

RESTORING THE RULE OF LAW

HEARING

BEFORE THE
SUBCOMMITTEE ON THE CONSTITUTION
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
ONE HUNDRED TENTH CONGRESS

SECOND SESSION

SEPTEMBER 16, 2008

Serial No. J-110-119

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RESTORING THE RULE OF LAW

TUESDAY, SEPTEMBER 16, 2008

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Subcommittee met, pursuant to notice, at 10:20 a.m., in room SD-562, Dirksen Senate Office Building, Hon. Russell D. Feingold, Chairman of the Subcommittee, presiding.

Present: Senators Feingold, Cardin, Whitehouse, and Brownback.

OPENING STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Chairman FEINGOLD. I will call the Committee to order. Welcome, everybody, to this hearing of the Constitution Subcommittee entitled "Restoring the Rule of Law."

We have two very distinguished panels of witnesses scheduled, and I want to thank all of you for being here.

Tomorrow, September 17th, is the 221st anniversary of the day in 1787 when 39 members of the Constitutional Convention signed the Constitution in Philadelphia. It is a sad fact as we approach that anniversary that for the past 7½ years, and especially since 9/11, the Bush administration has treated the Constitution and the rule of law with a disrespect never before seen in the history of this country. By now, the public can be excused for being almost numb to new revelations of Government wrongdoing and overreaching. The catalogue is breathtaking, even when immensely complicated and far-reaching programs and events are reduced to simple catch phrases: torture, Guantanamo, ignoring the Geneva Conventions, warrantless wiretapping, data mining, destruction of e-mails, U.S. Attorney firings, stonewalling of congressional oversight, abuse of the state secrets doctrine and executive privilege, secret abrogation of executive orders, signing statements. This is a shameful legacy that will haunt our country for years to come.

There can be no dispute that the rule of law is central to our democracy and our system of government. But what does "the rule of law" really mean? Well, as Thomas Paine said in 1776: "In America, the law is king." That, of course, was a truly revolutionary concept at a time when in many places kings were the law.

Over 200 years later, we still must struggle to fulfill Paine's simply stated vision. It is not always easy, nor is it something that once done need not be carefully maintained. Justice Frankfurter wrote that the law is "an enveloping and permeating habituation of behavior, reflecting the counsels of reason on the part of those

entrusted with power in reconciling the pressures of conflicting interests. Once we conceive 'the rule of law' as embracing the whole range of presuppositions on which government is conducted..., the relevant question is not, has it been achieved, but, is it conscientiously and systematically pursued."

So the post-9/11 period is not, of course, the first time that events have caused great stress for the checks and balances of our system of government. As Berkeley law professors Daniel Farber and Anne Joseph O'Connell write in testimony submitted for this hearing: "The greatest constitutional crisis in our history came with the Civil War, which tested the nature of the Union, the scope of Presidential power, and the extent of liberty that can survive in war time." But as legal scholar Louis Fisher of the Library of Congress describes in his testimony, President Lincoln pursued a much different approach than our current President when he believed he needed to act in an extra-constitutional manner to save the Union. He acted openly and sought Congress's participation and ultimately approval of his actions. According to Dr. Fisher, "[Lincoln] took actions we are all familiar with, including withdrawing funds from the Treasury without appropriation, calling up the troops, placing a blockade on the South, and suspending the writ of habeas corpus. In ordering those actions, Lincoln never claimed to be acting legally or constitutionally and never argued that Article II somehow allowed him to do what he did. Instead, Lincoln admitted to exceeding the constitutional boundaries of his office and therefore needed the sanction of Congress. . . . He recognized that the superior law-making body was Congress and not the President."

So each era brings its own challenges to the conscientious and systematic pursuit of the rule of law. How the leaders of our Government respond to those challenges at the time they occur is, of course, critical. But recognizing that leaders do not always perform perfectly, that not every President is an Abraham Lincoln, the years that follow a crisis are perhaps even more important. And soon, this administration will be over. So the obvious question is: Where do we go from here? I believe that one of the most important things that the next President must do, whoever he may be, is take immediate and concrete steps to restore the rule of law in this country. He must make sure that the excesses of this administration do not become so ingrained in our system that they change the very notion of what the law is.

That, of course, is much easier said than done. It is not simply a matter of a new President saying, "OK, I won't do that anymore." This President's transgressions are so deep and the damage to our system of government so extensive that a concerted effort from the executive and legislative branches will be needed. And that means the new President will, in some respects, have to go against his own institutional interests.

That is why I called this hearing: to hear from legal and historical experts on how the next President should go about tackling the wreckage that this President will leave. I have asked our two panels of experts who will testify to be forward-looking, to not only review what has gone wrong in the past 7 or 8 years, but to address very specifically what needs to be set right starting next year and how to go about it.

In addition to the testimony of the witnesses here today, I solicited written testimony from advocates, law professors, historians, and other experts. So far we have received nearly two dozen submissions from a host of national groups and distinguished individuals, and I want to thank each and every person who made the effort to prepare testimony for this hearing. You have done the country a real service.

Without objection, all of this testimony will be included in the written record of the hearing. I plan to present the full hearing record to the incoming administration. The submissions we have received so far can be seen on my website at feingold.senate.gov. I hope that many of these recommendations, along with the testimony we will hear today, will serve as a blueprint for the new President so that he can get started right away on this immense and extremely important job of restoring the rule of law.

[The prepared statement of Senator Feingold appears as a submission for the record.]

So now let me turn to our Ranking Member and thank him for his participation. Senator Brownback?

**STATEMENT OF HON. SAM BROWNBACK, A U.S. SENATOR
FROM THE STATE OF KANSAS**

Senator BROWNBACK. Thank you very much, Chairman Feingold. Thank you, witnesses, for being here today and the preparation that you have gone through to be here. I look forward to hearing your testimony, your thoughts, and the parameters that the Chairman has put forward, although first I have to take some question about the title of the hearing and the testimony offered by some of the witnesses here today, as both clearly are intended to imply that President Bush and certain members of the administration have undermined or even eviscerated the rule of law. I have to take issue with the premise.

Clearly, there is a wide range of opinion as to how the President has conducted the war against terrorism over the past 7 years. I give that. Just as there are differences of opinion with regard to how the courts and even we in Congress have handled that unique and unprecedented challenge.

Had the attacks of September 11th and their aftermath occurred at a different time under a different President, that President might have done different policy judgments. I am pretty certain, though, that another President would not have found him- or herself immune to strong criticism, be it from the same voices that disagree with President Bush or from a different group of voices altogether.

At the end of the day, though, the fact that these sorts of disagreements exist in no way demonstrates that our Nation is somehow subsisting in a lawless state. And I do not believe that it is helpful or even really productive to claim that it is.

Second, the topics that will be raised in this hearing ranging from a debate over the proper scope of executive power to electronic surveillance to alleged torture to national security letters to Government secrecy to the terrorist detainee policy are certainly not new topics to the Judiciary Committee or the Subcommittee. By my staff's count, there have been 24 hearings in this Congress and the

prior Congress addressing the very issues our witnesses today will discuss. And I appreciate that we are taking forward-looking sight and not a backward-looking one. But that does not even include, that number I listed, the times these issues have been raised at confirmation hearings or agency oversight hearings.

Now, I come from a farming background, so the expression that comes to my mind is that this is "well-plowed ground." Although these are obviously important issues, no one who has looked at the lengthy list of hearings we have had on these issues could legitimately claim that we have not received a significant amount of attention on these topics.

Furthermore, we have to a certain extent always seen considerable changes on some of these topics. For example, earlier this summer we passed the Foreign Intelligence Surveillance Amendments Act, which, for better or for worse, expanded the types of circumstances in which our intelligence agencies must seek court approval before undertaking electronic surveillance. Additionally, the issue of waterboarding had previously raised considerable concern. We now have assurances that the CIA no longer engages in the practice. While I am sure that knowledge does not satisfy everyone testifying here today, I think they would at least believe it is a step in the right direction.

With regard to detainee policy, the Supreme Court's decision this summer resolved some of the concerns of administration critics. And, of course, just as our panelists here today may disagree on whether our Constitution supports the President's broad view of executive power, I am sure they would also disagree on whether that same document requires that we grant Fourth Amendment protections to enemy combatants on foreign soil.

My final point involves these enemy combatants and my home State. There are numerous individuals and organizations, including some represented on our panel today, who have called for the United States to close the detainee facility at Guantanamo Bay, Cuba, and relocate individuals being held as enemy combatants to the disciplinary barracks at Fort Leavenworth, Kansas. I have personally toured the facilities at Fort Leavenworth many times, and the facility simply is not equipped to handle these sorts of non-military detainees.

First, the maximum security wing of the disciplinary barracks is near capacity with military prisoners and much too small to handle the Guantanamo Bay population.

Second, Leavenworth cannot sufficiently separate detainees from the rest of the prison population, which would violate laws and policies against commingling.

Third, Fort Leavenworth does not have the ability to house and feed the large number of personnel necessary to secure a detainee population.

Fourth, Fort Leavenworth perimeter security is inadequate for a detainee mission.

Fifth, the disciplinary barracks facility is not far enough away from the edge of Fort Leavenworth to safely house detainees.

Sixth, the disciplinary barracks does not have 24-hour-a-day medical facilities, which would require transporting detainees off-site for after-hours or emergency care.

And, finally, it is unwise to put detainees on the same installation with the next generation of Army leaders studying at the Command and General Staff College.

I would ask those who advocate moving terrorist detainees to my home State to consider these facilities and undertake an honest assessment of the physical realities of housing and securing a detainee population. I hope that the next President and many concerned Members of Congress will visit Fort Leavenworth to make such an assessment. I am confident any visitor would conclude that the Fort Leavenworth disciplinary barracks is not the best option for a detainee population. I would hope they would take that into consideration.

Mr. Chairman, I look forward to the testimony that the witnesses will present.

Chairman FEINGOLD. Thank you, Senator Brownback.

We will now turn to the testimony from our first panel of witnesses. Will the first panel of witnesses please stand and raise your right hand to be sworn? Do you swear or affirm that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. COOPER. I do.

Mr. EDWARDS. I do.

Mr. KOH. I do.

Mr. SCHWARZ. I do.

Mr. TURNER. I do.

Chairman FEINGOLD. Thank you, gentlemen, and you may be seated. I want to thank you, welcome you. I am extremely impressed with the caliber of the witnesses on both panels today. I would ask that you each limit your remarks to 5 minutes, as we do have a lot to discuss. Your full written statements will, of course, be included in the record.

Our first witness today will be Frederick A.O. Schwarz, Jr. Mr. Schwarz is a graduate of Harvard University and Harvard Law School. He is currently senior counsel at the Brennan Center for Justice at NYU Law School. Mr. Schwarz has had a long and impressive career in both private practice and public service. Of particular interest to us here today, in 1975 and 1976, he was chief counsel for the U.S. Senate Committee to study governmental operations with respect to intelligence activities, commonly known as the "Church Committee." In 2007, Mr. Schwarz co-authored with Aziz Huq the book entitled "Unchecked and Unbalanced: Presidential Power in a Time of Terror."

Mr. Schwarz, welcome and you may proceed.

STATEMENT OF FREDERICK A. O. SCHWARZ, JR., SENIOR COUNSEL, BRENNAN CENTER FOR JUSTICE, NEW YORK UNIVERSITY SCHOOL OF LAW, NEW YORK, NEW YORK

Mr. SCHWARZ. Thank you very much, Senator.

You know, you referenced the Church Committee, and the lesson that was drawn from our work there was that crisis always makes it tempting to abandon the wise restraints that keep us free. That has always been true. It is true today. However, today we have a worse problem than any one in our history: first, the crisis has gone on for longer; and, second, there is a new theory, never before

voiced by an administration in power, that the President has the right to ignore or defy the law. So in that sense, we are repeating history, but we are in a more dangerous part of history.

I think the title of this hearing actually cuts to the heart of the matter because the current administration has ignored and defied the rule of law. And in so doing, it has undermined America's greatest strength, and that is, our compliance with the rule of law and our reputation for doing so. That has not only left Americans less free; it has also made us less safe.

Now, I make a number of recommendations in my written testimony. One is that the new President, immediately upon taking office, should disavow the theory that Vice President Cheney first came up with 20 years ago that the President has the right to monarchical powers. That is very, very important. And I also recommend a number of specific pieces of legislation, many of which deal with secrecy.

But the one I want to start with and try to cover in this short period of time is that the next Congress and the next President should appoint an independent, bipartisan investigatory commission charged with determining what has gone right and what has gone wrong with our policies in confronting terrorism and to recommend solutions. Without full knowledge of all the facts, we cannot know why wrong steps were taken, and we cannot take the necessary steps to repair the damage.

We have plenty of problems. Torture—I talk about torture a lot in my paper, and even Colin Powell and Mr. Turner say that it is clear that what has been done has undermined America's greatest strength. Colin Powell put it: "The world is beginning to doubt the moral basis of our fight against terrorism." And waterboarding, yes, it has been said they are not using it, but it has not been disavowed. The Attorney General refuses to disavow it, and the Vice President positively embraces it.

These steps toward torture have hurt us enormously with our allies. We have lost support that we had. Intelligence services, even in Great Britain, are less willing to cooperate with us. And France and Germany have ordered the arrest of CIA officials.

So to avoid repeating history requires understanding history. We know that excessive secrecy smothers the popular judgment that gives life to democracy. We need to cut through that secrecy, and a commission would serve several functions.

First, it would reveal the many as yet unknown aspects of what our Government has done and, equally important, how internally it rationalized and evaluated its actions.

Second, documenting violations of the public commitments of the United States is also to fulfill an important moral imperative. Renewing our commitment to the rule of law by confronting and acknowledging our recent failures gives substance to our national moral commitment, and thus can help begin to restore our reputation in the rest of the world.

The findings of a commission also would play the important role of holding accountable those who are responsible for wrongdoing and for legal and constitutional violations. The public revelations made by a commission would lodge accountability for deeds where

it belongs and serve as a warning to future Government officials not to again stray into the bound of unchecked power.

And, finally, and most importantly, the commission's work would play an important role in preventing future abuses. Without the truth, we will not have—without the full truth, we will not have a sufficient factual basis for informed public debate on the role of Government activities in a free society during an extended time of crisis. And it is great that this Committee is having a debate, a discussion, and people on the other side who I respect, it is great that you are having a discussion about what we must do to restore the rule of law and to have a discussion about whether the President has the power to break the law.

Now, while the revelations of a new commission charged rooting out the truth of this most recent period of Government failures might prove embarrassing to some individuals, and perhaps even to the country as a whole, that embarrassment is a price that must be paid. For, as the Church Committee concluded in one of its reports: "We must remain a people who confront our mistakes and resolve not to repeat them. If we do not, we will decline; but if we do, our future will be worthy of the best of our past."

Now, I want to conclude with just one final thought, and that is, this is not, this should not be, it cannot be, a partisan issue. The need to restore checks and balances under the rule of law is far more important than the controversies that divide Americans. Indeed, understanding the importance of righting the separation of powers and checks and balances and restoring respect for the rule of law should bring all Americans together. If today's President happens to hail from one party and the congressional majority from another, in the future those affiliations will surely change. But the core principle that the preservation of the Constitution's checks and balances and respect for the rule of law is essential to effective Government endures, regardless of what party controls either branch. If we turn a blind eye to this truth, the Nation will feel the consequences far into the future.

[The prepared statement of Mr. Schwarz appears as a submission for the record.]

Chairman FEINGOLD. Thank you very much, Mr. Schwarz. Again, if people could try to keep their remarks to 5 minutes, it would be helpful.

Mr. SCHWARZ. Did I manage to, or did I—I am sorry.

[Laughter.]

Chairman FEINGOLD. We are pleased you are here.

Mr. SCHWARZ. The clock is not working on this thing here.

Chairman FEINGOLD. We'll get the clock going. But I was delighted to hear your remarks.

Our next witness is Charles Cooper. Mr. Cooper, a graduate of Yale University and Harvard Law School, is a founding member and chairman of the law firm of Cooper & Kirk, where his practice is concentrated in the areas of constitutional, commercial, and civil rights litigation. Mr. Cooper has over 25 years of legal experience in Government and private practice and was named by the National Law Journal as one of the ten best civil litigators in Washington. He served as Assistant Attorney General for the Office of Legal Counsel in the Reagan administration.

Mr. Cooper, thank you so much for being here today, and you may proceed.

STATEMENT OF CHARLES J. COOPER, PARTNER, COOPER & KIRK, PLLC, WASHINGTON, D.C.

