about President Bush's personal motives and even his integrity. It claims that President Bush actually misled the public, that he made false implications and inaccurate statements even in his State of the Union Address.

Now, Senator Feingold, of course, is free to believe these things about the President and to state his belief publicly. He has spoken to that end on the Senate floor. But this constitutionally suspect effort to punish the President by censure rests on premises which are at best highly debatable and, at worst, misleading or even false.

Finally, Mr. Chairman, even if concerns about this resolution's constitutional legitimacy and content can be avoided, I remain very

concerned about its timing and effect. The United States is at war. Our President has taken considered and measured steps that I believe are consistent with the law. I can only hope that this constitutionally suspect and, I believe, inflammatory attempt to punish the President for leading this war on terror will not weaken his ability to do so.

When the Senate turned aside the 1999 censure resolution directed at President Clinton, our colleague and later Attorney General John Ashcroft made a point which captures my concern about the resolution before us today. Senator Ashcroft was certainly a strong critic of President Clinton. He voted to convict and remove President Clinton from office. Yet, he said, "The Constitution recognizes that if a President cannot be removed through impeachment, he should not be weakened by censure," unquote. I agree.

Partisanship may be at a fever pitch around here these days, but wartime is not a time to take steps that may weaken the commander in chief, especially since there are many arguments that I think are valid arguments that are made on behalf of what the President has done. To discuss this and to work on it and to work as the distinguished Chairman has done in trying to come up with statutory language that any President may want to follow, I think, is a noble effort and we ought to all consider it on that basis and quit trying to score political points.

[The prepared statement of Senator Hatch appears as a submission for the record.]

Chairman SPECTER. Thank you, Senator Hatch.

Would any other member of the Committee care to make an opening statement?

Senator Sessions.

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Well, I would like the opportunity, Mr. Chairman.

The national spasm over the NSA wiretaps has had its run and I would have thought it would be at rest by now. This is now the fourth hearing we have had on the subject. The President has clearly stated his legal basis for what he thought justified his actions and he acted only after DOD lawyers and other lawyers had reviewed and approved the program. He has demonstrated that he has kept the responsible leaders of the House and Senate informed on the NSA system that has been operating.

Twelve to fifteen of our National leaders of the Congress were informed on this matter, including Tom Daschle, Harry Reid, Nancy Pelosi, and others. Not one of them objected. Some say Senator Rockefeller objected, but he simply wrote a letter that did two things. First, the letter said that he was well aware of the program, as were all of the members who were briefed, and that he did not ask for any more briefings or consultations or explanations from the professionals or lawyers, and he did not ask that the program be stopped.

After 9/11, we knew we had been attacked by sleeper cell terrorists. We did not know how many more such sleeper cells were in our country and what other targets they had in mind. No one

knew. We knew one thing. We knew we did not know about this attack that killed almost 3,000 Americans. It was a surprise. We concluded we needed more and better intelligence, and we had a national discussion of that.

The NSA intercept program, however it works technically, without doubt has the capability to help us locate persons that could identify other sleeper cells that may exist in our Nation, cells who may be capable of inflicting the most grievous wounds on our country. And that remains true to this day.

All of this has been openly discussed, and discussed in even more detail in the appropriate intelligence committees. There is no serious contention that the program should stop as the facts have been better understood, such as the fact that the calls involved are international calls. Concern in the Congress and of our people has drastically abated from the hysteria after the first announcement in a most serious breach of security that revealed the nature of this critical program.

So I would suggest we had better spend our time investigating how top secret programs such as this, a program fully shared with congressional leaders, was breached and provided to the media and revealed throughout the world.

I just returned from my fourth trip to Iraq. We met many soldiers there who are at risk this very day trying to protect America, and they fight everyday to help the people of Iraq create a safe and decent government against attacks by the same terrorists who attacked us. Not one of those soldiers asked that I should censure the President, nor did they ask that House and Senate leaders, bipartisan leaders who had the program explained to them in detail, and its operation updated to them on many occasions, be censured.

Why not censure the congressional leaders? We have power to censure them. That is constitutional. Why don't we send them to the Ethics Committee? The answer is they did nothing wrong. The President did nothing wrong. They did nothing worthy of censure. As Senator Hatch said, it is just not an appropriate discipline of the President by the United States Congress.

So I submit the congressional leaders and the President did the right thing, the lawful thing to protect our country and the people, as they are sworn to do. Our President is an honest man. He is a candid man, a direct man, a strong leader, and the people of America know it.

So this hearing, I think, is beyond the pale. This notion of censure is irresponsible. It is irresponsible because it is not well-founded in the Constitution, as Senator Hatch has demonstrated, and it has the potential to send abroad throughout the terrorist community and to those who are watching our resolve around the world, a very perverse and false message. It could suggest that the man who was elected President by a substantial majority might be unable to carry out the policy of our country, or that opposing political forces might block his ability to effectively wage the war on terrorism, both of which are false, both of which make the job of our soldiers and diplomats harder and place them at greater risk.

It is time for some in this Congress to get over it. We have established a national policy against terrorism. We have committed the lives and fortunes of our soldiers to that effort. We can and we

must be successful. Even if one disagrees with the decisions that have been made, they have been made and are being executed by the finest military and State Department personnel our Nation has to offer. Let's not play games with their lives.

The President is leading in a time of war, so are the congressional leaders. This motion for censure is clearly inappropriate and I dissent, if anyone would doubt otherwise.

Chairman SPECTER. Any other Senator care to make an opening statement?

Senator Graham.

STATEMENT OF HON. LINDSEY GRAHAM, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator GRAHAM. I thought he was on the fence there until the end. Thank you, Senator.

Thank you, Mr. Chairman, for, one, holding this hearing. You know, this is a democracy. You just throw it out in the open and you talk about it. As to Senator Feingold, I would like to amend my previous statements. I have known him a long time and I do respect him and he does call it as he sees it, and we just disagree here.

I was involved in impeachment. I am probably not the best guy to talk about it. I am 0 for 1, and that is the way it works. But I know how stressful it was back then. I know what the Senate went through. I wasn't a member of the Senate. I know what you all went through over here. It was very difficult, and being part of the House team, I know it was difficult there.

I openly talked about censure as sort of a middle ground when it came to impeachment. It just didn't quite go anywhere, but I thought that was appropriate, and everyone had their say about impeachment. I remember very much Senator Feingold being one of the more open-minded people about it.

The difference here is we just see it differently, and that is why we need to have this hearing. The idea of censuring the President for surveiling the enemy after notifying Congress, to me, is way beyond what would be appropriate and would have the effect of killing the program. I think that would be a very big mistake for our country to kill this program because it is, in my opinion, necessary in the war on terror to find out what the enemy is up to. And this seems to be a reasonable way to find out what they are doing as long as the program has constitutional checks and balances, and I am a big believer that it can survive with those constitutional checks and balances.

Senator Feingold sees this as an obvious violation of the law by the President deserving rebuke. I do not see it that way at all. I see it as a confusing, uncertain area of the law that deserves thought and collaboration. The *Hamdi* case, I believe is the name of the case, where Justice O'Connor argued that the use of force resolution would allow the detention of an enemy combatant because the Congress, by authorizing force to be used against Afghanistan, justified the ability of the President to hold somebody that was caught in that way as an express authorization by the Congress.

The other argument that is on the table, Mr. Chairman, is the inherent authority of the President. His enumerated powers under Article II would give him as commander in chief the inherent authority to do things necessary to wage war. Well, one of those things necessary is to follow the enemy. I don't think anyone doubts that part of fighting a war is to do surveillance and monitoring of enemy movements and enemy activity.

The problem is that you have got a preexisting FISA statute that says when an American citizen may be involve here in the United States with foreign intelligence activities, FISA becomes the exclusive remedy. You have a court of appeals case that says FISA is a peacetime statute. Once you are in a shooting war environment, we don't know if FISA has the same application. Those are really tough issues.

The Chairman has an approach on how to get this balance. I have got an approach. I think the approach the Chairman has taken and I have taken is constructive. I think censure is destructive. I think censure breaks us apart at a time we need to be brought together.

Here is what I would like us to rally around: the need for the program is real, the legal authority for the program is enhanced if it is between the executive and legislative. If we could get on the same sheet of music, this program is stronger, not weaker.

I agree with Senator Sessions. I think the President is an honest man and very committed to his way of doing business and he should be a strong commander in chief. Here is where I disagree: I believe, instead of using the inherent authority argument, the administration would be well served to reach out to the Congress and see if we can't—and if we fail, we fail—come up with a program the Congress could statutorily sanction, because I think we are stronger legally and militarily when we act in concert with each other.

So my two cents worth to the body is let's try to find out some solution to this real problem that will make us stronger as a Nation, and I don't believe censure takes us in that direction. I believe collaboration will, and with that said, Mr. Chairman, I look forward to the debate.

Chairman SPECTER. Thank you, Senator Graham.

Senator Cornyn, you indicated an interest in making an opening statement. You may proceed.

STATEMENT OF HON. JOHN CORNYN, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator CORNYN. Thank you very much, Mr. Chairman. Mr. Chairman, you have a reputation, well deserved, of being scrupulously fair and independent, and I come to this hearing with some sense of ambivalence. One, I agree with some of the sentiments expressed that if a Senator feels strongly enough about a matter that they file something of this nature, we ought to look at it and we ought to talk about it.

I say that at the same time that I feel that this motion for censure is completely without merit, and it is, I think, somewhat indicative of the meritlessness of the motion that Senator Feingold's mo-

tion has been cosponsored by only two members of his political party and everyone else seems to have run for cover.

But here we are, and I think the American people would be also justified in thinking that the atmosphere in Washington, D.C. is surreal when it comes to the global war on terror and how we conduct our business and how we spend our time.

While there were those who initially expressed some doubt as to the legality of the President's actions and his authority, you have conducted a number of different hearings, including with some judges who serve on the FISA court. The Chairman has noted a number of circuit court opinions which have reached the same conclusion that many of those judges did, and that is that the President's authority is not exclusively derived by a statutory grant from Congress under the Foreign Intelligence Surveillance Act. That would be a rather strange proposition to argue that indeed one branch of the Government is somehow limited in its authority by a grant of authority from another branch when, in fact, each derive their powers by the Constitution itself.

No one has suggested, to my knowledge, that this program be stopped. Senator Sessions mentioned that a number of people have been briefed on this program. I agree it should not be stopped. It is saving American lives and it is allowing us to fight and win the global war on terror. And it would be ironic indeed if Congress were to pass an authorization for the use of military force and say that we ought to locate, capture, detain and even kill the enemy, but we can't listen to their telephone calls that come from overseas to the United States. That, I think, contributes to the surreal atmosphere.

I guess, you know, when I was looking this morning at one of the witnesses that is going to be testifying that is selling a book and that is a convicted felon, it strikes me as very odd that the Judiciary Committee is giving some audience and opportunity to somebody under those circumstances as part of their marketing efforts.

We have had a lot of very serious witnesses who have expressed their opinion about the law, and this is a Committee full of lawyers and we can all have different views of the law and that doesn't surprise anybody who is a lawyer. But I think I have tried to explain why I come to this hearing with some sense of ambivalence, and I believe that the American people would view what we are about here as part of the surreal atmosphere that they believe, and sometimes correctly so, is completely out of touch with the rest of the United States.

Thank you.

Chairman SPECTER. Thank you, Senator Cornyn.

For the record, it ought to be noted that Senator Feingold was given the opportunity to name witnesses. He chose to bring two, and the individual you referred to was his selection and my judgment was that he should be accorded that standing. And if someone cared to make the comment about the credibility or background, as you have, that would be appropriate too. Let it all hang out.

We now turn to our panel of witnesses. Our first witness is Professor Robert Turner, a professor in the University of Virginia's Woodrow Wilson Department of Government and Foreign Affairs,

author or editor of a dozen books on international or constitutional law. He was counsel to the President's Intelligence Oversight Board from 1981 to 1983; a bachelor's degree from Indiana and a law degree from the University of Virginia.

Thank you very much for joining us this morning, Professor Turner, and we look forward to your testimony.

STATEMENT OF ROBERT F. TURNER, ASSOCIATE DIRECTOR, CENTER FOR NATIONAL SECURITY LAW, UNIVERSITY OF VIRGINIA, CHARLOTTESVILLE, VIRGINIA

Mr. TURNER. Thank you, Mr. Chairman. It is a pleasure to be here. I have a short statement which I would propose to submit for the record at this time—

Chairman SPECTER. Without objection, your statement will be made a part of the record.

Mr. TURNER [continuing]. That relies heavily upon the longer statement I gave on February 28th in the hearing which gives the footnotes, and so forth, that will support it.

Briefly summarized, Senator Feingold's Senate Resolution 398 seeks to censure the wrong lawbreaker. The President did not break the law. Every wartime President, even every wartime leader going back to George Washington when he authorized the opening of British mail coming into the United States during the American Revolution, has done this kind of behavior. It is essential to the successful conduct of war. Congress, in the wake of Vietnam, broke the law, not a statute, but the Constitution, in going after the President's control of foreign intelligence. That was one of many acts that usurped Presidential power.

As I documented in my testimony last month, the Founding Fathers knew that Congress could not keep secrets, and thus they gave the general management of the Nation's foreign intercourse, especially foreign intelligence-gathering, to the President.

In 1776, Benjamin Franklin and his unanimous Committee of Secret Correspondence decided they could not tell the Continental Congress about a secret, covert operation because, and I quote, "We find by fatal experience that Congress consists of too many members to keep secrets." In explaining the new Constitution to the American people during the ratification debate in 1788, John Jay, who became our first Chief Justice, praised the Constitution in Federalist No. 64 for having left the President, and again I quote, "able to manage the business of intelligence as prudence might suggest."

The constitutional basis of this important grant of power is found not just in the Commander in Chief Clause, but more importantly in Article II, section 1, which grants to the President the executive power of the Nation. Having been raised on the writings of Locke, Montesquieu and Blackstone, the Framers shared their belief that the Nation's external relations were part of the executive power, and this was embraced very clearly by the major players of the era.

In my earlier testimony, I gave examples with footnotes to statements by, among others, President George Washington, who was also President of the Constitutional Convention; Representative James Madison, often called the Father of the Constitution; Secretary of State Thomas Jefferson; Treasury Secretary Alexander

Hamilton, like Madison an author of the Federalist Papers; Chief Justice John Jay, the third Federalist Papers contributor; Representative John Marshall, later Chief Justice.

Thus, the leaders of both political parties of the era and all three authors of the Federalist Papers agreed that the executive power grant gave the President the general management of the Nation's foreign affairs. The National Security Act of 1949 made no provision for congressional oversight. There are references to it here. They really ought to say "as amended," because in 1949 Congress in writing this saw no need, saw no propriety for congressional oversight of intelligence activities.

The 1968 Crime Control and Safe Streets Act recognized that the President had independent constitutional authority for national security foreign intelligence wiretaps and expressly excluded them from its coverage. When FISA was first enacted in 1978, former appeals court judge Griffin Bell, then Jimmy Carter's Attorney General, told the Committee that FISA could not take away the President's independent power to collect foreign intelligence.

The FISA Court of Review that Congress set up in 1978 noted in 2002 that every Federal court that has considered this issue has found the President has independent constitutional authority to do this. And the court went on to say, "We assume that is true, and if it is true, that power cannot be taken away by FISA."

In *Marbury* v. *Madison*, perhaps the most famous of all Supreme Court cases, Chief Justice John Marshall noted that the President is given certain important political powers under the Constitution which are to be used at his discretion. And he noted, and I quote, "Whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion." Neither the courts nor the Congress can tell the President how to govern the collection of foreign intelligence during wartime.

Indeed, President Bush is not above the law, but in our country we have a hierarchy of laws in which the Constitution is supreme. Because of that, John Marshall noted in *Marbury* v. *Madison*, and again I quote, "An act of the legislature repugnant to the Constitution is void."

My conclusion is the President has broken no constitutional law, but Congress in the wake of Vietnam broke many, with terrible consequences. I strongly recommend that the Committee rewrite the resolution to censure the post-Vietnam Congress which violated its oath of office of its members, undermined our security and contributed directly to the consignment to communist tyranny in Indochina of tens of millions of people we had promised to defend and to the slaughter of millions of others.

I think the President's actions are also justified under the AUMF, but I don't have time for that. I will be happy to take it up in questions. Thank you, Mr. Chairman.

[The prepared statement of Mr. Turner appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Professor Turner.

We now turn to Mr. Bruce Fein, of the consulting firm of Fein and Fein. His experience in Government was as research director for the Joint Congressional Committee on Covert Arms Sales to

Iran, general counsel to the FCC under President Reagan, and assistant director of the Department of Justice's Office of Legal Policy from 1980 to 1983. He is a graduate of the University of California for a bachelor's degree and Harvard Law School, cum laude.

Thank you for joining us today, Mr. Fein, and the floor is yours.

STATEMENT OF BRUCE FEIN, FEIN AND FEIN, WASHINGTON, D.C.

Mr. FEIN. Thank you, Mr. Chairman. I would like my complete statement submitted for the record.

Chairman SPECTER. Without objection, it will be made a part of the record, as will all the statements submitted to the Committee.

Mr. FEIN. On September 17, 1787, Dr. Benjamin Franklin emerged from the Constitutional Convention which had fashioned the document that has lived ever since as a testament to what free minds can do in crafting democratic dispensations. He was approached by an elderly lady and asked, Dr. Franklin, what have we got, a monarchy or a republic? And he retorted, a republic, if we can keep it.

Now, there are two features of the current crisis with President Bush's assertion of inherent constitutional authority that I think are unprecedented. No. 1, these are wartime powers that have no ending point. There is no benchmark to suggest the time when the war against international terrorism will conclude, and therefore the President's assertions of powers have to be taken as permanent changes on the political landscape on checks and balances.

The second feature relates to the scope of the battlefield. The President has said that since Osama bin Laden and al Qaeda have threatened to kill any American, anytime, anyplace, anywhere, then all of the world is a battlefield, justifying battlefield tactics. There is no difference in the President's authority to shoot on the streets of Kandahar, Kabul or Baghdad as opposed to the street outside of Domino's Pizza.

These are the kinds of extravagant claims I suggest that require a very close attention to the legal theories that have been advanced to justify the warrantless surveillance program in secret for over four-and-a-half years. You can lose a republic on the installment plan every bit as efficiently as at one fell swoop with a coup d'etat.

The censure of the President for official misconduct, for alleging failing to faithfully execute the laws, seems to me no different than a species of congressional oversight of an executive program that concludes with a report harshly critical of the President or his subordinates, something similar to the majority report that culminated the hearings into the Iran-contra affair. If Harry Truman can run on a do-nothing-Congress platform, I see no reason why Congress cannot run on a wrongdoing-President platform.

Now, of course, every dispute between Congress and the Executive over legal interpretation should not occasion censure. The President should not be intimidated from making assertions of authority that he in good faith thinks are legitimate. But it seems to me there is a convergence of several factors that make his claim regarding the legality of the warrantless surveillance program something that justifies censure.

First, President Bush's intent was to keep the program secret from Congress forever. The New York Times published the program. He has now got a grand jury investigating whether it violated the Espionage Act, but his hope was to escape political and legal accountability forever, if he could do so.

As history teaches, sunshine is the best disinfectant. Even Presidents with good motives regularly overreach. The Church Committee hearings exposed 20 years of illegal mail-openings by the CIA and FBI, 20 years of illegal intercepts of international telegrams, years of the misuse of the National Security Agency for international criminal purposes rather than foreign intelligence purposes. All these abuses occurred because there was no sunshine. This was all concealed from Congress. That aggravates, I think, the President's conduct in this situation.

Now, it is said that the President could not alert Congress without exposing intelligence sources and methods, alerting the enemy to means of evasion that would frustrate the war against international terrorism that we all want to win. That seems to me clearly a specious argument. If the President informed Congress in the aftermath of 9/11 that he was undertaking a program of surveillance outside of FISA and he wanted Congress to know that and to consider it, that information by itself does not disclose intelligence sources. It does not disclose intelligence methods and it would not for the first time alert al Qaeda that we are trying to spy on them. They had known that at least since 1978 and they are not slower learners.

Second, President Bush's secrecy regarding the program makes it impossible to evaluate its reasonableness under the Fourth Amendment. One of the touchstones of that provision is whether or not the Government is engaged in a fishing expedition just hoping something will turn up or whether or not the Government is employing reasonably particularized standards for targeting searches and seizures that actually have the likelihood of turning something up that is useful.

The fact is, Mr. Chairman and members of the Committee, no one knows what the success rate is of these warrantless surveillance programs targeting American citizens on American soil. Nobody knows the number of Americans targeted. Nobody knows whether the targeting has revealed anything useful. Nobody knows exactly why it is that the Americans were targeted. There may be good reasons, but you are foreclosed from making an intelligent assessment of Fourth Amendment reasonableness when all of this is like a black hole.

Third, President Bush's interpretation of the authorization to use military force, I suggest, is not just wrong, but preposterous. Not a single member of the Congress—

Chairman SPECTER. Mr. Fein, you are a minute over. Could you summarize at this point, please?

Mr. FEIN. Yes. I would suggest that no one in Congress contemplated that interpretation, and for the executive branch to come up with that theory four-and-a-half years after the fact smacks of a surprise O. Henry ending.

The last observation I would make, Mr. Chairman, is that checks and balances are at the heart of our system of liberty. It is what

you might call the procedural equivalent of the Bill of Rights, and that is why it is so important to leave them undisturbed before we have a second 9/11, before new stresses may cause the program to expand even further.

Thank you.

[The prepared statement of Mr. Fein appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Mr. Fein.

We now turn to Mr. Lee Casey, partner at the law firm of Baker and Hostetler here in Washington. He specializes in issues of the Constitution, election, and international and regulatory law. He served in the Department of Justice's Office of Legal Counsel from 1992 to 1993, and the Office of Legal Policy from 1986 to 1990. He serves as adjunct professor of law at George Mason University.

Thank you for coming in today, Mr. Casey, and the floor is yours.

STATEMENT OF LEE A. CASEY, BAKER AND HOSTETLER, WASHINGTON, D.C.

Mr. CASEY. Thank you, Mr. Chairman. Unlike my colleagues, this is the first time I have ever testified before this Committee and I do want to say that I consider it an honor to have been asked.

Let me begin by saying that censuring President Bush over the NSA program would be a severe miscarriage of justice. When he authorized the NSA to intercept al Qaeda communications into and out of the United States, the President was fully within his constitutional and statutory authority. He did not break the law and there is no evidence that he has in any way misused the information collected. This is not Watergate.

The President's critics have variously described the NSA program as widespread, domestic and illegal. It is none of these things. It is targeted on the international communications of individuals engaged in an armed conflict with the United States and it is fully consistent with FISA.

In assessing the President's actions here, it is important to highlight how narrow is the actual dispute over the NSA program. Few of the President's critics claim that he should not have ordered the interception of al Qaeda's global communications or that he needed the FISA court's permission to intercept al Qaeda communications abroad. It is only with respect to communications actually intercepted inside the United States or where the target is a United States person that FISA is relevant at all to this National discussion.

Since this program involves only international communications where at least one party is an al Qaeda operative, it is not clear that any of the intercepts would properly fall within FISA's terms. This is not the pervasive dragnet of American domestic communications about which so many of the President's critics have fantasized.

The administration has properly refused to publicly articulate the full metes and bounds of the NSA program. Let us assume, however, that some of the intercepts are subject to FISA. As the Department of Justice correctly pointed out in its January 19, 2006 memorandum, FISA permits electronic surveillance without an

order if it is otherwise authorized by statute. The NSA program was so authorized.

The September 18, 2001 authorization for the use of military force permits the President to use all necessary and appropriate force against those responsible for September 11th in order to prevent any future acts of international terrorism against the United States. The Supreme Court has already interpreted this grant to encompass all of the fundamental incidents of waging war.

In *Hamdi* v. *Rumsfeld*, the Court considered and rejected the argument then being advanced with respect to the Non-Detention Act that the September 18th authorization permitted only those types of force not otherwise specifically forbidden by statute. The monitoring of enemy communications, whether or not within the United States, is as much a fundamental and accepted incident to war as is the detention of captured enemy combatants. Indeed, it is only through the collection and exploitation of intelligence that the September 18th authorization can be successfully implemented.

However, even in the absence of that law, the NSA program would fall within the President's inherent constitutional authority. The courts, including FISA's own Foreign Intelligence Surveillance Court of Review, have consistently recognized and respected this authority. In 2002, that court specifically noted that all the other courts who have decided the issue held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information, and that we take for granted that the President does have that authority. And assuming that is so, FISA could not encroach on the President's constitutional power.

Of course, the Supreme Court has never considered whether FISA may have improperly trenched upon the President's authority. The test will be whether it impedes the President's ability to perform his constitutional duty. If FISA were construed to prohibit the President from monitoring enemy communications in the United States without judicial approval, then the statute would be invalid. It need not and should not be so interpreted.

Obviously, there are many who disagree with this analysis. Few questions of either constitutional or statutory interpretation cannot be honestly debated. However, to censure the President because his view is inconsistent with that of one or more members of the Senate would be improvident and irresponsible. It amounts to an effort to punish not merely policy differences, but differences over legal arguments, and it is just plain wrong.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Casey appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Mr. Casey.

We now turn to Mr. John W. Dean III, White House Counsel to President Nixon from July 1970 to April 1973; a bachelor's degree from the College of Wooster and a law degree from Georgetown Law School. He had served as chief minority counsel to the House Judiciary Committee. He worked subsequent to leaving Government as an investment banker and he has authored a number of books.

Mr. Dean, welcome to the witness table and the floor is yours.

STATEMENT OF JOHN W. DEAN, WHITE HOUSE COUNSEL TO PRESIDENT RICHARD NIXON

Mr. DEAN. Thank you, Mr. Chairman. My qualifications for addressing the Committee, I think, were alluded to by the Senator from Texas, who is no longer here, and I think it is important that the Committee sometimes hear from the dark side; that those of us from that perspective can add some insights that might not otherwise be available to a body like this.

I must say I think I have probably more experience firsthand than anybody might want in what can go wrong and how a President can get on the other side of the law. Obviously, I refer to my experience at the Nixon White House during Watergate.

In addition to my firsthand knowledge of what can go wrong in a White House, I have spent the last some three decades studying Presidents past and present. And I am not here to sell a book today, but I did write a book that gave me additional insight. Indeed, the book I am going to be publishing soon that mentions the Senator from Texas will not be out until this summer.

No President that I can find in the history of our country has really ever adopted a policy of expanding Presidential powers for the sake of expanding Presidential powers, and I think that is what we have going on in this presidency. It was the announced objective of the Bush-Cheney presidency from the very outset and it has been pursued at every turn, on every issue, on any matter from a dispute with the General Accounting Office to now how they pursue their NSA program. Rather than come to Congress and even seek approval, they want to do it without approval. That is very unique. For example, Abraham Lincoln, in his very strenuous violations of many laws and constitutional provisions, came back to Congress and asked for permission. That isn't the case here. We have a President who doesn't want to do that.

In looking at the issue of censure, per se, I am sure this Committee, in particular, is intensely aware of what happened during the Clinton impeachment, when it was well debated. It was debated by Members of the House and the Senate. It was debated by constitutional scholars, political commentators, and the common denominator that came out of that debate, I think, was that everybody basically agreed that censure is a political proceeding.

I looked at the historical collection that I could find on that issue and it seems that those who have looked at historical—some four clear instances, with John Quincy Adams, Andrew Jackson, John Tyler and James Buchanan—those are the four leading precedents for censure and all were motivated by partisan political activity.

I find no constitutional question that the Congress has the power to grant impeachment. I have read debates on both sides. I read a lot of the material during the Clinton impeachment. This Committee is very familiar with Professor Michael Gerhardt's work, and he certainly, looking at everything from provisions within the Constitution where the House and Senate are able to keep their own journals, to the First Amendment, said there is just no prohibition in the Constitution that would prohibit a censure.

Now, why a censure is a better question. To me, this is not really and should not be a partisan question. I think it is a question of institutional pride of this body, of the Congress of the United

States. What has happened is particularly since 1994—and it didn't happen during the Clinton presidency, but there has been a growing tendency—and I started my career on Capitol Hill—to let the President do what he wants and to have virtually no oversight.

I can tell you from the other side of Pennsylvania Avenue that that is very important to Presidents. They take note of that when they are not being called to the mat. They push the envelope as far as they can. Richard Nixon was proud in throwing down the gauntlet at this body and felt it important that he do so.

So I think impeachment is premature. I think censure, which need not be political by any stretch of the imagination—in fact, if it carries too much political baggage, it can always be a resolution that is worded in some softer terms to make clear that the Congress itself is not waiving its power to step into these issues, because at some point as I track the constitutional law—and I put some of that in my formal statement—there is a waiver that occurs. And a censure, appropriately worded, is the answer to that.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Dean appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Mr. Dean.

