Testimony of

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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

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:

- 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."

- 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 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.

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 . . . ." 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.

- 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 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" --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. 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 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.

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.

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 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 and his testimony here last month--Prof. Koh cites cases like Brown v. United States and Little v. Barreme, 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.)

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.

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), 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 least 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 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."

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 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."

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 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)--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.

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 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 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 for 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. 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 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, 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.

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.

Mr. Chairman, that concludes my prepared statement. I will be delighted to take questions at the appropriate time.

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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 footnotes) 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.
2 - Robert F. Turner, "Congress, Too, Must 'Obey the Law': Why FISA Must Yield to the President's Independent Constitutional Power to Authorize the Collection of Foreign Intelligence," available on line at http://www.virginia.edu/cnsl/ .

3 - 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).
4 - FEDERALIST No. 64 at 434-35 (Jacob E. Cooke, ed. 1961) (emphasis added).
5 - 1 Stat. 129 (1790) (emphasis added).
6 - 11 WRITINGS OF THOMAS JEFFERSON 5, 9, 10 (Mem. ed. 1903).
7 - 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 Congress not make it "impossible" for the president to do his job.)
8 - 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 believe Mort's comment was in our preliminary banter before the microphones went live rather than actually being made on the show. One of the shows was on February 7, 2006.
9 - Marbury v. Madison, 5 U.S. [1 Cranch] 137, 165-66 (1803) (emphasis added).
10 - United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) (emphasis added).
11 - KOH, THE NATIONAL SECURITY CONSTITUTION 82.
12 - Brown v. United States 12 U.S. (8 Cranch)110 (1814).
13 - Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804).
14 - RICHARD J. BARNET, THE ECONOMY OF DEATH 178-79 (1969).
15 - 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.
16 - Remarks by Lt. Gen. Michael V. Hayden, National Press Club, January 23, 2006, available online at http://www.dni.gov/release_letter_012306.html.
17 - Id.
18 - 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).
19 - Quoted in TURNER, THE WAR POWERS RESOLUTION 118.
20 - See supra, note 14.
21 - 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.
22 - 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.
23 - "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).