

there was nothing willful in what he did; I am sure it was just an oversight.

To try to limit debate on this most important matter that Senator FEINGOLD is going to put before the Senate is not appropriate. I have no problem with arranging a time to finish debate on the Feingold proposal, but it seems to me what is happening in the Senate is there is no time to debate much. And we are under a statute, and that is why we are here today with the budget resolution, with 50 hours on this.

But if we look at what we have facing us in the future, in the immediate future, the Secretary of the Treasury has asked us to increase the national debt from \$8.2 trillion to \$9 trillion. Now, if there were ever an opportunity for the American people to hear the differences between the two parties, I think it would be on that debate. Or, even if that weren't the case, something where we are being asked to increase the national debt by \$800 billion, shouldn't there be a debate on that?

To show our willingness to cooperate on something this important, I agreed with the distinguished majority leader that we would have 5 hours of debate on the national debt and three amendments that we would offer. We would have a half hour on each of ours, an hour and a half time is all we wanted. When we are going to be asked to increase the national debt by approximately \$800 billion, I think it is fair that we could have a few hours to talk about that.

But it appears at this stage that is not going to happen. It appears there will be the 50 hours on this matter that is now before the Senate which will be completed sometime Thursday, and there will be a mad rush to get out of here for the week break that we have. Of course, offering amendments after the matter is brought to the attention of the Senate, I mean we can't do that because we may shut down the Government. And that is why the majority has waited so long, even though Secretary Snow advised us in December that there was going to be a problem with the national debt ceiling.

So I have no problem with the Senator from Wisconsin being yielded time off the resolution by the distinguished ranking member of our Banking Committee who is now managing this bill for Senator CONRAD, but I want the record to be spread with the fact that this is an issue that deserves more debate, not less debate. I don't care if the time is used off the budget resolution.

So I would ask the distinguished Presiding Officer to read, or recall, at least, the unanimous consent request that was made by the distinguished majority leader.

The PRESIDING OFFICER. The unanimous consent request of the majority leader?

Mr. REID. Yes. It was my understanding the request was that the Senator from—

The PRESIDING OFFICER. The Senator from Wisconsin would be recog-

nized for 25 minutes as in morning business.

Mr. REID. But the time would be used off the budget resolution.

The PRESIDING OFFICER. That is correct.

Mr. REID. I have no objection.

The PRESIDING OFFICER. Is there objection?

Mr. SPECTER. Mr. President, reserving the right to object, I yield first to the majority leader to comment.

Mr. FRIST. Mr. President, a lot is happening very quickly now. In a very few minutes, we are going to get to the Senator from Wisconsin who has appropriately requested 25 minutes, and the unanimous consent request will be that the time would come off the bill and it will be as in morning business.

Just to clarify, he has said his intentions representing the other side of the aisle to offer a resolution to censure the President of the United States for a program that I have said and will restate is a lawful program, is a program that is constitutional, and is a program that is vital to the safety and security of the American people. My response to that unanimous consent request was if that is the case and if that is the position of the Democratic Party, that we are ready to vote at 5:30 or after our 5:30 vote today. That unanimous consent request was objected to by the other side of the aisle.

Then the second unanimous consent request that I propounded was that we would vote after a series of stacked votes tomorrow on the resolution to censure. There was an objection from the other side of the aisle.

When we are talking about censure of the President of the United States, at a time of war when this President is out defending the American people with a very good, lawful, constitutional program, it is serious business. And if it is an issue that the other side of the aisle wants to debate or debate through the night, I guess we are willing to do that as well. But the censure of the President is important, and if they want to make an issue of it, we are willing to do just that.

I have no objection to the unanimous consent request that has been made.

Mr. REID. There is no unanimous consent request now pending; is that right?

The PRESIDING OFFICER. No. You reserved the right to object, but there is only one pending before the Senate at this time.

Mr. SPECTER. Mr. President, I ask that the unanimous consent request giving Senator FEINGOLD 25 minutes be expanded to give this Senator 25 minutes, with the time running off the bill.

Mr. REID. So now we have Senator FEINGOLD speaking for 25 minutes, that would be yielded off the budget resolution, and Senator SPECTER speaking for 25 minutes, that being yielded off the resolution; is that right?

The PRESIDING OFFICER. That is the pending request. Is there objection? Without objection, it is so ordered.

Mr. REID. Mr. President, and there is no other unanimous consent request before the Senate at this time?