Our final witness is Mr. John Schmidt, a partner with Mayer, Brown, Rowe and Maw. He had been a visiting scholar at Northwestern University School of Law, governmental service as Associate Attorney General of the United States during the administration of President Clinton from 1994 to 1997, and was Ambassador and chief U.S. negotiator for the Uruguay Round under the General Agreement on Tariffs also in the Clinton administration from 1993 to 1994; magna cum laude, Harvard College, cum laude at Harvard Law School.

Thank you for coming in today, Mr. Schmidt, and we look forward to your testimony.

STATEMENT OF JOHN SCHMIDT, MAYER, BROWN, ROWE AND MAW, CHICAGO, ILLINOIS

Mr. SCHMIDT. Thank you, Mr. Chairman. I am pleased to be here and give you my views on this issue. As your introduction indicates, I come at this from the perspective of having served in the Justice Department under a Democratic President, Bill Clinton, and I have a lifetime of activity as a Democrat, including serving as chief of staff to a Democratic mayor of Chicago. So I don't have any partisan bias in favor of President Bush on this issue.

I nevertheless feel very strongly that any consideration of censure of the President for authorizing the NSA program is completely unwarranted and inappropriate, and it seems to me to really demean and undermine the kind of serious discussion of this issue which we should be having.

My own legal judgment, which I set out publicly right after the disclosure of the NSA program in an article that I attached to my statement, was and is that the President had the authority under Article II of the Constitution to authorize the NSA program, notwithstanding the fact that it was and is inconsistent with the terms of the Foreign Intelligence Surveillance Act.

To me, that comes down to two propositions. The first is setting aside anything Congress might have done, the President has the inherent authority under Article II to order surveillance of a foreign power, whether it is a terrorist group or a nation, that is active in this country. As was indicated, the Supreme Court left that question open back in 1972, but we have three court of appeal decisions that have said clearly the President has that authority.

The further question is can Congress take that inherent authority away from the President. I think the answer to that is no. We have less authority on that, but we have one judicial statement which has been alluded to and that is the 2002 opinion of the Foreign Intelligence Surveillance Court of Review which looked at the issue, looked at the case law I was just describing and said it took for granted that the President has the constitutional authority to order warrantless surveillance for intelligence purposes. And assuming that is true, Congress could not encroach upon that Presidential power. That is the same quote that was quoted earlier and it is one that deserves repeating. It is dicta. It is not a holding in that case, but it is from three Federal court of appeals judges who were fully familiar with the constitutional issues involved, and it is the only judicial statement on this issue.

There is a further authority, if I can call it that, that in my own thinking weighs heavily, and that is the position that was taken by Attorney General Edward Levi, who was, as you all know, Attorney General under President Ford. He came into office really to clean up the mess that Mr. Dean and his colleagues had left and did a magnificent job.

Ed Levi's position was that Congress could and should establish a court mechanism to allow judicial approval of intelligence surveillance, but he was always explicit. Congress could not make that mechanism exclusive. It could not take away from the President his inherent constitutional authority to act in other circumstances.

He was asked at a hearing what are the other circumstances where the President might act outside the confines of the FISA Act. He was prepared to give a letter that President Ford would act under the FISA Act under all circumstances he could then anticipate. He said I don't know, but I know the future is unpredictable. He said the foreign threats to this country in the future are unpredictable, and he repeatedly emphasized that technologies could change.

It seems to me he had it exactly right, and what happened after 9/11 was we faced a type of a threat, a serious terrorist attack in this country we had never faced before. The President, according to what he has said and according to what General Hayden has said, went to the NSA and said can you come up with a program that will be more effective in trying to get information on where and when they may attack again?

The NSA said we can; we can do something under current technologies, but we can't do it under the confines and within the current FISA process. Under those circumstances, it seems to me the President had, should have, needs to have the constitutional authority to authorize that program.

As was quoted earlier, when FISA actually passed Attorney General Griffin Bell, who was then in office, said the Act cannot take

away the President's inherent constitutional authority in this area. But, you know, if you assume all that wrong—I am wrong and Attorney General Levi was wrong and the Foreign Intelligence Surveillance Court of Review is wrong—I still cannot conceive of a basis for censure of the President under these circumstances.

There is no evidence that the President did anything but authorize in good faith a program which he believed was necessary to protect the country. There is no evidence that he did anything but rely in good faith on the legal advice he received from the Justice Department and other lawyers in the Government. Under those circumstances, to censure the President seems to me to be simply wrong and to have no justification.

I do think there is reason to think seriously about legislation in this area to establish a court process to approve this kind of program. But to talk about censuring a President for acting in good faith to authorize a program based on the good-faith legal advice he received seems to me to be irresponsible and really a disservice to the serious discussion of these kinds of issues.

[The prepared statement of Mr. Schmidt appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Mr. Schmidt.

We now come to the portion of our hearing where the Senators will question, and in accordance with our practice we will have 5-minute rounds.

The two witnesses requested by Senator Feingold, Mr. Fein and Mr. Dean, have given us the opposite ends of the poles. Mr. Fein wants sunshine and Mr. Dean wants to turn to the dark side.

Mr. DEAN. I want to report on the dark side.

Chairman SPECTER. I was looking for the comments on bad faith or good faith, and finally we heard it from you, Mr. Schmidt, that there is no evidence of bad faith. It seems to me that before a censure resolution can get anywhere, can rise to the level above being frivolous, there has to be an issue of bad faith. Senator Feingold's resolution doesn't say a word about bad faith.

Don't you think, Mr. Dean, that that is an indispensable prerequisite, a sine qua non, to censure the President? I note that your 2004 book, Worse than Watergate, called for the impeachment of President Bush. So you were pretty tough on him long before this surveillance program was noted.

But to come back to good faith and bad faith, don't you think there has to be some issue of bad faith?

Mr. DEAN. In Worse than Watergate, I didn't call for impeachment. I laid out a case that could be made for impeachment. I do make a distinction.

As far as Senator Feingold's resolution, when I read those "whereas" clauses, it seems to me that there is evidence of bad faith. First of all, there is certainly a prime facie case that—

Chairman SPECTER. Mr. Dean, do you think that Senator Feingold would shy away from those two magic words, "bad faith," when they are so much easier to define than the "whereas" clause? I recollect his 25-minute speech on the floor. I wanted to ask him about bad faith and didn't get a chance to.

Mr. DEAN. I don't recall bad faith as being a prerequisite to censure.

Chairman SPECTER. Well, it is not a matter of recollection.

Mr. DEAN. It is conduct.

Chairman SPECTER. Don't you think that it takes bad faith to censure a President?

Mr. DEAN. I think in gathering my thoughts to come back here, I thought, you know, had a censure resolution been issued about some of Nixon's conduct long before it erupted to the degree and the problem that came, it would have been a godsend.

Chairman SPECTER. Well, then the Congress was at fault in not giving him a warning signal.

Mr. DEAN. It would have helped.

Chairman SPECTER. Let me turn to you, Mr. Fein. You have testified that censure is really not different from oversight. I have to disagree with you categorically. When we do oversight and call in executive branch officials and look at what they have done and disagree and make suggestions, I have never heard in an oversight hearing somebody say you ought to be censured for what you have done. Occasionally, you hear the word "shameful."

But come to your central point where you say you shouldn't censure every legal disagreement, and you are a very good lawyer, Mr. Fein. You have testified before this Committee on a number of occasions and we don't have to engage in any extended discussion to note the powerful circuit opinions on executive authority under Article II for stealth and speed and secrecy.

When you say that President Bush kept it secret, that is not so. He told the so-called Gang of 8. We have the letter which Senator Rockefeller wrote saying he wasn't very extensively informed and didn't have a lawyer with him. I chaired the Intelligence Committee during the 104th Congress, in 1995 and 1996, so I was a member of the Gang of 8 at that time. President Clinton was in the White House and they didn't tell us very much.

I am not defending the failure to notify the intelligence committees, which is what the National Security Act of 1947 calls for. But there has been a lot of precedent for just informing the Gang of 8, and it has been a long time that Congress has sat back and not insisted that Presidents, Democrats and Republicans alike, observe the interdiction to inform the committees, but that has happened.

So before my red light goes on, Mr. Fein, I will ask you the question. Wasn't the Gang of 8 informed, so that there was not secrecy here? And don't you really have a situation where you have a deep-seated, complex legal issue which at least gives the President a basis for taking his position without calling him to task for censure?

Mr. FEIN. Let me make a couple of observations about bad faith or secrecy. One, we don't have the information, if it exists, indicating what advice President Bush received just before he commenced the warrantless surveillance program. You don't know, I don't know, and he is resisting giving that information to you that could dispel any uncertainty on such a critical matter. That still is secret.

Second, with regard to informing a handful of Members of Congress, that is not all Members of Congress. And, of course, as you pointed out, we don't want the President to do things that would risk the national security of the United States and to inform in

such detail that intelligence sources and methods could be disclosed.

But if you are going to have accountability, you have to have accountability to the Congress of the United States, not just one or two Members, and accountability that at least indicates the nature of the program in sufficient detail to enable an assessment of its legality and wisdom. If you don't know how many people are being spied on in the United States, you don't know what the results of that are. How can you make an assessment as to its reasonableness?

The purpose of informing is not just to have informing for its own sake. It is to have the operation of checks and balances at work, and it has to be done in a framework then that enables a collective judgment of Congress to be brought on the legality, the success of the program. It is still so secret, in my judgment, that it is still impossible for Congress to make that assessment at present.

Chairman SPECTER. Thank you, Mr. Fein.

Senator Leahy.

Senator LEAHY. Well, thank you. Mr. Fein, I have to agree on that. As I said in my opening statement, the only time we have actually had anybody here to testify who could answer that question was the Attorney General, and I finally lost count of the number of times he refused to answer the question in questions asked by both Republicans and Democrats.

Mr. Dean, as I understand your arguments in favor of censure, you see it not so much as a punitive sanction, but rather as a way of reaffirming the separation of powers and preserving the rule of law for the future.

Mr. DEAN. That is correct.

Senator LEAHY. And not whether the President acted with malice in authorizing a secret domestic spying program, but whether the President has to abide by the law and must come to us. In other words, if the President doesn't agree with the law, he can't just break the law. He has to come to the Congress and ask to have the law changed. Is that correct?

Mr. DEAN. That is correct. There is certainly a prime facie basis of evidence to believe that he is not complying with the law. There is a healthy debate as to whether he is complying, and it seems to me the President shouldn't want to be in that position. He ought to come to Congress and say here is what I need to make sure I am complying with the law, but he has decided to use this as another vehicle to test his power.

Senator LEAHY. Well, there seems to be an evolution of his reasoning. Each time this stuff comes out from the White House, there is somewhat of a different reasoning, the latest being that he was somehow authorized for this spying on Americans because of our resolution, which I supported, to go into Afghanistan and get Osama bin Laden—something, ironically enough, they never did.

What if we had actually declared war on Iraq or anywhere else? Would that have allowed the President to disobey the law?

Mr. DEAN. I don't believe so, per se. I don't think there is something in the Commander in Chief Clause that gives a preemptive right over existing statutory law. Obviously, we were not declared

in Korea during the *Youngstown* case, and even then the President was arguing virtually unlimited authority and the Court made it very clear he didn't have it.

Senator LEAHY. Well, let me ask Mr. Fein on this. I mean, I am just trying to think about other situations where the President violates the law. Republicans and Democrats last month raised national security concerns—whether they were good or bad is not the issue, but national security concerns about the administration's approval of a deal allowing a government-owned entity in Dubai to take over port operations in the United States.

Now, here, we had a specific, express Federal statute, the Exon-Florio provision which requires a mandatory investigation that the administration is supposed to follow. They didn't bother to carry that out; they didn't bother to follow the law. Many in Congress wanted to scuttle the deal. Again, whether it was good or bad, we had a law that was not followed and in the end the deal was scuttled. Nobody called for censure there.

Why is censure appropriate here and not there?

Mr. FEIN. Because I think the magnitude of the separation of powers issue is so much more momentous. The President's theory that he has inherent constitutional power to gather foreign intelligence in any way he wishes, irrespective of congressional statutes, means he can open our mail tomorrow if he says I am trying to gather foreign intelligence, despite the criminal prohibition. It means he can break and enter our homes, despite FISA's government of physical searches, because he says he is gathering foreign intelligence. It means he can torture detainees, irrespective of a Federal statute, if he says I am seeking to gather foreign intelligence. It has no stopping point and that is why the consequences of endorsing that theory are so much more momentous.

I would like to say another word about the authority of Congress to act in this area because we are not speaking of an effort by Congress to usurp the President's power to gather foreign intelligence. Article I, section 8, clause 18, the Necessary and Proper Clause, grants to Congress the power to regulate the powers of the United States Government, no matter whether exercised by Congress, the executive branch or the judicial branch.

The President does have inherent authority to gather foreign intelligence, but Congress may regulate that under the Necessary and Proper Clause. And all it has done in FISA is said because of the history of abuses disclosed by the Church Committee, we want a judge between the spy and the targeted American citizen. You can still engage in foreign intelligence collection.

And then if I could just add this one final point with regard to the workability of FISA, on July 31, 2002, before the Senate Intelligence Committee, the Department of Justice of President Bush said FISA is working beautifully; we need no changes with it. What has happened since July 31, 2002, that has suddenly made it unworkable? If it has happened, we haven't been informed of it.

Senator LEAHY. Mr. Chairman, might I just follow with a question to Mr. Schmidt because it relates to this?

Chairman SPECTER. Proceed, Senator Leahy.

Senator LEAHY. Thank you. Incidentally, I agree with what Mr. Fein said.

Mr. Schmidt, you said in your statement that as far as you can tell, the President, quote, "acted on the basis of credible legal advice," close quote. Who knows that? I mean, when we asked what the documents were, when we asked when this was first said, when we asked what led up to it, when we asked when it supposedly evolved, when all this happened, all that has been withheld. How in heaven's name do we know it comes from credible legal advice?

Mr. SCHMIDT. Well, we know that both the President and General Hayden have said that they relied upon the advice of not only the Justice Department, but the lawyers within the National Security Agency. General Hayden has briefed Members of Congress. I assume he has said the same thing, and if he is lying, I guess he would be committing a felony.

Senator LEAHY. I am not saying that, but we don't know what the credible legal advice was. Nobody has talked about it, nobody has shown it to us, and the one person who could tell us what it is refuses to answer the question. Do you understand my frustration?

Mr. SCHMIDT. If you are saying you want evidence that the advice that you are now hearing from the Attorney General is the same advice he gave initially—he is, what, lying now and saying something that he said he said then, but he is not saying now? Then it seems to me you are putting him in the position where he is lying to Congress. So if you are saying you want documents to confirm that the Attorney General is not lying to Congress, I haven't seen those documents, but I don't see any reason to suspect that he is lying about it.

Chairman SPECTER. Senator Hatch.

Senator HATCH. Well, as a practical matter, Presidents don't give up their private counsel advice. But as you have very effectively pointed out, the Attorney General has appeared here and given the advice that they have used. This is the most classified program in the Federal Government. I am aware of it and I have to say that I think some of the arguments are not only fallacious, they are ridiculous.

To come and try and say that the President has violated the law, come on. Presidents do have powers. There is no question Congress needs to do what it can to overview these matters, and we are doing that and we are doing it on the Intelligence Committee. I have appreciated the testimony of all of you. I don't agree with some of the things, but at least this has been a reasonable discussion.

Let me start with you, Mr. Dean. On September 14, 2001, just 3 days after the terrorist attacks on America, you published an article entitled "Examining the President's Power to Fight Terrorism." Now, in that article you argued that, quote, "The President does not need congressional authority to respond," unquote.

Mr. DEAN. Right.

Senator HATCH. You wrote that Article I, section 8, which gives Congress the power to declare war, quote, "does not put the Congress in charge of counterterrorism, which is an executive function," unquote. You also wrote, quote, "Yet, as all his predecessors realized, when it gets down to how, when and where to respond, the President can do whatever he feels necessary, whether Con-

gress agrees or disagrees. Article II, section 1, has vested him with that power."

Now, President Bush and Attorney General Gonzales have made exactly the same arguments about inherent constitutional authority. Yet, today I hear you saying that Congress can bind the President's counterterrorism efforts by statute after all. I hear you saying that the President needs congressional authority to respond after all. Now, maybe I have misconstrued what you said. I don't want to do that.

Mr. DEAN. In the September 14th piece I wrote, what I was trying to do was to pull together a broad look at the powers the President had.

Senator HATCH. Sure, but those are pretty explicit comments.

Mr. DEAN. Yes, they were.

Senator HATCH. They seem to rebut what you are saying here today.

Mr. DEAN. In fact, I cited Mr. Turner as a good source, but I also did not say the President had authority to violate any existing statute, because I don't believe he does have that—

Senator HATCH. But you don't know whether he has violated any existing statute, including FISA.

Mr. DEAN. Well, as I said earlier, I believe there is certainly prime facie evidence that that is the case.

Senator HATCH. I can tell you there is no prime facie evidence.

Mr. DEAN. Well, most Presidents who have even had a doubt have come to Congress and asked for authority. And I am telling you that I believe this is a part of a very consistent, long-term, early announced policy of this Presidency that they are seeking to build Presidential power for the sake of Presidential power.

Senator HATCH. You have no evidence of that.

Mr. DEAN. I have lots of evidence of that, Senator.

Senator HATCH. I don't think you have any.

Mr. Turner.

Mr. TURNER. In fairness to the President, what they have tried to do—

Senator HATCH. Your name has been used. That is why I am turning to you.

Mr. TURNER. They have tried to restore the balance that was understood from the days of John Jay and Thomas Jefferson and Alexander Hamilton, all of whom said that Article II, section 1, gives the President the Executive power, which includes the management of foreign affairs, subject to narrowly construed checks vested in Congress and in the Senate, that was taken away following Vietnam by things like the war powers resolution and the Hughes-Ryan amendment, and so forth. They are trying to restore the constitutional balance, for which I think the President deserves praise.

But also, in wartime, the idea that the President should sit back and say, well, I have the power to do this, it can save American lives, but I don't want to offend certain Members of Congress, so I am not going to allow the National Security Agency to listen when bin Laden calls some U.S. person who might well be a Saudi national who is totally committed to bin Laden's cause who lives in this country and he qualifies as an American under FISA—we have got considerable evidence that FISA contributed to 9/11.

We know Colleen Rowley, the FBI agent who made Time's Person of the Year in 2002 because she was angry that the FBI would not get her a FISA warrant—the FBI could not give her a FISA warrant because Moussaoui was not an agent of al Qaeda. Moussaoui was a lone wolf. In 2004, Congress amended FISA to cover the lone wolf problem.

We know that General Hayden, the head of NSA, now the deputy director of national intelligence, has said if we had had this program prior to 9/11, it was his professional judgment they could have found and identified some of the 9/11 terrorists. He didn't follow on to say that means we might have stopped the attack, but that seems implicit in it.

So a lot of harm has been done by what Congress did in the wake of Vietnam. The President is trying not to seize new power, but to take us back where this country was from 1789 to about 1975.

Senator HATCH. Mr. Chairman, is it possible that I could just ask Mr. Schmidt one more question?

Chairman SPECTER. Proceed, Senator Hatch.

Senator HATCH. I hate to impose on you, but let me just ask you this question. I have questions for the rest of you, but I have run out of time.

The Feingold resolution's conclusion, Mr. Schmidt, that the President should be punished by censure because he broke the law rests, I think, on a particular premise. The resolution states that the FISA Act trumps the President's constitutional authority to conduct his foreign intelligence surveillance program. Now, it seems to me that if this premise is even arguable, then this whole censure gamut fails.

I understand from your testimony that you reject this premise that the FISA Act trumps the President's inherent constitutional authority. Could you expand on that and explain further how this is a longstanding principle, not something the Bush administration recently discovered?

Mr. SCHMIDT. Well, that is correct, Senator. My view is that the President had the constitutional authority under Article II. The FISA Act could not take that away from him. That is not a new idea. It is what Ed Levi believed, it is what Griffin Bell believed.

Senator HATCH. And a lot of Presidents have relied on it.

Mr. SCHMIDT. It has been a consistent view, I think, of Presidents that their authority could not be constrained when it comes to the need to obtain foreign intelligence. Actually, I think we are talking about even the narrowest category of foreign intelligence. We are talking about a foreign power, a foreign terrorist group that has attacked in this country, and the question is surveillance to get information on where they are going to attack again. So I think it is really the strongest possible case for the exercise of that inherent authority, and that is a longstanding principle of the executive branch, upheld in the one judicial statement we have on the issue.

I would agree with you, though, that as I said, even if that is wrong—I may be wrong, obviously, and certain even people like Attorney General Levi or a three-judge court can be wrong. It is still an argument that serious legal scholars and serious lawyers can make, and under those circumstances to suggest that the President

should be censured because you don't agree with the legal advice he got seems to me to be out of the ball park in terms of the way we can sensibly discuss and talk about issues like this.

Senator HATCH. Well, thank you all.

Chairman SPECTER. Senator Feingold.

Senator FEINGOLD. Thank you, Mr. Chairman. First, with regard to the comment of the Senator from Texas, who basically did a hit-and-run here on our witness, Mr. Dean, of course Mr. Dean committed a crime and paid the price. But let's remember what caused that. It was involvement with a violation of the laws of this country by the President of the United States, and he was a courageous voice that revealed that.

I note the irony of Mr. Schmidt being here, third man in the Clinton Justice Department. As Senator Leahy pointed out, where is the Attorney General and Mr. Comey, who, according to reports, have indicated their discomfort with this program? Why are they not before this Committee talking plainly about their objections? Do you know what word comes to mind, Mr. Chairman? It is a word that first came into my consciousness in 1974—cover-up. It is a cover-up.

Mr. Chairman, on the issue of the constitutionality of censure, I obviously strongly disagree with Senator Hatch. Censure has historically been an option for the Senate to express its opinion of Presidential action. The Senate expresses its view through resolutions all the time and I would like to submit for the record, if I could, Mr. Chairman, an article by Professor Michael Gerhardt, whom Mr. Dean spoke about, on the constitutionality of censure published in 1999 in the University of Richmond Law Review.

Chairman SPECTER. Without objection, it will be made a part of the record.

Senator FEINGOLD. One sentence from that: "The truth is that censure, understood as a resolution critical of the President passed by one or both houses of Congress, is plainly constitutional."

Mr. Chairman, if you want to look to recent precedent, Senator Feinstein's resolution of censure in 1999 had 38 cosponsors, including five Republicans, three of whom are still members of this body. That resolution stated specifically that "The U.S. Senate does hereby censure William Jefferson Clinton." So there certainly is precedent for the idea that censure could be referred to specifically.

Now, Mr. Chairman, before I ask my first question, I want to get to this question of—you didn't help me draft this thing, but if you want the words "bad faith" in there, let's put them right in, because that is exactly what we have here.

The whole record here makes me believe, with regret, that the President has acted in bad faith both with regard to not revealing this program to the appropriate Members of Congress, the full committees that were entitled to it, but more importantly by making misleading statements throughout America suggesting that this program did not exist—I understand if he didn't talk about—and then after the fact dismissing the possibility that he may have done something wrong here, that he may have broken the law. So call it bad faith, call it aggravating factors.

Mr. Fein, for me, the law-breaking is shocking in itself, but the defiant way that the President has persisted in defending his ac-

tions with specious legal arguments and misleading statements is part of what led me to conclude that censure is a necessary step. Let me ask you about the first factor you cite that the intent was to keep this program secret from Congress and avoid political or legal accountability indefinitely.

Do you think that that factor answers the claim that the President should not be censured because he acted in good faith on the basis of legal advice from the Department of Justice?

Mr. FEIN. Yes, because that is, in fact, one of the most critical elements in disturbing checks and balances and separation of powers. You cannot have the operation go forward with someone checking a program that is unknown, and without the New York Times publication I feel confident Bush would have celebrated leaving office and having this still secret. A secret Government of that magnitude spying on Americans on American soil forever without being disclosed to anybody is frightening.

It is exactly that kind of prolonged secrecy that the Church Committee exposed as yielding 20 years of illegal mail-openings, illegal seizures of international telegrams, illegal use of the NSA for criminal justice purposes. Secrecy breeds that kind of abuse and it is not going to change post-9/11 or pre-9/11.

Senator FEINGOLD. Thank you, Mr. Fein.

Mr. Dean, one of the things that troubles me greatly and which I cite in my resolution as grounds for censure again are the misleading statements that the President made concerning wiretaps during his reelection campaign and in his campaign to reauthorize the PATRIOT Act. He repeatedly emphasized that wiretaps in this country are always approved by a judge. He knew he wasn't telling the complete story, but he continued to engage in it. That is why on July 14, 2004, he said, quote, "The Government can't move on wiretaps or roving wiretaps without getting a court order."

On April 20, 2004, he said, quote, "When we are talking about chasing down terrorists, we are talking about getting a court order before we do so," unquote. He knew when he gave those reassurances that he had authorized the NSA to bypass the very system of checks and balances that he was using as a shield against criticisms of the PATRIOT Act and his administration's performance.

Do you agree that misleading the American people in this way is worthy of condemnation?

Mr. DEAN. Is that question to me, Senator?

Senator FEINGOLD. Yes.

Mr. DEAN. It was certainly very striking. It was rather blatant, it was misleading, and in the context that it has arisen it is such an important issue. If it were unique and isolated, I might feel differently. I think it is a pattern and practice.

Senator FEINGOLD. Thank you, Mr. Dean. Thank you, Mr. Chairman.

Chairman SPECTER. Well, it is my turn again. Is Senator Graham in the back room? If so, he will come back for a second round.

Mr. Fein, you just responded to the question of Senator Feingold saying secret, without being disclosed to anyone. Why do you persist in saying that when the Gang of 8 was informed about the program?

Mr. FEIN. Because I think the informing function has to be measured against what the role of checks and balances is. The level of disclosure and the magnitude or the breadth of disclosure has to be commensurate with the ability of the other body to check and evaluate and make conclusions. I do not think that checks and balances—

Chairman SPECTER. But, Mr. Fein, you don't know the scope of the disclosure. You don't know what was told to the Gang of 8, do you?

Mr. FEIN. I have made inquiries of some Senators and have asked specifically, have you been told the number of individual Americans who have been spied upon, have you been told this is the kind of intelligence we have gathered through these programs? And there has been silence. I don't know whether you have been told that, but certainly no one else has yielded that. Perhaps Senator Hatch could explain whether he has been told the number of Americans who have been spied on and the nature of the intelligence and how effective it is.

Chairman SPECTER. Well, Mr. Fein, with all due respect, you aren't the last word in defining what has to be disclosed in order to have it not a secret. But you have it on the record; you have Senator Rockefeller's letter that he was told about the program. There have been public statements by others of the Gang of 8 that they were told about the program. Now, maybe they weren't told as much as you would like to have them told, but it seems to me that it is just wrong for you to continue to say it is secret.

Mr. FEIN. I certainly am not a Member of Congress who can be definitive. I am a citizen of the United States who cares about a republic rather than a monarchy, and I have an interest in having Congress exercise its authority to check the Executive, even if Congress does not wish to go forward on that score.

It is for that reason why, in my judgment, the kinds of limited disclosure that you have described are not sufficient for Congress to exercise the oversight and evaluation of a program whose scope and breadth and detail is not known to you and is required to be known to evaluate the Fourth Amendment's reasonableness standard.

Chairman SPECTER. Well, no one could say that I am not interested in having a check and balance and finding out what this program is, but I just disagree with you head-on when you say that it is still secret.

Professor Turner, you raised your hand, but let me ask you a question before you respond focusing on the issues that I want to bring out in this hearing, and that is you are a very strong defender, and I appreciate your fervor defending Presidential authority.

But what would be wrong with the President submitting to the FISA court the program that he has? If it is domestic spying under the FISA Act, he is obligated to make a disclosure to the FISA court on domestic surveillance, and it is in part domestic surveillance and it is in part foreign. And there are strong arguments which I have already advanced for inherent authority, but we can't really gauge whether that inherent authority is being used constitutionally because that depends upon the standard of reason-

ableness which you can gauge only if you know what the program is.

What would be wrong with the President disclosing to the FISA court his program and having them determine constitutionality?

Mr. TURNER. Well, two comments, Senator. First of all, what we know about the program—that is to say what was reported in the New York Times on December 16th of last year and what has been said by General Hayden and what has been said by the Attorney General all say that one party to every one of these conversations was a foreign national outside this country believed to be tied to al Qaeda.

Now, in this country, if we get a wiretap warrant against Al Capone and I call Al Capone to sell him something on eBay, the FBI or the police can listen to that whole conversation and use every word I say against me in court. In other words, it is the target that matters, and in these cases I gather the targets are foreigners.

But there are two problems with FISA. I have been out of the oversight business now for more than 20 years, but I am told there is some new technology that I don't understand and haven't been briefed on that makes it hard to do FISA. Some of this also has to do with that we know cell phone numbers that have been used by al Qaeda, but we don't know who is talking on that cell phone at any one time. We know e-mail accounts; we don't know who is talking on that e-mail.

There is another aspect of this that has to do with delay. Washington once wrote that if Congress—this was during the American Revolution—if Congress believes that constantly changing members of their committees can monitor the business of war which requires speed and secrecy and unity of design, they deceive themselves.

