

Statement of

# The Honorable Russ Feingold

United States Senator  
Wisconsin  
March 31, 2006

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Senate Judiciary Committee Hearing On the Call  
To Censure the President  
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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 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.