Mr. COOPER. Thank you very much, Chairman Feingold and Ranking Member Brownback, for inviting me to this hearing. Before discussing particular separation of powers issues that have been at the forefront of today's controversy, I think it is important to remember the extraordinary context in which these issues have arisen.

Just 5 days ago we marked the seventh anniversary of the September 11th terrorist attacks, and we entered into the eighth year of an out-and-out war with those who seek the destruction of our Nation and our way of life.

In perilous times such as these, with regard to momentous and difficult issues such as those that have confronted our Government, can the imperative to grant the Executive the benefit of genuine legal doubt be any greater?

Like Robert Jackson, the former Attorney General and Supreme Court Justice, I believe the President, especially in time of war, is surely entitled to "the benefit of a reasonable doubt as to the law."

This has traditionally been the view of the President's legal advisers in the Office of Legal Counsel. And I feel bound also to say this about the lawyers that have recently served in OLC: I cannot imagine a more important, yet more difficult, more trying, more thankless, and, indeed, it now appears, more perilous job for a lawyer than being a legal adviser to the President and the administration in the weeks and months following 9/11. I give thanks that the office was not confronted with so grave and difficult a responsibility during my time at OLC, and I am grateful to the men and women who have served their country in that office under these awful circumstances.

The bill of particulars that the administration's harshest critics have offered in support of the charge that the administration has abandoned the rule of law appears to focus on four general areas of concern, and I address each of those in my written statement, but in these remarks I will focus only on issues related to the detention and prosecution of foreign terrorists and enemy combatants.

The debate over these issues more than any other of the issues that have arisen in the last 8 years has been settled in our courts. And in the Federal courts of appeals—that is, in the courts that are bound to follow faithfully Supreme Court precedent—the administration is undefeated in the major war on terror cases. In those cases—*Rasul*, *Hamdi*, *Hamdan*, and *Boumediene*, of the 12 votes cast by courts of appeals judges, 11 of them came down on the side of the administration. Now, that judicial acceptance of the administration's positions surely established that they were well grounded in Supreme Court precedent.

One can hardly fault the administration, for example, for failing to predict the *Boumediene* Court's abandonment of a venerable case like *Eisentrager*. The *Boumediene* case overturned the Military Commission Act of 2006, which was Congress's carefully considered

statutory framework for determining the status of Guantanamo detainees. Thus, the five Justices in the *Boumediene* majority essentially ignored Justice Jackson's famous formulation in the steel seizure case that when the President acts pursuant to an act of Congress, his authority is, in Jackson's words, "at its maximum" and should be accorded "the strongest of presumptions and the widest latitude of judicial interpretation."

Indeed, prior to the war on terror cases, the Supreme Court had uniformly accorded the President great deference in the area of national security and foreign and military affairs. That a bare majority of the Supreme Court has now effectively cast aside that long history of deference in an area so critical to our national security is, I would submit, the most significant development in the separation-of-powers area to come out of the last 8 years. If you want to know my advice on what the next President and Congress or Senate should do to ensure that the rule of law as embodied in our Constitution will be respected, it is this: appoint and confirm judges and Justices who will respect the constitutional prerogatives of the other branches of Government.

One last point while I am on the subject of the Supreme Court. A large majority of the Court's decisions each term reverse the opinions of lower court judges, and the Court invalidates congressional statutes virtually every term. In other words, every term the Court declares that Congress and lower court judges got the law wrong. But these judges and Members of Congress are presumed, quite properly, to make good-faith efforts to interpret the law honorably and to the best of their abilities. Yet that presumption is typically not accorded to members of the executive branch.

Which brings me to something that the next administration and Congress, in my opinion, most assuredly should not do, and this will conclude my testimony, Senator Feingold. It should not threaten executive branch lawyers from the prior administration with ethical inquiries and criminal investigations. Even tranquil times, let alone times of war and national peril, engender serious debate and vigorous emotional disagreement over matters of policy and law. If disagreement between lawyers is sufficient to provoke criminal investigation, civil liability, or bar discipline proceedings, why would anyone—of either party or no party—elect to serve as a lawyer for the Government?

Thank you, Senator Feingold.

[The prepared statement of Mr. Cooper appears as a submission for the record.]

Chairman FEINGOLD. I thank you, Mr. Cooper.

Our next witness is former Congressman Mickey Edwards. Congressman Edwards was a Republican Member of Congress from Oklahoma for 16 years, from 1977 to 1993, during which time he served on the House Appropriations and Budget committees and was a senior member of the House Republican leadership as Chairman of the party's Policy Committee. After leaving Congress, Edwards was on the Harvard faculty for 11 years, where he taught at both the Kennedy School of Government and Harvard Law School. For the past 4 years, he has been on the faculty of Princeton University Woodrow Wilson's School of Public and International Affairs. Congressman Edwards is also on the board of di-

rectors on the Constitution Project. He was one of three founding directors of the Heritage Foundation, national chairman of the American Conservative Union, and he has chaired the annual Conservative Political Action Conference five times.

Congressman Edwards, thank you for being here and for your time today. You may proceed.

STATEMENT OF MICKEY EDWARDS, BOARD OF DIRECTORS, THE CONSTITUTION PROJECT; LECTURER, WOODROW WILSON SCHOOL OF PUBLIC AND INTERNATIONAL AFFAIRS, PRINCETON UNIVERSITY; FORMER MEMBER OF CONGRESS 1977-1993; AND FORMER CHAIRMAN, HOUSE REPUBLICAN POLICY COMMITTEE, WASHINGTON, D.C.

Mr. EDWARDS. Thank you, Mr. Chairman, members of the Committee. On behalf of myself and the Constitution Project, I want to thank you for the opportunity to discuss the rule of law as it pertains in particular to the prerogatives and obligations of the Congress. I have become increasingly concerned about the failures of Congress to meet its constitutional responsibilities.

There are a great many important questions, substantive policy questions, to be face. Not one of those issues—and not all of them combined—is as important as remaining a Nation governed by the rule of law under our Constitution. In our case, the principal law that governs us and to which all other laws are subordinate is the Constitution, which spells out the powers and limits on the powers of the Government as a whole and of the component branches of the Government.

There has been a great deal of criticism directed at the President over actions viewed by many—and by me—as overstepping the proper bounds of his authority and violating the Constitution. I have no intention of renewing those criticisms here today. I am not here to point a finger of blame at President Bush.

So let me be clear. The current threat to our system of separated powers and the protections it affords stems not just from executive overreaching but also from the acquiescence of the Congress. America's Founders envisioned a system in which each branch of Government would guard its prerogatives and meet its obligations.

But for years, the Congress has failed to live up to its responsibilities as the representative of the people. Congress's constitutional role includes primary authority over spending priorities, tax policies, and whether or not to go to war. All of those decisions require the gathering of the information necessary to act judiciously and a willingness to see to it that Congress's decisions are complied with.

Instead of fulfilling this trust, Congress has too often been silent. When the President, in a direct challenge to Article I, Section 7 of the Constitution, declared that he would decide for himself whether he was bound by the laws he signed, both Houses of Congress held hearings but failed to pursue the matter any further. Particularly distressing to me as a former member of the Republican leadership was the reaction of the Republican members of the House Judiciary Subcommittee who indicated no concern at all about a President's declaration that he had the right to disregard the laws that the Congress had passed.

When the President declared that he had the authority to disregard Federal law that required a judicial warrant before conducting electronic surveillance on American citizens, Congress held hearings but never required compliance with its requests for full disclosure about how the program was conducted. And the Congress acquiesced to the President's demands that the law be changed without obtaining the information it needed.

When the President declared that the Congress could not question members of his staff to determine whether laws had been broken or new laws were needed, nearly half the members of the House—members of my party, which had always said it favored strict construction—walked out rather than hold White House staff members in contempt. And the Congress was forced to file a civil suit, as any citizen might do, as though it were not an equal branch of Government.

When the Congress has required information about the undertaking of covert actions or needed access to information the Executive has classified, the Congress has permitted the Executive to dictate who among the Members of Congress and their staffs may have access to that information, the result being that information that is available to hundreds of executive branch staff members is withheld not only from congressional staff members but from Members of Congress themselves. And with this, the Congress meekly complies.

Every Member of Congress takes an oath to uphold and defend the Constitution. Once that oath is taken, loyalty to the Constitution takes primacy over loyalty to party or individual. That is not what has happened in recent years.

Do Members of the Senate recall that the President is the head of state but not the head of Government? Do they understand that they are members not merely of a separate branch of Government, but of a branch that is completely the equal of the Presidency and in many areas—taxing, spending, the power to declare war—the pre-eminent branch?

Mr. Chairman and members of the Committee, do not let it be said that what the Founders created, you have destroyed. Do not let it be said that on your watch, the Constitution of the United States became not the law of the land but a suggestion. You are not a parliament; you are a Congress—separate, independent, and equal. And because of that you are the principal means by which the people maintain control of their Government.

Mr. Chairman, the issue is not what the next President should do. It is what the next Congress should do.

Thank you.

[The prepared statement of Mr. Edwards appears as a submission for the record.]

Chairman FEINGOLD. Thank you, Congressman Edwards. Your testimony I think is terribly important much beyond the confines of this hearing. I think it is a historic statement, and I welcome it.

Our next witness this morning is Professor Robert Turner of the University of Virginia Law School. Professor Turner co-founded the Center for National Security Law in April 1981 and has, with a few breaks for Government service, served as its Associate Director

since then. A veteran of two Army tours in Vietnam, he has worked for the Senate Foreign Relations Committee, at the Pentagon, and the State Department, and has served as three-term chairman of the ABA Standing Committee on Law and National Security. Professor Turner attended Indiana University and the University of Virginia Law School.

Professor Turner, it is good to see you again. Thank you for being here, and you may proceed.

STATEMENT OF ROBERT TURNER, PROFESSOR, GENERAL FACULTY, ASSOCIATE DIRECTOR, CENTER FOR NATIONAL SECURITY LAW, UNIVERSITY OF VIRGINIA SCHOOL OF LAW, CHARLOTTESVILLE, VIRGINIA

Mr. TURNER. Thank you, Mr. Chairman, Senator Brownback, and members of the Committee. I am deeply honored to be here again before this Subcommittee because the topic is one of great importance to the Nation: "Restoring the Rule of Law." Ironically, that was the subtitle to one of my books criticizing the War Powers Resolution.

My central premise is that we have a hierarchy of laws in this country, with the Constitution at the top. The President is not breaking the law when he violates a statute he believes to be unconstitutional. He is upholding the supreme law of the land. And, sadly, over the past three or four decades, Congress has been flagrantly violating the Constitution in a variety of ways.

As a Senate staff member in 1976, I drafted a lengthy memorandum explaining why legislative vetoes are unconstitutional. Seven years later, in the *Chadha* case, the Supreme Court reached exactly the same conclusion on a number of grounds. Sadly, rather than eliminating the hundreds of existing legislative vetoes already on the books, Congress responded by enacting more than 500 new patently unconstitutional legislative vetoes—thumbing its nose at the Supreme Court and the Constitution in the process. This is the single most common reason Presidents of both parties have found it necessary to issue signing statements.

The greatest congressional lawbreaking by far has occurred in the area of foreign affairs. This is an area that is not understood by many Americans. I did my doctorate on it, 1,700 pages, and have spent close to 40 years studying it. In my prepared statement, which runs some 60 or 70 pages, I include quotations from Founding Fathers like George Washington, Thomas Jefferson, James Madison, Alexander Hamilton, John Jay, and John Marshall, demonstrating their view that the Constitution gave exclusive control over foreign policy to the President—subject only to narrowly construed "exceptions" given to the Senate and to the Congress—when it vested the executive power in Article II, Section 1 in that office. And I demonstrate in my testimony that there is a long history of agreement on this point by all three branches of Government.

The Federalist Papers explained that, because Congress could not be trusted to keep secrets, the new Constitution had left the President, and I quote, "able to manage the business of intelligence as prudence might suggest." Throughout our history that was the collective understanding until 35 years ago, when Congress began usurping power in this area.

The first witness said that never before in our history has a President claimed the power to ignore a law. This is absolutely absurd. The first example probably was somebody—you cannot come from the University of Virginia and not mention Thomas Jefferson—who, upon assuming office, declared he was not going to be bound by the Alien and Sedition Acts because they were unconstitutional. They violated the First Amendment.

FDR, in the famous Supreme Court *Levin* case, issued a signing statement declaring he was not going to enforce a rider stuck on an urgent supplemental appropriations bill for World War II that said no money could be used to pay the salaries of three people believed by some to be Communists in Government service. During that debate, many members said this was a “Star Chamber process.” Congress was trying and punishing individuals without due process of law. Ultimately, the Supreme Court declared it was an unconstitutional bill of attainder.

I quote John Marshall in *Marbury v. Madison* as declaring, and I quote, “a legislative Act contrary to the Constitution is not law.” Ergo, the President’s duty to see the laws “faithfully executed” does not include unconstitutional Acts of Congress.

In *Marbury v. Madison*, in language often excluded from modern casebooks, Chief Justice Marshall noted the Constitution grants to the President a great deal of unchecked power. We hear today every power of a democracy must be checked. That was not the understanding of the Constitution by the Framers.

For example, to quote from Marshall in *Marbury*: “whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion.”

As recently as 1969, Senator J. William Fulbright, Chairman of the Senate Foreign Relations Committee, stated in a speech at Cornell Law School, “The pre-eminent responsibility of the President for the formulation and conduct of American foreign policy is clear and unalterable.” Soon thereafter, in the anger and heat of the Vietnam War, Congress began a rampage of lawbreaking.

Finally, Mr. Chairman, I show how this congressional lawbreaking has done extraordinary harm to our national security and the cause of world peace. I explain how an unconstitutional 1973 appropriations rider snatched defeat from the jaws of victory in Indochina and led directly to the slaughter of millions of lives we had solemnly pledged to defend in Cambodia and South Vietnam. I show how the horribly partisan congressional subversion of our peacekeeping deployment in Beirut a decade later led directly to the terrorist attack that killed 241 Marines. I document the role of that incident in persuading Osama bin Laden to attack Americans on 9/11 because he concluded we could not accept casualties. And I also show how unconstitutional constraints on our Intelligence Community, including the Foreign Intelligence Surveillance Act, prevented it from protecting us from those attacks.

Mr. Chairman, my time is up. I look forward to taking your questions at the appropriate time.

[The prepared statement of Mr. Turner appears as a submission for the record.]

Chairman FEINGOLD. I thank you, Professor Turner.

Our next witness is a dear friend of mine, but he also is better known, of course, as Harold Koh, the Dean and Professor of International Law at Yale Law School, where he has taught since 1985. Dean Koh attended Harvard College and Harvard Law School, and as I indicated, we had the pleasure of studying together at Oxford. From 1998 to 2001, Dean Koh served as Assistant Secretary of State for Democracy, Human Rights, and Labor. Before beginning work at Yale Law School, he practiced law at the Washington, D.C., law firm of Covington & Burling and worked in the Office of Legal Counsel at the Department of Justice.

Dean Koh, thank you for being here, and you may proceed.

STATEMENT OF HAROLD HONGJU KOH, DEAN AND GERARD C. & BERNICE LATROBE SMITH PROFESSOR OF INTERNATIONAL LAW, YALE LAW SCHOOL, NEW HAVEN, CONNECTICUT

Mr. KOH. Thank you, Mr. Chairman. As you mentioned, in my career I have had the privilege of serving our Government in both Republican and Democratic administrations and at the Justice Department and the State Department.

Seven years ago, our country was properly viewed with universal sympathy as the victim of a brutal attack. But, tragically, the current administration chose to respond with a series of unnecessary and self-inflicted wounds, which you catalogued in your opening statement, which have gravely diminished our standing and damaged our reputation for respect for the rule of law. These violations have been extensively documented, so in my written testimony, I have tried to answer the two questions you raised: first, to look at the vision of constitutional power that the administration has invoked to justify its policies; and, second, to identify four steps that the next President and Congress can take to reverse the damage and restore the vision of checks and balances.

First, the constitutional vision. Before September 11th, as a matter of constitutional law, our national security policy was conducted within four premises.

First, that under the Constitution, executive power operates within a constitutional framework of checks and balances, resting on shared institutional powers, a vision set forth in Justice Jackson's opinion in the steel seizure case. The simple idea is that checks and balances do not stop at the water's edge.

A second idea that within that realm of government activity, there are no persons, practices, zones, or courts outside the law.