Now, in a FISA warrant, you start off on the NSA side or an FBI analyst saying, hey, I would like to listen to this communication, I would like to intercept it. It is not really wiretapping, but we call it that. He goes to a lawyer at NSA. He may bring in some other lawyers and they say, OK, put together a packet. They then go to the Office of Intelligence Policy and Review over at Justice, where there are dozens of other lawyers, and they kick it around and they say, yes, this is probably a good idea. A few days may have passed.

Then they go to the Attorney General. Well, maybe he is out of town giving a speech. He comes back, he focuses on it and he says, yes, I like it. Then they need to get the signature of a senior—either the National Security Adviser or a senior national security official. Then they go back and put together about, on the average, an inch-thick packet of information for each case, which then gets sent over to the court to get in line.

Now, the court has been working weekends, nights. The judges deserve the highest praise for their work. But a system that says there are people over there trying to kill us, but before you can listen to what they are saying to people in this country who may well be foreign nationals and may well be totally dedicated to the enemy's cause, but come under the protection of FISA—before you can listen, you have to go through this whole process. You know, it throws in that element of delay that is incompatible with protecting the lives of the American people.

Now, in 99 percent of the cases I like FISA. I think it can work. I think it does provide a useful check, but when the President decides that the security of the Nation requires immediate action—and when he is talking about intercepting foreign terrorists, the idea that Congress would censure him suggests to me that Congress does not have the safety of the American people as much in its mind as it does the next election and the possibility that they can weaken the President and further party interest.

Chairman SPECTER. Professor Turner, I am not going to ask you another question because that last answer was two-and-a-half minutes. But I am going to come back to it in another round, so bear the question in mind. The delay response you just gave doesn't deal with my question as to why not have the program submitted to FISA, but I will come back to you when I have some time.

Senator Graham, you had stepped out of the room when your turn came, so we will recognize you now.

Senator GRAHAM. Thank you very much, and I will not make that mistake again. I appreciate very much your having this hearing, Mr. Chairman. Let's get to the good faith aspect of what is going on here.

Mr. Fein, we have worked together in the past and I think you are a very talented man, and I share some of your concerns about an inherent authority argument without checks. I have sort of raised that a bit, too, but let's see if we can agree on this. Whether you agree with them or not, this crowd in the White House really believes this stuff. They believed it before September 11, 2001, that the President has robust inherent authority.

Would you give them credit for really believing what they believe?

Mr. FEIN. I am not sure I would use the word "credit." I will accept that they believe what they believe.

Senator GRAHAM. Well, that is the way they feel about you. And the one thing I have gotten from this panel—you are all fine people and I am glad none of you are making policy because I think we would be in two real big ditches here.

Mr. FEIN. But this is the one observation I would make—

Senator GRAHAM. Do you doubt that Mr. Addington, who represents the Vice President, really believes this argument?

Mr. FEIN. I don't doubt that he believes what he says.

Senator GRAHAM. Good, because they do believe it. Now, you believe something else, but to say they don't believe it is a joke. These people really do believe the President has robust authority when it comes to fighting a war.

Now, Mr. Dean, this is a little bit different than Watergate. Did you ever believe there was a legal basis for the President of the United States to break into the Democratic National Headquarters?

Mr. DEAN. No.

Senator GRAHAM. You knew you were committing a crime. That wasn't the debate, whether or not it was legal or not. You just chose to break the law.

Mr. DEAN. I couldn't read the Commander in Chief Clause the way it is being read today.

Senator GRAHAM. That is different, that is different. You read it differently, but nobody read the Constitution to say that Richard Nixon and you could break into somebody's private office and steal.

Mr. DEAN. I don't think when we talk about Watergate—

Senator GRAHAM. Isn't that different? Isn't there a big difference between knowingly breaking the law, burglarizing somebody's office, and having a real debate about where authority begins and ends?

Mr. DEAN. Nixon didn't authorize the break-in.

Senator GRAHAM. Oh, he didn't, OK. Did you authorize it?

Mr. DEAN. No, I did not.

Senator GRAHAM. Did you know about it?

Mr. DEAN. No, I did not.

Senator GRAHAM. Did he ever know about it?

Mr. DEAN. After it happened.

Senator GRAHAM. OK, so then he covered up a crime that he knew to be a crime, right?

Mr. DEAN. Senator, it might be important for you to know that—

Senator GRAHAM. Did he cover up a crime that he knew to be a crime?

Mr. DEAN. He covered it up for—

Chairman SPECTER. Senator Graham, let him answer the question.

Mr. DEAN. He covered it up for national security reasons.

Senator GRAHAM. Give me a break.

Mr. DEAN. I am serious.

Senator GRAHAM. He covered it up to save his hide.

Mr. DEAN. No, sir. You are showing you don't know that subject very well.

Senator GRAHAM. What is the national security reason to allow a President to break into a political opponent's office?

Mr. DEAN. The cover-up didn't really concern itself with—

Senator GRAHAM. What enemy are we fighting when you break into the other side's office?

Mr. DEAN. Senator, if you will let me answer, I will give you some information you might be able to use.

Senator GRAHAM. Yes, please.

Mr. DEAN. He covered it up not because of what had happened at the Watergate, where I think he would have cut the reelection Committee loose. He kept them covered up because of what had happened while they were at the White House, which was the break-in into Daniel Ellsberg's psychiatrist's office. And that, he believed, was a national security activity.

Senator GRAHAM. So he had the view that you could plot a crime in the White House and that made it national security? That is absurd. That is why he got impeached.

Mr. DEAN. That isn't what I said.

Senator GRAHAM. That is why I went to jail.

Mr. DEAN. I did not go to—well—

Senator GRAHAM. So let's get to the reality. Let's get to the—

Senator LEAHY. Mr. Chairman, please. I hate to interrupt, but let him answer the question.

Chairman SPECTER. Just a minute, Senator Leahy. I will rule on that.

Senator GRAHAM. This is my 5 minutes. I would like to use it like I see fit.

Chairman SPECTER. So far, I asked Senator Graham to desist once and after that I think Mr. Dean has been defending himself pretty well.

Senator GRAHAM. Great, and my point is that this is—

Chairman SPECTER. That is with respect to answering the question, not necessarily as to the substance.

Senator GRAHAM. Thank you.

Chairman SPECTER. Go ahead, Senator Graham.

Senator GRAHAM. My point is this is apples and oranges. Anybody who believes that Richard Nixon was relying on some inherent authority argument to allow himself to break into a political opponent is recreating history. This debate is about when does the power of the President begin and end in a time of war. This is an honest, sincere debate.

We have got a Supreme Court case that says the force resolution—the *Hamdi* case—allows the President to put someone in jail as an enemy combatant in spite of the fact that Section 4001 of the U.S. Code—18 U.S.C. 4001 says no citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress. Justice O'Connor said the force resolution authorizing force in Afghanistan met that requirement, and she also said inherent to fighting a war is putting people in prison who are part of the enemy.

The problem here is that we have got a preexisting statute, Mr. Fein, and you are right. If you take this argument too far, what Mr. Addington is saying makes me wonder if you can have the UCMJ. Could the Congress ever do anything in a time of war to regulate the land and naval forces? The answer, to me, is, yes, the Congress can. Yes, the President can go after the enemy. The middle ground, to me, is the Congress and the President working together. They did act in good faith. I just disagree with them.

Chairman SPECTER. Thank you, Senator Graham.

Senator Leahy.

Senator LEAHY. Can he respond to that?

Chairman SPECTER. Do you care to respond?

Mr. DEAN. I would only respond that the very opening premise of the Senator's assumption that Nixon had somehow ordered a break-in, based on anything in the historical record, based on anything in my knowledge, is just dead wrong.

Senator GRAHAM. He condoned it.

Mr. DEAN. He did not know about it, Senator. It is hard to condone something you don't know about.

Senator GRAHAM. Once you know about it, he condoned it.

Mr. DEAN. Then as I told you, he had a totally different agenda for covering it up.

Chairman SPECTER. Senator Leahy.

Senator LEAHY. Thank you. I would note that Professor Turner says, and accurately so, there have been many, many changes in technology. I don't think any of us are Luddites. We know that, and this White House and previous White Houses have come to this Congress and this Committee asking for changes in the FISA law

to keep up with those differences in equipment, and so forth, and we have given it to them. They didn't ask for anything here.

You seem to believe that we are more concerned about the next election. I have got 5 years left on my term. I am not concerned about the next election. I am concerned about the Constitution being upheld and I am concerned about establishing the principle and reestablishing the principle and reaffirming the principle that nobody is above the law, not even this President.

Now, Mr. Fein, there has been a lot of discussion here about the President's inherent authority. Could you please explain the difference between inherent authority and plenary authority?

Mr. FEIN. Yes. Inherent authority means that a power can be exercised without it being conferred by a coordinate branch. And I think this is where Senator Specter is correct that the President has acknowledged that if Congress is silent, the President can gather foreign intelligence. That is part of the function of operating in the foreign affairs realm.

But Article I also endows Congress with authority to regulate inherent powers. It endows Congress with authority regulate every power of the U.S. Government, exercised by whatever agency is involved. And with regard to the collection of foreign intelligence, after exhaustive hearings showing a tendency to abuse, Congress decided not to eliminate the President's inherent power to gather foreign intelligence, but to regulate it, and regulate it in a very narrow fashion.

As I think Mr. Casey has pointed out, most foreign intelligence is gathered outside the scope of the Fourth Amendment or FISA because the target is an al Qaeda operative abroad. So this hypothetical that if you are targeting al Qaeda abroad and they called into the United States you would have to hang up the phone if FISA applied is simply wrong-headed. You have never had to have a warrant in those circumstances.

But Congress decided to regulate a narrow portion of the inherent authority to gather foreign intelligence, namely when the target is an American citizen standing on American soil. It doesn't say the President can't gather foreign intelligence in those circumstances. It says we want an independent, neutral magistrate, as Senator Specter has said is important to safeguard the Fourth Amendment, to have some kind of check on the reasonableness of the executive branch's interception, search or seizure. And going through that warrant requirement is simply a regulation, not an elimination, of the President's gathering power in foreign intelligence realms.

And with regard to speed and workability, all I can say with due respect to Mr. Turner is it was the Department of Justice itself, on July 31 of 2002, who said that FISA works beautifully; it is not a problem with going too slow. And I would trust their judgment, since they are operating on a day-to-day basis. And this was a statement made months and months after the warrantless surveillance program had begun.

Senator LEAHY. Thank you. You anticipated my next comment. Of course, my concern and the concern of many of us here is we still don't know, and with all due respect to the Gang of 8, they don't know whether Americans' e-mails are being opened, whether

mail itself is being opened. We have asked that question and we don't get an answer. It has been asked, certainly, in open session. I will let you draw your own conclusion whether it was asked in closed session, but I can tell you we don't have the answer.

Mr. Dean, you said something, and I was reading late last night—actually, I was reading two things. I was reading the statements of all of you that we had and I was also reading a biography of a former Senator from Vermont, Senator Flanders. You said at the end of your written statement that today it is very obvious that history is repeating itself. What did you mean by that?

Mr. DEAN. I mean by that that we have entered a period where a President is pushing the envelope. He actually defying the Congress. Nixon writes in his memoir how he has thrown the gauntlet down after he has been reelected. I can recall well from my visits with people like Senator Sam Ervin, who were quite upset with his reorganization of the executive branch contrary to the desires of the Congress, he was testing, if you will, where he could take his policies and authorities. He found, however, that with a divided Government it was a little rougher road to hoe. The reason history is repeating itself is because there is no check, as there has been in the past.

Senator LEAHY. Thank you very much. Mr. Chairman, thank you very much. As I explained to you earlier, at this point I am going to have to leave for other matters, but thank you.

Chairman SPECTER. Thank you, Senator Leahy.

Senator HATCH.

Senator HATCH. Well, let me just say this, that Presidents may push the envelope because they believe they have certain powers to protect the American people. And in this particular case, wouldn't he be tremendously criticized if he didn't do everything he could to protect the American people?

I don't see any evidence at all that the President is defying Congress. My gosh, the President not only required certain procedural mechanisms and opinions of the Justice Department and others, but the President actually had them inform the FISA two chief judges, plus we have for years around here operating in intelligence ways by having the eight leaders in Congress in certain areas be the people who are informed. One reason for that is so that these very, very important, top secret matters do not get out and that they don't, by getting out, undermine our country.

Also, the quote that FISA works beautifully that was made predating the date that this program was started—all I can say is that it would be apparent to anybody that if we want a FISA approach, FISA would have to be amended. And the distinguished Chairman has been working very hard, and I think in an intelligent way to try and bring Congress and the executive together with an additional bit of legislation.

Some of the statements here have been outrageous, but let me just say this. Mr. Casey, I didn't get a chance to ask you a question. Do you agree with Mr. Dean's assertion in a September 14, 2001, article that counterterrorism is an executive function which the President does not need Congress to pursue? And do you agree with Mr. Dean's assertion in his September 14, 2001, article that

Article II, section 1, vests the President with power to respond to these terrorist attacks, whether or not Congress agrees with him?

Mr. CASEY. Yes, Senator, I do. The President is vested by the Constitution with the whole executive authority of the United States and is Commander in Chief of the Armed Forces. He is entitled to deploy forces, repel attacks, and even to make attacks to defend the national interests of the United States.

Senator HATCH. Well, the Feingold resolution makes certain statements about the President's foreign intelligence surveillance program as grounds for the resolution's conclusion that the President broke the law and therefore should be censured. In my opening statement, I said that many of these statements in the resolution are either highly debatable and some of them are absolutely false.

I would like you to specifically address the following statement, in particular, quote, "Whereas the President's inherent constitutional authority does not give him the power to violate the explicit statutory prohibition on warrantless wiretaps in the Federal Intelligence Surveillance Act of 1978," unquote.

Mr. CASEY. Well, Senator, I disagree with that. That gets us, of course, to the fundamental constitutional question that we so often face. At what point does the President's exercise of authority run up against the Congress's exercise of its authority? These things are often worked out in a political way. Many times, they are resolved by the courts.

I don't think either side here, if we were litigating this, has a slam-dunk. I think the President has very much the better of the argument, but I don't think the other side's argument is absurd.

Senator HATCH. Mr. Turner, in the few minutes that I have, I expressed concern in my opening statement and in my statement to Mr. Casey that various statements in this censure resolution are either highly debatable or simply false. In your submitted testimony, you examined some of these statements. I think this is absolutely necessary, since these statements purport to be the premises for the conclusion that the President should be punished by censure for how he has conducted the war on terror. That is the whole point of this resolution.

Could you please discuss your reaction to the statement that no Federal court has evaluated whether the President has inherent authority to authorize wiretaps without complying with the Foreign Intelligence Surveillance Act? What have the courts ruled in this area? What has the very court established by FISA ruled about the President's inherent constitutional authority in this area?

Mr. TURNER. This is the key and I mentioned it earlier. In 1978, in addition to creating the Foreign Intelligence Surveillance Court, Congress created the Foreign Intelligence Surveillance Court of Review that has three court of appeals judges who are appointed by the Chief Justice of the United States. And in their only decision in 2002, they noted that every Federal court that has considered this issue has held that the President has independent constitutional authority to engage in national security foreign intelligence wiretaps. And then the court went on to say we assume that is true, and if it is true, FISA could not take that power away, which

is exactly the position that Griffin Bell, another former court of appeals judge, took during the Clinton administration.

There are two themes I am hearing here today. One is that secrecy is evidence of duplicity, and the second one is that there can be no unchecked Executive powers. On the first one, on June 6, 1944, the United States invaded Europe with our British allies on D-Day, and to conceal that operation from the American people the President and our military commanders put Lieutenant General George Patton in Dover, England, with a totally fictitious army, complete with inflatable tanks, to deceive the American people and the press and to keep them from knowing.

Now, obviously, it had something to do with deceiving the German high command so more Americans would survive the attack at Omaha Beach and we might win the war. But the same logic that says the President did not announce this highly secret operation to the public, to the Congress, you know, seems to suggest that in wartime when you keep secrets, you know you are doing something evil.

But more importantly, I just leave you—the most important Supreme Court case of all time was probably *Marbury* v. *Madison*. Just a brief quote: "By the Constitution of the United States, the President is invested with certain important political powers," and one of those, I would argue—the core of that is controlling foreign intelligence—quote, "in the exercise of which he is to use his own discretion and is accountable"—we keep hearing the word he has to be accountable—"and is accountable only to his country and his political character"—that is if he runs for reelection—"and to his own conscience."

And Marshall went on to say these powers, quote, "being entrusted to the Executive, the decision of the Executive is conclusive;" that is to say Congress cannot check this power, nor can the courts. And the reason for that is because of the need for speed and dispatch and secrecy and unity of design. And that is why John Jay explained when the Constitution was being ratified that we have given the power of intelligence, you know, the protecting sources and methods—the President will be, quote, "able to manage the business of intelligence as prudence might suggest." That is not ambiguous language. That was the original plan that comes from Article II, section 1, and when Congress usurps that power, Congress becomes the law-breaker.

We heard Senator Leahy say nobody is above the law. Well, Congress is not above the law. We have a hierarchy. The Constitution comes first, and Congress could no more take the President's intelligence power than it could pass a law telling the Supreme Court it must overrule *Roe* v. *Wade*. Even if it made funding contingent and said if the Court doesn't strike *Roe* v. *Wade* or reverse it, no money could be made available, that would still be a breach of trust, a breach of duty and a violation of the Constitution.

Senator HATCH. Mr. Chairman, I just want to compliment you for having this hearing, and Senator Feingold, whom I admire as a friend, but whom I violently disagree with on this issue, for always being as courteous and decent as he is. And I want to thank each of you. This has been an interesting hearing. It has been a worthwhile hearing.

Mr. Chairman, I think you deserve a great deal of credit for doing this, and I also want to say the Chairman deserves a great deal of credit for how hard he is working to try and bring Congress and the executive together in a way that will resolve these difficulties, because the current FISA Act, I can tell you, doesn't resolve them, and that is the problem.

Chairman SPECTER. Thank you very much, Senator Hatch.

Before turning to Senator Feingold for the next round, let me ask you, Professor Turner, on the heels of your declaration that Congress has violated the law when you cite those legal issues that Congress has disagreed with, do you think Congress ought to be censured for violating the law as you articulate it?

Mr. TURNER. Well, if you are going to—

Chairman SPECTER. I want a yes or no answer.

Mr. TURNER. Gee, that is hard. I stopped beating my wife.

Chairman SPECTER. Well, then I withdraw the question.

Mr. TURNER. I would say yes, yes, but not this Congress, the Congress that passed FISA in 1978.

Chairman SPECTER. Senator Feingold.

Senator FEINGOLD. Thank you, Mr. Chairman. I want to thank Senator Hatch. Even when he violently disagrees, he is calm and I give him credit.

I am very pleased that Mr. Dean finally had the chance to put on the record the history that he knows so well of what was going on with Watergate and the White House then and the fact that it did involve assertions of national security power.

I wish Senator Graham were still here, not only because I have a lot of admiration for him, but I would like him to hear my feeling that if, in fact, this is an apples-and-oranges situation, which I think it is not, certainly the greater danger, the greater threat to our republic is with what is going on here.

I mean, put this into context of the assertions of Executive power with regard to torture, the assertions of Executive power with regard to preemptive war, and put this together with it and what we have here, I think, is one of the greatest attempts to dismantle our system of Government that we have seen in the history of our country. That is exactly what is at stake here. Otherwise, I wouldn't be talking about censure.

The same thing goes for Senator Graham's comments that we are having an honest and sincere debate about this. Again, I wish that had been true, but that is not the way the White House has conducted this. In fact, this assertion that was made that somehow the authorization of military force in Afghanistan was not a sincere argument—I don't believe they believe it, not for 1 minute. And it was laughed out of this room, including by Senator Graham, because it is a bogus argument.

That goes, Mr. Chairman, to the question of whether censure is appropriate. It has to do with whether or not, when this was revealed, there was a sincere attempt to come together by the President or whether there was conduct that was frankly, in my mind, inappropriate and disrespectful of the role of Congress and our system of Government.

Mr. Fein, Mr. Casey's testimony includes the following statement: "Few of the President's critics have had the temerity to claim

that he was required to obtain the FISA court's permission to intercept and monitor al Qaeda communications outside of the United States," unquote. Perhaps the reason they haven't had the temerity to make that claim is because anyone familiar with FISA knows that the President doesn't need to get a FISA warrant to conduct surveillance of terrorists overseas, foreign intelligence. He does need a warrant when he is targeting an American on American soil, which we believe is what the President's program does.

Why do you think supporters of the program persist almost everyday in suggesting to the public, which does not understand the law as well as some do here, that the administration had to violate FISA in order to do overseas surveillance?

Mr. FEIN. I think they are trying to frighten the public into thinking that in the absence of this evasion of the Foreign Intelligence Surveillance Act, we couldn't spy on al Qaeda abroad and intercept their communications. This is the signature hypothetical. If al Qaeda is calling into the United States, you expect us to stop listening if an American hangs up. That is insinuating that FISA would require that. The fact is it has never required it, it shouldn't require it, and it never will require it. The Fourth Amendment does not apply outside the United States.

Senator FEINGOLD. Precisely. This intentional distortion of what the law really is with regard to foreign intelligence is part of the reason why something like censure is necessary because there is a concerted effort to convince the American people that some of us here don't believe that terrorists should be wiretapped. Every one of us does believe that. That is part of the misconduct that I see occurring here.

Mr. Dean, you make an interesting point about the need for an institutional rather than a partisan response to the President's actions, and I really do agree with you. I, of course, have been not surprised, but a little disappointed that my proposal has been characterized as partisan. My colleagues know on this Committee I am one of the least partisan Members of the Congress. Sometimes, I drive the Democrats crazy.

Can you talk about the Watergate era and the importance of Members of Congress putting the good of the country before their partisan concerns in reacting to President Nixon's wrongdoing?

Mr. DEAN. Indeed. In fact, one of my points and one of my concerns and one of the reasons I traveled this distance to come and visit with you all and the Chairman is let's say the Chairman's bill does pass. Let's say it passes the House as well. What concerns me will be the pattern that seems to be the prologue that if that law should be sent to the White House, while the signing ceremony is going on Dick Cheney is going to be drafting a signing statement that will indeed gut the law.

This is a new development. We saw it with the torture amendments. We have seen it with other bills where the President says, yes, you can pass it, I haven't exercised my veto because indeed I don't have to, I am just going to ignore this law. That is not the sort of thing you can do with a censure.

Senator FEINGOLD. Mr. Chairman, I will just ask one more question, if I could.

Chairman SPECTER. Go ahead.

Senator FEINGOLD. I want to read an excerpt for Mr. Schmidt from the now infamous Bybee torture memo. That is the 2002 Office of Legal Counsel memo that asserted such broad and extreme Executive power that once it was leaked, even the administration was basically forced to withdraw it. The memo says, quote, "In light of the President's complete authority over the conduct of war, without a clear statement otherwise we will not read a criminal statute as infringing on the President's ultimate authority in these areas," unquote.

Now, how is that legal argument which caused such outrage and led the Senate to vote 90 to 9 to prohibit our Government from engaging in torture any different than what the President is arguing now with regard to this NSA surveillance program?

Mr. SCHMIDT. It is totally different. The argument that was made on torture, I thought, was a terrible argument. I thought so at the time. I think most lawyers thought so. I think part of the problem the administration has now, frankly, is that they made some terrible arguments in the past. That doesn't mean they don't have a good argument now.

The argument over electronic surveillance is a very narrow argument. It comes down to the President's authority to conduct surveillance on a foreign power which has attacked this country, is threatening to attack again, and comes down to the circumstances under which that surveillance can take place. It relies on established case law. It has nothing to do with the prior effort to defend torture under circumstances, or even redefine torture down somehow so it wouldn't be real torture under circumstances where it was illegal.

Senator FEINGOLD. If I could, Mr. Chairman, Mr. Fein?

Mr. FEIN. I disagree. I think this is not a narrow argument or theory. Basically, the syllogism goes as follows: The President has inherent constitutional authority uncontrollable by Congress to gather foreign intelligence. One way to gather that is through electronic surveillance. Another way to gather that is through breaking and entering homes. Another way to gather that is through opening people's mail. Another way to gather that is through torture.

The theory that the President has advanced on electronic surveillance applies in spades to every one of those alternate methods. And when the President and his representatives have been asked, don't you agree with that, they have not said no; they have simply said, well, we haven't gotten that far yet. And they could get that far tomorrow.

Senator FEINGOLD. Thank you, Mr. Chairman.

Chairman SPECTER. Senator Graham.

Senator GRAHAM. Thank you, Mr. Chairman. I will make a quick observation of what is my opinion about the whole issue. I think to say that there is a political or moral equivalent from a President breaking into one's political opponent to find out what their political opponent may be up to or lying under oath in a private lawsuit—to say that that is a political or moral equivalent to this President's decision to surveil the enemy, I think, is absurd.

This is an honest debate where legitimate positions have been staked out about the role of a President in a time of war. I don't think there has ever been an honest debate in this country that the

President could lie under oath in a private lawsuit to help himself. I don't think there has ever been an honest debate in this country that the President could authorize or condone, once he has found out about it, the breaking-in of one's political opponent for national security reasons. Now, let's have this honest debate.

Mr. Turner, you seem to be advocating a position that to me goes too far. The inherent authority of the President, in my opinion, does have checks and balances, like Mr. Fein suggests. Let me ask you this question. Is there room for Congress to pass the Uniform Code of Military Justice in a time of war?

Mr. TURNER. That is a wonderful question, Senator, because it really gets—there has been a lot of rhetoric about the President—

Senator GRAHAM. Well, could you give me a wonderfully short answer?

Mr. TURNER. It really is a key point about the President having unchecked power, but it is checked in certain areas. For example, in Article I, section 8, Congress has the power to define and punish offenses against the law of nations. That includes torture. It has the power to—the UCMJ is clearly authorized by Article I, section 8. There is no question about it.

Senator GRAHAM. Well, do you know the Attorney General would not concede that?

Mr. TURNER. Well, I think that he is mistaken.

Senator GRAHAM. And that goes to this whole debate. I asked the Attorney General of the United States, does the Congress have the legal authority under Article I powers, which I think is to regulate the land and naval forces—if you can't regulate the discipline of your troops, what power do you have? So I disagree with the Attorney General. I believe, as you do, that the Uniform Code of Military Justice coexists with the inherent authority of the President and that we have the power to pass that statute and it is not an infringement of the President's power.

Mr. Fein—

Mr. FEIN. Well, I certainly agree with your observation.

Senator GRAHAM. No. I am going to ask you a question. I know you agree. Could the Congress require by statute that the President send over every target list before a military action is taken?

Mr. FEIN. No. I think that gets into specific tactics. I don't think that the Congress could tell the President to launch a rocket from one city to another.

Senator GRAHAM. Could the Congress set troop strengths in terms of what is necessary to fight a war?

Mr. FEIN. Yes, and I think the Congress did that in connection with the Vietnam War.

Senator GRAHAM. OK. That, to me, illustrates this debate. There is a point in time where you would agree that the Congress steps too far, and approving targets interferes with the ability of the Commander in Chief to fight the war. Setting troop levels kind of goes to how much money we want to spend on a war and how long we want to be there.

Now, let's get to the FISA situation. Do you believe that the Supreme Court got it right when they said that the force resolution authorizing force in Afghanistan is authority to the President to detain someone as an enemy combatant?

Mr. FEIN. Yes, and I think the distinction with FISA is very clear.

Senator GRAHAM. OK. Now, I understand, but tell me how you get around this. 18 U.S.C. 4001 is a preexisting statute before the war. It says no citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress. That, to me, is similar to FISA in the area of detention.

The Supreme Court said that the inherent authority of the President to detain a prisoner during war is really unquestioned. And if you have got any questions about it, the Congress gave him this authority when they said use all force necessary. So how were they able to get around 18 U.S.C. 4001?

Mr. FEIN. Well, 4001, No. 1, does not specifically address what is to happen during wartime. FISA does. That is one distinction.

Senator GRAHAM. Would you agree with me that there is case law out there questioning whether or not FISA would change if there was a war?

Mr. FEIN. FISA addresses what is supposed to happen during war.

Senator GRAHAM. Do you agree with me there is a court of appeals decision saying the question about how FISA applies in a declaration of war environment is different than 1978?

Mr. FEIN. I can't conceive how that argument can be made because there is explicit language in FISA that says when—

Senator GRAHAM. I am not asking you if you could conceive of it. Didn't the court raise that in their dicta in this opinion—

Mr. FEIN. *Hamdi*?

Senator GRAHAM [continuing]. That we are not addressing the issue of the inherent authority of the President to surveil the enemy in a time of war?

Mr. FEIN. I am a not sure which opinion—is this the *Hamdi* v. *Rumsfeld* case you are referring to?

Senator GRAHAM. No. I am talking about the FISA Court of Review.

Mr. FEIN. The *In re Sealed* case?

Senator GRAHAM. Yes.

