



AMERICAN
CONSTITUTION
SOCIETY FOR
LAW AND POLICY

**Prepared Remarks of U.S. Senator Russ Feingold
The American Constitution Society
Milwaukee, Wisconsin
April 5, 2007**

Thank you, Tom. You are a great friend, and a wonderful mayor for this city. We miss you in Congress, but as everyone here knows, you are doing a tremendous job leading Milwaukee, so I thank you.

I also want to thank all of you for inviting me tonight. In just a short period of time, the American Constitution Society has become a real force for change. There really was a need for an organization to step in and challenge the Federalist Society perspective in the legal community, and that is exactly what ACS has done so well.

I will tell you that I hope I never see the day when membership in ACS is a prerequisite for serving as a judge or in the Justice Department, as seems to be the case for the Federalist Society, but I do look forward to the day when many public servants proudly list ACS membership on their resumes.

I'm here tonight just three months into the new Congress, where we are actually getting the chance to challenge some of the prevailing perspectives ourselves. Unfortunately, since I was elected in

1992, I have spent a lot of time in the minority. I'm here to tell you that the change in control after the 2006 elections makes a big difference.

As people know, I believe strongly in bipartisanship no matter what, from my work with Senator McCain to clean up our campaign finance system, to my efforts with Senator Susan Collins of Maine to address rural health needs, to teaming up with Senator Sununu of New Hampshire to protect civil liberties. I have every intention of continuing those partnerships.

Unfortunately, some Republicans in Congress have been more interested in protecting the White House than in conducting oversight of an administration that has undermined the rule of law. That's what Democrats were up against when we were in the minority, and it made it incredibly difficult to hold the Administration accountable when it did something it shouldn't have, which, unfortunately, happened pretty frequently. It wasn't just that Republican leaders supported the policies of the President. It was that they were perfectly comfortable with abdicating the institutional responsibilities of Congress in order to protect the President from scrutiny and accountability that was so very much needed.

Tough congressional oversight is critically important to checking any executive branch, and especially this executive branch.

So now we finally have the ability to engage in tough oversight, and already, in three short months, you can see the results. For example, there is simply no way that we could have uncovered what we now know about the firing of the eight U.S. Attorneys without the power to force the Administration to turn over documents and evidence to the Judiciary Committee. What we have found, now that we have that power, is extremely troubling. And I'm sure there are more revelations to come.

Firing of U.S. Attorneys

Attorney General Gonzales testified in January that he would "never, ever make a change in the United States attorney position for political reasons." Yet there is increasingly disturbing evidence that political motivations played a significant role in what happened and that the Department of Justice did its best to obscure that fact.

Initially, the Department of Justice told this Committee that the dismissals were all performance-related. Then, Deputy Attorney General Paul McNulty conceded at a Judiciary Committee hearing that Bud Cummins in Arkansas was not dismissed due to his performance. Then we learned that most of the ousted U.S. Attorneys had received

stellar performance reviews right up until their dismissal. Former Deputy Attorney General James P. Comey even declared that David Iglesias, one of the U.S. Attorneys who was fired, was [quote] "one of our finest." Others were similarly commended for their work before they were fired.

I was also deeply concerned to learn that members of Congress may have tried to influence an ongoing federal criminal investigation that Mr. Iglesias was conducting. The intrusion of partisan politics into the prosecutorial discretion of our U.S. Attorneys and the way they conduct their investigations and pursue their indictments is absolutely unacceptable. I think that the Ethics Committee should take these allegations very seriously and should fully explore what investigation and action is warranted.

Whatever role political motivations played in the dismissals of these U.S. Attorneys, I think it is clear that the Administration has not acted in a manner that upholds the best interests of law enforcement and the reputation of our judicial system.

As everyone knows, this issue has raised the question of whether Mr. Gonzales, who authorized these firings, should continue as Attorney

General. My response to that is that he shouldn't have been our Attorney General in the first place. I voted against his confirmation in the Judiciary Committee, and again when his nomination came before the full Senate.

This is someone who, as White House Counsel, probably prevented improvements to the original Patriot Act, and who requested the infamous Bybee "torture memo," which so narrowly interpreted domestic and international prohibitions against torture that it permitted coercive interrogation techniques as long as they didn't rise to the level of causing organ failure, impairment of bodily functions, or death. This is someone who described the Geneva Conventions as [quote] "quaint" in the post-September 11th world.

Then, when he came before the Judiciary Committee for his confirmation hearing, he gave very misleading information to a question I asked concerning whether the position the Administration had taken with respect to torture might also allow it to authorize warrantless wiretaps. He called my question [quote] "hypothetical." Just less than a year later, we found out that the Administration had in fact taken precisely that position for years.