The PRESIDING OFFICER. The Senator is correct.

The Senator from Wisconsin.

RESOLUTION OF CENSURE

Mr. FEINGOLD. Mr. President, when the President of the United States breaks the law, he must be held accountable. That is why today I am submitting a resolution to censure President George W. Bush.

The President authorized an illegal program to spy on American citizens on American soil, and then misled Congress and the public—

Mr. SPECTER. Mr. President, will the Senator from Wisconsin yield for a question? May we have a copy of your resolution?

Mr. FEINGOLD. I will be introducing it at the conclusion of my remarks. I will be happy to supply the Senator with a copy of the resolution, but I do intend to introduce it at the conclusion of my remarks.

Mr. SPECTER. Mr. President, if the Senator from Wisconsin would let this Senator have a copy of it now.

Mr. FEINGOLD. Mr. President, I just said I would be happy to give the Senator a copy of the resolution right now.

Mr. President, I ask unanimous consent that my time be started over again.

The PRESIDING OFFICER. Without objection, it is so ordered.

The Senator from Wisconsin is recognized.

Mr. FEINGOLD. I thank the Chair.

Mr. President, when the President of the United States breaks the law, he must be held accountable. That is why today I am submitting a resolution to censure President George W. Bush. **The President authorized an illegal program to spy on American citizens on American soil, and then misled the Congress and the public about the existence and the legality of that program.** It is up to this body to reaffirm the rule of law by condemning the President's action.

All of us in this body took an oath to support and defend the Constitution of the United States and bear true allegiance to the same. Fulfilling that oath requires us to speak clearly and forcefully when the President violates the law. This resolution allows us to send a clear message that the President's conduct was wrong.

And we must do that. The President's actions demand a formal judgment from Congress.

At moments like this in our history, we are reminded why the Founders balanced the powers of the different branches of Government so carefully in the Constitution. At the very heart of our system of government lies the recognition that some leaders will do wrong and that others in the Government will then bear the responsibility to do right.

This President has done wrong. This body can do right by condemning his

conduct and showing the people of this Nation that his actions will not be allowed to stand unchallenged.

To date, Members of Congress have responded in very different ways to the President's conduct. Some are responding by defending his conduct, ceding him the power he claims, and even seeking to grant him expanded statutory authorization powers to make his conduct legal. While we know he is breaking the law, we do not know details of what the President has authorized or whether there is any need to change the law to allow it. Yet some want to give him *carte blanche* to continue his illegal conduct. To approve the President's actions now without demanding a full inquiry into this program, a detailed explanation for why the President authorized it, and accountability for his illegal actions would be irresponsible. It would be to abandon the duty of the legislative branch under our constitutional system of separation of powers while the President recklessly grabs for power and ignores the rule of law.

Others in Congress have taken important steps to check the President. Senator SPECTER has held hearings on the wiretapping program in the Judiciary Committee. He has even suggested that Congress may need to use the power of the purse to get some answers out of the administration. Senator BYRD has proposed that Congress establish an independent commission to investigate this program.

As we move forward, Congress will need to consider a range of possible actions, including investigations, independent commissions, legislation, or even impeachment. But at a minimum Congress should censure a President who has so plainly broken the law.

Mr. President, our Founders anticipated that these kinds of abuses would occur. Federalist Paper No. 51 speaks of the Constitution's system of checks and balances. It says:

It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections of human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place oblige it to control itself.

We are faced with an executive branch that places itself above the law. The Founders understood that the branches must check each other to control abuses of Government power. The President's actions are such an abuse. His actions must be checked and he should be censured.

This President exploited the climate of anxiety after September 11, 2001, both to push for overly intrusive powers in the PATRIOT Act and to take us into a war in Iraq that has been a tragic diversion from the critical fight

against al-Qaida and its affiliates. In both of these instances, however, Congress gave its approval to the President's action, however mistaken the approval may have been.

Here is the difference, Mr. President: This was not the case with the illegal domestic wiretapping program authorized by the President shortly after September 11. The President violated the law, ignored the Constitution and the other two branches of Government, and disregarded the rights and freedoms upon which our country was founded. **No one questions—no one questions—whether the Government should wiretap suspected terrorists. Of course we should and we can under current law. If there were a demonstrated need to change the law, of course, Congress should consider that step.** But instead, the President is refusing to follow the law while offering the flimsiest of arguments to justify his misconduct. He must be held accountable for his actions.