Third, that the President may not invoke legislative authority to impinge on civil liberties without clear legislative statement.

And, fourth, that except for the right to vote and serve on juries, the distinctions between citizens and aliens, especially with regard to social and economic rights, are modest.

Well, only 7 years later, that constitutional world has been turned upside down, each of these four aspects. The current administration has urged not a system of checks and balances, but a theory of unfettered power based on Article II and the Supreme Court's decision in *U.S. v. Curtiss-Wright Export Corporation*. They have argued for a system of law-free zones—Guantanamo; law-free practices—extraordinary rendition; law-free persons—enemy com-

batants; and law-free courts—military commissions, all of whom they say are exempt from judicial review.

Third, the executive branch has justified large-scale infringements on civil liberties based on vague legislative enactments, particularly the Authorization of the Use of Military Force Resolution of 2001. And as we all know, the conduct of the war on terror has led to sharp and growing distinctions between citizens and aliens, especially those of Muslim, Middle Eastern, and South Asian extraction with regard to their political rights.

And in recent years, we have really heard an even more disturbing claim: that, once taken, executive action is a kind of law unto itself. With respect to torture, NSA surveillance, state secrets, signing statements, and preemptive pardons, the administration has tried to use constitutional claims of executive authority to change the rules.

One example you remember well, Senator, came in January 2005. Before the NSA program came to light, you asked Attorney General-designate Gonzales, “Could the President violate existing criminal laws and spy on U.S. citizens without a warrant?” He said it was a “hypothetical situation” and “not the policy of the President to authorize actions in contravention of criminal statutes.” But, late, when it turned out that this was going on, and you asked him again, he said he had not misled Congress because once the President authorized it, it had become legal under the President’s constitutional powers and could not contravene any criminal statute.

The same line of reasoning was applied in the infamous torture opinion where the claim was that if Congress tries to regulate interrogations, it violates the Constitution’s vesting of the Commander in Chief power; and further argued that those who torture at the direction of the Commander in Chief cannot be prosecuted.

What this brings to mind is President Nixon’s statement: “If the President does it, it means it is not illegal.” But if that is true, then the President’s word alone is law, and the system of checks and balances in the Constitution does not exist.

This has led to a series of problems. It has clouded our human rights reputation. It has blunted our ability to criticize others. It has made us less safe and less free. And it has had huge costs for our foreign policy. And so in the second part of my testimony, I set forth four concrete steps to put our house back in order: closing Guantanamo through an interagency process; a series of executive orders to roll back some of these provisions; the introduction of national security legislation which could bring about repeals of some of the worst provisions of law; and, finally, a number of steps to reaffirm our respect for international national and institutions.

In closing, let me say, Mr. Chairman, that the vision of unchecked executive authority offered by the administration and some of the witnesses offends the vision of shared national security power that is central to what Justice Jackson called in Youngstown the “equilibrium of our constitutional system.” Our Government is defined by the rule of law. The rule of law defines who we are as a Nation and a people. If this country does not stand for the rule of law, we really do not stand for anything.

And so I think we have to remember that in the grand scheme of things, as difficult as the last 7 years have been, they loom far less important than the next 8 years, because the next 8 years will determine will the pendulum of U.S. policy swing back from where it has been pushed or will it stay stuck in what you could call a “new normal” position.

To regain our standing, I think the next President and Congress must unambiguously reassert our historic commitment to the rule of law as a major source of our moral authority.

Thank you.

[The prepared statement of Mr. Koh appears as a submission for the record.]

Chairman FEINGOLD. Thank you so much, Dean Koh.

Senator Brownback, I think we will begin with 7-minute rounds for this panel.

Senator BROWNBACK. That is fine.

Chairman FEINGOLD. Thank you. Ohio State University law professor Peter Shane submitted written testimony in which he argues that we need to reinstate a rule-of-law culture in Government. As he explains, “The written documents of law have to be buttressed by a set of norms, conventional expectations, and routine behaviors that lead officials to behave as if they are accountable to the public interest and to legitimate sources of legal and political authority at all times, even when the written rules are ambiguous and even when they probably could get away with merely self-serving behavior.”

I think this cuts to the core of the problem that the next President will face. After 8 years of disregard for the rule of law at the highest level of Government, how can we instill new norms and expectations that permeate throughout the Federal Government? I would ask Dean Koh and Mr. Schwarz if they could address this. Dean Koh?

Mr. KOH. Yes, Senator. The answer, I think, is in four parts.

First, the message must come from the top. The President takes an oath to preserve, protect, and defend the Constitution of the United States of America. And so it takes a President, an Attorney General, a White House counsel, a head of an Office of Legal Counsel to send this message of commitment to the rule of law. And it can be done. After Watergate, President Ford, Attorney General Levi, Phil Buchen all worked together with Congress to restate a culture in the White House and in the executive branch of rule of law.

Second, the process has to be made transparent and inclusive. There should be no secret legal opinions. We need full vetting by good lawyers. In the Washington Post, they have had coverage of Bart Gellman’s book “Angler.” One of the issues raised was how a secret legal opinion on FISA was being challenged as making no sense, and former Deputy Attorney General Comey said, “No good lawyer would ever rely on that opinion.” But that opinion is still not available for anyone to look at it, even though people were relying on it to violate the law.

Third, the President has to act quickly to take steps that will reverse the trend and not adopt half measures. And I have outlined in my testimony a package of suggestions: closing Guantanamo, ex-

ecutive orders, introducing legislation, taking a number of steps with regard to international law.

And, finally, I think the President should create new structures. One structure that we propose is a national security law Committee which could be chaired by the Attorney General and guarantee that the President get good legal advice. It might make sense for Congress to consider creating a congressional legal adviser on the other side who could examine the kinds of legal justifications that are being brought forward.

The key idea here is that the President has to report what he does to people who do not work for him, because they are ones who will be inclined to tell him something he does not want to hear, and to report to people whose job it is to look not to what he wants but what do the Constitution and laws direct.

Chairman FEINGOLD. Thank you, Dean Koh.

Mr. Schwarz?

Mr. SCHWARZ. I would agree with what the dean said. I would supplement slightly.

The leadership side, I think it has to come from the Congress as well as the President. And in both cases, understanding by the people of where we have gone wrong and how it has hurt us contributes to people wishing to be leaders. And the public cannot do their job if secrecy smothers what has happened. So those things are all connected—the people, the leaders, secrecy, and the way in which leaders lead and the public demands that they lead.

Transparency is obviously necessary. I think all the witnesses today would agree we should have more transparency. John Podesta in his testimony later is very good on what we should do about too much secrecy. My idea of a commission I think is helpful in that.

Then the public needs to understand some of the key arguments, which are not being made forcefully enough to the general public. One is that when we abandon the rule of law, when we go against our own values, we are actually making this country less safe, because Muslim recruiters get talking points against us and our allies are less likely to join with us.

The second thing the public needs to understand, which will then help produce the leadership, is that the—we have separation of powers of a very good reason. It makes Government work better. And if you do not have a debate surrounding important issues, you are far less likely to get the decision right and you are far more likely to get the decision wrong.

Chairman FEINGOLD. Thank you, Mr. Schwarz.

I will go to Congressman Edwards, and I will have a follow-up for Mr. Schwarz on this one as well.

Congressman, I think your point that Congress has a significant role to play in preventing the executive branch from overreaching is obviously very important. No one was more disappointed and vocal about the congressional response to the revelations about warrantless wiretapping than I was. I think we abdicated our responsibility to the country and to the Constitution by not taking much more significant action once we learned what was going on.

In this case, we had the President's party controlling the Congress at the time of the revelations, and that could be the situation

in the future, of course. So what would be your advice for how the minority party should handle such a situation in the future? And how can we make it more likely that a majority party in Congress that is also of the President's party will be willing to part with him or her on these important issues?

Mr. EDWARDS. Well, I want to go back to something Mr. Schwarz just said. You have to frame the issues in a way that gets the public involved in understanding why we have a separation of powers. When the party, my party, you know, as the majority with a Republican President, acquiesced to what the President was asking even when it went beyond constitutional authority, your party responded mostly with policy debate—with policy debate about where people should be, whether it should be at Guantanamo. You know, that is nothing—never was the question of not policy but process raised about the fact that we preserve our liberties by virtue of having the people's branch retain its constitutional authority.

Members of the majority party were never challenged on that. It was all a matter of policy, and you cannot win that way. And the Congress has authorities it does not use. The Congress has the power to withhold funding, the power to hold up appointments. If you really want to fight to preserve not your power, not your authority, but your responsibilities and obligations under the Constitution, then you have to use all the tools that are found in the first section of the Constitution. And I have not seen it happen. I mean, I used the example a moment ago about the executive branch telling the Congress—telling the Congress of the United States—you know, whether or not they would enforce a contempt citation, telling the Congress of the United States whether we will let you as a United States Senator have access to information that hundreds of executive branch staff people have. And the Congress goes—you have to engage on that front and say, "We are not going to put up with it. And if you insist, Mr. President, you are going to pay a price. You are going to pay a price in appointments. You are going to pay a price in withholding of funding," and so forth.

Chairman FEINGOLD. Of course, I could not agree with you more. I will turn to Senator Brownback in a second, but I just wanted to see if Mr. Schwarz had any thoughts on this point in light of your service on the Church Committee.

Mr. SCHWARZ. Well, I think first that it is important that Congress overcome partisanship. I said these issues should not divide Americans. History tells us we have in the past, FDR and Lincoln in their Cabinets brought in members of the opposite party or political opponents. David Boren's terrific new book, a Senator from Oklahoma, talks about how when he was a rookie Senator, he had made a vote which Howard Baker, the Republican leader of the Senate, knew was going to hurt him in Oklahoma. And Howard Baker went up to him and said, "You know, you ought to change that vote. You have not really understood it, and it is going to hurt you." That is a culture which we need to restore.

Now, on the Church Committee—do you want me to make a comparison between—

Chairman FEINGOLD. Just very briefly, because I really should call on Senator Brownback.

Mr. SCHWARZ. OK. The key issues that we found were troublesome—ambiguous laws, implicit orders to violate the law, excessive secrecy and lack of oversight—are all problems today. But I do think that the willingness and assertion of this administration that the President can violate the law—and when you look carefully at the Constitution, they will violate the Constitution—is something which is totally new and which this Committee and others ought to put to rest, and the new President, whoever it is, ought to renounce upon taking office.

Chairman FEINGOLD. Thanks so much.

Senator BROWNBACK?

Senator BROWNBACK. Thank you, Mr. Chairman, and I want to thank the panelists for their thoughts in considering these matters. You have obviously put a lot of consideration into it, and I appreciate your doing it.

Mr. Cooper, I was struck, you said that 11 of 12 circuit court judges have ruled in favor of the administration. I want to make sure I am clear on what you were saying of that on these cases. Is that correct?

Mr. COOPER. That is right, Senator Brownback. In the war on terror cases that the Supreme Court has decided, and it has decided them uniformly against the administration, but by very close votes, either three or usually four Justices in dissent. In every one of those cases, the administration won the case in the court of appeals and by lopsided votes. There was only one court of appeals judge who did not agree with the validity of the administration's legal analysis and views in those cases.

Now, the court of appeals are not free, as the Supreme Court is, to break with Supreme Court precedent. They are bound to conscientiously and faithfully apply Supreme Court precedent. The point I was making Senator Brownback is that it is simply not reasonable to charge that the administration in its analysis and its conclusions that led to the decisions that were at issue in those cases, those four war on terror cases, was indifferent to, let alone contemptuous of, the rule of law. It carefully applied Supreme Court precedent, and at least the court of appeals uniformly thought they were actually right.

But even if we accept for the moment that the majority in each one of those cases in the United States Supreme Court got it right and the dissent was wrong, and that, therefore, the administration was wrong on the legal call, it cannot reasonably or responsibly be said that the administration was indifferent to the rule of law.

Senator BROWNBACK. I did not know that number.

Dean Koh, good to see you again here. I am certain you are not suggesting moving the Guantanamo Bay detainees to Fort Leavenworth disciplinary barracks—is that correct?—in your testimony.

Mr. KOH. In my testimony I said that there were four categories of detainees. As I understand it, there is a very tiny number of high-value detainees. They have a right of habeas corpus now under the Supreme Court's decision, and so they could be moved to supermax facilities in the United States. Where they move them obviously is a decision to be made by the executive branch.

One thing I can say about—

Senator BROWBACK. But you agree they cannot be mixed with the current population of prisoners. Is that correct?

Mr. KOH. I think we have in the United States many dangerous detainees who are held separately in special facilities, and we have had that for a long time.

I would say to say about Mr. Cooper's point, however, that—

Senator BROWBACK. Could I finish this point? Because I have got limited time, and you can come back on the other one. I hope you would look and review particularly a situation like the Leavenworth disciplinary barracks, you are advocating the closing of Guantanamo Bay, to look at the problems of doing it at least in that facility. Now, maybe there is a place in Wisconsin that fits or works, but the disciplinary barracks in Leavenworth does not.

As one advocates that position—and I respect you for doing that—there is a very practical side to then how you handle that, and this is one that—I have been there multiple times. I do not know if you have. I have not been incarcerated there, but I have been there many times. And I just hope you will look it over.

Mr. KOH. Senator, Timothy McVeigh was held in a facility in Colorado and was tried there, and he was the adjudicated killer of thousands of people in the terrorist attack on U.S. soil. There is no suggestion that he was not held safely or without due process of law.

Senator BROWBACK. Professor Turner, I want to ask you, if I could, it has been suggested that the Congress would withhold funding or make it conditional if the administration does things along this line that the Members of Congress would look at as questionable. I take it you would have great challenge to that on legal grounds, on constitutional grounds. Is that correct?

Mr. TURNER. Senator, the question is: Could Congress do it directly? If Congress attempts to do something by conditional appropriation, that it is not permitted under the Constitution to do directly—for example, tries to usurp, if Congress were to pass an appropriation bill and say no money can be used for combat operations in Cambodia, for example, which they, in fact, did and killed over 20 percent of the population of Cambodia as a result—that I believe would be unconstitutional.

The best example I can give you: What if Congress were to pass a rider saying no funds shall be available for the judiciary if the Supreme Court declares any Act of Congress to be unconstitutional—thus trying to usurp judicial review?

Now, there is a much stronger case for that under the Constitution than there is for usurping the Commander in Chief power, because judicial review is an implied power that John Marshall gave us in *Marbury*. I think it was intended by the Founding Fathers, I like it, but you cannot look at the constitutional text and say, "Here it says the Supreme Court can overturn an Act of Congress." But that has been our law. If Congress were to pass a law saying no money shall be available for the judiciary unless the courts overturn *Roe v. Wade*—or if they overturn *Roe v. Wade*—my point is that would be an unconstitutional usurpation. And if we allowed this type of conditional appropriation, we would totally destroy the doctrine of separation of powers.

Senator BROWNBACK. Congressman Edwards, I have appreciated your career and all you have done, and I am looking forward to the football game. Hope we do well in it. We will see, with how strong Oklahoma is.

Once in a while the Supreme Court gets it wrong, too: the *Dred Scott* decision, *Korematsu*, *Plessy v. Ferguson*. Are there things that we should look at, or is there anything that controls the Supreme Court in cases like that, other than, I guess, just time and wearing it out, that the society says, "No, this is wrong"? When you look at it, we can look back on those decisions and say, "That was a horrible decision by the Supreme Court." You know, you have looked at the Congress toward the President, and your comments are there, and I respect and I understand those and I think those are good. Is there any limitation on the Court?

Mr. EDWARDS. Well, at the lower courts, you always have the judicial review. Congress has the authority to limit jurisdiction, as you know. But, you know, generally, it is a matter of over time we get it right. It is not just the Supreme Court. I mean, we had the Alien and Sedition Acts. We had the imprisonment of the Japanese-Americans.

We have this tendency sometimes to get it wrong, but I am not advocating, you know, that the Congress step in and, you know, try to second guess the courts. There are cases where policy can be made by the legislative branch. But, you know, I am not a scholar of the Supreme Court, and I do not pretend to be. But you are right, I mean, I agree with you there have been a lot of very bad decisions over the years, maybe starting with *Marbury v. Madison*.

Senator BROWNBACK. I will leave that alone.

[Laughter.]

Senator BROWNBACK. Thank you, Mr. Chairman.

Chairman FEINGOLD. I want to thank Senator Cardin for attending the entire first panel before he had to leave, and now I am very delighted to turn to Senator Whitehouse for his round of questions.