Mr. FEIN. That was dicta. It wasn't seeking—

Senator GRAHAM. But it was a legal thought thrown out suggesting—and I know my time is over—that we haven't gotten to that question yet and it may have a different answer because FISA was passed in peacetime. Now, we are in war and the court is opining through dicta that that may be different. Do you just concede to me they are doing that?

Mr. FEIN. They are suggesting that, but I would suggest this, Mr. Senator. At the time FISA was enacted, we were in a cold war where we could be destroyed instantly with Soviet missiles if we didn't gather intelligence in advance—a danger far more momentous to the existence of the country than exists at present.

Senator GRAHAM. I would end it with this. I understand, and really, actually, I share many of your concerns. But the whole idea that this is not an area where there is unsettled law, whether there is a legitimate debate—I come out where Mr. Schmidt said; I think this is a genuine, very narrow, focused question. I think the admin-

istration has taken legal positions in the past that have gone too far.

Chairman SPECTER. Senator Graham, may we continue this in the next round?

Senator GRAHAM. Yes, sir. Thank you.

Chairman SPECTER. We are going to have one more round. It has been a long hearing. We appreciate the patience and fortitude of the witnesses and, as I say, one more round and then we will bring the hearing to a close. We are now past the two-and-a-half-hour mark.

Mr. Schmidt, I have legislation pending which would give to the FISA court jurisdiction to pass on the constitutionality of the President's program, and it is structured because of the concerns about Congress leaking, just like the White House leaks, but the FISA court doesn't leak. Courts, I think it is safe to say, don't leak as a generalization. They have the expertise and experience to handle it.

Do you think that legislation ought to be enacted?

Mr. SCHMIDT. Yes, I do. I think it would be a good thing for the country. I think it would be a good thing for the President, although I don't gather the President has yet come around to that point of view. Had that procedure been in place, it seems to me the President would have submitted this program to the court. Based on everything we know, everybody who has been fully briefed on it, the court would have said that is reasonable and we wouldn't be having this hearing.

Chairman SPECTER. Mr. Schmidt, the administration hasn't said they don't like it. They just haven't said.

Mr. SCHMIDT. Well, good.

Chairman SPECTER. Mr. Casey, what do you think about the proposed legislation?

Mr. CASEY. Well, Senator, I think it certainly has merit. I have looked at it. I think we all need to keep in mind that there have been a lot of constitutional issues through here in the last 30 years and I don't remember FISA figuring in any of them.

The executive branch has made clear it believes—and I think it is right—it continues to have inherent power. But it has used FISA. It used FISA right up until the point where it concluded that FISA no longer worked in a particular situation. To the extent, obviously, that Congress can now make it work, there is no reason to believe the executive branch won't go back to using FISA.

Chairman SPECTER. Mr. Schmidt, there has been other legislation introduced which would leave the administration free to conduct electronic surveillance without judicial approval for 45 days and, at the end of the 45 days, if there is sufficient evidence for probable cause, to go to the FISA court; if not, to go to the subcommittee on the Intelligence Committee.

Do you think that is adequate to provide judicial review for executive authority on surveillance, search and seizure?

Mr. SCHMIDT. No, I don't. I think I get a lot more comfort having a court make an up-front decision that a program is constitutional. And it seems to me, as I say, it is in everyone's interest, including the President and others in the executive branch, to get that determination made.

Chairman SPECTER. Thank you, Mr. Schmidt.

Mr. Casey, what do you think about legislation which would leave the surveillance to roam at large for 45 days and 45 days later, if there is insufficient evidence for securing a warrant, you go to the Subcommittee of Intelligence?

Mr. CASEY. Well, Senator, that also would be another way to handle it. I mean, obviously, that doesn't—

Chairman SPECTER. Do you think it would be adequate?

Mr. CASEY. I think it would be adequate to provide a check on the President to avoid potential abuses. The one thing it probably wouldn't give you—

Chairman SPECTER. Would it be sufficient under our tradition to have judicial review before you have a warrant where the legislation allows the administration to side-step the FISA court and go to the Intelligence Committee? We don't know under the legislation what the Intelligence Committee is supposed to do. We know the Intelligence Committee is not a court.

Mr. CASEY. Sure. Well, I don't think we need to get the courts involved in every one of these decisions. If we do, though, we get a real advantage, and that is if you get an order from the FISA court, the evidence is admissible in a later criminal trial and that is real value. And so while I don't think that the President needs to get an order in every case and I don't think Congress should try to force him to do that, there is value in it.

Chairman SPECTER. Professor Turner, let me put those two cases to you, if you can give me a brief answer. Do you think the legislation taking the administration program to the FISA court would be a good idea?

Mr. TURNER. I think it is preferable to go to the FISA court than it is to go to the congressional committee. I think your legislation is quite good in many respects. The only thing I would add would be a recognition that the President does have some inherent constitutional power, and this is all the courts have said. That was Griffin Bell's comment. There is nothing in this bill that recognizes that.

Chairman SPECTER. Let me move on to one more question before my time expires. In a key "whereas" clause in Senator Feingold's resolution, it says, quote, "Whereas the President's inherent constitutional authority does not give him the power to violate the explicit statutory prohibition on warrantless surveillance in the Foreign Intelligence Surveillance Act of 1978." Now, you have *In re Sealed* and you have *Truong* saying that the Constitution obviously trumps a statute.

Do you think, Mr. Fein, that there are some circumstances where, depending on what the program is, the program would be within the President's inherent constitutional authority, which would trump the FISA statute?

Mr. FEIN. There is none that I can imagine. I think the President in times of war is given the 15-day window in which he can do what he thinks is necessary to save the Nation from exceptional danger. When Congress contemplated the wartime exigencies, initially they were giving him a 1-year period. They thought 15 days was sufficient to come to Congress.

Congress certainly would be receptive to extending that period, if necessary. I think Congress showed in the aftermath of 9/11 they would do that, so that the kind of special emergency where Congress would be rigid against the President simply is unlikely to ever happen, although it is possible.

Chairman SPECTER. Senator Feingold.

Senator FEINGOLD. Thank you, Mr. Chairman, for your generosity in terms of the rounds, as well.

First, on the point on *Truong*, of course, that case was based on facts that preceded the passage of the FISA law. I would like that on the record. Let me just point out that since we don't have the contemporaneous Bybee memo, Mr. Fein, on this topic, we don't know what the legal rationale for this program was when it was authorized originally. I think it is possible, if not likely, that the exact same argument was made in that memo that was made in the Bybee torture memo.

Would you like to comment on that?

Mr. FEIN. Yes. The Attorney General has stated that the administration's reasoning with regard to the authority for the warrantless surveillance program has not been static. It has been dynamic, something like a living Constitution, which the administration has not applauded elsewhere.

That assertion suggests that what was stated initially is not what is being stated now. We don't know what was stated initially because as the Chairman has pointed out, there has been a resistance through the invocation of executive privilege even to talk; that is to say former Attorney General John Ashcroft, who was there at the time the program began. That leads to suspicion that this was something akin to the Bybee memo.

Senator FEINGOLD. Not in the spirit of a living Constitution, but in the category of shifting justifications, I agree entirely with your conclusion that the argument for the legality of this program based on the authorization for use of military force is preposterous. I don't know if the Chairman would use the same word, but he certainly agrees that it is not a basis for this program.

Yet, many of the administration's defenders persist in making this argument, including two of our witnesses here today, Mr. Casey and Professor Turner. The administration has refused to provide the contemporaneous legal memo, so I have no way of knowing. But I wonder whether this argument was even made at the time the program was first authorized.

Can you talk for a minute about the significance of whether there is a statutory basis for this program, as opposed to relying solely on the notion of inherent authority under Article II?

Mr. FEIN. Well, I think the reason why you would rely upon the statutory basis is a belief that your constitutional argument is very, very fragile. You ordinarily make your strongest argument first and secondary arguments follow. The administration has not made a primary argument that the President's inherent constitutional power trumps and holds FISA unconstitutional. It is very striking.

Some others in this Committee have made that argument, but the administration has not, and yet it is the executive branch. That

is why I think they have reverted to this statutory because they fear they would lose clearly the Article II claim.

One of the things that is somewhat glaring with regard to Senator Specter's proposal is that everything that he is asking be done—judicial review of the legality of the warrantless surveillance program—could be done by the administration right now. They just need to go to the FISA court and say we are asking for a warrant and we are relying upon information we gathered under the warrantless surveillance program. That would then raise the question whether it could be admitted in seeking that kind of warrant. But the administration has evaded judicial review of its program, suggesting they are not confident of their theory.

Senator FEINGOLD. Mr. Fein's testimony here is critical to why censure is appropriate. This is exactly the pattern: first, a very brief effort to try to justify this under FISA, which nobody took seriously, then the resort to this idea, if you follow the press statements, that somehow this was authorized by the Afghanistan resolution. And then only when that failed were these rather extreme assertions of Executive power used. That, to me, suggests something inappropriate with regard to conduct concerning the role of Congress and the Executive.

Mr. Dean, this morning a blogger named Glen Greenwald wrote about a 1969 article from Time magazine that quotes then-Attorney General John Mitchell giving reassurances about new surveillance powers. Here is what Mitchell said: "Any citizen of the United States who is not involved in some illegal activity has nothing to fear whatsoever." Now, as Greenwald points out, those statements are remarkably similar to what the President and the Attorney General have said about the NSA program.

People who actually don't know anything about the program other than what has been reported publicly have repeated those assurances. I have heard it from some people back home: this program is very narrow; it only covers people who they have reason to believe are part of al Qaeda, et cetera.

I have no reason to believe that the administration is not telling the truth in this case, but certainly our history has taught us, as Ronald Reagan famously said, trust, but verify. That is why, after the abuses of the Nixon era, Congress passed FISA so that a secret but independent court could evaluate Government wiretapping requests and make sure that these kinds of assurances are actually true.

Would you say a bit, finally, to comment on the parallels here? Do you agree that testing these kinds of public assurances are exactly why we have the FISA law and why the administration must comply?

Mr. DEAN. I believe the Attorney General, John Mitchell, made that statement shortly before the *Keith* case argument, in which the Justice Department relied on King George III, in which the court was very prompt to remind the Justice Department that one of the things we fought for in the Revolution was against warrantless surveillance. That message got through and they pulled back for a while.

Senator FEINGOLD. Thank you, Mr. Chairman.

Chairman SPECTER. Senator Graham.

Senator GRAHAM. Thank you, Mr. Chairman. We will talk about the DeWine-Graham bill in a moment and get some views on that because I want to explain it in terms of its entirety. We are debating about a solution between Senator Specter's approach and our approach, and that is a healthy debate to have because I think we will be better off if we have constitutional checks and balances when it comes to administering this program.

But let's get back to the central point. I personally believe if you went the censure route, you would kill this program. Not only would you kill this program, which would hurt our National security interest, you would do a lot of damage to future Presidents because they could not go down a road of honest debate without facing extreme political consequences. As I said, the two other cases dealing with breaking into one's political opponent and clearly lying under oath in a civil matter are not remotely similar to what we are talking about.

Now, Mr. Fein, would you agree that the Supreme Court has used the force resolution passed to invade Afghanistan to justify the detaining of enemy combatants by the President?

Mr. FEIN. Yes. They did that in the *Hamdi* case.

Senator GRAHAM. The point I am trying to make is that it is clear that the force resolution was seen by the Supreme Court to be authorizing certain actions of the President. And I agree with the Chairman here that if you had asked me the day I voted in the House, did I intend for FISA to be repealed, I would have said no. But if you had asked me the day I voted in the House, did I intend for the President to be able to detain an enemy combatant or enemy prisoner, I would have said yes.

If you had asked me the day I voted in the House, did I intend for the President to be able to surveil the enemy, I would have said yes. If you had asked me the day I voted in the House, did I mean for the President to be able to follow an American around, reading everything they write, listening to everything they say, without court supervision, believing they are cooperating with al Qaeda and no warrant is required, I would have said no. If you had asked me, did I want to impede the ability to surveil the enemy by having a bureaucratic nightmare called FISA, I would have said no.

So here is what I am trying to say: I don't believe you need a warrant to follow the enemy in a time of war. To me, that is inherent to fighting a war. But if the American Government believes that any Joe Doe out there is aiding and collaborating with the enemy, I think it is incumbent upon us to have that checked out by a court in a reasonable fashion.

So my legislation says you don't need a warrant when you are surveiling the enemy, but when a contact with an American citizen has been made, that would require a FISA warrant. You have to go get that FISA warrant. The problem here is that we don't want to impede the ability to surveil the enemy, and I think an advisory opinion of the court alone is not a substitute.

Congress needs to be involved here. Congress needs to set out in some reasonable fashion when you cross that line, and what we are proposing is that you have a statute that will allow the President to surveil the enemy without a warrant. And the only time you need a warrant is when there is a contact with an American cit-

izen, giving rise to a reasonable belief or probable cause that they may be helping the enemy.

Here is an example of what I am trying to say. You could have a computer in Afghanistan that has 1,000 phone numbers in it, all American citizens. Do you need a warrant to monitor that phone number before a call is made, Mr. Fein?

Mr. FEIN. Well, the standard that is set out by FISA which echoes the Fourth Amendment is the warrant is required when there is a reasonable expectation of privacy. If you are simply having a computer intercept certain things and a human being doesn't understand the contents, I don't think there is any case law that exists—that creates a reasonable expectation of privacy.

It is the same way in which you can look at the outside of a letter, of an envelope and see who is it addressed to and what the return address is. That doesn't mean you can look at the contents, so that I don't think there is a problem—

Senator GRAHAM. I agree with you totally. There is a conversation between someone in Kansas and someone in the Mideast, and that someone in the Mideast, unbeknownst to the person in Kansas, is a front person for al Qaeda trying to raise money, trying to finance the war. The deal is about wheat. The person in Kansas doesn't know that the person in Afghanistan or some other Mideast country is actually a front person.

Do you need a warrant to listen into that phone call as to whether or not it is about wheat?

Mr. FEIN. If you are targeting the al Qaeda member abroad and you are making the interception of the transmission when it is outside the jurisdiction of the United States, you do not need a warrant. It is not covered by FISA, it is not covered by the Fourth Amendment.

Chairman SPECTER. Senator Graham, would you care to take 2 minutes to sum up? I am going to call on Senator Feingold for 2 minutes to sum up. Do you care to use it?

Senator GRAHAM. Thank you, Mr. Chairman. One, I want to compliment you for having this hearing, and if I have said anything that is rude to the witnesses, I apologize. This is an emotional area, but I feel really confident that by discussing this, we are stronger, not weaker.

I think censure takes the discussion in the wrong area. It undermines the program, it sends the wrong signal to the enemy. But I stand ready, willing, and hopefully able to find some middle ground here where you allow a robust ability to surveil the enemy by the President as a wartime commander, but you never allow in this country the ability of the Government to follow an American citizen forever, unhindered, believing they are helping the enemy, because if you think I am helping the enemy if I am talking to somebody in the Mideast, you would be wrong. And I don't think it is unfair to ask the Government to have their homework checked at some appropriate point when they are focusing on an American citizen on the other end of that call. You don't have to do it right away, but you eventually have to do it. I don't want any FBI agent to come to an American citizen's door, after listening to them for a year and believing they are helping the enemy, without getting

some third eye to look at this. I think that can happen and still save this program.

Chairman SPECTER. Senator Feingold, you have two minutes if you would like to sum up.

Senator FEINGOLD. I appreciate that, Mr. Chairman. Let me say if this were only an issue of the way the Chairman and Senator Lindsey Graham handle this issue, there wouldn't be any need to talk about censure at all. Both of you address the issue and the arguments on the merits, and you say which ones you agree with and which ones you don't.

The problem here is that when this program was revealed, the White House took a different course. Had they said, look, this is a close case, we might have gone too far here, let's work it out, that would be one thing. They chose the opposite. They chose to put forward an incredibly bogus argument about the authorization for military force, and then they tried an expanded doctrine of inherent power that frankly has no end that would essentially mean the Congress of the United States would not have much of a role in conducting its business.

That is why, Mr. Chairman, I take the step of proposing censure. I don't do it lightly. I do it with a sincere belief that if we do not assert ourselves as a Congress at this point, it will go down as one of the great losses for our system of Government. So I offer it in that spirit, I offer it looking for bipartisan support and I offer it in good faith.

Thank you, Mr. Chairman.

Chairman SPECTER. Before taking my 2 minutes, without objection I want to put into the record a letter from Carl Llewellyn Professor from Chicago, Cass Sunstein, and to read briefly one paragraph which is his conclusion. He appears before this Committee a great deal. Quote, "There can be no doubt that the program has been subject to serious legal objections and that it is entirely legitimate for Congress to make a serious inquiry into those objections. But in the face of a legally controversial assertion of power by the President of the United States, the preferred course is to begin with a careful assessment of the underlying facts and the law, not to take the exceptionally rare course of censuring him," close quote.

Now, you can start my two minutes.

The New York Times, which disclosed the program and has been very tough on the President, had this to say about Senator Feingold's resolution, quote, "The censure proposal is a bad idea," close quote. The San Diego Union Tribune called the censure resolution a, quote, "stunt that will accomplish nothing." The Chicago Tribune commented, quote, "It is hardly the kind of act that would warrant censure," close quote. The Boston Herald observed that, quote, "Democrats are ignoring the pointless effort to censure President Bush."

This hearing, I think, is important for the reason that it is a further exploration of the President's inherent powers that we have to come to grips with, and with the authority of the Congress to legislate, which the Congress has constitutional authority to do on these subjects, but most of all the paramount authority of the courts to be the arbiter between the law enforcement official and the citizen.

The Judiciary Committee can't have any more hearings in March because March is over, but we may have set a record of a sort in having four of them. I was on the floor when Senator Feingold introduced his resolution because I wanted to utilize that as a forum to press the President to allow some judicial review. But as for the President's conduct, you have this long resolution, but not a word about bad faith. And if you don't assert bad faith, there is just no basis, it seems to me, for a censure resolution.

I think this hearing has been very, very informative and constructive, and I thank all of you gentlemen for participating today.

That concludes our hearing.

[Whereupon, at 12:27 p.m., the Committee was adjourned.]

[Submissions for the record follow.]

SUBMISSIONS FOR THE RECORD

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Censure circus hits town

BODY:

The weather in Washington has been balmy. The cherry blossoms are nearly ready to bloom. And the circus has come to town. Or is that just Sen. Russ **Feingold** (D-Wisc.) in the polka dot suit and floppy shoes, trying to get a little traction in the 2008 presidential race?

Even fellow Democrats are ignoring his pointless efforts to **censure** President Bush over the warrantless wiretaps of those suspected to have terrorist ties.

Now we think Bush was dead wrong on the issue, and the Senate Intelligence Committee well within its rights to investigate and to tell the president whether indeed his wartime powers trump provisions of the 1978 Foreign Intelligence Surveillance Act. But that's obviously too grownup an approach for **Feingold.**

No, he'd rather huff and puff and attempt the first **censure** of an American president since 1834. That's when Andrew Jackson incurred the ire of Senate Whigs.

Maybe this will do for **Feingold's** political career what it did for the Whigs, when they were consigned to history's dustbin.

LOAD-DATE: March 15, 2006

Testimony in Opposition to Senator Feingold's Effort to Censure President Bush

by Steven G. Calabresi[1]

Thank you for the opportunity to submit this written testimony in opposition to Senator Feingold's effort to censure President Bush because of the NSA wiretapping matter. I wish to discuss two issues: first, the constitutionality of Senator Feingold's proposal and second its merits if the Senate were to decide it had the power to censure the President.

First, it is my opinion based on my sixteen years of experience teaching courses in constitutional law that neither the Senate nor the House has the constitutional power to censure the President. The constitution sets up a government of limited and enumerated powers. The powers of Congress as a whole are carefully enumerated in Article I, Section 8. Eighteen powers of Congress are listed there and a power to censure is not among them. Article I also lists some powers that each House of Congress possess on its own. These powers include a power of each House to elect its own officers and set the rules of its own proceedings. Article I also makes it clear that the House of Representatives has the sole power of impeachment and the Senate has the sole power to try all impeachments. Again, there is no mention here of a power to censure. Other portions of the Constitution and the amendments grant powers either to the Senate alone (confirming nominees and ratifying treaties) or to Congress (power to admit new states). Nowhere in the rest of the Constitution is a power to censure the President or anyone else to be

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[1] George C. Dix Professor of Constitutional Law, Northwestern University.

found. The inevitable conclusion that I draw from this is that the power to censure is one of the many powers of government which the Constitution does not grant to either House of Congress and which is therefore reserved by the Tenth Amendment to the people or the States.

This conclusion is bolstered by the fact that the Constitution does specifically discuss the subject of congressional punishment of officials in other branches of government in the impeachment clauses. The Supreme Court has stressed the fact in the case of Walter Nixon v. United States that the House has the "sole" power of impeachment and the Senate has the "sole" power to try impeachments. The Constitution's use of the word "sole" and the explicit provision for impeachment in several different clauses cause me to think that the Constitution does not allow for punishments other than impeachment. The impeachment clauses themselves specifically make clear that congressional punishments for impeached officials cannot extend beyond removing those officials from office and disqualifying them from holding office again in the future. Senator Feingold's resolution seems to presuppose, contrary to this clause, that the Senate can impose sanctions on the President other than removal from office now and disqualification from holding office in the future. That conclusion violates the plain text of the impeachment clauses.

There is an important canon of constitutional interpretation which is relevant here. It is *expressio unius, est exclusio alterius*. What this means is that the expression or writing down of one thing with respect to a matter excludes other contrary things. I think this maxim is plainly applicable here. The Constitution specifically addresses the issue of congressional punishment of officials in other branches of government in the impeachment clause and it makes no provision for a power to censure. I think that when the Constitution specifically addresses a subject and

provides rules to govern it, it would be a mistake to go beyond the plain text.

A final argument that might be made in defense of a Senate power to censure is that Article I, Section 8, Clause 18 gives Congress the power to enact all laws necessary and proper for carrying into execution the foregoing powers. I think it is clear on the face of things why the Necessary and Proper Clause is irrelevant here. First, the Clause confers no powers on the Senate or House acting alone. The power granted by the Necessary and Proper Clause is to Congress as whole. Second, the Necessary and Proper Clause only expands Congress's lawmaking authority. The Clause gives Congress power to enact "laws" pursuant to the Article I, Section 7 lawmaking process. A censure resolution, even one passed by both houses and signed by the president, is not a "law." Finally, it is well settled that Congress cannot use its powers under the Necessary and Proper Clause to alter our system of separation of powers and federalism. That is precisely what Congress would be doing here if it arrogate to itself a power to censure the President.

It bears noting that if Senator Feingold were right that there was a power on the part of the Senate to censure President Bush, it would follow a fortiori that the Senate could also censure the Supreme Court or the Ninth Circuit for decisions that it thought were profoundly wrong-headed. There is no difference in the relationship of the courts to Congress and the relationship of the President to Congress so a power to censure the one must also be a power to censure the other. I think it is obvious on the face of things that it would be unconstitutional for the Senate to censure the Supreme Court for say its flag burning opinions or for issuing Roe v. Wade. Exactly the same concerns are raised here with censuring President Bush. The Constitution addresses the question of congressional punishment of the other branches of government in the impeachment

clauses and that is the sole way in which those other branches can be punished.

I would conclude by noting that my textual arguments above are all supported by the consistent practice of the last 207 years under the Constitution. The Senate did attempt to censure President Andrew Jackson for his role in withdrawing federal funds from the Bank of the United States and for firing his Treasury Secretary. This attempt met with such disapproval that the censure was formally expunged from the records of the Senate. Practice suggests what the text makes clear. The Senate does not have the power to censure President Bush.

The second question is whether, if the Constitution did give the Senate power to censure President Bush for the NSA wiretaps, ought Congress to exercise that power here. The first issue here is whether the NSA wiretaps were in violation of the law. It is my opinion that the use of force resolution passed after 9/11 authorized the NSA wiretaps. That resolution gave Congress power to use "all necessary and appropriate" force to apprehend or punish those who committed the 9/11 attacks and anyone who aided and abetted them. The words "necessary and appropriate" are a legal term of art as every first year law student learns when she studies the great Chief Justice Marshall's in McCulloch v. Maryland. In that case, Marshall construes the Necessary and Proper Clause of the Constitution as authorizing the use of all means that are "convenient to" or "useful to" a constitutionally authorized end. Marshall specifically considers and rejects the idea that "necessary" means "indispensible".

The question therefore with the NSA wiretaps of conversations with suspected Al Quada terrorists is: is it "convenient" or "useful" to the process of apprehending those terrorists and those who aided and abetted them to intercept their phone calls and e-mails. The answer to this question is plainly "yes." I thus firmly believe the President's wiretap program was authorized

by Congress.

It might be objected that many members of Congress did not understand the post 9/11 use of force resolution as going that far. The answer to this is that the meaning of statutes has to be deduced from the plain words of the language enacted into law and not from the original intentions of those who voted for it. In other contexts, this committee has expressed concern about arguments from original intent. By using a legal term of art like "necessary and appropriate" Congress authorized the President to use all means that were "convenient to" or "useful to" the apprehension of Al Quaida members. I have no doubt whatsoever that electronic intercepts fall in that category. Thus, it is my view that President Bush secured a congressional declaration of war against Al Quaida after 9/11 and that that declaration did not use the words declare war only because Al Quaida is not a foreign state. I think the President was acting in Justice Robert Jackson's category one from his Steel Seizure case concurrence and had the full weight of Congress behind him. For these reasons, I find it unnecessary to address the question of whether the President has inherent power under Article II to act as he did.

Some have objected that the President's actions violated FISA which, because it is said to be a more specific statute, applied here. I disagree with that. The post 9/11 use of force resolution is more specific than FISA when it comes to dealing with the Al Quaida terrorists. FISA would be applicable if the President were conducting electronic intercepts about any matters not bearing on Al Quaida but that is not what is going on here, as best as we can tell. President Bush has acted entirely appropriately in this matter in every way in my judgment.

I should add that in my judgment it would have been a gross dereliction of duty for the President NOT to conduct warrantless, electronic intercepts of Al Quaida communications given

that Congress had passed the post 9/11 resolution. The President takes a special oath "to preserve, protect, and defend" the Constitution of the United States from all enemies foreign and domestic. That oath of office obliged him, in my view, to go after the 9/11 terrorists and everyone associated with them energetically and with the full force of the government of the United States. The President did this with Congress's blessing and attempts almost five years later to second guess his military judgments are inappropriate. The President was obligated by his oath of office to act as he did and to even discuss sanctioning him for acting as he did in wartime is highly inappropriate.

Statement
of
Lee A. Casey
Before the United States Senate Committee on the Judiciary
March 31, 2006

Thank you, Mr. Chairman.

Let me begin by saying that it would be a severe miscarriage of justice for the United States Senate to censure President George W. Bush over the National Security Agency program to intercept and monitor al Qaeda's global communications. Based on the publicly available information, it is clear that the President was fully within his constitutional and statutory authority when he authorized this program, including his decision to permit the interception of al Qaeda communications into and out of the United States without first obtaining an order from the Foreign Intelligence Surveillance Act ("FISA") Court.

The President's critics have variously described the NSA program as "widespread," "domestic," and "illegal." It is none of these things. Rather, the program is limited, targeted on the international communications of individuals engaged in an armed conflict with the United States, and is fully consistent with FISA. First, in assessing the President's actions here, it is important to highlight how narrow is the actual dispute over the NSA program. Few of the President's critics claim – at least openly – that he should not have ordered the NSA to monitor al Qaeda's communications on a global basis. Indeed, in the wake of the September 11, 2001 attacks, he would surely have been worthy of censure had he not ordered this surveillance. Moreover, few of the President's critics have had the temerity to claim that he was required to obtain the FISA Court's permission to intercept and monitor al Qaeda communications outside of the United States.

It is, in fact, only with respect to communications actually intercepted by the NSA within the United States, as opposed to by satellites or listening posts located abroad, or where the "target" of the intercept is an American citizen or resident alien, that FISA is relevant at all to this national discussion. Despite the rhetoric of the last four months, FISA is not a comprehensive statute that requires the President to obtain a "warrant" to collect foreign intelligence. It is a narrow law that requires an "order" be obtained for "electronic surveillance" in only four circumstances:

(1) Where a United States person is the target of, *rather than incidental to*, the surveillance;

(2) Where the acquisition of the intelligence will be accomplished by devices located within the United States;

(3) Where the sender and all recipients of the relevant communication are present in the United States; or

(4) Where surveillance devices are used within the United States to collect communications other than wire or radio communications.

50 U.S.C. § 1801(f)(1-4).

That being the case, based upon how the President, Attorney General, and General Hayden (former head of NSA and now Deputy Director of National Intelligence), have described the NSA program, it is not at all clear than any of the intercepts would properly fall within FISA in the first instance. In that regard, the NSA program appears to have been:

(1) targeted at al Qaeda operatives and their associates – in other words, communications are intercepted and monitored based on an al Qaeda association; and

(2) directed only at international communications with an al Qaeda operative or associate on one end: As General Hayden made clear, "one end of any call targeted under this program is always outside the United States;" and

(3) the purpose is not to collect evidence for a criminal prosecution, but to identify and thwart additional attacks against the United States.