The facts are pretty straightforward. Congress passed the Foreign Intelligence Surveillance Act, known as FISA, nearly 30 years ago to ensure that as we wiretap suspected terrorists and spies, we also protect innocent Americans from unjustified Government intrusion. FISA makes it a crime to wiretap Americans on U.S. soil without the requisite warrants, and the President has ordered warrantless wiretaps of Americans on U.S. soil. So it is pretty simple. The President has broken that law and that alone is unacceptable.

But the President did much more than that. Not only did the President break the law, he also actively misled Congress and the American people about his actions and then, when the program was made public, about the legality of the NSA program. He has fundamentally violated the trust of the American people. The President's own words show just how seriously he has violated that trust.

We now know that the NSA wiretapping program began not long after September 11. Before the existence of this program was revealed, the President went out of his way, he went out of his way in several speeches to assure the public that the Government was getting court orders to wiretap Americans in the United States, something he now admits was not the case.

On April 20, 2004, for example, the President told an audience in Buffalo, "Any time you hear the United States government talking about wiretaps it requires a court order. Nothing has changed, by the way."

In fact, a lot had changed. But the President wasn't upfront with the American people. Just months later, on July 14, 2004, in my own State of Wisconsin, the President said, "Any action that takes place by law enforcement requires a court order. In other words, the government can't move on wiretaps or roving wiretaps without getting a court order."

And then, Mr. President, last summer on June 9, 2005, the President spoke in Columbus, OH, and again insisted that his administration was abiding by the laws governing wiretaps. "Law enforcement officers need a federal judge's permission to wiretap a foreign terrorist's phone, a federal judge's permission to search his property. Officers must meet strict standards to use any of these tools. And these standards are fully consistent with the Constitution of the U.S."

Now, Mr. President, in all of these cases the President knew that he wasn't telling the complete story. But engaged in tough political battle during the Presidential campaign and later over the PATRIOT Act reauthorization, he wanted to convince the public that a system of checks and balances was in place to protect innocent people from Government snooping. He knew when he gave those reassurances that he had authorized the NSA to bypass the very system of checks and balances that he was using as a shield against criticisms of the PATRIOT Act and his administration's performance.

This conduct is unacceptable. The President has a duty to play it straight with the American people. But for political purposes, he just ignored that duty.

After a New York Times story exposed the NSA program in December of last year, the White House launched an intensive effort to mislead the American people yet again. No one would come to testify before Congress until February, but the President's surrogates held press conferences and made speeches to try to convince the public that he had acted lawfully.

Most troubling of all, the President himself participated in this disinformation campaign. In the State of the Union Address he implied that the program was necessary because otherwise, the Government would be unable to wiretap terrorists at all.

Now, Mr. President, that is simply untrue. In fact, nothing could be further from the truth. You don't need a warrant to wiretap terrorists overseas, period. It is clear. You do need a warrant to wiretap Americans on American soil, and Congress passed FISA specifically to lay out the rule for these types of domestic wiretaps.

FISA created a secret court made up of judges who develop national security expertise to issue warrants for surveillance of suspected terrorists and spies. These are the judges from whom the Bush administration has obtained thousands of warrants since 9/11. They are the judges who review applications for business records orders and wiretapping authority under the PATRIOT Act. The administration has almost never had a warrant request rejected by these judges. It has used the FISA Court thousands of times, but at the same time it asserts that FISA is an "old law" or "out of date" in this age of terrorism, that it can't be complied with. Clearly the administration can

and does comply with it except when it doesn't. Then it just arbitrarily decides to go around these judges and around the law.

The administration has said that it ignored FISA because it takes too long to get a warrant under that law. But we know that in an emergency where the Attorney General believes that surveillance must begin before a court order can be obtained, FISA permits the wiretap to be executed immediately as long as the Government goes to the court within 72 hours. Now, the Attorney General has complained that the emergency provision does not give him enough flexibility; he has complained that getting a FISA application together, of getting the necessary approvals, takes too long. What the Attorney General is actually talking about, the problems he has cited, are bureaucratic barriers that the executive branch put in place. They are not mandated by Congress. They are not mandated under FISA. These were put into place by the Justice Department, the executive branch itself, and they could be removed if they wanted.