Senator WHITEHOUSE. Thank you, Chairman. First of all, let me tell you how much I appreciate that you are holding this hearing. You have two very large and very distinguished panels, and it is a vital question that you inquire into. If only we had more time, because the extent to which the rule of law has been challenged by this administration, it is so broad that we could probably spend 2 hours on 10 different subsets of it.

I would like to ask about two issues. I am a bit of a student of separation of powers, and I am firmly convinced of its importance to the preservation of liberty in our country. But within the executive branch, we have over time through the administrative apparatus we have set up, both independent commissions and executive agencies, a bit carved up or cut into or perhaps the best way to describe it would be "required structure" of executive decisions. The Administrative Procedures Act has requirements before an agency can act. A responsible office holder who takes his oath of office seriously in the light of the duties of the agency he serves and the office that he occupies or she serves or she occupies has certain constraints around them. They run in opposition to the unified executive theory in which everybody works for the President, everybody is supposed to do his bidding. As we read in a very impressive pair

of articles in the Washington Post recently, it is the President's view that he decides what the law is. And there is impatience if not outright hostility to a control over the process by which decisionmaking takes place in the executive branch.

I would be interested in your thoughts on to what extent we have created and should preserve a structure within the executive branch that controls executive decisionmaking. Some of it is quite formal, like the Administrative Procedures Act and the statutory missions of the different agencies. Some of it is a little bit more practical, and in some cases not even derived from Congress. One of my favorite examples is the rule that the Department of Justice developed over time to prevent White House officials from meddling in Department of Justice criminal and prosecution decisions, which was a very important firewall, was monitored by this Committee, and was systematically disassembled by the Bush administration until they satisfied themselves that, for instance, Vice President Cheney's legal counsel or Karl Rove now had access to prosecutors in the Department of Justice to talk with them about ongoing cases without what I would consider adult supervision.

So there is a broad array of these things, and if you have anything to say about that sort of—for want of a better word, executive administrative separation of powers, I would be interested in hearing that, because we overlook that, I think.

Mr. SCHWARZ. Maybe I could take a try on that. Without having those auxiliary devices within the executive branch, given the hugeness of the Federal Government, Congress cannot possibly do that which it should do. I mean, we all think Congress could do more. But unless you have within the executive branch internal checks and balances, Congress cannot do the job given the size of the Federal Government. So there are things like Inspector Generals that I think are lawful and appropriate and often work well.

And then the other observation I would make from recent events is that one of the things that went wrong with the current administration was they fenced out from decisionmaking on matters of such importance as the Geneva Convention and torture. They fenced out people within the executive branch who would bring real expertise to that question—the State Department, military lawyers, and military generals. All of those people—

Senator WHITEHOUSE. The NSA lawyers, for instance, were not allowed to read the OLC opinion on the program that they themselves were administering.

Mr. SCHWARZ. Exactly. And so that is an observation of how dangerous it is when not only do you not have the check of the Congress working the way the Constitution intended, but within the administration you have a tiny coterie of people who were deciding things that are going to affect our reputation in the whole world adversely and not consulting the relevant people within their own administration.

Senator WHITEHOUSE. So you are comfortable that, in addition the constitutional separation of powers among the branches, we should also in Congress attend to what you, I think, better than I called “internal checks and balances” within the executive branch of Government.

Mr. SCHWARZ. Yes.

Senator WHITEHOUSE. Professor Koh? I think I saw a hand go up.

Mr. KOH. Yes. The parallel to the Administrative Procedures Act on the national security side is the National Security Act of 1947 which creates the current such, and much of it has been amended by laws that were passed after the Watergate/Vietnam era, which were designed to create this both system of internal checks and balances and consultation.

The breakdown here came from two different points. One is a concentration of decisionmaking within the executive branch, which, as Mr. Schwarz described, fenced out expertise, ruled out moderate voices, prevented legal opinions that were in secret from being examined, and disrupted the chain of command. And so you had this extraordinary situation where the counsel to the Vice President was giving direction to the Deputy Assistant Attorney General for the Office of Legal Counsel, with apparently not going through the Attorney General? And that is an extraordinary disruption of process and ought to be addressed.

And I think a second point is that lawyers need to be included at the key points, brought in before, ex ante, to help make legal decisions, not after the fact to give legal justifications.

Senator WHITEHOUSE. Mr. Chairman, my time has expired. I appreciate your courtesy.

Chairman FEINGOLD. Thank you, Senator Whitehouse. I will begin a second round.

Dean Koh, again, thank you for your excellent testimony. I particularly appreciate the specificity in your written testimony about what exactly the next President should do right off the bat. You list seven executive orders a President should issue to "send the unequivocal message that the United States does not accept double standards in human rights." This is so important not only for what it says about who we are, but also for our relationships with our allies and the message we send to and about our adversaries. I hope that the next President and his advisers will read these suggestions and pay very close attention to them.

Now, you have served in the State Department, and you say a bit about the importance of the rule of law and dealings with other countries, and particularly about its role in the next President's efforts to restore relationships with allies and build trust and cooperation that we are going to need to take on issues all the way from climate change or combating terrorism or extremism.

Mr. KOH. Yes, Senator. The last 7 years have been devastating in this regard. Perhaps the worst example I could give is a conversation I had with a dissident in Cuba who is against the Castro regime. He described the situation he was under where he had been detained on numerous occasions without charge. His home was being wiretapped. I said, "How much unrest is there about this domestically?" And he said, "If you raise this issue, all anyone can say is 'Guantanamo.'" It is a complete answer to the idea that we have a right to point fingers.

The same goes with regard to the Chinese who regularly in our diplomatic negotiations point to human rights issues at home as a way of saying that we should not interfere with internal affairs.

On September 12, 2001, President Putin of Russia said, "You have your war on terror. So do we, which gives me carte blanche to act against the Chechens."

With regard to our close allies in the European Union, their concerns that individuals that they might turn over to us might be subjected to harsh treatment or other kinds of violations of human rights and the rule of law have dramatically interfered with our cooperation in these intergovernmental efforts.

So I think that the costs have been huge, and I think it goes to the basic point that rule of law is very central to our stability and our reliability, and that what people think is that terrorists are a dangerous source of instability, but responding to terrorists in a way that violates the rule of law creates even more instability, and that is what we have been experiencing.

Chairman FEINGOLD. Thank you.

Congressman Edwards, I was impressed by your statement that, "Securing our position as a Nation governed by the rule of law is the most important issue facing the next President and the Congress." Can you say a little bit more about why you think that is the case? How does this issue in your experience interact with all the complicated and important domestic and international issues that we must tackle in the years ahead?

Mr. EDWARDS. Senator, when the Founders created this country, they turned everything upside down, because in the Old World you had rulers and subjects, and the rulers decided and the subjects obeyed. And our Founders said, "We are not going to be subjects. We are going to be citizens, and citizens tell their Government what to do instead of the other way around." And the way we do that is through the Congress, through the people selecting their representatives.

Now, the Executive has said, this Executive has said that people do have a voice. They speak every 4 years. Well, that is not the way our system works. The people speak every day through you. They speak through their Representatives, their Senators. And the issues that are on the table today, whether it is energy independence, repairing our infrastructure, access to affordable health care, those issues and other issues come and go. They rise in importance. You know, they ebb. But what matters and makes us different is the way in which we keep the people in charge of the decision-making process. If we lose that, all of the other issues fade in importance.

So that is why I argue that the number one issue that has to happen in the next couple of years, no matter who is elected President, is for the Congress to reassert its own role as an equal branch of Government. That will allow us to get past a lot of the problems we have had in the last few years.

Chairman FEINGOLD. Louis Fisher of the Library of Congress is one of the country's foremost experts on executive power. In his written testimony, he argues that the basis for the Bush administration's theory of inherent executive power—a theory that underlies so many of its controversial programs—is fundamentally misguided and that, in fact, there is no legal basis for any inherent power in the President.

Dean Koh, can you explain why that is the case?

Mr. KOH. Well, three points. This is the Subcommittee on the Constitution. Article II created a President and not a king. The difference is that a President is subject to checks and balances from Article I and Article III. And so, therefore, the scope of his executive power is limited by what he cannot do without the cooperation of the other branches.

Second, there are some things that the executive has no inherent power to do. The executive has no inherent power to order torture. He is the Commander in Chief, not the torturer in chief. He has no power to order genocide or other kinds of acts. And so the idea that somehow these are justified by inherent powers is giving him power that no everything has.

And the third point, which I think is a functional point, why is this good policy, is it is good law. A President who relies on inherent power and does not get either political support from Congress or legal approval from the courts ends up going it alone. And as a result of that, they end up having to rely on popularity polls. And if the war in which they engage or the acts which they pursue become unpopular, then they have no political or legal support for what they are doing.

So the system of checks and balances was designed to ensure that a Government which runs on the consent of the governed as opposed to on the power of the kind is actually notified to the people and that the President talks to people who do not work for him.

Chairman FEINGOLD. Thank you.

Mr. Schwarz, in your written testimony, you expressed your support for the State Secrets Protection Act, which establishes procedures for judges to review executive claims of the state secrets privilege. You also noted that this bill and the companion bill in the house could be strengthened.

Could you just say a few words about how you think these could be strengthened to prevent—

Mr. SCHWARZ. I would say two things that I think could strengthen it.

The first is the current draft directs or suggests—I think directs—judges to give deference to the executive or substantial weight to the position of the executive. I do not think that is appropriate. The problem here with state secrets is that the courts have flopped over, particularly in times of crisis. The Supreme Court did differently because they looked at what was going on and said 7 years is too much. Indefinite period is too much. That is where we are going to put a stop to what in earlier wars they might not have stopped.

But the district courts and the courts of appeals have been far too deferential to the executive branch. I think that is a problem with the draft. And then the draft, I think, also does not give sufficient attention to the importance of the district judge finding a way to allow the lawsuit to continue without breaching some narrow secret that may be involved. CIPA, the Classified Information Procedures Act, and other acts show that courts can work out practical solutions. I think more attention needs to be given to that.

And, finally, I think it is very important that the law not leave the position open to just plain dismiss a case on the basis of an alleged state secret, which my experience suggests is going to be ex-

aggerated, but sometimes will be real. But they should find a way to keep their case alive without compromising secrecy, and there are ways to do it.

Those are the thoughts I had.

Chairman FEINGOLD. Thank you so much.

Senator Brownback?

Senator BROWNBACk. No further questions.

Chairman FEINGOLD. Senator Whitehouse?

Senator WHITEHOUSE. The other question that I would love to get to with such an expert panel has to do with secrecy. On this Committee, we are from time to time presented with classified information. On the Intelligence Committee, on which Senator Feingold and I both serve, we are constantly bombarded with classified information, and it has a very crippling effect on our oversight of these agencies. And, in particular, there is a built-in bias toward the executive branch that is capable of being used perniciously, and I believe in this administration has been used perniciously. And that is that the senior executives who have access to classified information are often what are called "declassifiers," which means they can stand up and tell you something that is secret in public, and they have not violated a confidence, they have not divulged classified information. They have declassified.

And so you come into a situation in which there is an array of facts, as there are in many circumstances, and the executive branch will pick out and declassify a very selective group of facts and then go to their talking points and pound those publicly. And we in Congress are not capable—we are literally legally incapable of responding with the other facts that we know to make the counterargument, to explain to the public why the executive branch is wrong on this, because we are not declassifiers. We are trapped in the classification snare that the executive branch controls by classifying everything in sight and then declassifying selectively. And I have seen this just in my brief and year and—whatever it is—9 months in the Senate play out over and over and over again.

It strikes me that the only way to solve this is to create a counterbalance, and the counterbalance that I would recommend is that the Chairman of the Senate Judiciary Committee and the Chairman of the Senate Select Committee on Intelligence also be made declassifiers. That, I think, will not only have the effect of allowing the Senate committees to make their case when they need to, it will also discourage the abuse of the selective declassification technique by the propaganda arm of the executive branch, because they will know they can be answered, so there is not the return on going there, and so you are spared the initial misleading salvo, if you will.

I am not going to have time to hear from all of you on this, but I would like to ask that a question for the record, how you would respond to that, what concerns you might have, and where we go from here. I have maybe a little bit over 3 minutes left, so we have time for a little bit of a response. But I see Professor Koh's and Professor Turner's and Representative Edwards's hands up. Can we try to keep it within a quick minute each given the timeframe? I do not want to trespass on the Chairman's time.

Mr. KOH. Two points. One solution is to have documents be automatically declassified unless someone insists that they remain classified. I was in the executive branch, and many documents just were never classified because there is no incentive to declassify them.

The second point, which I think is critical for the function of this hearing, is declassifying legal opinions, which are often based on facts which have now become public. And the fact of the matter is that these legal opinions ought to be examined, and sometimes the fact that the first paragraph mentions—

Senator WHITEHOUSE. I will jump in and let you know that I have examined them, and I could not agree with you more. And I am convinced that if the folks at the Office of Legal Counsel understood that those opinions would become public and be subjected to the critical scorn that they deserve, in my opinion, they would never have written them in the first place, and we would not have gone down those shameful roads.

Mr. KOH. I agree.

Mr. TURNER. Just briefly, the Founding Fathers gave a lot of consideration to the issue of secrecy. Indeed, Madison said we would have had no Constitution had it not been for the strict rule of secrecy in the proceedings of the Convention. Ben Franklin, as Chair of the Committee of Secret Correspondence in 1776, concluded unanimously with the other members they could not tell the Continental Congress about a major French covert operation because “we find by fatal experience that Congress consists of too many members to keep secrets.”

Senator WHITEHOUSE. Professor Turner, don't get me wrong. I am not against secrecy. I am against the abuse of secrecy.

Mr. TURNER. Oh, the question—

Senator WHITEHOUSE. And wouldn't everybody love to be in a debate in which they got to make their argument and they could tell the other side, “I am sorry. You do not get to argue?”

Mr. TURNER. Yes, sir. I'm sorry, Senator. The issue arose first during the Jay Treaty debate. I went back and read that entire debate in the Annals of Congress. It is very lengthy. Only one member said Congress had an absolute right to executive information. Several members said, were this an impeachment inquiry, Congress would have the right. James Madison, who knew the Constitution pretty well, said each branch was to be the judge of what information in its possession it would share with the other branches. And he said, “If Washington's refusal was based on the claim that these were sensitive secrets, I should not object.” But his refusal was based on the claim the House had no role in treaty making, which Madison disputed.

The Supreme Court, of course, in the *Curtiss-Wright* case, looked at that debate and said the Congress ultimately got it right, and Washington was right in refusing to give information to Congress. As recently as 1957, Ed Corwin in his classic study—

Senator WHITEHOUSE. Well, this is—again, you are not on the topic. This is in situations in which they have given information to Congress. We know it. But we just cannot argue back because we are under restriction of classification.

Mr. TURNER. But if they have a right—

Senator WHITEHOUSE. You are talking across my point and not at it.

Mr. TURNER. Sorry, Senator. If they have a right to say you cannot have the information, surely they have the right to say this is information we are very concerned about making public, but we will share it with you in return for a promise of—

Senator WHITEHOUSE. How would you remedy the situation in which, to secure propaganda advantage, one branch of Government discloses half of the information that supports its case and the other one is forbidden to by classification rules and, therefore, the public who we are here to serve never get actually a fair explanation of what the issue is?

Mr. TURNER. I think the problem there is trying to find a way to tell Congress and the American people everything without our enemies finding out. Let me just—

Senator WHITEHOUSE. Well, I understand that. Let me go on to Representative Edwards and then I saw Mr. Cooper's hand up.

Mr. EDWARDS. Well, I thought your answer was a pretty good one. I mean, the President has the sole treaty-making authority. He has no treaty-approving authority, to react to that.

You know, you used the words yourself. You said the problem is that you are legally incapable of doing something. "Legally" is the law. Who writes the law? You do. Change it.

Chairman FEINGOLD. One more quick comment from each of you, and then I do need to move to the next panel.

Mr. COOPER. If I could just make this comment: I have no brief for the abuse of classified information or state secrets by any stretch, and it does sound to me like you have described an abuse of the classification authority. But I do have some experience in dealing with classified information, distant experience, but that means that someone has made the sober judgment that the release of this information publicly would damage our vital national security interests.

And so I think the Committee and the Congress would need to very, very carefully consider the potential implications and ramifications of adding to the individuals who would have declassification authority. But you certainly have identified a problem. It sounds me like some solution ought to be devised.

Chairman FEINGOLD. Did you have something, Mr. Schwarz?