Back in January 2005, long before the NSA wiretapping story broke, I believed that Alberto Gonzales did not have the proper respect for the rule of law to serve as Attorney General. He wasn't, in my mind, the right person for that job in the first place.

We still don't know the whole story behind the U.S. Attorney firings. We know enough, though, to merit a full investigation. And we also know, fortunately, that Democrats in charge of the Judiciary Committees of the House and Senate will pursue that investigation wherever it leads.

While the U.S. Attorney firings have grabbed a lot of headlines in recent weeks, and rightly so, I think in some ways even more troubling is the recently revealed widespread abuse of national security letters by the FBI. Here again, Democratic control of the Congress means that Congress can explore these abuses and take action.

National Security Letters

National security letters, known as NSLs, are issued by the FBI to businesses to demand certain types of private records, including

information about phone and internet usage, and even detailed credit reports. To issue NSLs, the government does not need to get any court approval whatsoever, not from the Foreign Intelligence Surveillance Court or any other court.

The Patriot Act, which, as you know, I opposed, dramatically expanded the NSL authorities, essentially granting the FBI a blank check to obtain some very sensitive records about Americans, including people not under any suspicion of wrong-doing, without judicial approval. Congress gave the FBI very few rules to follow, and accordingly shares some responsibility for the FBI's troubling implementation of these broad authorities.

It's bad enough that the law expanded the reach of these NSLs and watered down the privacy protections applicable to them, but now it turns out that the FBI wasn't even following those rules. Instead, they basically made up their own rules, and the result is that they trampled on some basic privacy rights.

In a report issued last month, the Justice Department's own Inspector General said that he found, [quote] "the widespread and serious misuse of the FBI's national security letter authorities."

The report revealed that the FBI took a shockingly cavalier attitude toward the privacy of innocent Americans in its implementation of the Patriot Act NSL authorities.

The Inspector General found, based on FBI records, that the FBI's use of NSLs expanded exponentially after the Patriot Act, moving from approximately 8,500 requests in 2000, to 39,000 requests in 2003, 56,000 requests in 2004, and 47,000 requests in 2005.

But the Inspector General also found that even those numbers are inaccurate because the FBI had no policies in place with respect to the retention or tracking of NSLs. In many cases, agents did not even keep copies of signed NSLs. As a result, the FBI significantly **undercounted** its NSL requests. It also resulted in inaccurate information being reported to Congress about the use of NSLs.

But perhaps the most disturbing revelation in this report, among many disturbing revelations, is that on more than 700 occasions, the FBI obtained telephone billing records or subscriber information from three telephone companies *without* first issuing NSLs or grand jury subpoenas. Instead, it relied on what it called [quote] "exigent letters" signed by personnel not authorized by statute to sign NSLs.

Although there is a statutory emergency provision permitting the FBI to obtain certain communications records in emergencies where there is an immediate threat to a person's physical safety, the FBI admitted that many of these exigent letters were issued in non-emergency situations. Indeed, they were used as a matter of course by one headquarters unit. This violated both the statute and internal FBI policy.

There were earlier indicators that NSLs were being abused by the FBI than this Inspector General's report. In November 2005, a *Washington Post* story described the mountain of National Security Letters that had been issued by the FBI in recent years. But the Department of Justice sent a letter strongly implying that the number was inaccurate, and stating that it had robust internal controls in place to constrain the use of NSLs. Of course, we now know that wasn't the case at all.

It's an understatement to say that the Inspector General's report uncovered serious flaws in the use of National Security Letters. But these were flaws waiting to happen. It should not have taken this type of highly critical report to convince Congress to do something about such wide-ranging government power.

Had it not been for this independent audit, Congress and the public might never have known how the NSL authorities were being abused by the FBI. The FBI uses these NSL authorities in secret. And when, during the Patriot Act reauthorization process last year, Congress asked questions about how these authorities were being used, we got empty assurances and platitudes that have turned out to be completely false.

The Inspector General report proves that "trust us" doesn't cut it when it comes to the government's power to obtain Americans' sensitive business without a court order and any suspicion that they are tied to terrorism and espionage.

It was a big mistake for Congress to grant the government broad authorities and just keep its fingers crossed that they wouldn't be misused. Congress should have known better.

Unfortunately, when Congress reauthorized the Patriot Act last year- again over my opposition- it did nothing to address the standard of issuing a NSL. It left in place the breathtakingly broad standards for issuing NSLs. Not only that, but it left in place the automatic, permanent gag rule imposed on NSL recipients.

Congress needs to put appropriate limits on this kind of government authority-limits that allow agents to actively pursue criminals and terrorists, but that also protect the privacy of innocent Americans.

Already, there have been two hearings on the report in the Judiciary Committee, but I think we need to do more. I plan to hold a hearing next week in the Constitution Subcommittee, which I chair, on the types of sensible reforms that will help prevent future abuses of National Security Letters. Legislation is clearly needed to fix this problem.