FISA permits the Attorney General to authorize unlimited warrantless electronic surveillance in the United States—unlimited—during the 15 days following a declaration of war to allow time to consider any amendments to FISA required by a wartime emergency. This is the time period that Congress specified very clearly. Yet the President thinks he is above the law. He thinks that he can just ignore that 15-day period and do this indefinitely. The President has argued that Congress gave him authority to wiretap Americans on U.S. soil without a warrant when it passed the authorization for use of military force after September 11, 2001.

That is ridiculous. Members of Congress did not pass this resolution to give the President blanket authority to order warrantless wiretaps. We all know that. Anyone in this body who tells you otherwise either was not there at the time or isn't telling the truth. We authorized the President to use military force in Afghanistan, a necessary and justified response to September 11. We did not authorize him to wiretap American citizens on American soil without going through the process that was set up nearly three decades ago precisely to facilitate the domestic surveillance of terrorists with the approval of a judge. That is why—and I have heard them do this very clearly—many Senators, both Republicans and Democrats, have come forward to question this bogus theory.

This particular claim is further undermined by congressional approval of the PATRIOT Act just a few weeks after we passed the authorization for use of military force. The PATRIOT Act made it easier for law enforcement to conduct surveillance on suspected terrorists and spies while maintaining FISA's baseline requirement of judicial approval of wiretaps of Americans in

the U.S. It is also ridiculous to think that Congress would have negotiated and enacted all the changes to FISA in the PATRIOT Act if it thought it had just authorized the President to ignore FISA in the AUMF.

In addition, in the intelligence authorization bill passed in December 2001, we extended the emergency authority in FISA at the administration's request from 24 hours to 72 hours. Why did we do that? Why do that if the President has some kind of inherent power or power under the authorization of force resolution to just ignore FISA? That makes no sense at all.

The President has also said that his inherent executive power gives him the power to approve this program, but here the President of the United States is acting in direct violation of a criminal statute. That means his power is, as Justice Jackson said in the steel seizure cases a half century ago, "at its lowest ebb." A letter from a group of law professors and former executive branch officials points out, "Every time the Supreme Court has confronted a statute limiting the Commander-in-Chief's authority, it has upheld the statute." The Senate reports issued when FISA was enacted confirm the understanding that FISA overrode any preexisting inherent authority of the President. As a 1978 Senate Judiciary Committee report stated, FISA "recognizes no inherent power of the President in this area." And "Congress has declared that this statute, not any claimed Presidential power, controls." So contrary to what the President told the country in this year's State of the Union, no court has ever approved warrantless surveillance in violation of FISA.

The President's claims of inherent executive authority and his assertions that the courts have approved this type of activity are baseless. But it is one thing to make a legal argument that has no real support in the law; it is much worse to do what the President has done, which is to make misleading statements about what prior Presidents have done and what courts have approved to try to somehow make the public believe that his legal arguments are much stronger than they really are.

For example, in the State of the Union, the President argued that Federal courts have approved the use of Presidential authority that he was invoking. I asked the Attorney General about this when he came before the Judiciary Committee, and he could point me to no court—not the Supreme Court or any other court—that has considered whether, after FISA was enacted, the President nonetheless had the authority to bypass it and authorize warrantless wiretaps. Not one court. The administration's effort to find support for what it has done in snippets of other court decisions would be laughable if this issue were not so serious.

In the same speech, the President referred to other Presidents in American

history who cited executive authority to order warrantless surveillance. But of course, those past Presidents—like Wilson and Roosevelt—were acting long before the Supreme Court decided in 1967 that our communications are protected by the fourth amendment, and before Congress decided in 1978 that the executive branch could no longer unilaterally decide which Americans to wiretap. I asked the Attorney General about this issue when he testified before the Judiciary Committee. And neither he nor anyone in the administration has been able to come up with a single prior example of wiretapping inside the United States since 1978 that was conducted outside FISA's authorization.

So again the President's arguments in the State of the Union were baseless, and it is unacceptable that the President of the United States would so obviously mislead the Congress and American public.

The President also has argued that periodic internal executive branch review provides an adequate check on the program. He has even characterized this periodic review as a safeguard for civil liberties. But we don't know what this check involves. And we do know that Congress explicitly rejected this idea of unilateral executive decision-making in this area when it passed FISA.

Finally, the President has tried to claim that informing a handful of congressional leaders, the so-called Gang of 8, somehow excuses breaking the law. Of course, several of these members said they weren't given the full story. And all of them were prohibited from discussing what they were told. So the fact that they were informed under these extraordinary circumstances does not constitute congressional oversight, and it most certainly does not constitute congressional approval of the program.