Mr. SCHWARZ. Well, I think, Senator, you put your finger on one of the most important problems, which is excessive secrecy. I believe the next Congress should, perhaps in cooperation with the next President, have a real serious study of the abuse of secrecy. There is far too much. Expert panels would probably be a good idea. It is something that reasonable people can come together on and stop arguing. There is far too much secrecy.

Chairman FEINGOLD. Thank you, Senator Whitehouse, and I thank the panel for an excellent job. I ask you to retire and ask the second panel to come forward. Thank you all.

Now we will turn to the second panel. Will the witnesses please stand and raise your right hand to be sworn. Do you swear or affirm that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. DELLINGER. I do.
 Ms. ROTUNDA. I do.
 Ms. MASSIMINO. I do.
 Mr. PHILBIN. I do.
 Ms. SPAULDING. I do.
 Mr. PODESTA. I do.

Chairman FEINGOLD. Thank you very much. You may be seated. As with the first panel, I ask that you try to limit your remarks to 5 minutes. You have all provided excellent written testimony. I want to thank you for that. Your full written statements will be included in the record.

Our first witness on this panel is Professor Walter Dellinger. Professor Dellinger is a partner at the Washington law firm of O'Melveny & Myers, and a Visiting Professor of Law at Harvard Law School. He headed the Office of Legal Counsel at the Department of Justice from 1993 to 1996. Professor Dellinger served as the Acting Solicitor General of the United States from 1996 to 1997, where he argued nine cases before the Supreme Court in a single term. Professor Dellinger graduated from the University of North Carolina and Yale Law School, and he clerked for Justice Hugo Black on the United States Supreme Court.

Mr. Dellinger, it is great to have you here. Please proceed.

STATEMENT OF WALTER DELLINGER, PARTNER, O'MELVENY & MYERS, LLP, VISITING PROFESSOR OF LAW, HARVARD LAW SCHOOL, FORMER ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL (1993-1996), FORMER ACTING SOLICITOR GENERAL (1996-1997), CHAPEL HILL, NORTH CAROLINA

Mr. DELLINGER. Thank you, Senator Feingold.

We address this morning the issue surrounding the rule of law and the concern expressed by many of those who have responded to the Committee's invitation that, during the past 7 years, we have wandered away from the kind of adherence to norms of lawfulness that ought to be achieved.

To say that is not to demean the fact that there are dedicated career attorneys in the Department of Justice who have served with distinction throughout this period, nor that many of the political appointees have acted with courage and dedication. Indeed, one of the problems is that career attorneys were too often eliminated from the process, and the wonderful ballast that comes from the fact that the Department of Justice has so many lawyers who do not change with changing administrations, the wonderful effect of that was lost by the failure to include career attorneys, the failure to draw upon the judgment of officials, lawyers who had served throughout different administrations in the national security agencies, the military agencies, and otherwise.

It does not necessarily mean that opinions were issued in bad faith, though when former Assistant Attorney General Jack Goldsmith says of the torture and a series of other memos that they were "deeply flawed: sloppily reasoned, overbroad, and incautious," one certainly comes very close to wondering how, when you read these opinions, could have possibly been written by someone who was trying in good faith to achieve a lawful answer.

But even where issued in good faith, an opinion, and especially a series of opinions, can undermine the essential elements of the rule of law, even where the views are held in good faith. I take it that it is a minimum of what we think about when we think of lawfulness that Government decisions are made as part of a good-faith effort to comply with the law. But that is not enough. There are substantive elements in our system that provide the legitimacy that goes under that term.

The division of authority among branches of Government, with each branch having a role, checking and balancing one another, with the legislative, the executive branch, and the judiciary each having a role to play that is respected by the others, where the core legitimacy of our Government, moreover, depends upon the consent of the governed, where actions of the Government are not made public, where constitutional and statutory interpretations result in the President being empowered to disregard national laws promptly enacted by Congress under its authority, and in combination with the fact that this is done in secret, to have executive orders that state publicly what the rule of law is but a different law being applied contrary to that—this so fundamentally undermines the ability of the governed to consent to the kind of Government that they have, that even if those conclusions about executive power are reached entirely in good faith, I think it is still fair to say that they ill serve the basic concepts of the rule of law.

How might one proceed from here? I think that what we heard this morning is clearly right, that the President must understand that every President is ill served if he wants answers from lawyers to give him what he wants to hear. It turns out that is not in the best interests of any President. I think transparency, as Mr. Podesta will argue, the elimination of secrecy to the extent possible, is absolutely critical to the rule of law. Proper procedures, fully vetting opinions, is also critical.

If I had to make one suggestion, Senator, it would be with respect to the OLC opinions. I think we have to have some sense of bipartisanship with respect to reviewing what our essential legal constraints are, and that in either party, it would be advisable for the head of the Office of Legal Counsel to have an advisory committee, modeled somewhat on PFIAB in the intelligence area, a group of people, a bipartisan group, including those who have served in other administrations, who would review with the Office of Legal Counsel all of the opinions, including those that we have not seen, and make an assessment, where the Presidentially appointed, Senate-confirmed Assistant Attorney General would have to make his or her decision at the end of the day, subject to review by the President and the Attorney General, but would make known what a bipartisan group, including some of those who have been witnesses here from each party, had to say about these issues. And I think that would go in some step to reclaiming the sense that we have had for a long time that we can trust the Office of Legal Counsel under political parties of both administrations, and indeed is exemplified by the courageous actions of Mr. Philbin and others in more recent administrations. It is a goal that can be attainable. We know in both parties OLC has stood up to the administration and told them no, and I think we can achieve that again.

[The prepared statement of Mr. Dellinger appears as a submission for the record.]

Chairman FEINGOLD. Thank you, Professor.

Our next witness is Professor Kyndra Rotunda of Chapman University School of Law. Professor Rotunda is the former Director of the Clinic for Legal Assistance to Service Members at George Mason Law School, where she devised and taught a military curriculum to second- and third-year law students and supervised students representing military families in civil legal disputes. Professor Rotunda began her legal career as an officer in the U.S. Army JAG Corps. She remains in the U.S. Army Reserves and was recently selected for promotion to major. Ms. Rotunda graduated from the University of Wyoming and the University of Wyoming College of Law.

We welcome you, Professor. Thank you for your time and you may proceed.

**STATEMENT OF KYNDRA ROTUNDA, PROFESSOR OF LAW,
CHAPMAN UNIVERSITY SCHOOL OF LAW, ORANGE, CALI-
FORNIA**

Ms. ROTUNDA. Thank you, gentlemen. It is a pleasure to be with you this morning. I am a law professor at Chapman, and as you mentioned, sir, I am also a soldier. I am a major in the Army JAG Corps. I have served three tours in the global war on terror, including one in Guantanamo Bay and one as a legal prosecutor at the Office of Military Commissions, and my testimony today is based on those experiences serving in this global war.

As we discuss the rule of law this morning, it is important to remember our military troops and our obligation to preserve and protect their rights, too. The United States should interpret the law in a way that helps and does not hurt our men and women in uniform. Unfortunately, in several important respects, that is not happening.

For instance, in Guantanamo Bay, the U.S. military requires religious accommodation in a way that risks the safety of soldiers. It issues various religious items to each detainee, including a copy of the Koran. But, incredibly, it forbids military prison guards in charge of the facility from even touching the Koran under any circumstance. Not surprisingly, detainees have figured this out and they use the Koran to hide weapons, which they use to viciously attack our American soldiers. Attacks in Guantanamo Bay have risen to eight a day. In one year, detainees stabbed military troops with homemade knives 90 times.

An incident at Camp Bucca, Iraq—a U.S.-run detention camp in southern Iraq—is just one example. At Camp Bucca, the military erected a tent as a mosque for detainees and designated it off limits to U.S. prison guards who were running Camp Bucca. The detainees used their makeshift mosque as a weapons cache, where they stashed concrete shards that they had dug from the concrete around tent poles, and home-made bombs that they had made with items we had given them. The prisoners attacked Camp Bucca from the inside out, and for 4 days they held off U.S. forces and seriously injured several troops. One officer was hit in the eye with a chunk of cinderblock. It fractured his cheek in three areas and

broke his teeth. The U.S. was forced to call for back-up in order to get security of our own prison camp.

What does the law say about religious accommodation? Well, the Geneva Conventions say that POWs must follow the disciplinary routine of their captors in order to preserve their religious latitude. This is similar to the standard applied in U.S. prisons. In *O'Lone v. Estate of Shabazz*, the Supreme Court said that prison officials could impinge on prisoners' right to exercise their religion for reasons related to legitimate prison management.

The U.S. should restore the rule of law in Guantanamo Bay by allowing U.S. prison guards to search all items in detainee cells, including the Koran. No item or place within our own prison camps should be off limits to our guards. Doing so, gentlemen, is extremely dangerous, and neither international nor U.S. law require or authorize this unusual accommodation.

When I served in Guantanamo Bay, I was appalled to learn that the U.S. military engages in gender discrimination against female military prison guards. Because it offends detainees, the U.S. forbids female soldiers from performing all aspects of their jobs within the detention camp. The U.S. should not engage in gender discrimination to appease the detainees. During World War II we did not discriminate against our Jewish soldiers to appease the Nazis, and we should not discriminate against our female soldiers to appease detainees who embrace similar discriminatory views.

The U.S. should uphold the rule of law by ensuring that all troops are allowed to perform their jobs, without regard to the prejudices of our enemies.

The U.S. follows the laws of war, and when our troops are captured, they are entitled to POW protections. That is not what happened for Staff Sergeant Matt Maupin.

On April 9th of 2004, Iraqi terrorists attacked his convoy and led Private Maupin away from his convoy and his fellow soldiers. Later, terrorist captors released footage of Matt sitting on the floor, wearing his uniform, surrounded by masked gunmen and being forced to make a statement. Later, they claimed they murdered him. It was not until 4 years later, this last March in 2008, that we actually discovered his body.

Incredibly, the military refused to acknowledge that Staff Sergeant Maupin was a POW. Instead, it gave him a title unknown under the Geneva Conventions. It considered him "missing" and called him "missing/captured" instead of referring to him, rightly, as a POW.

Where was the International Committee of the Red Cross for Staff Sergeant Maupin? What happened to his rights under the Geneva Convention? We welcome the ICRC in Guantanamo Bay. I was the liaison to the ICRC during one of my tours there. We listened to their complaints, and we answered all of them while I was there. Should not the ICRC lobby to visit the prison camps where our soldiers are being held? The ICRC is supposed to issue complaints when it does not have the access necessary to determine if detainees are held humanely. But the ICRC has been silent.

The U.S. should restore the rule of law and stop waiving POW protections for our own soldiers. U.S. soldiers adhere to the Geneva Conventions and, if captured, they are entitled to POW protections.

In closing, I wish to thank the Committee for the opportunity to address this matter. It is important that we uphold the rule of law and protect our men and women in uniform.

[The prepared statement of Ms. Rotunda appears as a submission for the record.]

Chairman FEINGOLD. I thank you, Professor Rotunda.

Our next witness is Ms. Elisa Massimino. Ms. Massimino is the Chief Executive Officer and Director of Human Rights First. She joined Human Rights First as a staff attorney in 1991 and became the organization's Washington Director in 1997. This year, she was named to head the entire organization. She was also named by the Hill newspaper as one of the top 20 public advocates in the country. She holds degrees from Trinity University, Johns Hopkins University, and University of Michigan Law School, and she has taught at the University of Virginia School of Law, George Washington School of Law, and Georgetown University Law Center.

Ms. Massimino, thank you for being here and please proceed.

STATEMENT OF ELISA MASSIMINO, CHIEF EXECUTIVE OFFICER AND EXECUTIVE DIRECTOR, HUMAN RIGHTS FIRST, WASHINGTON, D.C.

Ms. MASSIMINO. Thank you, Mr. Chairman. I appreciate the opportunity to be here and share our views on this important topic.

Restoring the Nation's commitment to the rule of law must be a top priority for the next President of the United States. Words will be important; but particularly because of the way the current administration has sought to distort, obscure, and evade the clear language of the law, words will not be enough. It will be the actions of the next administration that will either confirm Vice President Cheney's assertion that the drift away from the rule of law—which necessitates today's hearing—is "the new normal" or will prove him wrong.

Much of our focus today is on the impact of the policies of the last 7 years here at home, but it is important to understand that the erosion of human rights protections in the United States has had a profound impact on human rights standards around the world. Opportunistic governments have co-opted the U.S. "war on terror," citing U.S. counterterrorism policies as a basis for internal repression of domestic opponents. In some instances, U.S. actions have encouraged other countries to disregard domestic and international law when such protections stand in the way of U.S. counterterrorism efforts.

In the course of my work, I often meet with human rights colleagues from around the world, many of them operating in extremely dangerous situations. When I ask them how we can support them as they struggle to advance human rights and democratic values in their own societies, invariably they tell me one thing: "Get your own house in order. We need the United States to be in a position to offer strong leadership on human rights." The next President will have an opportunity to provide that leadership.

You have asked me today to focus on concrete steps the United States must take in order to realize a return to the rule of law in the area of detainee treatment. In brief, the next President must do three things: enforce the prohibitions on torture and other cruel

and inhuman treatment of prisoners; close Guantanamo; and abandon the failed experiment of military commissions in favor of the proven effectiveness—and due process—of our Federal criminal system.

U.S. detention and interrogation policy over the past 7 years have been marked by ongoing violations of fundamental humane treatment standards rationalized by a series of secret legal opinions that have stretched the law beyond recognition. Such violations range from abusive interrogations sanctioned by Department of Justice memoranda to renditions of individuals to torture and the maintenance of a secret detention system shielded even from the confidential visits of the International Committee of the Red Cross. The return to a detention policy that is firmly rooted in the rule of law—not in loophole lawyering—is essential both to restoring the moral authority of the United States and to ensuring the success and sustainability of U.S. counterterrorism efforts going forward.

On the battlefield in Afghanistan and Iraq, the military has learned the importance of ensuring that prisoners are treated humanely. The new joint Army-Marine Corps Counterinsurgency Manual issued in June of 2006 under the leadership of General David Petraeus makes clear that in order to gain the popular support we need to confront insurgency threats, the United States must send an unequivocal message that it is committed to upholding the law and principles of basic human dignity. I refer you to my written statement for the details of our comprehensive recommendations, which I will try to summarize briefly now.

To reclaim what General Petraeus called the “moral high ground” in our counterterrorism efforts, perhaps the most important step the next President must take is to revoke and repudiate all existing orders and legal opinions that authorize cruel interrogations or secret detentions or imply that legal standards of humane treatment differ when they are applied to the CIA. At the top of that list is Executive Order 13440, which authorizes the CIA to maintain a secret detention program using interrogation techniques that have been rejected by our own military as unlawful and unproductive. Professor Turner from the last panel has written eloquently about the dangerous impact of that order and warns that it places the President and all who implement that order in serious legal jeopardy. The next President must enforce a single standard of human treatment of prisoners across all Government agencies based on the military’s Golden Rule standard. We cannot engage in conduct that we would consider unlawful if perpetrated by the enemy against captured Americans.

In addition, we have to end the practices that facilitate torture, including rendition, and the operation of secret prisons, holding “ghost prisoners” outside of the range of the access of the ICRC, a provision that is included in this year’s intelligence authorization bill and which was debated very eloquently on the floor last night by Senator Whitehouse.

I refer you to my written statement for the details of our recommendations on a step-by-step plan on how to close Guantanamo and move prisoners into the Federal criminal justice system, which

has shown itself quite adaptive and capable of delivering sentences in terrorism cases.

Thank you.

[The prepared statement of Ms. Massimino appears as a submission for the record.]

Chairman FEINGOLD. Thank you, Ms. Massimino.

Our next witness is Mr. Patrick Philbin. Mr. Philbin is a partner at the law firm of Kirkland & Ellis here in Washington, where he practices appellate litigation. Mr. Philbin has degrees from Yale University, Harvard Law School, and Cambridge University, and clerked for D.C. Circuit Judge Laurence Silberman and Supreme Court Justice Clarence Thomas. From 2001 to 2005, Mr. Philbin served at the Department of Justice, including time in the Office of Legal Counsel and as Associate Deputy Attorney General. His responsibilities at DOJ centered on national security, intelligence, and terrorism issues.

Thank you, sir, for taking the time, and you may proceed.

STATEMENT OF PATRICK F. PHILBIN, PARTNER, KIRKLAND & ELLIS LLP, WASHINGTON, D.C.

