Testimony of

Mr. John Schmidt

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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.

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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.

A historical solution to the Bush spying issue
by John Schmidt

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Thirty years ago, Edward Levi, the most respected U.S. attorney general of the modern era, suggested a procedure that would resolve the dispute regarding President Bush and the National Security Agency wiretapping program.

In 1975 testimony to the Church Committee on U.S. intelligence activities, Levi suggested that court power to authorize foreign- intelligence wiretapping in the U.S. go beyond traditional warrants based on probable cause for surveillance of a particular individual. He said it should include power to approve a "program of surveillance" that is "designed to gather foreign-intelligence information essential to the security of the nation." Congress passed the Foreign Intelligence Surveillance Act in 1978, setting up a new court with authority to approve electronic surveillance on a caseby- case basis, but without Levi's suggested additional power.

Levi said a traditional warrant procedure works when surveillance "involves a particular target location or individual at a specific time." Foreign intelligence, however, may in some situations require "virtually continuous surveillance, which by its nature does not have specifically predetermined targets." In these situations, "the efficiency of a warrant requirement would be minimal."

In approving a surveillance plan, "judicial decision would take the form of an ex parte determination that the program of surveillance designed by the government strikes a reasonable balance between the government's need for the information and the protection of individuals' rights."

Had Levi's procedure been in place, President Bush could have submitted to a court an application setting out the elements of the proposed NSA surveillance program: the target; communications to be intercepted; screening methods; controls on information dissemination. Because FISA procedures are secret, a court application would not have compromised the program's secrecy. If Congress puts this procedure into the law, the president can submit the NSA program for approval now.

The court role would be limited to approving the "reasonableness" of the plan under the 4th Amendment, using a standard of review that recognizes the president's primary constitutional role in surveillance on foreign powers. The approving court might be the three-judge FISA court of review. Based on everything we know, NSA's surveillance program would be approved. Even the president's critics generally acknowledge that, based upon what we know, the NSA program is "reasonable" in responding to the Al Qaeda threat.

Although Levi supported legislation in the foreign intelligence area, he rejected the position of Bush critics that the president's authority to order warrantless foreign intelligence surveillance can be limited by Congress to a statutory procedure. Levi told the Church Committee that the president has inherent constitutional authority to conduct such surveillance. Asked by Sen. Frank Church "if the constitutional powers in the area of foreign intelligence are exclusive to the executive or whether they are concurrent with the legislative branch," Levi replied: "They 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.'"

Levi was correct in predicting that, despite the president's inherent power, legislation by Congress in the foreign intelligence area would be "influential."

All presidents since FISA was passed have used the FISA court process to obtain surveillance authorization for particular individuals. Presidents would also use Levi's suggested procedure to obtain court approval of a surveillance program. President Bush has said he pressed his lawyers on whether the NSA program could be carried out through the existing FISA process, but the rapid time sequence and the need for security professionals to make quick decisions could not be reconciled with the FISA requirement to determine case-by-case probable cause in a manner that could satisfy the court.

Giving a court the power to approve a reasonable surveillance plan proposed by the president gives everyone--the president and those in the executive branch who carry out the surveillance, members of Congress who have oversight responsibility, and the American people--greater assurance that constitutional rights are being protected.

It made sense when Edward Levi suggested it 30 years ago and it makes sense today.

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1997 as the associate attorney general in the Justice Department under President Bill Clinton.