In fact, it doesn't even comply with the National Security Act, which requires the entire memberships of the House and Senate Intelligence Committee to be "fully and currently informed of the intelligence activities of the United States." Nor does the latest agreement to allow a seven-member subcommittee to review the program comply with the law. Granting a minority of the committee access to information is inadequate and still does not comply with the law requiring that the full committee be kept fully informed.

In addition, we now know that some of the Gang of 8 expressed concern about the program. The administration ignored their protests. One of the eight members of Congress who has been briefed about the program, Congresswoman JANE HARMAN, ranking member of the House Intelligence Committee, has said she sees no reason why the administration cannot accomplish its goals within the law as currently written.

None of the President's arguments explains or excuses his conduct, or the

NSA's domestic spying program. Not one. It is hard to believe that the President has the audacity to claim that they do.

And perhaps that is what is most troubling here. Even more troubling than the arguments the President has made is what he relies on to make them convincing—the credibility of the Office of the President itself. He essentially argues that the American people should trust him simply because of the office he holds.

But Presidents don't serve our country by just asking for trust, they must earn that trust, and they must tell the truth.

This President hides behind flawed legal arguments, and even behind the office he holds, but he cannot hide from what he has created: nothing short of a constitutional crisis. The President has violated the law, and Congress must respond. Congress must investigate and demand answers. Congress should also determine whether current law is inadequate and address that deficiency if it is demonstrated. But before doing so, Congress should ensure that there is accountability for authorizing illegal conduct.

A formal censure by Congress is an appropriate and responsible first step to assure the public that when the President thinks he can violate the law without consequences, Congress has the will to hold him accountable. If Congress does not reaffirm the rule of law, we will create another failure of leadership, and deal another blow to the public's trust.

The President's wrongdoing demands a response. And not just a response that prevents wrongdoing in the future but a response that passes judgment on what has happened. We in the Congress bear the responsibility to check a President who has violated the law, who continues to violate the law, and who has not been held accountable for his actions.

We are hearing people say that somehow this censure resolution sends a terrible signal to the terrorists who want to do us harm. I tell you what is a terrible signal, that we are so meek in response to this terrorist threat that we are going to let the President of the United States break the law of this Nation and not do anything about it. Now that is a victory for the terrorists if we won't even stand up for our system of Government because everybody has to be afraid to mention that this President broke the law.

Passing a resolution to censure the President is a way to hold this President accountable. A resolution of censure is a time-honored means for the Congress to express the most serious disapproval possible, short of impeachment, of the Executive's conduct. It is different than passing a law to make clear that certain conduct is impermissible or to cut off funding for certain activities.

He should be censured.

The Founders anticipated abuses of Executive power by creating a balance

of powers in the Constitution. Supporting and defending the Constitution, as we have taken an oath to do, requires us to preserve that balance and to have the will to act. We must meet a serious transgression by the President with a serious response. We must work, as the Founders urged in Federalist 51, to control the abuses of Government.

The Constitution looks to the Congress to right the balance of power. The American people look to us to take action, to speak out with one clear voice, against wrongdoing by the President of the United States.

To conclude, in our system of government, no one, not even the President, is above the law.

I send the resolution to the desk.

The PRESIDING OFFICER. The resolution will be received and appropriately referred.

Mr. FEINGOLD. Mr. President, I yield the floor.

The PRESIDING OFFICER. Under the previous order, the Senator from Pennsylvania is recognized for 25 minutes.

Mr. SPECTER. Mr. President, might I ask the Senator from Wisconsin to stay on the floor?

Mr. President, I think this subject matter is worthy of debate, but notwithstanding my experience of debating, I don't think I can debate without someone to debate with. I tried to attract the attention of the Senator from Wisconsin before he departed the Chamber. I think I got in right as he was on the way out the door.

But let me ask his staffers if they would invite the Senator from Wisconsin to return to the floor. Having listened to his long soliloquy, I would appreciate the benefit of his presence so we can deal with these issues in some substantive detail.

At the outset, I say that I agree with a number of things which the Senator from Wisconsin said and items which are in his resolution.

When he comes to the resolve clause and speaks about censure and condemnation of President Bush, I think he is vastly excessive. Call it over the top, call it beyond the pale, the facts recited in this resolution simply do not support that kind of conclusion.