Mr. PHILBIN. Thank you, Chairman Feingold, Ranking Member Brownback, and members of the Subcommittee. I appreciate the opportunity to address the topic before the Subcommittee today. Because the topic of the hearing is broad and time is limited, in my opening remarks I would like to touch on only three points.

First, I respectfully take some issue with the title of today's hearing and the comments that some of the other witnesses have made. A hearing on "Restoring the Rule of Law" might be understood to suggest that there has been a widespread abandonment of the rule of law. I reject that premise. Such a premise would do a disservice to the dedicated men and women throughout the Federal Government who work tirelessly every day, and who have done so since 9/11, to ensure that the actions the Federal Government takes to protect the Nation remain within the bounds of the law. In my time at the Department of Justice, I was privileged to work with dozens of dedicated individuals, both career employees and political appointees, who were committed to getting the right answer and ensuring that the rule of law prevailed.

That does not mean that mistakes have not been made or that there were not sharp disagreements about the law. I was involved in contentious debates that required us to address novel and complex issues of law under enormous pressures. And in some instances, I ultimately disagreed with the reasoning others had endorsed. In the most acrimonious debate that occurred during my time in Government, I believe the rule of law prevailed. In one way, the very fact that so much energy and contention was focused on disputes about legal interpretations shows that the rule of law was considered vital. If it were not, debates about legal interpretations would not have mattered so much. And disagreements, mistakes, or errors in interpreting the law do not amount to an abandonment of the rule of law.

Second, I want to point out a danger that I believe comes along in some of the rhetoric that is used about the rule of law. All too often in debates about the war on terror, many attempt to pack

into the concept of the “rule of law” the implicit assumption that any unilateral executive branch action or any argument for executive power that is not subject to judicial review necessarily abandons the rule of law. That is not the assumption of our Constitution. The Constitution assigns different roles to the three branches of Government, and particularly in the conduct of warfare, the role of the executive is paramount.

One particular aspect of the judicial-centric rhetoric of the “rule of law” deserves emphasis. In many instances, arguments based on this approach are, at bottom, a challenge to the fundamental legal paradigm governing the conflict with al Qaeda. After 9/11, the President determined that the Nation was in a state of armed conflict and that this conflict should be treated as war, not as a matter of mere criminal law enforcement. Congress agreed with that assessment by passing the Authorization for Use of Military Force. And the Supreme Court itself endorsed it in *Hamdi v. Rumsfeld*. As the Court put it, detention of combatants, “for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the ‘necessary and appropriate force’ Congress has authorized the President to use.” The proper legal framework for our conflict with al Qaeda is thus provided by the laws of war, not what is most familiar to us from the processes of the criminal law. Complaints, therefore, about detention without trial are entirely misplaced here. Detention without trial is precisely what the law allows for enemy combatants.

Third, and finally, I would like to address one area where I believe Congress can and should take action to accomplish not a restoration of the rule of law, but a needed restoration of balance in the law. I believe that, as Attorney General Mukasey has argued, legislation is warranted in response to the Supreme Court’s decision in *Boumediene v. Bush*.

In *Boumediene*, the Court determined that aliens detained by the military outside the sovereign territory of the United States in an ongoing armed conflict have a constitutional right to the writ of habeas corpus.

At the same time that the *Boumediene* Court effected a seminal shift in the law concerning constitutional rights for aliens outside the United States, however, it declined to provide further concrete guidance concerning exactly what procedures would be required in these particular habeas cases to satisfy the right to the Great Writ. Under the Court’s decision, that matter would be left entirely for lower courts—and subsequently appellate courts, and eventually the Supreme Court itself—to sort out in litigation. At least as a practical matter, there thus may be some truth in what Chief Justice Roberts pointed out in dissent: what the decision is about most significantly is “control of Federal policy concerning enemy combatants.” The Supreme Court’s decision shifts a large measure of that control to the judiciary and away from the political branches, both executive and legislative, which had already jointly crafted a detailed system of review for the detainees at Guantanamo through the Detainee Treatment Act and the Military Commissions Act of 2006.

Chief Justice Roberts makes an interesting point in noting that, if one considers who has “won” as a result of *Boumediene*, it is “[n]ot the rule of law, unless by that is meant the rule of lawyers, who will now arguably have a greater role than military and intelligence officials in shaping policy for alien enemy combatants.”

I believe that the lack of guidance the Court has provided—although the Court has determined that there is a constitutional right for the detainees at Guantanamo to habeas, the lack of guidance leaves a role for the political branches. Congress can and should step in to shape the habeas actions now required under *Boumediene* by legislation to streamline the procedures rather than leaving the matter solely to the ad hoc process of multiple rounds of litigation, which could take years.

Legislation introduced by Senator Graham in the form of Senate bill 3401 provides a step in the right direction. I urge the Committee to give that bill, or similar legislation, serious consideration rather than leaving the contours of the habeas actions required in the wake of *Boumediene* to be determined solely by litigation.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Philbin appears as a submission for the record.]

Chairman FEINGOLD. Thank you, Mr. Philbin. I thank, of course, everybody for their patience today.

Our next witness is Ms. Suzanne Spaulding. Ms. Spaulding’s expertise in national security issues comes from 20 years of experience in Congress and the executive branch. She has worked in both the House and Senate Intelligence Committees and has served as Legislative Director and Senior Counsel to Senator Specter. She has served as Executive Director of two different congressionally mandated commissions focused on terrorism and weapons of mass destruction and has worked at the CIA. She is currently a principal at Bingham Consulting Group and past Chair of the American Bar Association’s Standing Committee on Law and National Security.

Thank you very much for being here, and you may proceed.

**STATEMENT OF SUZANNE E. SPAULDING, PRINCIPAL,
BINGHAM CONSULTING GROUP, WASHINGTON, D.C.**

Ms. SPAULDING. Thank you, Mr. Chairman, Ranking Member Brownback. I would like to begin by commending you for holding this hearing, focused not on re-litigating past disputes but on understanding the current and future imperative for upholding the rule of law.

As we anticipate a new administration, it is appropriate to assess where we are and endeavor to put in place a long-term, sustainable approach to security, one that reflects all that we have learned in the intervening years about the nature of the threat today and effective strategies for countering it.

We are all familiar with the “soft-on-terror” charge of having a “September 10th mindset.” The truth is that no American who experienced the horror of September 11 can ever again know the luxury of a September 10th mindset. The greater concern is being stuck in a September 12th mindset, unable or unwilling to understand the lessons we have learned since those terrible days. It is this mindset that undermines America’s long-term security.

On September 12, 2001, for example, we lived with a deep sense of fragility as we waited in fear for the next attack. Over the subsequent days and years, however, we have come to understand that resiliency is a powerful and essential weapon against terrorism. It means knowing that there may be another attack, but refusing to live in, or make decisions based upon, fear. If politicians and policy-makers fall back on that September 12th mindset of fear to convey their message and promote their policies, they will undermine that essential public resiliency.

On September 12th, we thought we could defeat terrorism by going to war. Today, most of us understand that we are engaged in long-term struggle for hearts and minds, competing against the terrorists' narrative of a glorious "global jihad"—a narrative that can be very compelling to young people searching for identity and answers. But we now understand that the image of an America committed to the rule of law and ensuring that even suspected terrorists get their day in court can be a powerful antidote to that twisted allure of terrorism.

We sought, in those first days and months after September 11th, to "balance" national security and civil liberties, as if they were competing objectives on opposite sides of the scale. We thought we could only get more of one by taking away from the other. Over the past 7 years, however, we have been reminded that our values are an essential source of our strength as a Nation.

For example, experts agree that the primary reason the United States does not face the level of homegrown terrorism threat that Europe has experienced is that immigrants are better integrated into American society. Effectively working with Muslim communities in this country is one of the most promising avenues for deterring radicalization of young people. Policies that undermine those efforts threaten our national security.

Similarly, while it seemed to some that on September 12th our careful system of checks and balances was a luxury we could no longer afford, we have seen since that an avaricious arrogation of power by the Executive actually leads to a dangerously weakened President. We have been reminded that our Government is strongest when all three branches are fulfilling their constitutional roles.

Mr. Chairman, we all awoke to a changed world on September 12th. But the world has continued to change, and so must our understanding of the threat we now face and how to combat it. The struggle for hearts and minds is of tremendous consequence. The enemy is deadly, determined, and adaptive. We cannot defeat it if we are stuck in the past. It is essential to move beyond our fears and understand what it is that makes us strong.

It is with this in mind that I recommend in my written testimony that a new administration undertake a comprehensive review of all domestic intelligence activities, all relevant laws, policies, regulations, guidelines, and memos. In addition, as I have previously testified, Congress should undertake its own similar review.

At the same time, the administration should ask the Director of National Intelligence to oversee a thorough assessment of the nature, scale, and scope of the national security threat inside the United States.

In conclusion, Mr. Chairman, I will quickly list just a few of the key issues that I describe in greater detail in my written testimony that should be part of a comprehensive review:

A review of all electronic surveillance activities since January 2001 and of the entire Foreign Intelligence Surveillance Act, not just the amendments enacted this summer;

A review of the legal regime for national security letters and its implementation—something I know is of particular interest to the Chairman of this Committee;

A review of the new Attorney General guidelines for counterterrorism investigations;

An assessment of the First Amendment implications of domestic intelligence activities, including safeguards to protect against political spying and the chilling effect of current and proposed policies and activities;

The need for a legal framework for Government data collection and data mining practices;

The appropriate role of the various entities engaged in domestic intelligence activities, and that includes, obviously, not just FBI but also CIA, NSA, the Department of Defense and its other intelligence components, DHS, and State and local police;

And, finally, the need to enhance transparency and oversight—in both the executive branch and Congress—in order to sustain public support, improve the quality of intelligence, and ensure respect for the rule of law.

It is clear that this Committee understands the absolute importance of that final bullet, and I again commend you for holding this hearing, and thank you very much for the opportunity to participate.

[The prepared statement of Ms. Spaulding appears as a submission for the record.]

Chairman FEINGOLD. Thank you, Ms. Spaulding, for your very useful testimony.

Our final witness this morning is Mr. John Podesta. Mr. Podesta is the President and CEO of the Center for American Progress Action Fund. From October 1998 to January 2001, Mr. Podesta served as Chief of Staff of President Bill Clinton, where he was responsible for directing, managing, and overseeing all policy development, daily operations, congressional relations, and staff activities at the White House. Before that, he served on the United States Commission on Protecting and Reducing Government Secrecy, chaired by the late Senator Daniel Patrick Moynihan. Mr. Podesta is currently a Visiting Professor of Law on the faculty of Georgetown University Law Center and is a leading expert on technology policy and Government secrecy. Mr. Podesta is a graduate of Knox College and Georgetown University Law Center.

Thank you for your patience and thank you so much for being here, and you may proceed.

STATEMENT OF JOHN D. PODESTA, PRESIDENT AND CHIEF EXECUTIVE OFFICER, CENTER FOR AMERICAN PROGRESS ACTION FUND, WASHINGTON, D.C.

Mr. PODESTA. Thank you, Mr. Chairman and Mr. Brownback. It is an honor to be here today, and if you will permit me a brief mo-

ment of nostalgia, I got into this Government secrecy question as a counsel to this very Subcommittee when I served Senator Leahy here in 1981 when he successfully opposed amendments that would have gutted the Freedom of Information Act. So it is great to be back on this side of the table.

I just want to make a few points. I have given you a lengthy statement on what I see as the excesses of secrecy in the current administration and what we need to do about it. But let me just make a few points.

First of all, obviously most Americans appreciate the need to keep secret national security information whose disclosure would pose a genuine risk of harm to the United States. I certainly subscribe to that view, and I have seen operational plans, sources, and methods, information that needs to be classified to keep the public safe. But I think as the 9/11 Commission concluded, too much secrecy can put our Nation at greater risk and breed insecurity by hindering oversight, accountability, and information sharing.

Excessive secrecy conceals our vulnerabilities until it is too late to correct them. It slows the development of the scientific and technical knowledge we need to understand threats to our security and to respond to them effectively. And it short-circuits public debate. Moreover, it undermines the credibility of the information security system itself, which encourages leaks and causes people to second-guess legitimate restrictions.

Finally, secrecy, I think, has a corrosive effect on the rule of law, the subject of this hearing, which requires that laws be known and understood and that Government officials be held accountable for their actions. Without such information, there can be no checks and balances, no accountability, no rule of law.

You mentioned a commission I served on that was chaired by Senator Moynihan. It was a bipartisan commission that included Senator Helms as a co-chair. That commission concluded unanimously that the best way to ensure that secrecy is respected and that the most important secrets remain secret is for secrecy to be returned to its limited but necessary role. Secrets can be protected more effectively if secrecy is reduced overall. And, again, I recommend Senator Moynihan's very short volume on secrecy. It is a terrible book for those of you who are interested in this particular topic.

Unfortunately, in my view, President Bush and Vice President Cheney have created, I think, a cult of secrecy within the executive branch that is probably rivaled only, I think, by the Nixon administration. The Bush administration has systematically overhauled policies and practices that deny Americans information held by the Government. I would note that this took place and preceded 9/11. It is not only a reaction to 9/11. But I think some of those policies, his amendments to the Presidential Records Act, although issued right after 9/11, the Attorney General's memorandum which, I think, reversed the presumption of openness and Freedom of Information Act, all that preceded 9/11. I go into some detail in my testimony on that. So without sort of going over the abuses that I see in the policies implemented by the administration, let me go to six specific things that are summaries, again, of my testimony that

need to be accomplished, I think, by either the next President, three in that category, or by the Congress itself.

First, I believe that the next President should rewrite the Bush Executive on classification policy to reinstate the Clinton era provisions, which established a presumption against classification in cases of significant doubt and prohibited reclassification of material that had been properly declassified and released to the public. I think we also need to get back to really policing the system of automatic declassification that was, I think, a feature of the earlier Clinton order.

Second, I think the next President and, if the President does not do it, the Congress should take action to reduce the practice of designating so-called controlled unclassified information. That has really exploded during the administration. The GAO found that 26 agencies use 56 different information control markings that are beyond the scope of the executive order on classification, and that is just growing. I think that is a matter that needs urgent attention. If the President does not undertake it, I think the Congress needs to pass legislation, some of which has already passed the House and I recommend it to you.

Third, the next President should revoke the Bush executive order on the Presidential Records Act, which I think both permit surviving relatives of former Presidents to block access to Presidential records, created a new Vice Presidential privilege. It really turns over on its head the whole import of the Presidential Records Act, and I think that that needs to be reversed.

Fourth, I think in the realm of the things that Congress need to undertake, Congress should enact legislation directing courts to weigh the costs and benefits of public disclosure before dismissing lawsuits on the basis of state secrets privilege. Fritz talked about that.

Fifth, Congress should enact S. 3405, the Executive Order Integrity Act, introduced by you, Mr. Chairman, to prohibit the President from secretly modifying or revoking a published executive order.

And, finally, Congress should strengthen the Whistleblower Protection Act of 1989 to protect public employees from reprisal when they disclose information, particularly to Congress, regarding Government wrongdoing.

So, with that, let me conclude. Thank you.

[The prepared statement of Mr. Podesta appears as a submission for the record.]

Chairman FEINGOLD. Thank you so much, Mr. Podesta.

We will go to questions, a 7-minute round. I will begin.

Mr. Dellinger, I opened my questions to the first panel by highlighting the need for a rule-of-law culture in Government. The majority of these executive actions will never be reviewed in a court of law or examined in a congressional hearing, and so a culture of respect for the rule of law within the executive branch itself is essential. I would like to return to that point now because I believe it has special relevance for the Office of Legal Counsel.

From your vantage point as a former head of OLC, what can be done going forward to instill a culture of respect for the rule of law

among the attorneys who give advice to the President and other executive agencies?

Mr. DELLINGER. Senator, I think first one has to recognize that administrations under both political parties have indeed maintained a very high standard over the years. There has been a bipartisanism, if you look at the Office of Legal Counsel under Ted Olson in the first Reagan administration, I believe Harold Koh, one of our witnesses today, and others served in the Office of Legal Counsel during that period of time. Charles Cooper, another of your witnesses today, issued opinions that were quite contrary to the intense political ambitions of the President and stuck with it. So that it is, first of all, important to overcome the cynicism that says this cannot be done.

I think it is also important to recognize, quite honestly, that we did vary from it in this administration. To read the torture memo, one cannot just dismiss as a difference of legal opinion a torture memo that—whose reasoning is so tortuous as it goes through why there is no need to comply with or to interpret away the criminal assault statute, the maiming statute, the war crimes statute, the torture statute, customary international law, the Convention Against Torture, the Fifth, Eighth, and 14th Amendments. To read an opinion like that is just to be stunned at what it has done.