Whatever this program is, it is not the pervasive dragnet of American domestic communications about which so many of the Administration's critics have fantasized. Moreover, unless some of these communications are intercepted in the United States, or the targeted al Qaeda operative happens also to be a "United States person," FISA does not apply by its own terms. In other words, under Senator Feingold's resolution, the President is to be censured because some of the communications that everyone agrees must be intercepted to protect the American people, may have been taken in the United States without first having obtained a FISA order. This would be manifestly wrong.

The Administration has properly refused to publicly articulate the full metes and bounds of the NSA program. For the sake of argument, however, let us assume that some of the communications intercepted as part of this program are intercepted within the United States, or that some of the targeted al Qaeda operatives are "United States persons" within FISA's meaning. (This would include American citizens, permanent resident aliens, and U.S. corporations. 50 U.S.C. § 1801(i)). Did the President break the law? No, he did not.

As the Department of Justice correctly pointed out in its memorandum of January 19, 2006, "Legal Authorities Supporting the Activities of the National Security Agency Described by the President," FISA itself provides that electronic surveillance otherwise subject to the statute can lawfully be accomplished without a FISA order if it is "authorized by statute." 50

U.S.C. § 1809(a)(1). The surveillance of al Qaeda, in the United States or anywhere else in the world, has been authorized by statute – in the form of the September 18, 2001 Authorization for the Use of Military Force. 50 U.S.C. § 1541 note.

That statute specifically authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, *in order to prevent* any future acts of international terrorism against the United States by such nations, organizations or persons." (Emphasis added).

This is a broad grant. There are, of course, many who argue that the September 18 Authorization was not broad enough to permit the NSA program because it did not specifically reference electronic surveillance or FISA. Significantly, however, an identical argument was advanced with respect to the capture and detention of certain al Qaeda and Taliban operatives under the "Non-detention Act," 18 U.S.C. § 4001(a). That law forbids the detention of American citizens save as authorized by act of Congress and specifically provides that: "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." It should go without saying that the Non-detention Act, and the principle it seeks to implement, are as important to our system of ordered liberty as is FISA.

Nevertheless, in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the Supreme Court correctly interpreted the September 18, 2001 Authorization for the Use of Military Force to authorize the President to detain American citizens, consistent with 18 U.S.C. § 4001(a), because that authorization must be interpreted to permit all of the normal incidents of war. As explained by Justice O'Connor in her plurality opinion (which commanded a majority of 5 votes on this point), the detention of captured enemies "is so fundamental and accepted an incident to war as

to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use." 542 U.S. at 518.

Surely, the monitoring of enemy communications, whether into or out of the United States, is also such a "fundamental and accepted" incident to war. That is how wars are fought; that is how wars have always been fought; and it is especially how this war must be fought. Only through the collection and exploitation of intelligence can the purpose of Congress' September 18, 2001, Authorization – "to prevent any future acts of international terrorism against the United States" – be achieved. For his part, the President has not claimed the right to surveil the American population in general, but only enemy agents as they communicate into and out of the United States.

This type of intelligence gathering has been a critical part of warfare since the first man with a spear crept to the edge of his enemy's camp listening for voices in the night. As George Washington explained to an American agent during the War for Independence, the "necessity of procuring good intelligence, is apparent and need not be further urged. All that remains for me to add is, that you keep the whole matter as secret as possible. For upon secrecy, success depends in most Enterprizes of the kind, and for want of it, they are generally defeated." *CIA v. Sims*, 471 U.S. 172 n.16 (1984) (quoting letter from George Washington to Colonel Elias Dayton, July 26, 1777). In ordering this surveillance the President acted fully in accordance with an express congressional authorization, at the very zenith of his powers as outlined in Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

For those who claim that the September 18, 2001, Authorization cannot be read to have amended FISA; it did not. FISA remains intact, just as the Non-detention Act remains intact. The September 18, 2001 Authorization works with these laws, not against them. Of course, had

Congress formally declared war, under FISA section 111 (50 U.S.C. § 1811), the entire statute would have been suspended for 15 days. During that period, the President would have been free to target anyone and everyone's electronic communications, not merely those of known al Qaeda operatives. This program is much more limited.

Indeed, it is sufficiently limited clearly to fall within the President's inherent constitutional authority, under Article II, as Chief Executive and Commander-in-Chief. This authority has been consistently recognized, and respected, by the United States courts. Indeed, the United States Foreign Intelligence Surveillance Court of Review, established under FISA, has itself acknowledged this authority. In *In re Sealed Case No. 02-001*, where the Court of Review reversed an effort by the FISA trial court to reimpose a kind of "wall" between intelligence gathering and law enforcement, despite Congress' amendment of FISA as part of the Patriot Act, the Court also noted that: "all the other courts to have decided the issue, held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information." 310 F.3d 717, 742 (FISA Ct. of Review 2002). It went on to state that "[w]e take for granted that the President does have that authority [to conduct warrantless surveillance for foreign intelligence purposes] and, assuming that is so, FISA could not encroach on the President's constitutional power." *Id.*

Significantly, in this connection, the FISA Court of Review was discussing another important precedent, *Unites States v. Truong*, 629 F.2d 908 (4th Cir. 1980). This is, in fact, the leading case recognizing the President's inherent power, as a function of his role in formulating and implementing U.S. foreign policy, to order warrantless electronic surveillance for foreign intelligence purposes. This power exists even when the surveillance is in the United States and directed at an American citizen. In *Truong*, the Carter Administration authorized warrantless

wire-tapping of a resident alien and an American citizen, in the United States, in a successful effort to identify the source of classified documents being illegally transmitted to foreign government representatives.

The defendants challenged their espionage convictions by arguing that this surveillance violated the Fourth Amendment guarantee against unreasonable searches and seizures and the attendant warrant requirement. In response, the Carter Administration stated without equivocation that: "In the area of foreign intelligence, the government contends, the President may authorize surveillance without seeking a judicial warrant because of his constitutional prerogatives in the area of foreign affairs." *Truong*, 629 F.2d at 912. The United States Court of Appeals for the Fourth Circuit agreed, and ruled that the warrantless surveillance ordered in this case had been lawful. The court reasoned as follows:

> For several reasons, the needs of the executive are so compelling in the area of foreign intelligence, unlike the area of domestic security, that a uniform warrant requirement would, following [*United States v. United Stated District Court (Keith),* 407 U.S. 297 (1972)], "unduly frustrate" the President in carrying out his foreign affairs responsibilities. First of all, attempts to counter foreign threats to the national security require the utmost stealth, speed, and secrecy. A warrant requirement would add a procedural hurdle that would reduce the flexibility of executive foreign intelligence initiatives, in some cases delay executive response to foreign intelligence threats, and increase the chance of leaks regarding sensitive executive operations." [Citations omitted.]
>
> More importantly, the executive possesses unparalleled expertise to make the decision whether to conduct foreign intelligence surveillance, whereas the judiciary is largely inexperienced in making the delicate and complex decisions that lie behind foreign intelligence surveillance. . . .
>
> Perhaps most crucially, the executive branch not only has superior expertise in the area of foreign intelligence, it is also constitutionally designated as the preeminent authority in foreign affairs. [Citations omitted]. The President and his deputies are charged by the Constitution with the conduct of the foreign policy

> of the United States in times of war and peace. [Citations omitted.] Just as the separation of powers in *Keith* forced the executive to recognize a judicial role when the President conducts domestic surveillance, [citations omitted] so the separation of powers requires us to acknowledge the principal responsibility of the President for foreign affairs and concomitantly for foreign intelligence surveillance.

Truong, 629 F.2d at 913-14.

FISA was, of course, enacted shortly before the decision in *Truong* was announced, and the court did not, therefore, address the law's impact as part of its holding. Neither has the Supreme Court considered whether, or to what extent, FISA may have trenched upon the President's constitutional authority. This, however, is the question we are left with. No court has questioned the existence of the President's constitutional power to order warrantless foreign intelligence surveillance, electronic or otherwise. President Bush did not invent this authority, as some critics have implied, nor has he asserted more power than his predecessors have claimed. As explained by the Justice Department in its January 19, 2006, Memorandum (pp. 7-8, 16-17), various forms of warrantless electronic surveillance have been utilized since the Civil War. Presidents Franklin D. Roosevelt and Harry S. Truman authorized, without judicial participation, the use of wiretaps as a means of obtaining intelligence against the United States' enemies, as did President Woodrow Wilson. *See* Exec. Order No. 2604 (Apr. 28, 1917). Both the Carter and Clinton Administrations also affirmed the President's inherent constitutional authority to conduct warrantless surveillance and/or searches for foreign intelligence purposes. *See* January 19 DOJ Memorandum, p. 8.

As to the question whether Congress exceeded its authority in enacting FISA, the answer depends very much on how that law is interpreted and applied. The interplay between the Executive and Congress is, in the best of circumstances, complex and shifting. As a general proposition, Congress is entitled to legislate on any number of matters that may impact how the

President discharges his constitutional role. The test is whether Congress has "impede[d] the President's ability to perform his constitutional duty." *Morrison v. Olson*, 487 U.S. 654, 691, 695-96 (1988) (appointment of independent counsel by special judicial body, and imposition of a removal for cause requirement, did not impermissibly impede the President's authority, where there were a number of other means by which the officials activities could be supervised). If FISA were construed to prohibit the President, without judicial approval, from monitoring enemy communications into and out of the United States during wartime, then the statute could fairly be said to impede the President's exercise of his constitutional authority and would, to that extent, be invalid. It need not, and should not, be so interpreted.

In this connection, it should also be noted that the Executive Branch secures one very valuable advantage when it does obtain an order pursuant to FISA's provisions – the evidence collected pursuant to such an order will almost certainly be admissible in a later criminal proceeding. *See, e.g.*, *United States v. Squillacote*, 221 F.3d 542, 553-54 (4th Cir. 2000), *cert. denied*, 532 U.S. 971 (2001). Congress was surely within its constitutional authority in establishing such a process. At the same time, hard choices are often necessary during an armed conflict. If the President determines that the process established in FISA is insufficiently protective of national security, as he has done with respect to the NSA program, and he is prepared to risk having intelligence information secured without a FISA order later ruled inadmissible in court (as the *Truong* Court suggested was a possibility in certain circumstances, 629 F.2d at 915), then he is fully entitled to rely on his constitutional authority alone. To the extent that Congress sought to forbid such reliance, and to foreclose the President's right to order the interception, without a FISA order, of enemy communications in wartime, it exceeded its constitutional authority.

Obviously, there are those who disagree with this analysis. There are few questions of either constitutional or statutory interpretation that cannot be debated, and debated in good faith. Arguing about what the Constitution's Framers or Congress meant on any particular occasion is how many of us in the legal profession earn our livings. However, to censure the President because his view is inconsistent with that of one or more members of the Senate would be improvident and irresponsible. It amounts to an effort to punish not merely policy differences, but differences over legal arguments.

This is especially the case in view of the fact that there has been no suggestion that the President has misused or abused any of the information obtained from the NSA program. By all accounts, it has been utilized entirely in carrying out Congress' instructions in the September 18, 2001, Authorization – "to prevent any future acts of international terrorism against the United States." Individual Senators, and members of this Committee of both parties, may well honestly believe that this law did not authorize the President to use any incident of force that is otherwise prohibited by statute, and their opinions must be respected. However, the Supreme Court disagreed only two years ago in the *Hamdi* case. That case supports the President's position with respect to the NSA program. At a minimum, therefore, his position cannot be considered frivolous, arbitrary or an example of Executive overreaching and is not worthy of censure.

Overall, the proposal to censure President Bush over the NSA program is ill-founded, and should be rejected by the Senate.

Thank you, and I would be pleased to answer any questions the Committee may have.

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HEADLINE: Censure: the wrong option

BODY:

Wisconsin Sen. Russ **Feingold's** proposal to **censure** President Bush set off two stampedes--one of Republicans rushing to denounce it, and one of his fellow Democrats fleeing in panic. So it's safe to say that the chance Bush will be reprimanded is about the same as the chance Tiger Woods will abandon golf for the Iditarod. But before Congress decides not to **censure** the president, it ought to give thought to why it shouldn't.

Feingold's resolution is a response to the once-secret electronic surveillance program operated by the National Security Agency and disclosed in December. Starting shortly after Sept. 11, 2001, the NSA has engaged in warrantless wiretapping of people in the United States and abroad whom the administration believes have some connection to terrorism. That is a departure for the agency, which has long eavesdropped on calls conducted abroad.

It may also be illegal under the 1978 Foreign Intelligence Surveillance Act (FISA), which requires a warrant to wiretap anyone in the country. The administration could have sought permission to monitor these communications from the FISA court, but it didn't, viewing the procedure as too slow. It claims it may legally bypass FISA because of powers granted by Congress when it authorized military action against Al Qaeda, and insists that the president has such powers in his role as commander-in-chief.

The war resolution said nothing about such surveillance, and Atty. Gen. Alberto Gonzales admitted that Congress would not have approved this program had it been asked. Many legal experts think that though the president has powers in this realm, they are subject to restriction by Congress. Senate Judiciary Committee Chairman Arlen Specter (R-Pa.) said in February that he thinks it is illegal. But Bush's actions are also consistent with several previous court decisions on presidential authority and with the positions taken by other presidents.

Ultimately, the issue may have to be resolved by the courts--where Bush might prevail. But even if the courts rule the program violates the law, it's hardly the kind of act that would warrant **censure,** which hasn't been used against a president since Andrew Jackson was rebuked in 1834.

In wartime, a president has primary responsibility for protecting the nation against attack, and most people would argue it's better for him to be too vigilant than not vigilant enough. As Specter has said, the president appears to have acted in good faith, not to mention for a legitimate end. Any violation of the law that may have taken place was the result of uncertainty about what the president may do, not the product of sinister motives.

If Congress thinks the program was unjustified, or if the courts rule it illegal--questions that are still open--the answer is not to give the president a rap on the knuckles. It's to establish and require a judicial oversight process.

Feingold's bill may be good fodder for talk shows and press releases. But a subject as serious as this deserves a more serious response.

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FOR IMMEDIATE RELEASE
March 31, 2006

CENSURE RESOLUTION HASN'T STOPPED A SINGLE TERRORIST, PREVENTED A SINGLE ATTACK, CORNYN SAYS

'Today's hearing is our Committee's first—and hopefully last—discussion of Sen. Feingold's resolution to censure the President.'

WASHINGTON – *U.S. Sen. John Cornyn (R-Texas), chairman of the Emerging Threats and Capabilities subcommittee, made the following statement at the Judiciary committee's hearing Friday titled, An Examination of the Call to Censure the President:*

Today's hearing is our Committee's first—and hopefully last—discussion of Senator Feingold's resolution to censure the President. But I should point out that this is the fourth time our Committee has gathered to discuss and debate the Terrorist Surveillance Program. We first heard from the Attorney General, who persuasively laid out the Administration's legal rationale for the targeted surveillance of al Qaeda operatives. At two subsequent hearings, former jurists and constitutional scholars weighed in on the subject. And now we're here today.

We should be here today talking about how Congress can help this President protect the American people. But instead we're talking about censure. To expend the time and energy to attempt a censure of the President—to deem a program illegal in the face of facts and law to the contrary—is merely to obstruct the work of protecting this nation.

Before these hearings began, I took a long and serious look at the legal justification for the Terrorist Surveillance Program. As I said at the time: "We are in the midst of a global war against an enemy who not only opposes our cherished freedoms, but opposes our very existence. That should be the starting point for our discussion of the legal authorities for the NSA's surveillance of al Qaeda."

And after taking a careful look at the facts and the law, I came to the conclusion that the President acted appropriately and within his Article II powers when he authorized the surveillance of al Qaeda. I also concluded that the program is entirely consistent with the terms of the September 18, 2001, Authorization for the Use of Military Force. The force authorization was passed by Congress just days after the 9/11 attacks. By the terms of the force authorization, Congress directed the President to wage a global war against al Qaeda.

Ironically, some of the President's critics contend that when Congress directed the President to kill, capture, or confine al Qaeda, it somehow prevented him from intercepting al Qaeda phone calls or emails into or out of the U.S.

Over and over again, the President's critics misleadingly characterize the NSA program as some sort of broad-based 'domestic' spying on U.S. citizens. The NSA program is narrowly focused. Let's be clear: the Terrorist Surveillance Program targets the international communications of al Qaeda in an effort to connect the dots and prevent another 9/11.

It's hard to swallow the accusations of those who say the President and the Republican majority aren't taking the necessary steps to protect the American people—especially when there's such hyperbole and hysteria out there about a program well within the President's legal authorities to protect the American people from another terrorist attack.

The President of the United States has no greater responsibility than protecting the American people. We in Congress share in that awesome responsibility and we must take it seriously. This censure resolution—and similar unfounded, politically motivated attacks on the President—do nothing toward that end.

Testimony of John W. Dean before the Senate Judiciary Committee

Regarding Senator Feingold's Proposed Senate Resolution 398

Relating To the Censure of George W. Bush

March 31, 2006

Mr. Chairman and members of the committee, I have set forth a brief overview of the testimonial subject where I feel I might be of assistance to the Senate Judiciary Committee's consideration of Senate Resolution 398 relating to the censure of President George W. Bush, for (1) unlawful electronic surveillance of Americans contrary to the provisions of the Foreign Intelligence Surveillance Act of 1978, as amended; (2) the failure of the President to inform the respective congressional committees of his actions as required by that law; and (3) the presidents conspicuously misleading statements to the American people about the nature of his actions along with his dubious legal arguments claimed as justification for his actions.

I assume it is stipulated that no one disagrees with the Administration's desire to deal aggressively with terrorism. Rather the question is about ways and means not about desired results or hopeful outcomes.

Qualifications To Testify

My qualifications for addressing the committee are more expertise than anyone might wish to have based on personal experience in how presidents can get themselves on the wrong side of the law. Obviously, I refer to my experiences at the Nixon White House during Watergate. That, as it happens, was the last time I testified before the Senate. As with my testimony today, that testimony was voluntarily given. I appear today because I believe, with good reason, that the situation is even more serious. In addition to my first-hand witnessing a president push his powers beyond the limits of the

Constitution during my years as White House counsel from, 1970 to 1973, I have spent the past three plus decades studying presidents past and present.

No presidency that I can find in history has adopted a policy of expanding presidential powers merely for the sake of expanding presidential powers. Presidents in the past who have expanded their powers have done so when pursuing policy objectives. It has been the announced policy of the Bush/Cheney presidency, however, from its outset, to expand presidential power for its own sake, and it continually searched for avenues to do just that, while constantly testing to see how far it can push the limits. I must add that never before have I felt the slightest reason to fear our government. Nor do I frighten easily. But I do fear the Bush/Cheney government (and the precedents they are creating) because this administration is caught up in the rectitude of its own self-righteousness, and for all practical purposes this presidency has remained largely unchecked by its constitutional coequals.

Must Censure Be A Purely Political Condemnation?

Members of this committee are quite familiar with the debate that arose during the Clinton impeachment proceedings regarding the propriety of censuring a president. That thirteen month debate involved members of the House and Senate, as well as political commentators and constitutional scholars. Some members thought it a viable alternative to impeachment or conviction of a president; other members believed it a threat to the separation of powers. For example, Senator John D. Rockefeller of West Virginia thought it an effective way "to say to myself and my people" that President Clinton had

done something wrong. (*Washington Post*, Feb. 9, 1999, at A17.) Senator Larry Craig of Idaho viewed it as "a raw political cover" and "nothing more than a slap on the wrist." (*Time*, Feb. 15, 1999). Senator Phil Gramm of Texas thought it was too easy a way out of a difficult political decision that could "corrode" the constitutional structure of the separation of powers. (*Washington Post*, Feb. 13, 1999, at A32.) Legal scholars fell on both sides of the question of whether it was a constitutionally permissible action, although the weight of the arguments clearly fell on the side of its constitutionality. Michael Gerhardt, whose work is very familiar to this committee, observed that there are several provisions in the Constitution, including the First Amendment, that authorize both the House and the Senate to take appropriate action. As Gerhardt summed it up, "One may plainly infer from these various textual provisions the authority of the House, the Senate, or both to pass a non-binding resolution expressing an opinion - pro or con - on some public matter, such as that a president's conduct has been reprehensible or worthy of condemnation." (Michael J. Gerhardt, "The Constitutionality of Censure," *University of Richmond Law Review*, vol. 34 (1999) at 34.)*

One thing was clear from this protracted debate during the Clinton impeachment, and the same can be said of the debate so far that has been provoked by Senator Feingold's proposed resolution, censure has long been viewed as a purely political action. That has been true historically as well. Historian Richard Shenkman assembled the precedents for censure during the Clinton proceeding, which he recently republished.

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* This entire debate is fully reviewed in the transcript prepared by Thomas R Lee of a 1999 panel on impeachment, published in the *Brigham Young University Law Review* (1999).

(http://hnn.us/blogs/entries/22843.html). Shenkman found, "All four censures [John Adams, Andrew Jackson, John Tyler, and James Buchanan], however, have more in common than that they simply have been largely forgotten. All were the work of highly partisan politicians eager to score political points." He concluded, "censures must be bipartisan to carry weight with the American people. History suggests that a resolution passed along party lines would be a source of palpable political divisiveness."

I am hopeful that Congress for institutional reasons, not partisan gamesmanship, will act on Senator Feingold's resolution. If the term "censure" carries too much historical baggage, then the resolution should be amended, not defeated, because the president needs to be reminded that separation of powers does not mean an isolation of powers; he needs to be told he cannot simply ignore a law with no consequences.

Institutional Reason for Censure: Preventing Waiver

Justice Felix Frankfurter's concurrence in *Youngstown* recognized the power of "executive construction of the Constitution," citing *United States v. Midwest Oil Co.,* 236 U.S. 459 (1915), as the basis for that authority, but finding it to exist only when there is a showing of "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned." (*Youngstown,* 343 U.S. at 610-11). *Midwest Oil* – the leading case on Congressional acquiesce -- is pretty old and times have changed. Nor is this a very precise body of law. What does it take for Congress to question presidential action? Does it mean a member of Congress, a committee, a single chamber, or both houses? And what if the president deliberately and knowingly ignores

Congress, relying on his own construction of the Constitution, when both houses have questioned presidential conduct and a law has been signed by a predecessor president? Is it a "political question" that the courts today will not touch? What if Congress does nothing about it? At some point will not a waiver occur when we are talking about constitutional co-equals? These, I suggest, are issues this committee must address. There are two ways to address them: legislation or a resolution expressing the sense of the Congress. Or, of course, doing nothing, and permitting the President to break the laws adopted by Congress.

Bush's on-going action with his NSA wiretapping (if not secrecy, torture, etc.) and Congressional inaction (or acquiescence) must, sooner or later, intersect, and a point will be reached and crossed when the Congress has all but sanctioned the conduct and the president can violate the law with utter abandonment. No one can say that the Congress has not been put on notice. While there is vague law that says Congressional inaction is not a license for executive action, Congress is now confronted with executive branch attorneys who take the most aggressive reading possible in all situations that favor executive power. It is only necessary to look at the Administration's interpretation of the September 18, 2001 Authorization for Use of Military Force (Public Law 107-40; 50 U.S.C. 1541) which it reads as authorization for the NSA program, to appreciate how far it will push.

And that is what I believe will happen if Chairman Specter's proposal to involve the Foreign Intelligence Surveillance Act court should become law. If past is prologue,

President Bush will not bother to veto the bill, rather he will quietly issue a signing statement saying as Commander in Chief he disagrees with the bill, and he does not care what the FISA court says, and he will just keep doing what he has been doing. In short, should Congress pass Chairman Specter's bill, the Chairman should recall what happened to Senator John McCain's torture amendment before he attends the photo op at the White House while Vice President Cheney is off somewhere approving the signing statement – and gutting the law. If this committee does not believe this Administration is hell bent on expanding its powers with such in-your-face actions, you have been looking the other way for some five years of this presidency.

That is why censure might be the only way for the Senate to avoid acquiescing in what is clearly a blatant violation of the 1978 FISA stature, not to mention the Fourth Amendment. If "censure" is politically too strong for the Senate, then an appropriately worded Sense of the Senate resolution not acquiescing in the president's defiance of the law might be a fall back position to prevent a waiver, and preserve Congress's prerogatives.

In short, I implore the Senate to undertake not a partisan action, but a strong institutional action. I recall a morning – and it was just about this time in the morning and it was exactly this time of the year – March 21, 1973 – that I tried to warn a president of the consequences of staying his course. I failed to convince President Nixon that morning, and the rest, as they say, is history. I certainly do not claim to be prescient. Then or now. But actions have consequences, and to ignore them is merely denial.

Today, it is very obvious that history is repeating itself. It is for that reason I have crossed the country to visit with you, and that I hope that the collective wisdom of this committee will prevail, and you will not place the president above the law by inaction. As I was gathering my thoughts yesterday to respond to the hasty invitation, it occurred to me that had the Senate or House, or both, censured or somehow warned Richard Nixon, the tragedy of Watergate might have been prevented. Hopefully the Senate will not sit by while even more serious abuses unfold before it.

I have attached a number of articles that I have published on this and related topics and I ask that they be included in the record. The full text of these articles can also be found at <http://writ.news.findlaw.com/dean/>.

Thank you again for the opportunity to testify. I would be happy to answer your questions.

Statement of Bruce Fein

Before the Senate Judiciary Committee

Re: S.Res. 398 Relating to the Censure of

George W. Bush

March 31, 2006

Mr. Chairman and Members of the Committee:

I am grateful for the opportunity to express my support for Senate Resolution 398. It would censure President George W. Bush for seeking to cripple the Constitution's checks and balances and political accountability by secretly authorizing the National Security Agency to spy on American citizens in the United States in contravention of the Foreign Intelligence Surveillance Act and misleading the public about the secret surveillance program.

Censure of the President for official misconduct is a species of congressional oversight of the Executive Branch including the exposure of mismanagement, corruption or other wrongdoing. Broad congressional oversight jurisdiction was endorsed by the United States Supreme Court in Watkins v. United States, 354 U.S. 178 (1957). Congress regularly writes reports harshly critical of official actions at the conclusion of oversight hearings, for example, the Majority Report of the Iran-contra Joint Committee on Covert Arms Sales to Iran. Censure seems to me at least a first cousin—a collective judgment of Congress about the performance of the President regarding the discharge of official duties, including an obligation to faithfully execute the laws. With regard to S. Res. 398, it is also a statement to the Supreme Court that Congress disputes President Bush's interpretation of FISA and inherent Article II powers. If President Harry Truman could run against a "do nothing " Congress, I see no reason why Congress cannot reciprocally run against a "doing wrong" president.

In conjunction with President William Jefferson Clinton's impeachment, which I supported, I then held a different view regarding the propriety or legitimacy of censure. I

worried that it would enable Congress to engage in character assassination by condemning a president without an opportunity to present exculpatory evidence, in contrast to the impeachment process. I am now persuaded that my worry was overbroad. In this case, the President has been given a full opportunity to dispute the censure assertions and the Senate record is open to publish any presidential response, the danger of character assassination is much attenuated. Censure now seems to me a legitimate expression of Congress about the conduct of the President that contributes to enlightened public opinion and debate. With regard to my former unsound view, I can cite President Abraham Lincoln for the proposition that a man who does not grow wiser by the day is a fool, and Justice Robert H. Jackson who explained a similar recantation with the observation that he was astonished that a man of his intelligence had been guilty of such foolishness. See McGrath v. Kristensen, 340 U.S. 162 (1950)(concurring opinion).

Censure should not be employed over every legal disagreement between Congress and the Executive. A president should not be intimidated from good faith interpretations, especially where presidential prerogatives are at stake. But the warrantless surveillance program justifies censure because of the convergence of aggravating factors.

First, President Bush's intent was to keep the program secret from Congress and to avoid political or legal accountability indefinitely. Secrecy of that sort makes checks and balances a farce. Sunshine is the best disinfectant. Popular government without popular information is impossible. Neither Congress nor the American people can question or evaluate a program that is entirely unknown. Mr. Bush could have informed Congress that he was acting outside FISA without disclosing intelligence sources or methods or otherwise alerting terrorists to the need for evasive action. Since 1978, FISA

has informed the world that the United States spies on its enemies, and disclosing the fact of the NSA's warrantless surveillance program would not have added to the enemy's knowledge on that score. That explains why the Bush administration continued the program after The New York Times' publication.

Second, President Bush's refusal to disclose the number of Americans that have been targeted under the surveillance program and the success rate in gathering intelligence useful in thwarting terrorism from Americans targeted makes a congressional assessment of its constitutionality or wisdom impossible. Fourth Amendment reasonableness pivots in part on whether the government is on a fishing expedition hoping that something will turn up based on statistical probabilities, like breaking and entering every home in the United States because a handful of emails might be discovered showing a communication with an Al Qaeda member. Without knowing the general nature and success of the surveillance program, Congress is handicapped in fashioning new legislation or undertaking other appropriate responses.