Going right to the heart of the issue, the Senator from Wisconsin says in the fourth "whereas" clause on page 2 that the President does not have the inherent constitutional authority to act in distinction and difference from the Foreign Intelligence Surveillance Act.

That is what you call a naked assertion unsupported by any statement of law, unsupported by any rationale.

The Judiciary Committee, of which the Senator from Wisconsin is a member, has held two hearings on the authority of the President to conduct electronic surveillance. And there has been a great deal of testimony from reputable sources saying that the President does have inherent authority under article II of the Constitution.

If that legal conclusion is correct, then constitutional authority trumps a statute.

The Congress cannot legislate in derogation of the President's constitutional authority.

We cannot enact laws which take away authority prescribed to the President under the Constitution, just as we cannot legislate to take away authority that the Supreme Court has under the Constitution. Just as we cannot delegate our authority which the Constitution gives to the Congress, we cannot delegate our authority in derogation of our constitutional responsibilities and authorities.

Those are very basic principles of law.

I am sorry that the Senator from Wisconsin saw fit to condemn and excoriate the President for 25 minutes but doesn't have time to come to this floor to answer a simple question. And that simple question is, Doesn't the Constitution trump statute?

A subordinate part of that question is if the President has inherent authority under article II, isn't it incorrect to say that the President has violated the Foreign Intelligence Surveillance Act, which would be superseded or trumped by the President's constitutional authority?

We are going to have some more hearings before the Judiciary Committee. If I don't have an opportunity to confront the Senator from Wisconsin this afternoon, I will find another opportunity to do so.

But I think the RECORD should be plain that in the hearing last month a number of academicians testified that the President does have inherent authority under article II to supersede the Foreign Intelligence Surveillance Act. And the Attorney General testified at length that the President has inherent authority under article II, which would lead to the conclusion that if Attorney General Gonzalez is correct, as a matter of law, then there is no violation of law by the President. Admittedly he is taking the President's side, but that is the job of Attorney General as a generalization. He also represents the American people, and he has to discharge his oath consistent with his duties to the American people.

There are a number of points, as I have said earlier, where I think the Senator from Wisconsin makes a valid argument.

I think on his third "whereas" clause on page 1 of the resolution, where he says that the Foreign Intelligence Surveillance Act is the exclusive statutory authority for electronic surveillance, he is correct. That doesn't rule out the Constitution superseding the statute, however.

When the Senator from Wisconsin says on his third "whereas" clause on page 2 that the resolution authorizing the use of military force did not change the Foreign Intelligence Surveillance Act, I think the Senator from Wisconsin is correct. But the correctness

of those two propositions do not supersede the inherent article II authority of the President. And that is the issue which has yet to be resolved.

The majority leader spoke very briefly this afternoon before the Senator from Wisconsin presented his resolution. Senator FRIST said that we are dealing with a lawful program. Senator FRIST is in the position to make an evaluation on that subject because Senator FRIST is one of the so-called Gang of 8, which has had access to the program. He has been briefed on the program.

I believe the Senator from Wisconsin is correct in the body of his resolution when he raises an issue that the statute requires all members of the Intelligence Committee to be briefed. That is the applicable law. It may be that there are good reasons for not briefing all the members of the Senate Intelligence Committee and all members of the House Intelligence Committee. Perhaps because members of the Congress leak. But if good reasons do exist, then the President ought to come to the Congress and ask it to change the law. I agree with him that the Congress leaks. I have to say, in the same breath, that the White House also leaks. That is not a very good record for either the Congress or the White House.

That is why I have prepared legislation which would submit the NSA electronic surveillance program to the Foreign Intelligence Surveillance Court. That court now passes on applications for search-and-seizure warrants under the Foreign Intelligence Surveillance Act. They apply the standard, which is different than the standard for a search-and-seizure warrant in a criminal case. They have expertise in the field. They also have an exemplary record for keeping secrets.

That is the way to deal with this issue. There must be a determination on constitutionality. It is not possible, in my legal judgment, to make a determination as to whether the President's inherent article II powers authorize this kind of a program, without knowing what the program is. I don't know what the program is. The Attorney General would not tell us what it is when he testified last month. I understood his reasons for not telling us, even though we could have gone into a closed session. But the Judiciary Committee was looking at the legalities of the program. We were in a position to render a judgment on whether the Foreign Intelligence Surveillance Act was the exclusive remedy, and whether the resolution to authorize the use of force changed the FISA act. But it is a matter for the Intelligence Committee to get into the details of the program which, until last week, the administration has been unwilling to do.

