Testimony of

Mr. John Dean

March 31, 2006

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
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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 Administrations 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 selfrighteousness, 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 authorizing both the House and the Senate to including the mention the First Amendment. As Gerhard 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.

* 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 Frankfuter'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 residential 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 otherway 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 .

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