The Justice Department's credibility concerning the powers contained in the Patriot Act is in shreds. Congress needs to exercise extensive and searching oversight of those powers, and it must take corrective action. The Inspector General report has shown both that current safeguards are inadequate and that the government cannot be trusted to exercise those powers lawfully. Congress must address these problems and fix the mistakes it made in passing and reauthorizing the flawed Patriot Act.

[Wiretapping/OPR Investigation](#)

Of course, any discussion of the Administration flouting the law wouldn't be complete if I didn't at least touch on what has to be the worst abuse of all- the President's illegal wiretapping program. As you may know, I introduced a resolution last year to censure the President for approving and misleading the public about this program. My resolution caused some controversy, and it got a lot of support- a little of that support came from my colleagues in the Senate, and a lot of it came from Americans who were outraged by the President's actions.

By asserting to override the clear language of the Foreign Intelligence Surveillance Act, the President ran roughshod over both of the other branches of government: Congress, which wrote FISA, and the judiciary, which is responsible under FISA for approving and issuing wiretap orders.

The President's unprecedented assertion of executive power with that program was a real threat to the principles on which our country is founded, and his decision to end the program was, I think, a significant moment in our constitutional history.

But, historical significance aside, there are still a lot of outstanding questions that Congress needs answered.

For one thing, the Congress still needs to understand fully how and why the illegal program went forward in the first place. One way we could have learned more would have been if the Office of Personal Responsibility of the Justice Department had been able to complete its internal investigation into the conduct of the attorneys who worked on and approved the program. But that investigation was blocked when lawyers who were to conduct it were denied security clearances.

And Attorney General Gonzales testified last summer that the President himself made the decision to deny the clearances.

Now, obviously, with all the public outcry about this program after it was revealed in the New York Times, the idea that the President blocked this investigation was outrageous. A number of members of Congress complained, but, of course, nothing more happened.

A few weeks ago, however, there was a press report that the Attorney General may have known that his own actions would be looked at as part of this internal investigation when he discussed it with the President. This raised serious questions. And now, with control of the Senate, we can get some answers.

Along with several Senators on the Judiciary Committee, I wrote to the Attorney General and asked him about this report. The Department of Justice responded that the Attorney General did not know he was a target of this investigation, and that he actually advised the President to grant the security clearances, but the President disagreed. Already that is more information we were given at the time of the initial decision.

Congress must now get to the bottom of this. The American people deserve to know whether the Attorney General of the United States acted ethically and appropriately. We have renewed our request for documents that discuss this matter.

In addition, the President should immediately issue the clearances needed for the internal investigation to proceed, regardless of whether the Attorney General himself is a target. That investigation should also consider whether the Attorney General conducted himself properly in making his recommendation to the President. Obviously, the Attorney General should recuse himself from any further involvement in this.

Of course, what went on with this fairly narrow investigation, and whether the Attorney General acted appropriately, isn't nearly the

whole story. It's just one question that remains unanswered more than five years after the illegal NSA program started. Congress still has to investigate how and why the Administration conducted illegal wiretapping of Americans rather than following the law that Congress passed to permit such surveillance.

And that gets back to my larger point- with control of the Congress, Democrats are finally able to make sure that Congress fulfills its constitutional duty as a co-equal branch of government. For six long years, the Administration acted without oversight and without accountability. The list of damaging episodes for which there was a wholly inadequate congressional response is long, and sad – WMD, Abu Ghraib, Guantanamo Bay, NSA spying, CIA detention facilities, Katrina, Valerie Plame, Jack Abramoff, and the list goes on and on. The lack of oversight and accountability not only kept the public from knowing what really happened in many of these episodes, it also, in my view, encouraged the Administration to act even more irresponsibly in the mistaken view that the Congress would never hold it to account.

In just three months, there are already unmistakable signs that things have changed. Does anyone have any doubt that the U.S. Attorney

scandal would have been swept under the rug long ago if the results of the November election had been different? Does anyone think that the DOJ Inspector General report would have been much more than a one-day story if Republicans still were in charge?

I am excited about the possibilities for the next two years, not because I long to settle political scores with the President, or score partisan points for the next election, but because Congress' fulfillment of its historic role and responsibility in our system of government has been sorely lacking in recent years. As the people's representatives, it is our job not only to make laws, but to keep a close eye on the branch of government that is charged with enforcing those laws. Only when we meet that responsibility, can the people be confident that their government is acting with the proper respect for the rule of law. And that, in the end, is why the Constitution provides for checks and balances in government, not an all-powerful executive.

I know that this organization is dedicated to these principles as well, which is why I am proud to be here with you today. Thank you very much.