I have great respect for my colleague Senator DEWINE, and have talked to him extensively about this issue. He and I serve on the Judiciary Committee together. I like his idea about

getting the administration to submit the program to, at least, the eight members of the Senate Intelligence Committee who, according to the press accounts, were briefed about it last week. I do not think it is adequate, as other parts of the DeWine legislation propose, to allow the surveillance to go on for 45 days, and at the end of that 45-day period to then give the administration the option of going to the FISA Court or to the Senate subcommittee. The subcommittee does not grant authorization for warrants. The subcommittee function is oversight. It is not a replacement for the Foreign Intelligence Surveillance Court.

A way is at hand to deal with this issue. The majority leader, Senator FRIST, said we have a lawful program. That opinion has weight, substantial weight in my mind, but it is not conclusive. Senator FRIST is not a judicial official. It may be that a more detailed analysis is necessary than has been presented to the Gang of 8. I don't know, because I don't know what they heard or what they learned.

How much time do I have remaining?

The PRESIDING OFFICER. The Senator has 11½ minutes.

Mr. DURBIN. Will the Senator yield the floor?

Mr. SPECTER. No, but I will at the conclusion of my presentation.

We ought to focus for a few moments on the importance of judicial review on the fourth amendment issues of search and seizure.

With the limited time I have left, I have only a few references, but I begin with a famous case in 1761 where a Boston lawyer defended Boston merchants who had been searched by customs house officials. James Otis gave a stirring 5-hour speech, charging the customs officers "break locks, bars, and everything in their way; and whether they break through malice or revenge, no man, no court may inquire." Very weighty words in 1761. Maybe if James Otis had seen this program, we could take his word on its constitutionality.

John Adams described this case as the spark of the American Revolution. He stated:

Then and there was the child Independence born.

Then in the Declaration of Independence in 1776, it is stated that one of the key reasons for the American Revolution involved the King allowing his officers to violate the rights of Americans and then protecting them "by a mock trial, from punishment," for the injuries that they had committed.

And then we have the fourth amendment. We need to go back to the basics of this amendment, which prohibit unreasonable searches and seizures. That is the question in this matter.

In 1916, in the Weeks case, the Supreme Court of the United States ruled that evidence obtained in violation of the fourth amendment could not be used in a criminal trial. In 1961, in Mapp v. Ohio, the Supreme Court of the United States ruled that the due

process clause of the 14th amendment prohibited States and State criminal prosecutions from using evidence obtained as a result of an unreasonable search and seizure.

We have had the Supreme Court of the United States intervene, even in time of war, to limit the President's authority. During the Korean war, President Truman cited "the existence of a national emergency" to "be able to repel any and all threats against our national security."

The Supreme Court of the United States, in *Youngstown Sheet v. Sawyer*, said the President did not have that authority. They said it exceeded his authority.

In the Hamdi case, 2004, 18 or 20 months ago, the Supreme Court stated:

We have long since made it clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens.

And the Court went on to say:

... whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties were at stake.

We have a way through this maze. The way through the maze is for the Congress to give jurisdiction to the FISA Court. That is our job, to give jurisdiction to Federal courts. We have dealt with the issue as to whether there is a case or a controversy. There is one. Without going into details here, it is not an advisory opinion.

But this resolution calling for the condemnation and the censure of the President is out of line and out of bounds. In listening to the Senator from Wisconsin, I did not hear, at any time, him say the President has acted in bad faith. The President may be wrong, but he has not acted in bad faith. I think all would concede that the President was diligently doing the best job he can. And I agree with him. I think the President's best job is satisfactory, and that no one has ever accused him of bad faith.

In the absence of any showing of bad faith, who has standing to censure and condemn the President and then not stay in the Chamber to debate the issue? I do hope this matter is referred to the Judiciary Committee, and not to the Rules Committee. We have already had two hearings on matters relating to this subject. I especially want to see this resolution referred to the Judiciary Committee because if it is in the Judiciary Committee, I can debate Senator FEINGOLD. If it goes to the Rules Committee, I cannot debate Senator FEINGOLD. Now, isn't that a powerful jurisdictional argument for the Judiciary Committee?

Mr. DURBIN. Will the Senator yield?

Mr. SPECTER. I do.

Mr. DURBIN. First, through the Chair, I commend the Senator from Pennsylvania. As a member of the Senate Judiciary Committee, he has shown