Third, President Bush's interpretation of the AUMF is preposterous, not simply wrong. FISA is clearly a constitutional exercise of congressional power both to protect the Bill of Rights and to regulate the power of the President to gather foreign intelligence through either electronic surveillance or physical searches during both war and peace. The necessary and proper clause in Article I authorizes Congress to legislate with regard to all powers of the United States, not simply those of the legislative branch.

Congress was emphatic that FISA was intended as the exclusive method of gathering foreign intelligence through electronic surveillance or physical searches. And

FISA was enacted when the United States confronted a greater danger to its existence from Soviet nuclear-tipped missiles than it does today from Al Qaeda.

The argument that the AUMF was intended an exception to FISA is discredited by the following. Neither any Member of Congress not President Bush even hinted at such an interpretation in the course of its enactment, including a presidential signing statement. The interpretation would inescapably mean that the AUMF also was intended to authorize President Bush to break and enter homes, open mail, torture detainees, or even open internment camps for American citizens in violation of federal statutes in order to gather foreign intelligence. To think Congress would have intended to inflict such a gaping wound on the Bill of Rights by silence is thoroughly implausible. The AUMF argument was concocted years after its enactment. It does not represent a contemporaneous interpretation entitled to deference. Further, numerous provisions of THE PATRIOT ACT would have been superfluous if the AUMF means what President Bush now says it means. Finally, FISA is a specific statute prohibiting the gathering of foreign intelligence in both war and peace except within its terms, whereas the AUMF is silent on the issue of foreign intelligence. The specific customarily trumps the general as a matter of statutory interpretation. FISA is more definitive against the President than the failure of Congress to enact legislation in Youngstown because the former tells the Commander-in-Chief "you cannot act" whereas the latter simply said "we are not conferring this power to seize private businesses."

Fourth, President Bush has evaded judicial review of the legality of the NSA's warrantless surveillance program by refusing to use its fruits in seeking FISA warrants or in criminal prosecutions. Pending private suits are problematic because of difficult

standing questions. The President's evasion of the courts makes it proper for Congress to step into the breach to express its on view on the legality of the spying program.

Fifth, President Bush's theory of inherent prerogatives under Article II to justify warping a natural interpretation of the AUMF would reduce Congress to an ink blot in the permanent conflict with international terrorism. The President could pick and choose which statutes to obey in gathering foreign intelligence and employing battlefield tactics on the sidewalks of the United States, akin to exercising a line-item veto over FISA and its amendments.

Even if President Bush's official misconduct regarding the NSA's warrantless surveillance program would justify censure, the ultimate decision of whether to press forward is political—a type of prosecutorial discretion. The objective should be to restore the Constitution's checks and balances that President Bush has begun to cripple. If President Bush had shown a serious inclination to collaborate with Congress over joint approaches to defeating international terrorism and gathering foreign intelligence, then censure would be counterproductive. But the President has been intransigent. Censure would not worsen the intransigence, but would facilitate a judgment by the American people during the next election as to whether they approve or disapprove of President Bush's contempt for the rule of law and constitutional limitations. But an even superior response would be the exercise of the power of the purse to prohibit electronic surveillance for foreign intelligence purposes outside of FISA, which I have previously advocated before this Committee.

News From:

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Statement of U.S. Senator Russ Feingold
Senate Judiciary Committee Hearing On the Call To Censure the President

March 31, 2006

Mr. Chairman, first, thank you for scheduling this hearing. I know you recognize that this is a serious issue, and I thank you for treating it as such. I want to welcome and thank our witnesses, some of whom – Mr. Fein, and Professor Turner -- were with us just a few weeks ago, and one of whom -- Mr. Dean -- last appeared before a congressional committee in 1974. I am grateful for your participation, particularly given the short notice that you were given of this hearing.

There is a time-honored way for matters to be considered in the Senate. Bills and resolutions are introduced, they are analyzed in the relevant committee through hearings, they are debated and amended and voted on in committee, and then they are debated on the floor. We have now started that process on this very important matter, and I look forward to seeing it through to a conclusion.

Mr. Chairman, I have looked closely at the statements you have made about the NSA program since the story broke in December. We have a disagreement about some things, but I am pleased to say we are in agreement on several others. We agree that the NSA program is inconsistent with FISA. We agree that the Authorization for Use of Military Force did not grant the President authority to engage in warrantless wiretapping of Americans on U.S. soil. We agree that the President was and remains required under the National Security Act of 1947 to inform the full Intelligence Committees of the NSA program, which he refuses to do.

Where we disagree, apparently, is whether the President's authority under Article II of the Constitution allows him to authorize warrantless surveillance without complying with FISA. You have said you think this is a close question. I do not believe he has such authority and I don't think it's a close question. We will continue to debate that I'm sure. But I think the fact that you have proposed legislation on this program undermines your argument that such presidential authority exists. Because if it does exist, then nothing that we can legislate, no matter how carefully crafted, is worth a hill of beans. For starters, your proposed bill may or may not cover what the NSA is now doing. You and I have no way of knowing because we have not been fully briefed on the program, and I am a member of the Intelligence Committee as well. But

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regardless, if the President has the inherent authority to authorize whatever surveillance he thinks is necessary, then he surely will ignore your law, just as he has ignored FISA on many occasions.

If Congress doesn't have the power to define the contours of the President's Article II powers through legislation, then I have no idea why people are scrambling to draft legislation to authorize what they think the President is doing. If the President's legal theory, which is shared by some of our witnesses today, is correct, then FISA is a dead letter, all of the supposed protections for civil liberties contained in the reauthorization of the Patriot Act that we just passed are a cruel hoax, and any future legislation we might pass regarding surveillance or national security is a waste of time and a charade. Under this theory, we no longer have a constitutional system consisting of three co-equal branches of government, we have a monarchy.

We can fight terrorism without breaking the law. The rule of law is central to who we are as a people, and the President must return to the law. He must acknowledge and be held accountable for his illegal actions and for misleading the American people, both before and after the program was revealed. If we in the Congress don't stand up for ourselves and for the American people, we become complicit in his law breaking. A resolution of censure is the appropriate response – even a modest approach.

Mr. Chairman, the presence of John Dean here today should remind us that we must respond to this constitutional crisis based on principle, not partisanship. How we respond to the President's actions will become part of our history. A little over 30 years ago, a President who broke the law was held to account by a bipartisan congressional investigation and by patriots like Archibald Cox and Elliot Richardson and yes, John Dean, who put loyalty to the Constitution and the rule of law above the interests of the President who appointed them. None of us here can predict how history will view this current episode. But I hope that thirty years from now, this Senate will not be seen to have backed down in the face of such a grave challenge to our constitutional system.

I look forward to hearing from our witnesses. Thank you Mr. Chairman.

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Terms: **williams and censure and date(geq (10/13/98) and leq (10/13/98))** (Edit Search | Suggest Terms for My Search)

Clinton Censure Isn't the Answer; Seemingly Attractive Option in Scandal Would Be Unconstitutional Fulton County Daily Report October 13, 1998, Tuesday

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October 13, 1998, Tuesday

LENGTH: 1489 words

HEADLINE: Clinton **Censure** Isn't the Answer;
Seemingly Attractive Option in Scandal Would Be Unconstitutional

BODY:
Victor **Williams** is an associate professor of law and director of the Law & Justice Program at the University of Tampa. He specializes in litigation, administrative law and white- collar criminal law and is an active member of the District of Columbia Bar. Provided by American Lawyer News Service.

Momentum is growing for congressional **censure** as a "third way" punishment for our Third Way president.

A plea bargain in which Bill Clinton accepts formal condemnation by Congress is heralded as an efficient, certain alternative to an increasingly unlikely resignation or a drawn-out, complicated impeachment removal process.

Most recently, a fine to be levied personally against the president has been added to the formula. This "**censure**-plus" would ostensibly help recoup the investigative costs (a low estimate is $4.5 million) caused by months of presidential prevarication and the broader administration cover-up.

Censure is seductively presented as a way to save the nation from prolonged exposure to the sordid details of Bill Clinton's pattern and practice of carnal exploitation. But as with most of the world's temptations, the **censure** alternative must be vigorously resisted. A plea bargain is not a constitutionally valid option for either the White House to spin or Congress to consider.

Few popular commentators see the constitutional implications. Some proponents argue that **censure** is the correct alternative because a majority of Americans favor it over impeachment and removal. The fundamental constitutional issue of whether the president has committed an impeachable offense is thus reduced to the rawest political deal--one supposedly based on the will of the people.

Other advocates express legitimate concerns about the national interest, but, like former Attorney General Elliot Richardson in a Sept. 18 New York Times op-ed article, attempt to minimize the manifestly criminal nature of the conduct and cover-up.

Leon Panetta, former White House chief of staff, now leads the call for **censure** to "bring closure" to the investigation. He wrote in The Washington Post on Sept. 17 that "enough is enough," that **censure** is fair punishment and that an impeachment inquiry will "weaken the presidency, Congress, the country and the moral fabric of the nation." Of course, further examination may also show that administration officials bear more direct responsibility for covering up the president's affairs than was heretofore acknowledged. Certainly, a quick

censure resolution would feel very good to all current and former members of the administration.

Ultimately, however, it is not public policy, partisan politics or adult discipline that mandates resistance to a short- cut solution. It is the text of the Constitution.

Congressional **censure** of any president (with or without a fine) amounts to passage of a "Bill of Attainder," which the Constitution prohibits in Article I, Section 9, Clause 3. The Supreme Court has interpreted the term bill of attainder to mean simply legislative punishment without judicial trial.

Mindful of the harsh, arbitrary punishments passed by the British Parliament on simple majority votes, and of the colonial and state enactment of bills of attainder (and lesser bills of pains and penalties) prior to 1787, the Framers chose to proscribe explicitly the practice of retroactive legislative punishments by either Congress or the states. Exercising what Raoul Berger, in his classic work Impeachment: The Constitutional Problems, termed "superabundant caution," the Framers further curtailed the powers of the national legislature by explicitly forbidding Congress from legislatively punishing either individual citizens or civil officers. This prohibition against nonjudicial punishment protects the life, liberty and property of citizens; the office, reputation and salary of government officers, and the independence of the judicial function.

The bill-of-attainder proscription is a textual cornerstone of the constitutional separation of powers: By reinforcing the impeachment removal process as the sole constitutional device of discipline, it protects the independence of executive officers. A simple legislative act cannot be used to punish an executive officer. In United States v. Lovett (1946), Justice Hugo Black opined for the Supreme Court that the bill-of- attainder prohibition was also applicable to congressional efforts to terminate the employment of politically unpopular government employees.

Of course, each chamber of Congress is allowed under Article I, Section 5, Clause 2 to discipline administratively, punish and even expel its own members. Thus the 1997 House ethics reprimand of Speaker Newt Gingrich, which included a $300,000 investigative reimbursement fine, is wrongly cited as a relevant precedent for a **censure**-plus of Bill Clinton's actions. Such intra- house discipline is the textual exception that makes the bill- of-attainder prohibition the rule.

Similarly, there was no separation-of-powers violation when the Judicial Council of the 9th U.S. Circuit Court of Appeals recently censured U.S. District Court Judge James Ware for lying about his background. Ware admitted he had misrepresented, in a series of public appearances, his kinship to a teenager slain during a Birmingham civil rights campaign in 1963. Ware had also listed the youth--Virgil Ware--as his brother on a government form, filed under oath, in connection with his prospective elevation to the 9th Circuit. The judge remains exposed to a criminal indictment and/or a House impeachment inquiry.

History mocks the Senate that passed a resolution of **censure** against President Andrew Jackson. Indeed, the Senate recognized its own high folly and expunged the resolution. So too would history condemn our contemporary Congress for agreeing to **censure.** As for Bill Clinton, he will have transformed himself from a presidential felon into a constitutional-law breaker if his White House continues to promote, and he accepts, a **censure** plea bargain just to stay in office.

Since legislative punishment is unconstitutional, judicial process is required. The impeachment removal process necessitates a formal transformation of Congress into two judicial organs. The House of Representatives must recast itself into an impeachment grand jury to exercise its "sole Power of Impeachment." If the House brings specific articles of

impeachment to the Senate, the upper chamber must exercise its "sole Power to try all Impeachments" by transforming itself into a judicial court.

The Senate's sergeant of arms then becomes a constitutional bailiff to cry the body into session as the nation's "High Court of Impeachment." One hundred judges are sworn under oath to consider impartially the evidence generated by the House grand jury as well as to judge any evidence offered by the impeached official, who is represented by counsel. To emphasize the Senate's formal metamorphosis from legislative to judicial body, the chief justice of the United States presides over impeachment trials of the president. (While the Senate in the last three impeachment trials of federal judges has invoked Senate Rule XI in order to designate a mere 12-member committee to gather evidence, this practice was of questionable constitutionality and would be absolutely improper in the case of an impeached president.)

The constitutional prohibition on bills of attainder helps explain why the impeachment removal standard of "high Crimes and Misdemeanors" was broadly written in 1787 and should be broadly read in 1998.

During the Constitutional Convention debates, George Mason articulated the link between the bill-of-attainder proscription and very broad impeachment removal criteria. As bills of attainder were not to be permitted for purposes of controlling errant officials, Mason successfully argued that the basis for impeachment removal should be expanded far beyond the first-draft language, which allowed removal only for "Treason and Bribery."

The record of the convention reads: "As bills of attainder ... are forbidden, it is the more necessary to extend the power of impeachments." He moved to add after "bribery" "or maladministration." Ultimately, the convention agreed to even broader language.

Upon conviction by the Senate court of impeachment, the Constitution allows for nothing less than the removal of the official from his duties (and, on the court's judgment, disqualification from future office). There is no third way.

The idea of **censure** tempts us as a means to end this "long national nightmare" before we must learn even more about the inner workings and adolescent affairs of the Clinton White House. But Congress must reject all pleas for a corrupt plea bargain, say no to a constitutionally invalid "solution" and do its textually mandated duty. With apologies to James Carville: It's the Constitution, stupid. end

LOAD-DATE: October 12, 1998

Source: Legal > / . . . / > **Legal News Publications**
Terms: **williams and censure and date(geq (10/13/98) and leq (10/13/98))** (Edit Search | Suggest Terms for My Search)
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NEWS RELEASE

ORRIN HATCH

United States Senator for Utah

FOR IMMEDIATE RELEASE
March 31, 2006

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Statement of Sen. Orrin G. Hatch
for the hearing
"An Examination of the Call to Censure the President"
Senate Judiciary Committee

Mr. Chairman, I strongly oppose Senate Resolution 398, the resolution purporting to censure President Bush regarding the foreign intelligence surveillance program. Let me briefly mention three reasons for my opposition.

First, I do not believe that the Constitution authorizes the Senate to punish the president through a mechanism other than impeachment.

Make no mistake, censure is punishment and this censure resolution aims to punish the president. Senator Feingold has repeatedly stated his belief that the president has broken the law and must be held accountable. That is done by punishment.

The last time a Senator introduced a resolution to censure a president was in 1999, directly on the heels of the Senate voting to acquit President Clinton on the charges for which he had been impeached by the House. It was offered as a form of punishment because censure is punishment.

I do not believe that the fundamental principle of the separation of powers, and our written Constitution built on that principle, authorize the Senate to punish the president other than by impeachment.

In 1800, the first time either House considered a resolution to denounce a president's actions, Representative William Craik of Maryland argued that the House had the power of impeachment but not censure. That resolution failed.

Many claim historical precedent for punishing the president through censure in the resolution introduced by Senator Henry Clay and passed on March 28, 1834. That resolution addressed President Andrew Jackson's actions regarding the Bank of the United States.

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I have that resolution right here, copied from the original *Journal of the Senate*. It is one sentence long. It states the Senate's opinion that President Jackson "has assumed upon himself authority and power not conferred by the constitution and laws, but in derogation of both."

I know that nearly everyone refers to this as a censure resolution, but it says nothing of the kind. This resolution, unlike the one before us today, never uses the words *censure* or *condemn*. It expresses the Senate's opinion about the president's action, but does not even purport to punish the president. Three years later, the Senate voted to reverse itself and to expunge this resolution from the record.

The official United States Senate website describes this 1834 resolution. While it does, I think mistakenly, refer to this as a censure resolution, our own Senate website states unequivocally that this resolution was "*totally without constitutional authorization.*" I have that page right here in my hand, printed directly from the Senate website, stating that that the 1834 resolution was totally without constitutional authorization.

If a resolution not even purporting to punish or censure the president is without constitutional authorization, how can one which would explicitly punish the president by censuring him and condemning his actions have constitutional authorization?

There are other constitutional objections to such an effort to punish the president through censure. I ask unanimous consent to submit for the record an article by Victor Williams, law professor at the University of Tampa, arguing that the attempt to censure President Clinton was unconstitutional.

Mr. Chairman, even if this serious constitutional concern did not exist or can somehow be waived aside, my second concern is with the content of this censure resolution. The statements offered to support the conclusion of censure are not established facts at all but, at best, highly debatable propositions.

This resolution states as fact propositions about which there is very real, and very public, debate. These include the legal bases President Bush has claimed for his foreign intelligence surveillance program, including the extent of his inherent constitutional authority and the effect of Senate Joint Resolution 38, the Authorization for Use of Military Force.

The resolution asserts that a statute, the Foreign Intelligence Surveillance Act, trumps the president's inherent constitutional authority as Commander in Chief.

In addition, this resolution makes very serious claims about President Bush's personal motives, and even his integrity. It claims that President Bush actually *misled* the public, that he made *false* implications and *inaccurate* statements, even in his State of the Union Address.

-more-

Senator Feingold, of course, is free to believe these things about the president and to state his belief publicly. He has spoken to that end on the Senate floor. But this constitutionally suspect effort to punish the president by censure rests on premises which are, at best, highly debatable and, at worst, misleading or even false.

Finally, Mr. Chairman, even if concerns about this resolution's constitutional legitimacy and content can be avoided, I remain very concerned about its timing and effect. The United States is at war. Our president has taken considered and measured steps that, I believe, are consistent with the law.

I can only hope that this constitutionally suspect and inflammatory attempt to punish the president for leading this war on terror will not weaken his ability to do so.

When the Senate turned aside the 1999 censure resolution directed at President Clinton, our colleague and later Attorney General John Ashcroft made a point which captures my concern about the resolution before us today.

Senator Ashcroft was certainly a strong critic of the president. He voted to convict and remove President Clinton from office. Yet he said: "The Constitution recognizes that if a President cannot be removed through impeachment, he should not be weakened by censure."

I agree. Partisanship may be at a fever pitch these days, but wartime is not the time to take steps that may weaken the Commander in Chief.

Thank you, Mr. Chairman.

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Statement Of Senator Patrick Leahy,
Ranking Member, Judiciary Committee Hearing On
"An Examination of the Call to Censure the President"
Friday, March 31, 2006

This is our fourth hearing to consider the President's domestic spying activities. Regrettably, this hearing, like the two that preceded it, is not an oversight hearing. After this hearing, we will have heard from a total of 20 witnesses. Of those, only one had any knowledge of the spying activities beyond what he had read in the newspapers. That witness was Attorney General Gonzales, who flatly refused to tell us anything beyond "those facts the President has publicly confirmed, nothing more."

What the President has publicly confirmed is that, for more than four years, he has secretly instructed intelligence officers at the National Security Administration to eavesdrop on the conversations of American citizens in the United States without following the procedures set forth in the Foreign Intelligence Surveillance Act.

After its secret domestic spying activities were revealed, the Administration offered two legal justifications for the decision not to follow FISA. First, it asserted a broad doctrine of presidential "inherent authority" to ignore the laws passed by Congress when prosecuting the war on terror. In other words, the rule of law is suspended, and the President is above the law, for the uncertain and no doubt lengthy duration of the undefined war on terror.

Second, the Administration asserted that in the Authorization for the Use of Military Force, or AUMF, which makes no reference to wiretapping, Congress unconsciously authorized warrantless wiretaps that FISA expressly forbids even in wartime. That is not what we in Congress said or intended.

Because the Republican-controlled Congress has not conducted real oversight, and because the attempts this Committee has made at oversight have been stonewalled by the Administration, we do not know the extent of the Administration's domestic spying activities. But we know that the Administration has secretly spied on Americans without attempting to comply with FISA. And we know that the legal justifications it has offered for doing so, which have admittedly "evolved" over time are patently flimsy. I therefore have no hesitation in condemning the President for secretly and systematically violating the law. I have no doubt that such a conclusion will be history's verdict.

History will evaluate how diligently the Republican-controlled Congress performed the oversight duties envisaged by the Founders. As of this moment, history's judgment of the diligence and resolve of the Republican-Controlled Congress is unlikely to be kind.

Our witnesses today will address whether censure is an appropriate sanction for those violations. I am inclined to believe that it is. If oversight were to reveal that when the President launched the program, he had been formally advised by the Department of

Justice that it would be lawful, that kind of bad advice would not make his actions lawful, but might at least provide something of an excuse.

If, on the other hand, he knowingly chose to flout the law and then commissioned a spurious legal rationalization years later after he was found out, he should bear full personal responsibility. To quote Senator Graham from an earlier point in his congressional service, when he bore the weighty role of a House Manager in a presidential impeachment trial: "We are not a nation of men or kings, we are a nation of laws."

I have said before that this Committee needs to see any formal legal opinions from this Administration that address the legality of NSA practices and procedures with respect to electronic surveillance. The American people have a right to know whether or not their President knowingly chose to flout the law when he instructed the NSA to spy on them.

That is why our next step should be to subpoena the opinions. We know the President broke the law – we should find out why.

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March 17, 2006 Friday
Late Edition - Final

SECTION: Section A; Column 1; Editorial Desk; Pg. 22

LENGTH: 451 words

HEADLINE: Time for Facts, Not Resolutions

BODY:

We understand the frustration that led Senator Russell **Feingold** to introduce a measure that would **censure** President Bush for authorizing warrantless spying on Americans. It's galling to watch from the outside as the Republicans and most Democrats refuse time and again to hold Mr. Bush accountable for the lawlessness and incompetence of his administration. Actually sitting among that cowardly crew must be maddening.

Still, the **censure** proposal is a bad idea. Members of Congress don't need to take extraordinary measures like that now. They need to fulfill their sworn duty to investigate the executive branch's misdeeds and failings. Talk about **censure** will only distract the public from the failure of their elected representatives to earn their paychecks.

We'd be applauding Mr. **Feingold** if he'd proposed creating a bipartisan panel to determine whether the domestic spying operation that Mr. Bush has acknowledged violates the 1978 surveillance law, as it certainly seems to do. The Senate should also force the disclosure of any other spying Mr. Bush is conducting outside the law. (Attorney General Alberto Gonzales has strongly hinted that is happening.)

The Senate Intelligence and Judiciary Committees should do this, but we can't expect a real effort from Senator Pat Roberts, the Intelligence Committee chairman, or Senator Arlen Specter, chairman of the Judiciary Committee. They're too busy trying to give legal cover to the president's trampling on the law and the Constitution.

When the Republicans try to block an investigation, as they surely will, Senator Harry Reid, the minority leader, should not be afraid to highlight that fact by shutting down the Senate's public business, as he did last year. This time, though, Mr. Reid needs to follow up. The first time Mr. Reid forced the Senate into a closed session, Mr. Roberts said he would keep his promise about an investigation into the hyping of intelligence on Iraq. But Mr. Roberts continues to sit on that report.

The nation needs to know a great deal more about the domestic spying. How many people's calls and e-mail were tapped? How were they chosen? Was Mr. Bush planning to do this until the war on terror ended -- that is, forever? The public should be asking why members of Congress are afraid to make those important and legitimate queries.

With so much still unknown about the domestic spying, the **censure** resolution merely allows the Republicans to change the subject to fairy tales about Democratic leaders' trying to impeach Mr. Bush. They are also painting criticism of Mr. Bush as unpatriotic. That's tedious nonsense, but watching Mr. **Feingold's** Democratic colleagues run for cover shows how effective it is.

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March 16, 2006 Thursday

SECTION: OPINION ; Pg. B-10:C; B-8:R; B-12:E,S

LENGTH: 318 words

HEADLINE: Onion-worthy;
Feingold censure stunt a disservice to nation

BODY:

Sen. Russell **Feingold,** D-Wis., wants us to think his proposal to **censure** President Bush on grounds that his wiretapping program amounted to a "conscious and intentional" attempt to violate the Constitution and ignore plain law is a deeply serious matter.

On the one hand, of course it is. We have deep misgivings about the White House's bypassing judicial review in some electronic surveillance and we are pleased that changes appear to be in the works that will address these concerns.

But on the other hand, **Feingold's** push reminded us of a Feb. 27 story in The Onion, the often-hilarious satirical weekly:

In a press conference on the steps of the Capitol on Monday, congressional Democrats announced that, despite the scandals plaguing the Republican Party and widespread calls for change in Washington, their party will remain true to its hopeless direction.

"We are entirely capable of bungling this opportunity to regain control of the House and the Senate and the trust of the American people," Senate Minority Leader Harry Reid, D-Nev., said ... . "It will take some doing, but we're in this for the long and pointless haul."

Talk about life imitating The Onion. **Feingold's** proposal is a stunt that will accomplish nothing beyond boosting his presidential prospects with the big chunk of the Democratic Party that thinks George W. Bush is a war criminal.

The good news is that the rest of America is sane enough to realize that such partisan stunts are a horrible diversion at a time of war.

The bad news is that **Feingold** is far from the only prominent Democrat who seems to see the president as America's biggest enemy. Former Vice President Al Gore said this week that "American democracy faces a time of trial and challenge right now more serious than any that we have ever faced."

Got that? What Bush is doing to the country is worse than the Civil War. Even The Onion doesn't come up with stuff that crazy.

GRAPHIC: 1 PIC; CAPTIONS: Russell **Feingold**

STATEMENT OF FORMER ASSOCIATE ATTORNEY GENERAL JOHN SCHMIDT ON RESOLUTION TO CENSURE PRESIDENT BUSH FOR AUTHORIZATION OF NATIONAL SECURITY AGENCY SURVEILLANCE PROGRAM

My name is John Schmidt. I am now a partner in the law firm of Mayer, Brown, Rowe & Maw in Chicago. I served from 1994 to 1997 as the Associate Attorney General in the Justice Department under President Clinton. I have a long history of leadership positions in the campaigns of Democrats for office at the local, state and national levels, including those of Bill Clinton, Paul Simon and Richard Daley, who I served as chief of staff when he first became Mayor of Chicago. So I approach this issue without any partisan presumption or bias in favor of President Bush.

I believe strongly, however, that any consideration of "censure" for the President's authorization of the NSA surveillance program is totally unwarranted and inappropriate. To characterize the President's actions in such terms demeans and undermines serious discussion of matters vital to the national security and the constitutional rights of the American people.

My own legal judgment, which I expressed publicly following the disclosure of the NSA program, is that, based on everything we know, the President had the constitutional authority to authorize the NSA program. See "President Had Legal Authority to OK Taps" (Chicago Tribune, Dec. 21, 2005) (attached). The President had that constitutional authority notwithstanding the provisions of the Foreign Intelligence Surveillance Act (FISA) that purport to make the court process under that Act the "exclusive" legal means of surveillance for foreign intelligence purposes.

The conclusion that the President's constitutional authority is not limited by the FISA Act is supported by the 2002 opinion of the 3-judge Foreign Intelligence Surveillance Court of Review which said that, based upon prior federal court of appeals decisions, the court "take[s} for granted" that the President has constitutional power to order warrantless surveillance for foreign intelligence purposes and "assuming that is so, Congress could not encroach on the President's constitutional power." In re: Seated Case No. 02-001 (United States Foreign Intelligence Surveillance Court of Review, November 18, 2002). That statement is dicta in a decision on other issues--but it is flat dicta from three federal court of appeals judges and it is the only judicial statement on this issue.

The conclusion that the President retained constitutional authority to order warrantless surveillance of a foreign power, outside the procedures of the FISA Act, is also supported by the position taken by Edward Levi, the most respected Attorney General of the modern era, who played a critical role in the development of the FISA legislation. Attorney General Levi believed that Congress could establish a court mechanism for the exercise of the President's foreign intelligence surveillance power. But he stated repeatedly in testimony before Congress that the court mechanism could not be exclusive and deprive the President of the inherent constitutional authority to order surveillance in circumstances not contemplated by the statute. See, e.g. Testimony of Edward Levi before the U.S. Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (November 6, 1975) (constitutional powers in the area of foreign intelligence "are sufficiently concurrent so that legislation by the Congress would be influential . . . You are asking me whether I think there is presidential power beyond that and my answer is 'Yes.'")