I believe that one of the things a President has to understand is that Presidents who get the answer they want wind up being ill served by it. They get into trouble. It really is important, and the President should tell that to the Office of Legal Counsel. I think the Attorney General has to play an active role in advancing that, and I think most importantly, we have to follow the recommendations, I believe, in the legislation that you are introducing, suggested by the testimony of Mr. Podesta. There has to be as much transparency as national security imperatives will allow in making public what the basis for the President's legal conclusions are and to make those readily, timely, and widely available for Congress and the American public to assess.

Chairman FEINGOLD. Thank you, Professor.

Ms. Massimino, you have recommended, as have a number of organizations who submitted written testimony, a single interrogation standard for all U.S. Government agencies. I could not agree more and have advocated this both publicly and behind closed doors at the Intelligence Committee for years. The argument I often hear in opposition is that intelligence interrogators have different needs and goals than military interrogators, and that the same rules should not apply.

How do you respond to that? How do you know that we will not lose valuable intelligence information as a result?

Ms. MASSIMINO. First, I want to say that I, too, have heard the arguments from the President and other administration officials that the so-called enhanced interrogation techniques are effective at obtaining information. It is a difficult assertion to challenge, not because it is so obviously true, but because the people who have the information that would substantiate it are the only ones who have seen it.

So I do want to point out first, though, that effectiveness does not convert a felony into a misdemeanor or not a crime. It does not

rectify a breach of Common Article 3. And it does not make a given technique any less painful or inhumane.

That said, though, there are serious reasons to question these assertions that intelligence interrogators need different techniques. The recent report by the Intelligence Science Board, called "Educating Information," has found that there is no evidence to suggest that these so-called enhanced interrogation techniques produce reliable or actionable intelligence.

Over the summer, my organization, Human Rights First, convened an off-the-record meeting with about 15 intelligence interrogation experts—from the military, the FBI, and the CIA. It was supposed to be a 2-day meeting. After about three-quarters of the first day, they found such strong common agreement that not only did they not need to go beyond the standards of Common Article 3 as outlined in the military manual, but they were gravely concerned that we were going to permanently lose vital intelligence by continuing down the road of use of these enhanced techniques.

Now, I am not an interrogation expert, but they sure are. Within that room was more than 150 years of intelligence interrogation expertise. And there was no doubt in anyone's mind that what they need to do and what they asked for was an investment by the next administration in developing and training human intelligence gatherers in the traditional rapport-building techniques that work.

Chairman FEINGOLD. Thank you.

Ms. Spaulding, in the past several years I have repeatedly detected from the Justice Department a fundamental distrust of judges when it comes to domestic surveillance authorities, whether it is bypassing the FISA Court for more than 5 years or the NSA wiretapping program or arguing that statutes should be rewritten to decrease the role of the judiciary. This seems to be a consistent theme. Yet in our system of Government, the judicial branch plays a critical check on executive branch overreaching. Is this distrust of the judiciary warranted? And how should the role of the judiciary be considered in the context of the comprehensive review of domestic surveillance authorities that you have recommended?

Ms. SPAULDING. Senator, I think this mistrust of the courts is not warranted. As has been pointed out by other witnesses this morning, the courts are typically very deferential to the executive branch when it comes to national security, and it has been quite unusual to see the pushback from the Supreme Court recently with regard to administration legal claims in the war on terror. And I think that says less about the make-up of the Supreme Court than it does about the boundaries that this administration has been pushing in that legal context.

It is very interesting. One of the arguments that is often made is that we cannot trust regular Article III judges with highly classified information. There have been leaks from the executive branch—lots. There have been leaks from Congress. There has never been, as far as I know, a leak of classified information from the courts, from the judiciary, from a judge.

Judges deal with complex information all the time, and their role is absolutely vital when it comes to the areas that we are talking about today.

Supreme Court Justice Powell articulated it very well in the *Keith* case, which, as you know, is one of the key cases as we look at domestic surveillance issues, when he talked about how the role of the executive branch is not envisioned to be a neutral arbiter or decider, but actually to investigate and prosecute. And it is not appropriate to leave these final decisions in their hands lest they become subject to abuse in the zeal for prosecution.

The role of the judiciary in this area, particularly the area of domestic surveillance, is absolutely critical.

Chairman FEINGOLD. Thank you very much.

Senator Brownback?

Senator BROWNBACk. Thank you, Mr. Chairman. I thank the panelists for your presentations and your thought that you put into your presentations. I appreciate that all very much.

Professor Rotunda, particularly I was stunned by the things that you were talking about. I did not know about those factual situations, and I am hopeful we can get on top of that so we can keep our people safe.

Do we make the same sort of requirement for other religious materials that they cannot be touched or examined?

Ms. ROTUNDA. Sir, it is primarily the Koran. We do issue to detainees all kinds of religious items, including prayer oil, prayer beads, prayer rugs. We broadcast the call to prayer five times a day. We have arrows pointing to Mecca. At some points when they are praying, they are required to have 20 minutes of uninterrupted time, and we have prayer cones that we put up where guards cannot enter the area where they are praying.

Senator BROWNBACk. I want to get specific on this. Are there other religious documents that we hand to prisoners from other faiths that we say you cannot examine?

Ms. ROTUNDA. No, sir.

Senator BROWNBACk. This is the only one that we tell the guards you cannot look at.

Ms. ROTUNDA. Yes, sir.

Senator BROWNBACk. And the mosque is the only place we tell guards you cannot go into.

Ms. ROTUNDA. As far as I am aware, sir. I know that was at Camp Bucca. Now, when we have prayer cones up in the prison camp, guards cannot go into those areas where detainees are praying. So that is true in Guantanamo Bay and also at Camp Bucca.

Senator BROWNBACk. OK. And I thought it also interesting the limitation on what we allow female guards to do. I had not thought about that aspect of it.

Ms. ROTUNDA. Yes, sir.

Senator BROWNBACk. But not allowing them to do their job according to some other standard rather than our own of how we treat different genders.

Ms. ROTUNDA. That is right, sir. It is clearly discrimination.

Senator BROWNBACk. Thank you for bringing those up. I thought those were quite interesting.

Professor Philbin, Mr. Philbin, I want to talk with you, because this is the key kind of point, it seems like to me, of one of the things we have got to discuss, is how we are going to process these detainees at this point after the Supreme Court case. How is this

going to be handled? And your point is that you are either going to do it on this kind of makeshift case or run it through a bunch of different trials, run it up the appellate court multiple times to kind of get a body of law developed where the Congress is going to pass something. That is the summation of your point.

Mr. PHILBIN. Yes, essentially, sir.

Senator BROWNBAC. What do you think we should do and in what sort of legal framework should we look at these enemy combatants? Can you give me that in a minute or two? I realize that is a huge question, but it is one we have tried to wrestle with around here, thought we had something, and the courts said differently.

Mr. PHILBIN. And I can understand frustration with that, Senator, coming from the Congress, because Congress did make a concerted effort to respond to the Supreme Court's decision in *Hamdi* and *Hamdan* that outlined what would be necessary, even for a U.S. citizen, for habeas corpus procedures and modeled the procedures at Guantanamo on that.

I still think, though, that for the efficient conduct of the war, it is necessary not to allow things just to play out in years of litigation, but to take another stab at trying to determine what it is that the Court expects from these habeas proceedings. I think that the legal framework is the laws of war that these are enemy combatants. They can be detained without trial. But the specific contours of the habeas action have to be gleaned from the Supreme Court's decisions so far. And legislation that provided for a procedure that gave the necessary process and that also provided, I believe, for an expedited appellate proceeding so that the test case would go through, there would be an established timetable for an expedited appeal through the D.C. Circuit Court of Appeals, and perhaps then to the Supreme Court, to try to get the whole thing sorted out so that there is a clear guideline as soon as possible, because, otherwise, tremendous resources will be wasted in litigation.

Senator BROWNBAC. Now, this is not the first time this country has dealt with enemy combatants. Now, they were in a foreign government, and there were rules of law. But in World War II, we had a number of prisoners of war here in the United States. How did we treat them then? Under what legal system?

Mr. PHILBIN. In World War II, there were over 400,000 POWs in the United States. They had rights under the Geneva Conventions. And as far as I am aware, there was no attempt, there was never an effort to bring a habeas corpus action on their behalf.

Senator BROWNBAC. With all 400,000?

Mr. PHILBIN. As far as I am aware. There were efforts to bring habeas corpus actions on behalf of those in the *Quirin* Case, saboteurs who were not held as POWs, the *Quirin* Case, *Colepaugh v. Looney*, and at the end of the war, a U.S. citizen, Territo, a Ninth Circuit case, he was captured in the Italian Army, but he had been a U.S. citizen. But those were the only situations in which habeas corpus actions were entertained.

Senator BROWNBAC. But they were not treated as under our criminal law procedure at all. Correct?

Mr. PHILBIN. Correct.

Senator BROWNBACk. It was under the Geneva Convention and the treatment—and there were not trials going on as long as the war went on. Is that correct?

Mr. PHILBIN. That is correct.

Senator BROWNBACk. Then after the war, they were generally returned to their home country.

Mr. PHILBIN. They were repatriated, as required by the Geneva Conventions.

Senator BROWNBACk. So you are suggesting, if I can understand this a lot more, that we need to go along that line rather than involving the Guantanamo Bay or the military detainees in our criminal law structure in the United States.

Mr. PHILBIN. Well, I think it is important to maintain the paradigm that this is law, not simply—this is a war, and the laws of war apply and not simply a matter of criminal law enforcement. But given the *Boumediene* decision, there has to be a structure put in place for habeas corpus proceedings now for these detainees. That is the law under the Constitution as declared by the Supreme Court.

I think the question that the political branches face is how much time and effort will have to be spent in litigation to try to sort out exactly what the procedures are for that and how much time can be saved by the political branches taking what I believe is their proper role in something that is really a matter of war policy, trying to define as quickly as possible what the contours of those habeas actions will look like.

Senator BROWNBACk. Which I agree with, and I think that is the route we should go.

Ms. Massimino, I hope you were here at the outset when I was talking about the unsuitability of the disciplinary barracks at Fort Leavenworth for moving detainees. If you were not, I hope you could look at the specifics that I outlined, because I think this is just not an appropriate facility and not set up for this and not legal for us to move them there. And so I would hope in your advocacy of closing Guantanamo Bay, which I understand and appreciate, that you would also look at some of the difficult facilities we have in the United States and not—or at least question as well moving them to those places as well.

Ms. MASSIMINO. I will. And, in fact, Senator, in our written blueprint on how to close Guantanamo, we look at a number of different scenarios, possibilities. I think one of the challenges is to break down the population there into several categories, and the ones that we think are suitable to be moved to the United States or ones that we think the Government has identified as having committed crimes against the United States and should be tried. I have in my written testimony a whole explanation about why we think pursuant to this report we recently published on an evaluation of terrorism trials in the domestic criminal system that that is a far better—that our criminal system is far better suited than the current system of military commissions about which there has been so much controversy, even within the military command structure, about whether or not that system complies with our rules under the Geneva Conventions.

I think that, you know, we are talking about the rule of law here today, and the requirements of the rule of law, what it really means, I think, in practice is transparency, predictability, consistency. We have procedures to deal with suspected terrorists. We actually have been using them effectively in the criminal system. And instead of setting that system aside, we ought to be embracing it and using all the tools at our disposal to deal with the terrorist threat. And I think that is one that has been underused and is part, in my view, of the solution to the situation at Guantanamo.

Senator BROWNBACK. I would note—and that talks about the Leavenworth Penitentiary, and I do not think you want to move these folks into the Leavenworth Penitentiary system let alone the disciplinary barracks for mixing of populations. I appreciate your thought and your background on it. I just think there are very practical problems that I would hope you would look at as well.

Ms. MASSIMINO. Senator—

Senator BROWNBACK. My time is up, Mr. Chairman.

Chairman FEINGOLD. Excuse me, Senator Brownback. I want to just do one more question, because it has already been over 2½ hours. So I just want to ask Mr. Podesta: Government secrecy is an issue that permeates every other rule-of-law issue we are addressing here today. Almost every group or individual who submitted written testimony in advance of this hearing brought up the issue of Government secrecy, and they are more or less unanimous in their recommendations for concrete steps that the next President can take on day one of his administration. I truly hope that the next President takes note of this remarkable consensus and acts on this list of recommendations.

Now, one of the organizations that submitted a written statement for the hearing is openthegovernment.org, a coalition of groups that support open government. The statement includes the following recommendation: “The new President has an immediate opportunity to define the relationship between his administration and the public by issuing a Presidential memorandum on day one of his administration that makes clear that the Government information belongs to the public.”

Do you agree with this recommendation? And do you have any thoughts about what principles and commitments might be included in such a memorandum?

Mr. PODESTA. Thank you, Mr. Chairman. CAP is a member of openthegovernment.org. I do agree with the recommendation. I was thinking about this a little bit during the course of the hearing, and maybe the President might start with a statement that formed the basis of a study that was done by Professor Harold Cross from the University of Missouri, which led to the enactment of the Freedom of Information Act. He said in his classic study that the right to speak and the right to print—reflecting on the First Amendment—without the right to know are pretty empty. And I think that is a pretty strong statement that the President could issue on day one, direct his Government, again, the Justice Department, I think, to reverse and move back to the presumption of openness with regard to taking on FOIA cases, reform the executive order on classification, to deal with the problems that I have identified in my opening statement.

But I think ultimately this is about culture. It is about whether the President and whether his Cabinet are going to implement policies and oversee their own officials in a way that I think promotes openness and restores that sense of openness and integrity to the Government.

Chairman FEINGOLD. Senator Brownback, did you have a quick follow-up?

Senator BROWNBACK. I do.

Professor Rotunda, I am just curious. If we go the route that is being suggested by Ms. Massimino on the prisoners from Guantanamo Bay, what is kind of the practical effect? I am curious if actually people will be left in theater rather than moved back, and if that is done, if they will be repatriated to host countries. And I wonder if they will be better treated there than they would at Guantanamo. Do you have any thought?

Ms. ROTUNDA. Yes, sir. Well, Senator, two things.

First of all, under the Geneva Convention, we cannot take enemy combatants and move them to a prison with convicted criminals, and so that is one thing we have to consider. Those who have already been charged with a crime, one thing. We cannot just airlift Guantanamo Bay into a U.S. prison. And not only can't we, but we should not do that. Moving detainees to Guantanamo Bay presents significant security risks. We cannot maintain the type of security that is required. In Guantanamo Bay, we are surrounded by water on three sides and Cuba, with rows and rows of barbed wire, on the other side.

If we move them to the United States, it will be a magnet for some terrorist bomber to attack the United States from within, again, and take himself out, all the U.S. troops he can take out, and the detainees in Guantanamo Bay. So I think it is very dangerous. All the polling I have seen is that Americans do not want it, it is not good for Americans.

Additionally, the detainees in Guantanamo, many of them are very threatening toward their interrogators. Some of them have said that if they ever get out, they are going to hunt down their interrogators and their families and "slit their throats like animals." That is what one detainee told his interrogator. It is dangerous to move them here.

The other option, sir, you mentioned about moving them in theater, leaving them in Iraq or Afghanistan, I do not think that is a good idea either, and the reason is because right now in Guantanamo Bay, it is crawling with human rights advocates. The International Committee of the Red Cross had more access to detainees than I did, and I have a top secret security clearance, sir.

There is media all over Guantanamo Bay. There are hundreds of lawyers coming in and out of Guantanamo Bay. If we move them to Iraq or Afghanistan, all of this oversight is going to stop. And so those who are truly concerned about the treatment of detainees should think twice about suggesting that we move them anywhere near the theater in Iraq or Afghanistan where they are not going to have this contact with the outside world.

Chairman FEINGOLD. Senator Whitehouse, do you have a follow-up?

Senator WHITEHOUSE. I know that the Chairman is seeking to bring this wonderful hearing to a conclusion because of the press of other business we face, so I would like to ask a couple of questions just for the record and ask if the witnesses would follow up as they wish. I would, however, first like to recognize Ms. Spaulding and welcome her back to the Committee. She was on the other side of the aisle, but she worked very hard for us and was a wonderful asset to the Committee, and it is nice to see her back in this capacity.

