

STATEMENT OF BRUCE FEIN

BEFORE THE SENATE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION

RE: HONORING THE CONSTITUTION; RESTORING CHECKS AND BALANCES

SEPTEMBER 16, 2008

Dear Mr. Chairman and Members of the Subcommittee:

I welcome the opportunity to share my views on strategies to prevent the constitutional usurpations of the Bush-Cheney duumvirate and to a lesser degree their predecessors from becoming enshrined as constitutional law short of the impeachments, convictions, and removals from office of the President and Vice President for high crimes and misdemeanors prior to January 20, 2009.

I have detailed the Bush-Cheney constitutional transgressions in my book Constitutional Peril: The Life and Death Struggle for the Constitution and Democracy. They are generally well known to this Committee and do not need repeating. I will confine myself to forward-looking remedies to end or blunt their mischief.

One strategy is congressional censure. I testified in support of a censure resolution against President Bush introduced by Chairman Feingold a few years ago, and was dismayed at the overwhelming congressional indifference.

Another strategy would be a sense of the committee, sense of the Senate, or sense of the Congress resolution that establishes a non-exclusive roster of impeachable high crime and misdemeanor—the equivalent of a yellow flashing light to the President. I would recommend as examples a President's withholding information from Congress that bears on a decision to initiate war or lying to the American people about the same; ordering current or former White House or other executive officials to decline to appear before Congress to testify in response to subpoenas; initiating war without a congressional declaration of war or its equivalent, refusing to investigate or prosecute executive branch officials suspected of complicity in torture; knowing violations of the Foreign Intelligence Surveillance Act; or, state sponsored kidnappings, secret imprisonments, or torture abroad free from judicial supervision or oversight.

Moving on to particular strategies to address particular abuses, I would suggest the following for consideration:

1. Signing statements. A prohibition on the expenditure of any monies of the United States to enforce any provision of any law which the President has signed with a statement expressing his intent to disregard those provisions which he maintains are unconstitutional.
2. FISA violations. A prohibition on the expenditure of any monies of the United States to gather foreign intelligence contrary to the provisions of the Foreign Intelligence Surveillance Act, as amended.
3. Presidential wars. Making it a criminal offense for the President to initiate war without a declaration of war or its equivalent or to deceive Congress about intelligence bearing on a declaration of war or its equivalent.
4. Permanent war on international terrorism. Repeal the AUMF and enact a law that declares that the United States is not at war with international terrorists; and, that the United States criminal law in lieu of the law of war will apply to the apprehension, detention, trial, and punishments of suspected international terrorists. Among other things, this would mean an end to indefinite detentions of alleged unlawful enemy combatants without accusation or trial.
5. Executive privilege. Enactment of a law that establishes a three-judge court to appoint an independent counsel to enforce contempt findings by Congress against executive branch officials for refusing to answer questions, testify, or deliver requested documents.

6. Standing to challenge allegedly unconstitutional wars. Enact a law conferring standing on military personnel summoned to fight in allegedly unconstitutional wars initiated by the President either unilaterally or pursuant to a delegation from Congress.
7. Extraordinary rendition. Enact a law making criminal the abduction, secret imprisonment, or torture abroad under color of United States law of suspected international terrorists, provided that abductions for the purpose of bringing a suspect to trial in the United States with the trappings of due process would be permitted.
8. State secrets. Enact a law that in civil litigation directs the presiding judge to enter judgment in favor of a plaintiff alleging a constitutional violation by government officials and who presents a prima facie case of proof when the government invokes state secrets to decline to present a defense.
9. Mistake of law defense. Dramatically narrow the circumstances in which an executive official suspected of crime can invoke reliance on legal advice from the Department of Justice as a defense.

In addition to these ideas, I would also suggest that the House and Senate establish a permanent team of professional lawyers tasked to fashion and to defend constitutional theories and tactics that strengthen the hand of Congress vis-à-vis the executive just as the Office of Legal Counsel in the Department of Justice does for the President.