Indeed, although he was clear that the President's inherent constitutional power could not be limited to an exclusive statutory mechanism, Attorney General Levi was insistent that any statute contain an express acknowledgment of that retained Presidential power, saying it would be "extraordinarily dangerous" for Congress to legislate in the area without acknowledging the

President's retained constitutional authority. See, e.g., Testimony of Edward Levi before the Subcommittee on Criminal Laws and Procedures of the Committee on the Judiciary of the United States Senate (March 29, 1976) ("It is hard to imagine all the conceivable possible cases, particularly in an area where scientific developments may make enormous changes. . . The very nature of the reserved Presidential power, the reason it is so important is that some kind of an emergency could arise which I cannot foresee now, nor with due deference to the Congress, do I believe Congress can foresee . . . I would not want to advise anyone to think that the kinds of circumstances which might arise might not be of such a strange and peculiar nature that we would not have thought of them, and particularly in an area, as I say, where scientific developments come so frequently.").

Unfortunately, the FISA Act was subsequently enacted and signed into law by President Carter without a proviso acknowledging the President's inherent constitutional authority to order warrantless surveillance. In testimony on the Act, however, President Carter's Attorney General Griffin Bell stated that, despite the absence of an express reservation, the Act "does not take away the power of the President under the Constitution. It simply, in my view, is not necessary to state that power, so there is no reason to reiterate or iterate it as the case may be. It is in the Constitution, whatever it is." Testimony of Attorney General Griffin Bell before the Subcommittee on Legislation of the Permanent Select Committee on Intelligence of the House of Representatives (January 10, 1978).

The post-9/11 situation faced by President Bush demonstrates the prescience of Attorney General Levi's comments about unforeseen future threats and changing technologies that could require surveillance outside any statutorily prescribed mechanism. Everyone who has been briefed on the NSA program to date has concluded that it is a reasonable use of today's technologies in response to the unprecedented Al Qaeda threat of foreign terrorist attack in this country. The present confusion over the legality of the President's action also demonstrates the wisdom of Levi's advice that the President's retained constitutional authority should be recognized in the statute itself.

But even if one believes that the Foreign Intelligence Surveillance Court of Review, and Attorney General Levi and Attorney General Bell, and people like myself, are all wrong in concluding that the FISA Act did not limit the President's constitutional authority to authorize the NSA program, there is no basis for the Congress to consider "censure" of the President.

There is no evidence that the President did not act in good faith on the basis of the legal advice of the Attorney General and other lawyers at the Justice Department and at the National Security Agency. There is no evidence of any kind that the NSA program has been directed to serve any purpose other than the protection of the nation against further Al Qaeda attack. The program has been carried out by intelligence professionals--it is not Nixonian wiretapping on political enemies or J. Edgar Hoover spying on the sex life of civil rights leaders.

Debate over the legality of the NSA program is legitimate. Efforts to modify the FISA law to allow surveillance programs of this kind to come under the ambit of the FISA court (which Attorney General Levi suggested thirty years ago), or to provide for more effective congressional oversight, are legitimate and in my view desirable. See "A Historical Solution to the Bush Spying Issue," Chicago Tribune (February 12, 2006) (attached).

But a resolution to "censure" the actions of a President who has, by all evidence, acted in good faith and on the basis of credible legal advice to protect the nation against attack is irresponsible and should be rejected.

President had legal authority to OK taps

by John Schmidt

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President Bush's post- Sept. 11, 2001, authorization to the National Security Agency to carry out electronic surveillance into private phone calls and e-mails is consistent with court decisions and with the positions of the Justice Department under prior presidents.

The president authorized the NSA program in response to the 9/11 terrorist attacks on America. An identifiable group, Al Qaeda, was responsible and believed to be planning future attacks in the United States. Electronic surveillance of communications to or from those who might plausibly be members of or in contact with Al Qaeda was probably the only means of obtaining information about what its members were planning next. No one except the president and the few officials with access to the NSA program can know how valuable such surveillance has been in protecting the nation.

In the Supreme Court's 1972 Keith decision holding that the president does not have inherent authority to order wiretapping without warrants to combat domestic threats, the court said explicitly that it was not questioning the president's authority to take such action in response to threats from abroad.

Four federal courts of appeal subsequently faced the issue squarely and held that the president has inherent authority to authorize wiretapping for foreign intelligence purposes without judicial warrant.

In the most recent judicial statement on the issue, the Foreign Intelligence Surveillance Court of Review, composed of three federal appellate court judges, said in 2002 that "All the ... courts to have decided the issue held that the president did have inherent authority to conduct warrantless searches to obtain foreign intelligence ... We take for granted that the president does have that authority."

The passage of the Foreign Intelligence Surveillance Act in 1978 did not alter the constitutional situation. That law created the Foreign Intelligence Surveillance Court that can authorize surveillance directed at an "agent of a foreign power," which includes a foreign terrorist group. Thus, Congress put its weight behind the constitutionality of such surveillance in compliance with the law's procedures.

But as the 2002 Court of Review noted, if the president has inherent authority to conduct warrantless searches, "FISA could not encroach on the president's constitutional power."

Every president since FISA's passage has asserted that he retained inherent power to go beyond the act's terms. Under President Clinton, deputy Atty. Gen. Jamie Gorelick testified that "the Department of Justice believes, and the case law supports, that the president has inherent authority to conduct warrantless physical searches for foreign intelligence purposes."

FISA contains a provision making it illegal to "engage in electronic surveillance under color of law except as authorized by statute." The term "electronic surveillance" is defined to exclude interception outside the U.S., as done by the NSA, unless there is interception of a communication "sent by or intended to be received by a particular, known United States person" (a U.S. citizen or permanent resident) and the communication is intercepted by "intentionally targeting that United States person." The cryptic descriptions of the NSA program leave unclear whether it involves targeting of

identified U.S. citizens. If the surveillance is based upon other kinds of evidence, it would fall outside what a FISA court could authorize and also outside the act's prohibition on electronic surveillance.

The administration has offered the further defense that FISA's reference to surveillance "authorized by statute" is satisfied by congressional passage of the post-Sept. 11 resolution giving the president authority to "use all necessary and appropriate force" to prevent those responsible for Sept. 11 from carrying out further attacks. The administration argues that obtaining intelligence is a necessary and expected component of any military or other use of force to prevent enemy action.

But even if the NSA activity is "electronic surveillance" and the Sept. 11 resolution is not "statutory authorization" within the meaning of FISA, the act still cannot, in the words of the 2002 Court of Review decision, "encroach upon the president's constitutional power."

FISA does not anticipate a post-Sept. 11 situation. What was needed after Sept. 11, according to the president, was surveillance beyond what could be authorized under that kind of individualized case-by-case judgment. It is hard to imagine the Supreme Court second-guessing that presidential judgment.

Should we be afraid of this inherent presidential power? Of course. If surveillance is used only for the purpose of preventing another Sept. 11 type of attack or a similar threat, the harm of interfering with the privacy of people in this country is minimal and the benefit is immense. The danger is that surveillance will not be used solely for that narrow and extraordinary purpose.

But we cannot eliminate the need for extraordinary action in the kind of unforeseen circumstances presented by Sept.11. I do not believe the Constitution allows Congress to take away from the president the inherent authority to act in response to a foreign attack. That inherent power is reason to be careful about who we elect as president, but it is authority we have needed in the past and, in the light of history, could well need again.

John Schmidt served under President Clinton from 1994 to 1997 as the associate attorney general of the United States. He is now a partner in the Chicago-based law firm of Mayer, Brown, Rowe & Maw.

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March 31, 2006

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
Washington, DC

Dear Mr. Chairman:

This brief statement will respond to your request for my views on the proposed resolution to censure President George W. Bush in response to his approval of the National Security Agency (NSA) surveillance program. There can be no doubt that the program has been subject to serious legal objections, and that it is entirely legitimate for Congress to make a serious inquiry into those objections. But in the face of a legally controversial assertion of power by the President of the United States, the preferred course is to begin with a careful assessment of the underlying facts and the law, not to take the exceptionally rare course of censuring him.

Both the facts and the law remain less than clear. With respect to the facts: There is a dispute about the scope and nature of the surveillance program. It has been asserted that the program is limited to communications involving those with a real connection to those involved in the attacks of 9/11. But the nature of the connection remains unclear, and some people have claimed that surveillance has gone significantly further. To evaluate the program in legal terms, a better understanding of its nature would be extremely valuable.

With respect to the law: The Department of Justice has offered two arguments on behalf of the legality of the program. The first and more modest involves the 2001 Authorization for Use of Military Force (AUMF) against "those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" of 9/11. According to the Department of Justice, the AUMF permits warrantless communications surveillance of those against whom force has been authorized. The second and more ambitious argument is that under the Constitution, the President has *inherent* authority to engage in warrantless surveillance of the enemy for intelligence purposes, at least if the goal is to detect and prevent attacks on the United States.

Both of these arguments have been subject to strong counterarguments. The Foreign Intelligence Surveillance Act (FISA) and the AUMF have to be read together, and it is reasonable to think that the best way to do that is to require a warrant when electronic surveillance of Americans is involved. Hence it is not clear that the AUMF provides sufficient authority here. While some lower court decisions support the Depatment's broad claims of constitutional power, the Supreme Court has not revolved the issue, and it is far from clear that the Court would hold that the inherent power of the President forbids Congress from limiting warrantless searches in the way that FISA does. In short, the legal issues here are complex, not simple, and before reaching any final conclusions, they deserve careful attention in light of the nature and scope of the surveillance program.

As you are aware, a decision to censure the President of the United States is exceedingly rare. Our history suggests that such a decision should be reserved for cases in which the President has acted in bad faith, or abused his authority in a way that leaves no room for reasonable doubt. President Truman, for example, seized the steel mills, and his decision to do so was rejected by the Supreme Court, in a ruling that is very widely approved and indeed a cornerstone of current understandings of the separation of powers. But it would not have been proper to censure President Truman for taking a step that, while ultimately judged unlawful, was defended in good faith. President Bush made a serious of ambitious arguments in the *Hamdi* case -- arguments that undergirded some of his decisions with respect to the war on terror. The Supreme Court rejected those arguments; but censuring the President would not have been the appropriate response. These are but two highly visible examples. Others, involving some of our greatest presidents, are easy to find. Legal arguments in defense of presidential authority, made by the President, are not uncommonly found to be unconvincing within Congress or in federal court. The President is not censured because his legal arguments turn out to be wrong.

To the extent that the surveillance program is limited to those connected with Al Qaeda, or any others involved in the attacks of 9/11, the President appears to have acted on the basis of legal arguments that, whether or not convincing, could be made in good faith. I emphasize that nothing I have said here is inconsistent with the view that the Supreme Court should or would firmly reject those arguments. I emphasize as well that to say the least, there is good reason for congressional and public concern if the President has authorized an ambitious surveillance program for which legal authority is lacking. At this stage, the proper response to achieve greater clarity on the complex issues of both fact and law, and to adopt corrective reforms if they are deemed appropriate.

Sincerely,

Cass R. Sunstein

[Uncorrected Copy]

CENSURING THE WRONG BRANCH: Unconstitutional Congressional Usurpations of Executive Power Contributed to 9/11, and Seeking Partisan Gain During Time of War is *Despicable*

Prof. Robert F. Turner[1]

Mr. Chairman, it is always a great honor to appear before this distinguished Committee. But I appear before you today with a great sense of sadness. Indeed, my emotions approach *anger* as I consider this outrageously partisan effort to divide our country without reason in the midst of not one but *two* congressionally-authorized wars.

Others have made the point that it is a cherished tradition of the Rule of Law that fact-finding be completed before the accused is hanged, but I realize that further delay in this case might lead members and the American voters to realize that you are going after the *wrong* "lawbreaker."

I testified before this Committee on February 28 on this issue, and my 18,000-word prepared statement for that hearing addressed the underlying separation of powers issue in some detail. I was contacted late yesterday morning about testifying again this morning, so time simply did not permit a thorough and detailed discussion of the merits of this resolution in this statement. I would urge anyone who did not read my earlier statement to do so if you are seriously considering voting for this Resolution.

Let me highlight a few of the relevant facts in this matter:

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[1] Professor Turner holds both professional and academic doctorates from the University of Virginia School of Law, where in 1981 he co-founded the Center for National Security Law. A former three-term chairman of both the American Bar Association's Standing Committee on Law and National Security and the Committee on Legislative-Executive Relations of the ABA Section on International Law and Practice, Dr. Turner served as national security adviser to Senator Robert P. Griffin when FISA was enacted in 1978. Between 1981 and 1984 he served as Counsel to the President's Intelligence Oversight Board at the White House, where he was the senior attorney charged with the day-to-day oversight of FISA and other laws and executive orders pertaining to the Intelligence Community. He wrote the separation of powers chapter and co-edited the law school casebook, *National Security Law* (1990, 2005), and wrote his 1700-page (3000 footnote) SJD doctoral dissertation on "National Security and the Constitution," which has been accepted for publication as a trilogy by Carolina Academic Press when final revisions are completed. Responsibility for accuracy of facts and all opinions expressed are entirely personal and should not be attributed to any organization or other entity with which the witness is, or has in the past been, associated.

- American wartime leaders have been authorizing the warrantless intercept of enemy communications into the United States since General George Washington authorized the surreptitious interception of mail from Great Britain during the American Revolution. Abraham Lincoln authorized the tapping of telegraph lines, Woodrow Wilson authorized monitoring all cable traffic between the United States and Europe, and Franklin D. Roosevelt authorized broad monitoring of international communications long before Congress authorized American participation in World War II.

- When FISA was before the Senate in 1978, President Carter's Attorney General, former Court of Appeals Judge Griffin Bell, testified. He noted that FISA did not include any recognition of the President's independent constitutional authority to authorize warrantless wiretaps for foreign intelligence purposes, as the 1968 Crime Control and Safe Streets Act had done. And Attorney General Bell observed that the FISA statute "does not take away the power of the President under the Constitution."

- When FISA was enacted, Congress established not only the Foreign Intelligence Surveillance Court, but also a Foreign Intelligence Surveillance Court of Review to hear appeals from the FISA Court. In its only case, decided on November 18, 2002, the *unanimous* FISA Court of Review observed that *every court* to have decided the issue has, and I quote, "held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information," and concluded: "We take for granted that the President does have that authority and, assuming that is so, *FISA could not encroach on the President's constitutional power*." (My emphasis.)

- It is not as if the Founding Fathers *ignored* the issue of Intelligence. As early as 1776, Benjamin Franklin and his colleagues on the Committee of Secret Correspondence in the Continental Congress unanimously agreed that they could not share sensitive secrets about a French covert operation to assist the American Revolution, because: "we find by fatal experience that Congress consists of too many members to keep secrets."[2]

- On March 5, 1788, writing in *Federalist* No. 64, John Jay explained to the American people, while advocating ratification of the Constitution, that Congress could not be trusted to keep secrets. It is worth quoting his words:

> There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives, and there doubtless

[2] *Verbal Statement of Thomas Story to the Committee, in* 2 PAUL FORCE, AMERICAN ARCHIVES: A DOCUMENTARY HISTORY OF THE NORTH AMERICAN COLONIES, Fifth Series, 819 (1837-53).

> are many of both descriptions, who would rely on the secrecy of the president, but who would not confide in that of the senate, and still less in that of a large popular assembly. The convention have done well therefore in so disposing of the power of making treaties, that although *the president* must in forming them act by the advice and consent of the senate, yet he *will be able to manage the business of intelligence in such manner as prudence may suggest.*[3]

And from that time until the Vietnam War, both Congress and the judiciary were very deferential to the Executive when it came to managing "the business of intelligence"—whether in peace or war.

- The very first appropriation of Treasury funds for foreign affairs told President Washington to "account specifically" only for those expenditures "*as in his judgment may be made public*, and also for the *amount* of such expenditures *as he may think it advisable not to specify* . . . ."[4] That is to say, understanding that its members could not keep secrets, the Congress deferred to the President on matters of intelligence and foreign affairs. They didn't seek "classified reports" or "secret briefings."

  Indeed, this was the consistent practice during the early years of our nation. In a February 19, 1804, letter to Treasury Secretary Albert Gallatin, President Thomas Jefferson explained:

  > The Constitution has made the Executive the organ for managing our intercourse with foreign nations. . . . The Executive being thus charged with the foreign intercourse, no law has undertaken to prescribe its specific duties. . . . From the origin of the present government to this day . . . . it has been the uniform opinion and practice that the whole foreign fund was placed by the Legislature on the footing of a contingent fund, in which they undertake no specifications, but leave the whole to the discretion of the President.[5]

- In 1818, the great Representative Henry Clay observed on the House floor that expenditures from the President's "secret service" account were not "a proper subject of inquiry" by Congress.

- And since the ninth Whereas Clause in the pending resolution makes a reference to a requirement in the "National Security Act of 1947" that Congress be kept informed about intelligence activities, I should point out

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[3] FEDERALIST No. 64 at 434-35 (Jacob E. Cooke, ed. 1961) (emphasis added).
[4] 1 Stat. 129 (1790) (emphasis added).
[5] 11 WRITINGS OF THOMAS JEFFERSON 5, 9, 10 (Mem. ed. 1903).

that this reference really ought to say "*as amended*," because the *original* 1947 act did not include the slightest suggestion that Congress had any business looking into secret national security activities. And that was *not* an oversight.

- I would also add that I see no serious Fourth Amendment problem in this program (as it was described by the *New York Times* in the December 16 article that broke the story, and as it has been explained by the Attorney General and by Lt. Gen. Michael Hayden, who served as Director of the National Security Agency when the program began and until last year). Even Kate Martin, head of the Center for National Security Studies, has acknowledged that "surveillance of communications with *al Qaeda* . . . is *manifestly reasonable*"[6] — which would seem to take care of any concern about "unreasonable" searches or seizures. During a Voice of America "Talk to America" show that I did some weeks ago paired against Morton Halperin, Mort challenged my description of the program as involving only communications in which one party was a foreign national outside our borders who was known or believed to be tied to al Qaeda—explaining that could not possibly be accurate, because such communications could *obviously* be legally intercepted without a warrant.[7] Many bright scholars who have come down on the other side of the issue seem simply to have assumed that this program includes the intentional interception of communications that begin and end in this country, but that is not what the available data suggest. And I would add that, just as if the government has a lawful right to record and use my statements communicated to an American who is the target of an investigation for which a judge has issued a wiretap warrant, there should be no constitutional objection to intercepting communications during wartime involving known or suspected enemy agents outside (or, for that matter, *inside*) this country—even when Americans take part in the communication.

- Further, it is my impression from both the February 28 hearing and reading the transcript of the Attorney General's appearance that *not a single member* of this Committee believes that the United States should terminate the program (as described). That is to say, no serious person seems to be

[6] Kate Martin, *At Issue: Is the administration's electronic-surveillance program legal?,* C.Q. RESEARCHER, Feb. 24, 2006 at 185 (emphasis added). (This is a pro-con article including short essays by Ms. Martin and myself. She writes: "Following the law and obtaining a warrant would not make it impossible to conduct surveillance necessary to prevent future attacks. Courts would issue warrants for surveillance of communications with *al Qaeda*, which is manifestly reasonable." Of course, given the stakes involved in the war on terror, one might hope that the standard would be a bit higher than that it not be "impossible" for the president to do his job.)

[7] This was the first of two appearances on that show that Mort and I did together, but we were preempted after only half the planned show because VOA wanted to shift to cover a presidential press conference at the White House. I don't recall the date, and don't recall whether Mort's comment was in our preliminary banter before the microphones went live or was actually made on the show. One of the shows was on February 7, 2006.

denying that America *ought* to be listening in when al Qaeda operatives in other countries communicate with people inside this country. (That, after all, is how 9/11 was planned.) The only issue is whether the President must get a warrant before that can be done. And, again, past presidents of both parties, and every court to have considered the issue, have taken the position that the Constitution gives the President the power to authorize warrantless national security foreign intelligence wiretaps.

- Finally, I would note that my February statement documented the constitutional origins of the President's extraordinary authority in this field. It is found not merely in the Commander in Chief language of Article II, Section 2; but, more fundamentally, in the first sentence of Article II, Section 1, which vests the nation's "executive Power" in the President. Raised on the writings of men like Locke, Montesquieu, and Blackstone – each of whom viewed the control of external affairs to be "executive" business – the men who wrote our Constitution and governed this nation in its infancy shared this view. My February statement provides citations to statements supporting this view of the "executive Power" clause by such luminaries as:

    - President **George Washington**, who also served as President of the Constitutional Convention;

    - Representative **James Madison**, who is often referred to as the "Father of the Constitution" and was one of the three authors of the *Federalist* Papers (where he referred to Montesquieu as the oracle who was always consulted on matters of separation of powers);

    - Chief Justice **John Jay**, the nation's most experienced diplomat and another *Federalist* papers contributor;

    - Secretary of State (and later President) **Thomas Jefferson**;

    - Secretary of the Treasury **Alexander Hamilton** (the third contributor to the *Federalist* papers, which were the most important single source for explaining the new Constitution to the American people prior to ratification); and

    - Representative (later Chief Justice) **John Marshall**.

While I am on the subject of Chief Justice John Marshall, I would reaffirm two points that I made in last month's testimony that I consider critically important in this dispute. Both come from perhaps the most famous of all Supreme Court cases, *Marbury v. Madison*. Here is what Chief Justice Marshall wrote:

> By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. . . . [A]nd *whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion.* The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, *the decision of the executive is conclusive.*[8]

What John Marshall was explaining here is that not all powers vested in the President are "checked" by Congress or the courts. Some very important powers are given *exclusively* to the discretion of the President, and I submit at the core of those powers is his control over the gathering of foreign intelligence information – all the more so during periods of authorized war. Controlling intelligence collection is every bit as critically important during war as deciding where to deploy an infantry division or naval carrier battle group. (Indeed, these decisions are normally *determined* on the basis of the best available intelligence.)

Chief Justice Marshall's other key point from *Marbury* is equally important. He declared, and again I quote: "an act of the legislature, repugnant to the constitution, is void." This observation is fundamental to the widespread misunderstanding of the current dispute. It is true that President Bush is not "above the law," but in this country we have a hierarchy of *laws* in which the Constitution is supreme. And when Congress attempts to seize control of a power vested by the American people in their President through the Constitution, then Congress becomes a "lawbreaker" and the President is right and duty-bound to be guided by the Constitution.

For further evidence that certain presidential powers were not to be "checked" by Congress, we need look only at the most frequently cited of all foreign affairs cases, *Unites States* v. *Curtiss-Wright Export Corp.*, where the Supreme Court said:

> Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but *participation in the exercise of the power is significantly limited.* In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. *Into the field of negotiation the Senate cannot intrude, and Congress itself is powerless to invade it.*[9]

At the last hearing, there was little reference to *Curtiss-Wright* but much to Justice Jackson's concurring opinion in *Youngstown*. I have known and admired Yale Law School Dean Harold Koh for many years, and we have shared panels and debated many

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[8] *Marbury v. Madison*, 5 U.S. [1 Cranch] 137, 165-66 (1803) (emphasis added).
[9] *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (emphasis added).

times in various fora. But he profoundly misunderstands *Youngstown* when he contends that it somehow supercedes *Curtiss-Wright* as the proper paradigm for foreign affairs separation of powers cases. *Youngstown* involved a taking of private property within the United States without due process of law—a clear violation of the Fifth Amendment. And both Justice Black for the majority and Justice Jackson repeatedly distinguished the case from one involving the President's vast and often unchecked power in dealing with the external world. As I noted in my February statement, Columbia Law School Professor Louis Henkin noted in his 1972 book, *Foreign Affairs and the Constitution,* that *Youngstown* is not usually considered a "foreign affairs" case. And four members of the Supreme Court made that same point while dismissing *Youngstown* as a relevant precedent in their concurring opinion in *Goldwater v. Carter* (the Taiwan Treaty case).

The basic foreign affairs paradigm is that control over both the making and implementation of American foreign policy and international relations – including the conduct of war and the gathering of intelligence – is vested exclusively in the President except when Congress or the Senate are expressly given "checks" or "negatives" in the Constitution. And the unanimous view of the Framers, as far as my research over several decades has revealed, was that the "exceptions" vested in Congress or the Senate were to be "construed strictly."

I noted that—both in his book[10] and his testimony here last month—Prof. Koh cites cases like *Brown v. United States*[11] and *Little v. Barreme,*[12] ignoring the fact that both of these cases involve clear *exceptions* vested in Congress to the President's general control of foreign affairs. Much like *Youngstown*, *Brown* involved a seizure of property within the United States prior to the congressional declaration of war in 1812. In *Barreme*, the Congress had—pursuant to its Article I, Section 8, power to "make rules concerning captures on land and water"—authorized the seizure of American vessels bound *to* French ports, and the American owner of the *Flying Fish* had brought suit for damages because his vessel had been seized *coming out of* a French port. And even there, where the implied congressional limitation on the power of the Commander in Chief was pursuant to an *expressed grant* of power to Congress, there is evidence that Congress itself was not pleased with the Court's ruling, as it voted to *indemnify* Captain Little for his loses in the case.

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In the mid-1980s I was approached about possibly becoming staff director to the Senate Select Committee on Intelligence. I came over for an "interview" as an act of courtesy, but made it clear that I had serious constitutional reservations about the role of the Committee and thus said I was not interested in the position. (I interpreted this as a staff initiative, and did not perceive that the job had actually been *offered* to me. Rather, someone was seeking to learn if I would be interested in the position.)

[10] KOH, THE NATIONAL SECURITY CONSTITUTION 82.
[11] *Brown v. United States* 12 U.S. (8 Cranch)110 (1814).
[12] *Little v. Barreme,* 6 U.S. (2 Cranch) 170 (1804).

I honestly don't know where the idea for increased congressional involvement in "the business of intelligence" came from about the time of the Vietnam War. Obviously, the 1975 Church and Pike Committee hearings were a key factor, but I have traced it back at least to 1969. A radical leftist named Richard J. Barnet, who was instrumental in the founding of the Institute for Policy Studies (a group that was often involved in illegal contacts with the Castro regime and other Communist governments), proposed in a book entitled *The Economy of Death*:

> Congressmen should demand far greater access to information than they now have, and should regard it as their responsibility to pass information on to their constituents. Secrecy should be constantly challenged in Congress, for it is used more often to protect reputations than vital interests. There should be a standing Congressional committee to review the classification system and to monitor secret activities of the government such as the CIA. Unlike the present CIA review committee, there should be a rotating membership.[13]

I don't know if that's where the idea for the SSCI and HPSCI originated, or not—nor is it critically important to know that. What is clear is that the Founding Fathers understood that secrecy was important and that Congress could not keep secrets (I testified on this issue at great length before the HPSCI more than a dozen years ago[14]), and prior to the Vietnam War it was widely understood by all three branches that the control of foreign intelligence gathering was the exclusive province of the Executive—subject, of course, to the requirements of the Constitution. Thus, the President may not expend Treasury funds that have not been appropriated; he may not launch an aggressive war without the approval of both houses of Congress; he may not ratify a treaty that has not been approved by at leat two-thirds of the Senate; and, of course, of special relevance to the current controversy, he may not violate the Bill of Rights.

Did FISA Contribute to the Success of the 9/11 Attacks?

Mr. Chairman, I have been out of the intelligence oversight business for more than twenty years, and I don't have any "inside information" on the current NSA program that has led to this resolution. For the past 19 years I have made my living as a schoolteacher and legal scholar. Much of my work has focused in the separation of constitutional powers involving national security, which is presumably why you have invited me here today. And in my view, FISA constituted a usurpation of presidential power—a violation of the Constitution and their oath of office by those who voted to make it law in 1978. It was hardly the most egregious such usurpation in the post-Vietnam period, and its

[13] RICHARD J. BARNET, THE ECONOMY OF DEATH 178-79 (1969).

[14] Robert F. Turner, "Secret Funding and the 'Statement and Account' Clause: Constitutional and Policy Implications of Public Disclosure of an Aggregate Budget for Intelligence and Intelligence-Related Activities," prepared statement before the House Select Committee on Intelligence, February 24, 1994, available on line at http://www.fas.org/irp/congress/1994_hr/turner.htm.

harmful consequences have not rivaled those of the War Powers Resolution, for example, in my view. But it has, I believe, done identifiable harm.

You will no doubt recall that in 2001, *Time* Magazine included as one of its "Persons of the Year" a disgruntled FBI "whistleblower" named Colleen Rowley, who had written a angry memorandum to Director Louis Freeh denouncing bureaucratic incompetence by FBI lawyers who had refused to even *request* a FISA warrant she sought to permit access to Zacharias Moussaoui's laptop computer. In her view, she might have been able to prevent the September 11 attacks with such access.

