Testimony of

# Mr. Bruce Fein

March 31, 2006

Statement of Bruce Fein
Before the Senate Judiciary Committee
Re: S.Res. 398 Relating to the Censure of George W. Bush

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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.