I'm confident that most of you understand what *really* frustrated Ms. Rowley's efforts. In its effort to constrain the president from the vigorous exercise of his exclusive constitutional power to authorize the collection of foreign intelligence information, Congress had simply not considered the possibility of a "lone wolf" terrorist like Moussaoui. The FBI lawyers Rowley attacked had explained to her that she had failed to come close to meeting the factual predicate established by Congress to obtain a FISA warrant, but she apparently remains clueless to this day to the reality that FBI lawyers were merely "obeying the law" passed by Congress. In 2004, Congress corrected its error by amending FISA to address the "lone wolf" problem—but that was not soon enough to have permitted Ms. Rowley to have possibly prevented the 9/11 attacks. FISA also prohibited the interception of communications involving the covert *al Qaeda* terrorists who carried out 9/11. Lt. Gen. Michael V. Hayden, currently Deputy Director of National Intelligence and former Director of the National Security Agency, has expressed the view that "Had this program been in effect prior to 9/11, it is my professional judgment that we would have detected some of the 9/11 *al Qaeda* operatives in the United States, and we would have identified them as such."[15]

In a broader sense, the congressional contributions to the success of the 9/11 attacks date back to the sensationalized Church-Pike hearings of 1975, which prompted the dramatic decrease in emphasis on HUMINT intelligence collection during the Carter Administration. Former FBI counter-terrorism chief Buck Ravell has noted that, following the 1975 congressional hearings, he could not get a single FBI agent to volunteer for counter-terrorism duty. And surely Congress, when it imposed felony criminal sanctions on Intelligence Community professionals who carry out presidential orders that are later found to be in violation of FISA, foresaw and intended the "chilling effect" this would have and the likelihood it would promote the "risk-avoidance culture" that so many of the post-9/11 investigations have identified as a contributing factor to the success of those attacks. The message of the 1975 Church Committee hearings, and the felony convictions of FBI Deputy Director Mark Felt and intelligence chief Edward Miller for violating the civil rights of members of the "Weather Underground"—a purely domestic group that was exercising its First Amendment rights to murder policemen, rob banks, and set off pipe bombs across the country, and was conspiring to bomb a dance at a Non-Commissioned Officers' club in New Jersey—was not lost upon the Intelligence Community. I don't disagree that it is important to safeguard civil liberties as we seek to

[15] Remarks by Lt. Gen. Michael V. Hayden, National Press Club, January 23, 2006, available online at http://www.dni.gov/release_letter_012306.html.

identify and bring to justice those who wish to harm our country, and I know drawing that line is not always easy. But the American people need to understand that, when Congress passed FISA, it legislated unconstitutional constraints on the president's ability to safeguard our nation from foreign terrorists and provided statutory disincentives for our law enforcement and intelligence professionals to monitor the activities of the two 9/11 terrorists who lived in San Diego in 2000 and of Zacharias Moussaoui in Minnesota. Sixteen months before 9/11, NSA Director Michael Hayden told an open session of the House Permanent Select Committee on Intelligence that if Osama bin Laden himself were to cross the bridge from Niagara Falls, Ontario, to Niagara Falls, New York, FISA "would kick in [and] offer him protections and affect how NSA could now cover him."[16]

I am not alleging that had FISA not been on the books the FBI and NSA could have prevented 9/11. I don't know. But I do know that the statute contributed to the much-lamented "chilling effect" within the community, and it may well have been a major factor in preventing the discovery of the 9/11 plot in time to prevent the tragic loss of human life.

As I documented in last month's testimony, despite numerous claims to the contrary, Congress was not "invited" to enact FISA by the Supreme Court in the *Keith* case. *Keith* merely held that a warrant would henceforth be required for national security wiretaps of purely *domestic* targets – individuals or groups with no known connection with a foreign power or its agents in this country – and in *that* context Justice Powell suggested that Congress might wish to consider enacting new legislation to reflect the different requirements appropriate to a *domestic* national security intelligence wiretap versus those established by Title III of the 1968 Act. Justice Powell was talking about needing a warrant specifically for a surveillance of a member of the Black Panthers, and the case was carefully distinguished repeatedly from one that might involve a foreign power or its agents in this country.

Senator Feingold's Resolution

Let me now make a few observations about Senator Feingold's resolution. The first one has to do with motive. I assure you that I am most reticent to speculate about the motives of strangers and prefer to give them the benefit of the doubt. My special outrage over this resolution comes almost entirely from an Associated Press story authored by Frederic J. Frommer that appeared in several papers on Monday of this week. If that story is factually inaccurate, then my comments about the motivation for this resolution have no greater credibility. I have no other information on the facts and no specific information about the Senator's character. (It is my impression that he is a very bright and well-educated individual.)

The article quotes the Senator as denying any political motivation for introducing his resolution, but then quotes him as declaring that it is also "good politics." According

[16] *Id.*

to the AP story (which I found on line this afternoon on the Web site of the *San Jose Mercury News*), Senator Feingold explained: "'These Democratic pundits are all scared of the Republican base getting energized, but they're willing to pay the price of not energizing the Democratic base,' he said. 'It's an overly defensive and meek approach to politics.'"

I don't think I've ever had a partisan bumper sticker on my car endorsing any specific candidate for federal office. I don't think I'm registered as a member of any political party, and when Senator Chuck Robb was here I repeatedly gave him my vote. But I do have "political" bumper stickers on the back of my 2005 Toyota *Prius*, and it reads:

"Politics stops at the water's edge.
Stand UNITED in wartime."

It is a bumper sticker I designed myself, as bipartisanship (I actually prefer "nonpartisanship") is an issue very dear to my heart. I served twice as an Army officer in Vietnam, and I saw how often-partisan behavior in Congress ultimately snatched defeat from the jaws of victory and led directly to the consignment to Communist tyranny of tens of millions of people John F. Kennedy had pledged America would defend, and to the slaughter of millions more. I was in Saigon in April 1975 trying desperately to get permission to go into Cambodia to rescue orphans, and because of congressionally imposed restrictions that did not happen. Those orphans were among the estimated 1.7-to-2 million Cambodians who were slaughtered by the Khmer Rouge after Congress made it illegal for us to protect them.

The Cambodia Genocide Project at Yale University concluded that more than twenty percent of the Cambodian population was killed in the first three years after we allowed the Khmer Rouge Communists to seize power. A January 2004 story on the "killing fields" of Cambodia in *National Geographic Today* noted that, to save bullets, many of the small children were simply picked up by their legs and bashed against trees until they were dead. And if it appears that – like a lot of other Vietnam veterans – I'm still "upset" over that needless slaughter; well, that's an accurate assessment of my feelings.

So, to the extent that Senator Feingold, or any other person – Republican or Democrat (and *both* parties have demonstrated a willingness to put partisan interests about national security during periods of crisis[17]) – views these issues as appropriate opportunities for "politics as usual," I would commend to you the February 10, 1949, remarks of the late Senator Arthur Vandenberg, who said during a "Lincoln Day" address:

> It will be a sad hour for the Republic if we ever desert the fundamental concept that politics shall stop at the water's edge. It will be a triumphant day for those who would divide and conquer us if we abandon the quest for a united voice when America demands peace with honor in the world. In my view nothing has happened to absolve either Democrats or Republicans from continuing to put their country first. Those who don't will serve neither their party nor themselves.[18]

The Feingold Resolution

Now let me turn specifically to some of Senator Feingold's "Whereas" clauses and make some brief comments:

- His first clause states that FISA "provided the executive branch with clear authority to wiretap suspected terrorists inside the United States." No President and no court has ever denied that the President has constitutional authority to engage in foreign intelligence wiretaps even during peacetime, and no Congress ever denied it prior to the Vietnam War. This is akin to arguing that a presidential pardon involved "lawbreaking" by the President because Congress had enacted a gratuitous statute "authorizing" the President to grant pardons, but then providing pardons would only be valid if issued between the hours of noon and 3 PM on Fridays, or only if first approved by the spouse of the Speaker of the House. Congress can not usurp the independent power vested by the people in the President through the Constitution any more than it can usurp the power of Judicial Review by

[17] For a discussion of Republican partisanship during the Korean War, for example, *see* Robert F. Turner, *Truman, Korea, and the Constitution: Debunking the "Imperial President" Myth,* 19 HARV. J. L. & PUB. POL. 533 (1996).
[18] *Quoted in* TURNER, THE WAR POWERS RESOLUTION 118.

passing a mere statute. (Do any of you believe Congress could pass a statute directing the Supreme Court to overturn the constitutionally based holding in *Roe v. Wade*?)

- Whereas Clause Seven declares that "the President's inherent constitutional authority does not give him the power to violate the explicit statutory prohibition on warrantless wiretaps" in the FISA statute. I'm candidly not sure of the logic here – is it that statutes and the Constitution are of equal dignity, and thus the "later in time" controls? Surely, if as John Jay explained, the Constitution left the President free "to manage the business of intelligence as prudence might suggest" – a principle Jay explained was because potential foreign intelligence sources might not cooperate with us unless they could be "relieved from apprehensions of discovery," which in turn meant that the Senate and House had to be excluded from the business – it follows that a mere statute that attempts to alter this constitutional distribution of power must be "void." Again, this is hornbook law dating back to *Marbury v. Madison.*

- Then we have Clause Nine, which attacks the President from not sharing sensitive national security secrets with the full membership of the intelligence committees. (The leaders were informed.) The Founding Fathers would hardly have been shocked at this. I've already cited Ben Franklin's observation that Congress (referring to a much smaller Continental Congress in 1776) consisted of "too many members to keep secrets." In my 1994 HPSCI testimony I documented many other examples of the problems caused when Congress tried to manage foreign intercourse and failed to keep secrets.[19] And I've already noted that the original National Security Act of 1949 did not provide for the slightest congressional oversight of intelligence.

- Then we come to Clause Ten, which denounces President Bush for having "repeatedly misled the public" about sensitive intelligence collection during wartime. Wow! One only wonders the job the good Senator would have done on President Roosevelt for failing to announce in advance to the world the planned D-Day invasion of June 6, 1944. Indeed, there was an active disinformation campaign involving General George Patton and a phantom army – including inflatable rubber tanks – to deceive the German High Command that the invasion was being planned for Pas de Calais rather than the Cotentin. Well, one might conceivably argue that it was a brilliant ploy that saved tens of thousands of American lives and perhaps even meant the difference between victory and defeat. But, hey—FDR "lied" to the American people, and he didn't brief Congress or the press either! Perhaps the Senate can consider a retroactive resolution to censure such an evil public official? If the good Senator can find a way for the President to inform Congress and the American people without in the process increasing

[19] *See supra*, note 14.

the risk that our enemies will gain valuable intelligence in the process, that would be wonderful. Until then, I think most Americans are willing to forego knowledge of intelligence programs with the understanding that keeping them secret makes them more likely to be effective and may well save countless American lives.

- I was struck (but not surprised) by the absence of judicial authority for the legal assumptions underlying this resolution. On the other hand, I was impressed by the creativity reflected in Clause Twelve, where the Senator reasons that "no Federal court has evaluated whether the President has the inherent authority to authorize wiretaps inside the United States without complying with" FISA. He doesn't mention that *every* federal court that has addressed the issue has recognized inherent presidential authority for foreign intelligence wiretaps, or that the appeals court established by FISA itself declared in 2002 that FISA could not "take away" the President's independent constitutional power in this area. Let's go instead with the theory that, so long as a Federal court has not considered the issue, the President out to be censured for anything Senators don't like. (Well, that doesn't really help here either, as I gather Senator Feingold *does* like what is being done – only that the President *didn't ask permission* to do it (injecting further elements of delay in our efforts to identify terrorist cells whose members are plotting to kill large numbers of Americans). I was only asked to testify shortly before noon yesterday, so I did not have time to research the issue. But I strongly suspect it would be difficult to find a Federal court opinion declaring that the President may issue pardons on Friday mornings. But the absence of such an opinion would hardly be meaningful evidence that such behavior would be "illegal" or deserving of a Senate resolution of censure.

With all due respect, I would suggest that the *Resolved* clause in this resolution be modified as indicated below and then the resolution put on the fast-track for floor consideration by the full Senate:

> *Resolved*, That the United States Senate does hereby censure the United States Congress of 1978, and does condemn its unlawful usurpation of the constitutional powers granted to the President by the American people through the Constitution to manage the business of intelligence as prudence might suggest.

Had I more time, I might add further language incorporating the War Powers Resolution, the Hughes-Ryan Amendment (compelling disclosure of sensitive covert

operations to Congress), certain provisions of FOIA,[20] and the hundreds of legislative vetoes that have been left on the statute books more than two decades after the Supreme Court declared them unconstitutional. But my time is limited.

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POSTSCRIPT:

John Dean

When I was invited yesterday morning to take part in this morning's hearing, I was told that former Watergate figure John Dean would also appear on the panel. I know little about Mr. Dean or his constitutional expertise in this area (which is to say, I have no strongly positive *or* negative feelings towards him), but I do recall an article he authored immediately following the 9/11 attacks that a colleague brought to my attention at the time. It very kindly made reference to some of my own writings over the years. Mr. Dean wrote: "President Bush must take decisive action. And quickly." Then there was this line: "In fact, the President does not need Congressional authority to respond." He discussed the grant of the power "to declare War" in Article I, Section 8, of the Constitution, but added: "But, in fact, this clause does not put the Congress in charge of counter-terrorism, which is an Executive function." (For the record, I agree with all of these conclusions.)

I was both flattered and more than a bit embarrassed by his subsequent discussion of my views on the key importance of the grant of "executive Power" in Article II, Section 1, as he greatly overstated my actual importance as a Senate staffer during the mid-1970s. (I worked for a member of the Foreign Relations Committee, but was never "legal adviser" to the Committee.) But Mr. Dean clearly (and I think *wisely*) embraced the view that Article II, Section 1, was the basis of the President's primacy in foreign relations, and he added:

> While we don't know how President Bush will respond – which is, after all, consistent with the need for secrecy in this situation – it appears he is, indeed, consulting with Congress. Yet as all his predecessors realized, when it gets down to how, when and where to respond, the President can do whatever he feels necessary – whether Congress agrees or disagrees. Article II, Section 1 has vested him with that power.[21]

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[20] I've always found it amusing that, in enacting FOIA, Congress legally empowered the Soviet KGB and every other hostile foreign intelligence service to demand documents from the files of the Central Intelligence Agency; and yet, for some strange reason, the American people's "right to know" does *not* warrant their having access to documents in the files of the Senators and Representatives who the voters are actually called upon to pass judgment upon. But, of course, responding to FOIA applications would pose a "burden" on members of the Legislative branch.

[21] John Dean, *Examining the President's Powers to Fight Terrorism*, FINDLAW, Friday, Sep. 14, 2001, available on line at: http://writ.news.findlaw.com/dean/20010914.html.

I'm not sure I could have said it much better. And I'll be interested in seeing how Mr. Dean reconciles that clearly expressed view with his reported support for the pending Resolution.

I might add that his article was written *before* Congress added to the President's constitutional authority by enacting the AUMF joint resolution, empowering the President to fight a war against al Qaeda and its allies who were involved in the 9/11 attacks. As I noted in last month's testimony, in the 2004 *Hamdi* case a majority of the Supreme Court found the AUMF to be sufficient statutory authorization to satisfy the requirement that no American be detained without congressional authorization. The same logic would apply with *far greater force* to the requirement in FISA for statutory authorization of any departure from its terms. Obviously, if FISA itself is an unconstitutional infringement upon the President's independent powers in this area, the requirement for future legislative sanction before the President may exercise his own independent powers is without force. And it is of absolutely no significance that not a single member of Congress subjectively "thought" that the AUMF would have a direct impact upon FISA, any more than it is relevant that no member of Congress subjectively considered that the AUMF would satisfy the statutory authority requirement of 18 U.S.C. § 4002(a) – the Non-Detention Act. (That's just my *guess* – I know I didn't think about it at the time.)

I have argued that *Curtiss-Wright* rather than *Youngstown* provides the proper constitutional separation of powers paradigm to examine the interception of international communications during wartime involving known or suspected members of the enemy. I believe the President has this authority by virtue of his "executive Power" vested in him by Article II, Section 1, of the Constitution. And if he needed any additional authority, the AUMF statute – enacted with but a single dissenting vote in the entire Congress – clearly empowers him to exercise the intelligence-gathering component of his Commander in Chief power as well. So, in a very real sense—for those who still believe *Youngstown* is the proper paradigm—I submit the AUMF places the President's authority at its *zenith*—in Justice Jackson's first category.[22]

Mr. Chairman, that concludes my prepared statement. I will be delighted to take questions at the appropriate time.

[22] "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-36 (Jackson, J., concurring).

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ESSAY: THE CONSTITUTIONALITY OF CENSURE

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BIO:

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SUMMARY:
... It is beyond question, however, that one device that lost ground as a result of the storm of impeachment was censure. ... In doing so, I hope to clarify at the very least the constitutionality of a censure of a president--or, for that matter, any other official--for misconduct, particularly of the sort that does not rise to the level of an impeachable offense. ... Otherwise, the constitutional structure leaves several fora besides impeachment available to secure the accountability of an impeachable official for misconduct, including but not limited to that which does not rise to the level of an impeachable offense. ... Congress in the nineteenth century did not doubt that censure--or rebuke or condemnation by means of resolution--was available as an option for condemning official misconduct, particularly in the circumstance in which members believed that the misconduct did not rise to the level of an impeachable offense. ... Parliamentary maneuvering prevented a vote on censure in both the House and the Senate. Those who opposed a formal vote on censure based their opposition on the desire to have the formal record reflect that impeachment was the only viable option or, alternatively, to deny the President's democratic supporters the "political cover" to denounce without having to convict or remove the President for his misconduct. ...

TEXT:
[*33]

It has become commonplace for commentators to suggest that, in the aftermath of the Senate's acquittal of President William Jefferson Clinton, there have been only losers and no real winners. Whether this is true generally is a difficult question to which I will not hazard an answer. It is beyond question, however, that one device that lost ground as a result of the storm of impeachment was censure. That censure has taken a severe beating is unfortunate because so much of the beating was based on misguided interpretations of, or arguments about, the Constitution.

The truth is that censure--understood as a resolution critical of the President passed

by one or both houses of Congress--is plainly constitutional. [1] There might be good policy reasons to argue against the use of censure, such as censure is not particularly **[*34]** effective or might be overused; however, the debates in both the House and the Senate over censure blurred the line between constitutionally legitimate and politically acceptable. It is, however, important to separate the political from the constitutional arguments regarding censure, as I attempt to do below. In doing so, I hope to clarify at the very least the constitutionality of a censure of a president--or, for that matter, any other official--for misconduct, particularly of the sort that does not rise to the level of an impeachable offense.

In my opinion, every conceivable source of constitutional authority--text, structure, original understanding, and historical practices--supports the legitimacy of the House's and/or the Senate's passage of a resolution expressing disapproval of the President's conduct. First, there are several textual provisions of the Constitution confirming the House's or the Senate's authority to memorialize its opinions on public matters. The Constitution authorizes the House of Representatives and the Senate each to "keep a Journal of its Proceedings," [2] and provides that "for any Speech or Debate in either House, members shall not be questioned in any other Place." [3] Moreover, the First Amendment [4] presumably protects, individually or collectively, members' expressions of opinion about an official's misconduct. One may plainly infer from these various textual provisions the authority of the House, the Senate, or both to pass a non-binding resolution expressing an opinion--pro or con--on some public matter, such as that a president's conduct has been reprehensible or worthy of condemnation.

Second, the passage of resolutions critical of a president is quite compatible with the constitutional structure. Contrary to the assertions of some censure opponents during the impeachment proceedings against President Clinton, the Constitution does not establish impeachment as the only constitutionally authorized means by which the House or the Senate may "censure" the President. Instead, impeachment is the only means by which the House may formally charge and thereby obligate the Senate to consider removing a president for certain kinds of **[*35]** misconduct. [5] Removal and disqualification are the only sanctions that the Senate may impose if it were to convict an impeached official at the end of an impeachment trial. [6] Otherwise, the constitutional structure leaves several fora besides impeachment available to secure the accountability of an impeachable official for misconduct, including but not limited to that which does not rise to the level of an impeachable offense. These fora include civil proceedings (such as in Clinton v. Jones [7]), criminal process, the court of public opinion, the electoral process, the political process--broadly understood, and, of course, the judgment of history.

Moreover, it is nonsensical to think that if a resolution has no legal effect, it somehow still might violate the law. By definition, a resolution has no effect on the law (or legal arrangements) in any way. [8] To think that a resolution might have little or no practical effect is not a reason to think that it is unconstitutional; it is a reason to think perhaps that a resolution critical of the President might be a futile act politically. The calculation of whether a resolution is a worthwhile endeavor politically is separate and distinct from whether it is constitutional.

In addition, the House and the Senate each have passed more than a dozen resolutions condemning or criticizing the misconduct of presidents and other high-ranking officials. Indeed, on at least two occasions, the House has memorialized its disapproval of presidential misconduct. [9] Moreover, though the House decided not to

impeach President John Tyler for his exuberant exercises of his veto authority, the House did adopt a Committee report that was highly critical of President Tyler's construction and use of his veto authority. [10] In addition, the Senate censured President Andrew Jackson for firing his Treasury **[*36]** Secretary for refusing to implement President Jackson's instructions to withdraw national bank funds and to deposit them in state banks. [11]

Such resolutions provide historical precedents for the House and the Senate to do something similar with respect to a president (or any other official). For that matter, the thousands of resolutions that the House and the Senate each have passed over the years expressing opinions on a wide variety of public matters constitute other relevant precedents supporting the House's or the Senate's passage of a resolution expressing its condemnation or disapproval of a president's conduct. [12]

Last but not least, the consideration of the constitutionality of censure raises questions about the legitimacy of another mechanism--what came to be known as a "finding of fact"--the feasibility of which arose in the midst of the Senate's consideration of the impeachment charges against President Clinton. The proposal was initially suggested by, among others, Senator Susan Collins (R-Me.), who early in the proceedings professed to be intrigued by a proposal suggested years ago by University of Chicago Law School Professor Joseph Isenbergh.

Professor Isenbergh recently amended his earlier proposal in light of the current political situation and suggested that the Constitution allowed the House to impeach, and the Senate to convict, certain kinds of officials for misconduct that did not rise to the level of impeachable offenses. [13] According to Professor Isenbergh, only removal, as opposed to conviction, constitutionally required a two-thirds vote of the Senate and proof or evidence of impeachable offenses. [14] Professor Isenbergh based this reading of the Constitution on the fact that the textual provisions setting forth the House's and Senate's respective authorities regarding impeachment do not contain within them **[*37]** any express limitations, such as that the powers must be confined to the scope of impeachable offenses or, in the case of the Senate, to removal. [15]

In addition, Professor Isenbergh relied on the fact that in a couple of early impeachment proceedings, such as the impeachment trial of Judge John Pickering, the Senate took separate votes on guilt and on removal. [16] Professor Isenbergh's analysis led several senators, particularly Republican Susan Collins of Maine, to believe it would have been possible for senators to find the President guilty of some misconduct without having to remove him from office. This vote would have occurred before and would have been separate from a formal vote of conviction or removal. Moreover, some senators regarded a finding of fact to have been indistinguishable from censure. In the latters' opinion, the finding of fact would have embodied or represented nothing more than an expression of opinion about whether an official had done something. As such, a finding of fact conceivably would have been constitutional for many of the same reasons as censure would have been.

The proposed finding of fact, to the extent it relies on Professor Isenbergh's textual analysis, rests on a flawed reading of the impeachment clauses. It is mistaken to read the impeachment clauses in a disjointed or disconnected fashion. Instead, they should be read together, as a coordinated and coherent whole. When read in this fashion, it is clear that the impeachment clauses all have in common the obvious--impeachment--and impeachment is necessarily defined by its scope. The point of

enumerated powers is that powers have limitations, and impeachment has its limits in the constitutional language, "Treason, Bribery, or other high Crimes and Misdemeanors." [17]

To disconnect either the House's or the Senate's impeachment power from the scope of impeachable offenses not only does damage to the coherence of the constitutional text and constitutional structure, but also opens the door to extraordinary abuse on the part of either the House or the Senate, for each would then be completely unchecked and unbounded--constitutionally--from **[*38]** impeaching or convicting on whatever basis struck its fancy. Nothing confirms more dramatically that no such door was ever meant to be opened than the debates on impeachment in the constitutional and ratifying conventions. Throughout these debates, it was always clear that one of the framers' most important objectives in designing the impeachment process was to define narrowly--certainly, much more narrowly than Great Britain had ever done--the scope of the impeachment power. [18]

Another major problem with the finding of fact had to do with the uncertainty over whether it was meant only to be an expression of negative opinion about the President. Indeed, its timing--prior to the adjournment of the impeachment trial--made its status as an expression of opinion or something else dangerously ambiguous. As long as the Senate's vote on the finding of fact occurred as part of the impeachment trial, it could easily have been confused with a vote of conviction, and no doubt some senators understood it as tantamount to the latter. Undoubtedly, many senators who supported the finding of fact were motivated in part by their desire to prevent the President from claiming vindication or acquittal if the Senate failed to convict him for perjury or obstruction of justice. The finding of fact would have allowed these senators to suggest that the President had in fact been found guilty of certain misconduct (as defined in the finding of fact) by whatever number of senators had voted in favor of the finding of fact. Consequently, the finding of fact seemed to have represented for some senators a device to bring about a conviction (or the like) without the requisite vote.

If the finding of fact were the same as or tantamount to a vote of conviction, then at least two-thirds of the senators would have had to vote in favor of it in order for it to have had the effect of a conviction. If at least two-thirds of the senators had voted in favor of it, it almost certainly would have served as a conviction, and its subject--the President--would have been removed from office. If two-thirds of the senators had not voted in favor of the finding of fact, then the President almost **[*39]** certainly would have been entitled to claim that the vote should have counted as an acquittal.

Indeed, if senators had been required to take another vote on whether to convict or remove the President after having voted on the finding of fact, the President would probably have had good reason to claim a violation of fundamental fairness. For a vote on conviction following a vote on the finding of fact would have appeared to allow some senators the chance to try to convict the President on more than one vote--through the vote on the finding of fact and through the subsequent vote on conviction or removal. Subjecting the President to a vote of conviction more than once would have subjected him to a dubious and arguably spiteful process, and the result surely would have been perceived to have been unfair.

In the end, it is far from clear the extent to which censure might arise as an option in some future proceedings in which the members of Congress are considering the appropriate response to evidence or proof of presidential (or some other high-

ranking official's) misconduct. Congress in the nineteenth century did not doubt that censure--or rebuke or condemnation by means of resolution--was available as an option for condemning official misconduct, particularly in the circumstance in which members believed that the misconduct did not rise to the level of an impeachable offense. In the latter part of the twentieth century, the House and the Senate each failed to take formal votes on censure; but censure itself failed for political, not constitutional, reasons.

Parliamentary maneuvering prevented a vote on censure in both the House and the Senate. Those who opposed a formal vote on censure based their opposition on the desire to have the formal record reflect that impeachment was the only viable option or, alternatively, to deny the President's democratic supporters the "political cover" [19] to denounce without having to convict or remove the President for his misconduct. The final maneuvering underscored the extent to which impeachment is a political process, one in which all of the critical choices are as **[*40]** much political as they are constitutional. Such is the case as well with censure, for it too is as much a political as a constitutional choice. Consequently, the important thing in the future is to remember in a debate on censure or impeachment that not everything that is constitutional is politically feasible or desirable, while not everything that is politically popular or expedient is unconstitutional.

FOOTNOTES:

n1 It is noteworthy that, prior to the House's vote to impeach President Clinton, Representative William Delahunt (DMass.) sought opinions regarding the constitutionality of censure from the 19 constitutional scholars and historians who testified on November 9, 1998, before the House Subcommittee on the Constitution. See Letter from Representative William D. Delahunt to Representative Henry J. Hyde, Chairman, House Committee on the Judiciary (Dec. 4, 1998) (on file with author). Fourteen of the scholars indicated that they thought censure was constitutional. See Letter from Representatives William D. Delahunt and Frederick C. Boucher to Members of the U.S. House of Representatives (Dec. 15, 1998) (on file with authors).

n2 U.S. Const. art. I, § 5, cl. 3.

n3 Id. art. I, § 6, cl. 1.

n4 Id. amend. I.

n5 See id. art. II, § 4.

n6 See id. art. I, § 3, cl. 7.

n7 117 S. Ct. 1636 (1997).

n8 See Black's Law Dictionary, 1310-11 (6th ed. 1990).

n9 The subjects of these latter resolutions were Presidents James Polk and James Buchanan.

n10 See Jack Maskell, 98-843: Censure of the President By the Congress (Cong.

Res. Serv. Dec. 8, 1998).

n11 See id.

n12 Indeed, the House has also passed at least three resolutions expressing its disapproval of conduct by high-ranking executive officials other than the President, while the Senate passed two such resolutions in the nineteenth century. See id.

n13 See Joseph Isenbergh, Impeachment and President Immunity from Judicial Process 14, University of Chicago School of Law Occasional Paper No. 39 (Dec. 31, 1998).

n14 Cf. id. at 41-43 (discussing the conviction-removal dichotomy in the context of the impeachment trail of Judge John Pickening in 1803).

n15 See U.S. Const. art. I, § 2, cl. 5; id. § 3, cls. 6-7.

n16 See Isenbergh, supra note 13, at 42.

n17 U.S. Const. art. II, § 4.

n18 See generally Michael J. **Gerhardt,** The Federal Impeachment Process: A Constitutional and Historical Analysis 3-21 (1996).

n19 Senator Phil Gramm (R-Tex.) used this terminology during the discussion of censure in the Senate. See Wladyslaw Pleszczynski, About This Month, Am. Spectator, **Mar. 1999,** at 4, 4.