Question 1 is on how you go about unwinding Guantanamo. Everybody says we have got to get rid of it. I believe that a committee should take a look at it. Some problems are easy to get into and very difficult to unsnarl. I suspect that a committee that was to look at this, or a commission, would need military expertise, would need corrections expertise, would need intelligence expertise, would need law enforcement expertise, would need immigration and international law expertise. But if there is anything else that you can add as to how we unwind this, that would be helpful.

I would reiterate the same question I asked the first panel about secrecy. What is an appropriate response when you have an executive branch that is strategically declassifying for propaganda purposes in order to silence dissent or opposition from Congress by leaving us behind the veil of secrecy while they declassify at will their part of the argument?

And the third is that one of the—as I have been reading through these OLC opinions, you know, it is sort of one horror leads to another. I keep calling this a “George Bush Little Shop of Legal Horrors.” One of the assertions that was made was that an executive order, because it is an executive order, cannot bind a President; he is free to depart from it at his pleasure or disobey it at his pleasure, and he is under no compunction at any point to report that he is disobeying it. That strikes me as turning the Federal Register into essentially a screen of falsehood on which people cannot rely. But there is a constitutional germ of truth buried in there, and I would love to get the advice of the panel on what we should to assure that when Americans look at an executive order that, as we know, has the force and effect of law, takes a congressional act to overrule it, and until then has the force and effect of law, they know that they can actually count on its efficacy, its accuracy that it is legal, that it is not just a phony screen that has been put up. I think that is very dangerous for a structure, a Government that is built on laws and the laws become phony and you can run illegal or un-legal programs behind the screen of legal artifice.

So those would be the three questions I would love to hear from you, but I know that we have a caucus to get to, and you all have things to get to as well. And I very much appreciate the Chairman’s courtesy, and I know I am taking more time, but I really would like to reiterate how extremely valuable and important I think this hearing is, how astonishingly good the witnesses have been, both in the number and expertise—it has really been a very, very impressive panel—and how much I value Chairman Feingold’s leadership in calling this, along with the Ranking Member, Senator Brownback.

Chairman FEINGOLD. Thank you, Senator Whitehouse, and we have much to do, as we have indicated, and we will get on it.

Senator Brownback, did you have anything further?

Senator BROWNBACK. Nothing, Mr. Chairman.

Chairman FEINGOLD. Let me thank all the witnesses for their testimony and this thoughtful discussion. I appreciate your taking the time to be here. I thank you for your insights.

As the testimony today confirms, I do not think we can overstate the importance of this issue to our Nation and to this moment in history. We have heard a number of provocative and interesting proposals today, including some very concrete and practical recommendations for restoring the rule of law and returning to the principles on which this Nation was founded. This does not mean it will be easy, even though steps that are almost universally agreed upon, such as the necessity of closing the facility at Guantanamo Bay, are fraught with legal and practical complexity. And, of course, there may be institutional resistance within the executive branch to actions that are viewed as ceding power to the other branches of Government no matter how unprecedented the executive power theories that need to be undone.

But as I said at the outset of the hearing, it is the years that follow a crisis that may matter most that are the true test of the strength of our democracy. So I hope that the next President will heed what has been said today and carefully review the many recommendations that we have presented even before he takes office. I truly believe that the future of our democracy depends on it. Indeed, I think it is so important that this be done that I believe the next President, whoever he is, in the Inaugural Address should specifically say that he has an allegiance to the rule of law and that he will reverse and renounce the course followed by the current President. I believe it would obviously have to be brief in such an address, but it rises to that magnitude.

The hearing record will remain open for one week for additional materials to be submitted. Written questions for the witnesses must be submitted by the close of business one week from today. We will ask the witnesses to respond to those questions promptly so the record of this hearing can be completed and presented to the President the day that he takes office. And, again, I thank Senator Brownback for his tremendous patience and participation as the Ranking Member.

The hearing is adjourned.

[Whereupon, at 12:58 p.m., the Subcommittee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

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Senator Sheldon Whitehouse
Hart Senate Office Building
Room 502
Washington, D.C. 20510

Re: Response to Sen. Whitehouse's written questions for "Restoring the Rule of Law" hearing.

Dear Senator Whitehouse,

I appreciate the opportunity to respond to your written questions relating to the possible closure of the Guantanamo Bay detention facility and to problems created by exclusive Executive Branch authority over classification and declassification of sensitive national security information. I regret, however, that I have not given these important issues studied consideration and do not feel qualified to offer an opinion on them.

Sincerely,



Charles J. Cooper

**Responses from the Honorable Mickey Edwards to
Questions for the Record of Senator Sheldon Whitehouse**
Hearing before the
Senate Judiciary Committee
Subcommittee on the Constitution
on
“Restoring the Rule of Law”
Tuesday, September 16, 2008

1. **There is broad bipartisan support for closing the detention facility at Guantanamo Bay, Cuba. The question we face is *how* to close it. Doing so will raise complicated military, intelligence, judicial, diplomatic, correctional and civil liberties issues.**

Do you support the establishment of an independent commission on how to close Guantanamo Bay? If so, what expertise should the members of that commission have? What powers should the commission have in order to accomplish its work?

Before I would support the establishment of an independent commission on how to close Guantanamo Bay, I would call on the appropriate committees and subcommittees of Congress to hold hearings on the complicated military, intelligence, judicial, diplomatic, correctional, and civil liberties issues the closure raises. Congress must start fulfilling its duty to conduct proper oversight now. These are not isolated issues that solely relate to Guantanamo and our detention policies in Iraq and Afghanistan; rather, the way that we address these issues will determine whether and how we restore the rule of law in the every day operations of our government. An independent commission may be appropriate to make recommendations to Congress and the executive branch after the committees make their findings, but Congress cannot abdicate its responsibility to engage in appropriate investigations to make those findings. Congress' responsibility to restore and uphold the rule of law will not end when the committees and commission make their recommendations about Guantanamo. Rather, if we are to prevent further damage to our Constitution and to our national and international security, Congress must begin again to fulfill its ongoing obligation to conduct oversight of the executive branch. Congress should make full use of its subpoena power and its power to retain experts. Where necessary, it should meet in closed session. If, after congressional committees make their findings, a special commission convenes, it should have the same subpoena powers (including enforcement powers) and the ability to meet in closed session.

To restore integrity to the American justice system and repair our reputation as a nation committed to the rule of law, the Judiciary Committee and other appropriate committees must investigate what happened at Guantanamo Bay and

whether these policies and procedures continue at our other detention facilities. Prosecutions for terrorism offenses can and should be handled by traditional Article III courts with a limited exception for combatants captured on the battlefield who would be subject to traditional military jurisdiction who may be tried by military courts for offenses properly triable by such courts. Congressional committees and, when appropriate, a special commission, should include our military leaders, prosecutors at Guantanamo and military and civilian attorneys who represented detainees in Guantanamo, and federal prosecutors, judges, and defense lawyers who have used the criminal justice system to try terrorism cases, State Department officials, as well as representatives of the intelligence community. Congress and any special commission must also consult with non-governmental organizations that have worked with detainees in Guantanamo and in Iraq or Afghanistan.

Congress makes the laws regarding the regulation of the armed forces; by exercising its oversight function it can determine whether our government's failure stems from flawed implementation of existing laws or from a need for better laws. Our conduct in Guantanamo has damaged the reputation of the United States, fueled terrorist recruitment, and undermined the United States' image as a nation dedicated to the rule of law. Congress should not require a special commission to recall its obligation to restore and protect the rule of law; it should act now, and it should act forcefully.

2. **Many officials in the executive branch are granted the authority to classify and declassify. This means that if they disclose previously classified information, it is automatically declassified - and the "declassifier" faces no exposure to civil or criminal liability. By contrast, members of Congress are not granted this authority. This puts Congress at an extreme disadvantage when it is performing its constitutionally mandated oversight role. It also raises the possibility for abuse: executive officials can declassify material selectively for their own political and partisan purposes. Making matters worse, members of Congress, like other citizens, are prohibited by law from declassifying other information that would reveal the inaccuracies or distortions propagated by the executive branch.**

At the hearing, I raised the possibility of granting the Chairman and Ranking Member of the Judiciary and Intelligence Committees the authority to declassify. Do you support this approach? If not, can you offer another approach to address this problem?

I do support this approach. I am opposed to the practice of the executive branch seeking to dictate which members of Congress have access to information. As I testified during the hearing, Congress makes the laws and it has the responsibility to change those laws if it cannot fulfill its constitutionally mandated oversight role. I am always cautious about including some members of Congress while excluding others from the exercise of authority, and believe that Congress, not the executive branch should in general determine which Members and their staffs have access to such material. However, in this limited case, I would support the proposal described above.

Response of Elisa Massimino
Chief Executive Officer and Executive Director of Human Rights First
To Questions for the Record of Senator Sheldon Whitehouse

Hearing before the Senate Judiciary Committee Subcommittee on the Constitution
On "**Restoring the Rule of Law**"

Tuesday, September 16, 2008

- 1) The next administration should commit to closing the detention facility at Guantanamo Bay within one year of taking office. Following through on such a commitment will necessarily involve reassessing the circumstances of the detentions on a case-by-case basis. As is laid out in the recently issued proposal, *How to Close Guantanamo: Blueprint for the Next Administration*, which was submitted as an annex to my written testimony, Human Rights First recommends that this assessment be done by the executive agencies that will be responsible for executing the administration's closure policy.

Specifically, Human Rights First recommends that the next administration task the Attorney General with examining all detainee cases currently slated for military commission trial, and all other cases where criminal prosecution may be appropriate, to assess the feasibility of federal court prosecution. HRF further recommends that the Attorney General be charged with identifying secure U.S. detention facilities for those detainees for whom federal prosecution is deemed appropriate. The HRF Blueprint also recommends that the next Secretary of State be tasked with performing case-by-case reviews for transfer to prosecution, repatriation or resettlement and with performing case-by-case risk assessments that will assist the State Department in managing any risk posed by repatriation and/or resettlement.

By quickly addressing the factual details surrounding each Guantanamo detainee case, the administration can expedite the closure of the detention facility which was established to circumvent the rule of law and has greatly damaged the reputation of the United States, fueled terrorist recruitment and undermined international cooperation in counterterrorism operations.

- 2) Human Rights First strongly supports broader declassification of documents that have been used to authorize or justify cruel treatment, secret detention, and extraordinary renditions. The current administration's refusal to declassify such documents has clearly impeded efforts by members of Congress to put a stop to illegal practices. While I have not had the opportunity to closely review Senator Whitehouse's proposal for legislation, this is an issue that Human Rights First will be following closely going into the next administration and the next Congress.

Responses of John D. Podesta
President and CEO
Center for American Progress Action Fund

Questions for the Record of Sen. Sheldon Whitehouse
Hearing before the Senate Judiciary Committee
Subcommittee on the Constitution
“Restoring the Rule of Law”
Tuesday, September 16, 2008

1. *Do you support the establishment of an independent commission on how to close Guantanamo Bay? If so, what expertise should members of that commission have? What powers should the commission have in order to accomplish its work?*

Response:

I strongly support the closure of the military prison at Guantanamo Bay, I believe the establishment of an independent commission can be useful in bringing about this result. The closure of the facility will be a complex undertaking. Several nongovernmental organizations, including the Center for American Progress, Human Rights First, and most recently, the Center for Strategic and International Studies, have released detailed plans for closing the prison.

Our own recommendations call for a series of steps which include: moving the high-value detainees into the United States for trial in federal or military courts; and working with allies and partners to send the remaining detainees back to their home countries (or, where repatriation is not possible, to find other appropriate and lawful destinations for either their release or their continued incarceration).

The next administration will have only a brief window to deal with this problem in a responsible and expeditious manner. An independent nonpartisan commission that is established before the end of the year and that reports to the President and Congress by no later than March 1, could add valuable insight to the thicket of issues that need resolution and public credibility to a plan to move closing Guantanamo forward.

2. *At the hearing, I raised the possibility of granting the Chairman and Ranking Member of the Judiciary and Intelligence Committees the authority to declassify. Do you support this approach? If not, can you offer another approach to address this problem?*

Response:

I agree that Congress should have workable means at its disposal to declassify or seek declassification of government information. Congress has concurrent constitutional authority to obtain classified information and to declassify it, and congressional rules

specify procedures by which Congress can publicly disclose classified information when it determines that it is in the public interest to do so—even over executive branch objections. However, that procedure is quite cumbersome and offers little practical recourse when members believe information has been improperly withheld.

I also share the concern about selective classification by executive branch officials, but am concerned that providing additional individuals with the unilateral authority to declassify will only compound the problem.

One alternative might be to strengthen the existing authority of the Public Interest Declassification Board under the Public Interest Declassification Act of 2000, Public Law 106-567, as amended, with respect to congressional declassification requests. Currently, the PIDB reviews and makes recommendations to the President with respect to any congressional request, made by the committee of jurisdiction, to declassify certain records or to reconsider a declination to declassify specific records.

The PIDB is due to sunset at the end of this year unless reauthorized. That sunset may afford an opportunity to revisit the scope of the Board's authority with respect to congressional declassification requests. Similarly, the coming presidential transition may provide Congress with an opportunity to rethink its role in the declassification process. The Congress should consider establishing a National Declassification Center to improve the effectiveness of declassification policy. While the precise contours of such a Center need to be established, it can lead to a restructuring of the process for handling congressional declassification requests.

October 8, 2008

United States Senate
Committee on the Judiciary
Washington, DC 20510-6275

Re: Questions for the Record of Senator Sheldon Whitehouse

Dear Senator Whitehouse:

On September 16, 2008, I testified before the Senate Judiciary Committee, Subcommittee on the Constitution regarding *Restoring the Rule of Law*. This letter responds to your September 24, 2008 request for additional responses to two particular questions.

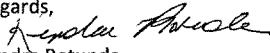
Question 1:

You asked whether I would support the establishment of an independent commission on how to close Guantanamo Bay. The answer is no. For reasons stated in my testimony before the committee on September 16, 2008, I do not think the U.S. should close the detention camp in Guantanamo Bay and therefore I do not support the notion of a commission to explore how to close Guantanamo Bay.

Question 2:

You asked whether I would support legislation authorizing the Chairman and Ranking Member of the Judiciary and Intelligence Committees the authority to declassify evidence. I suppose that Congress could pass a statute granting de-classifying authority to whomever it deems appropriate. But, the Department of Defense has strict guidelines to protect classified information, which also specify procedures to declassify information. These procedures are designed to ensure careful analysis and consideration before allowing any information to be declassified. Extending declassifying authority to any, or all, members of Congress could pose significant national security risks, and could increase the likelihood of security breaches and leaks. To ensure national security and the protection of classified information (particularly during a time of war), I would not support the notion of granting members of Congress the authority to declassify information at their discretion.

Regards,


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October 7, 2008

Senator Sheldon Whitehouse
 Hart Senate Office Building
 Room 502
 Washington, D.C. 20510

Re: Hearing before the Senate Judiciary Committee Subcommittee on the Constitution on "Restoring the Rule of Law" Tuesday, September 16, 2008.

Dear Senator Whitehouse:

Thank you for your insightful questions at the hearing chaired by Senator Feingold and in your post-hearing letter of September 24, 2008. Below are answers to the two questions in your post-hearing letter.

1. **There is broad bipartisan support for closing the detention facility at Guantanamo Bay, Cuba. The question we face is *how* to close it. Doing so will raise complicated military, intelligence, judicial, diplomatic, correctional, and civil liberties issues.**

Do you support the establishment of an independent commission on how to close Guantanamo Bay? If so, what expertise should the members of that commission have? What powers should the commission have in order to accomplish its work?

Without doubt, the winding up of detention operations at the Guantánamo Bay Naval Base implicates "complicated military, intelligence, judicial, diplomatic, correctional and civil liberties issues." Determining how to execute that winding-up, to be sure, demands sound policies grounded in careful consideration of all those issues. In my view, however, a commission does not present the best way to devise or implement these policies. Instead, the next president should take the initiative and also work to

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these policies. Instead, the next president should take the initiative and also work to facilitate the federal courts' effort to bring about a timely resolution of the detention facility in Cuba. Below, I spell out how a new administration can expedite equitable solutions to Guantánamo's dilemmas.

While Guantánamo has become a symbol of America's immoral anti-terrorism policies, and thus requires immediate attention, it is also important to remember at the threshold that the problems engendered by U.S. detention policies are not limited to Guantánamo Bay. Concerns over the treatment of prisoners, the risk of erroneous detention, and the prospect of indefinite confinement are all equally applicable to other detention and proxy detention efforts. Attention to the visible problem of Guantánamo should not mean that less well-known but equally problematic practices are left unchanged.

In Guantánamo, the hard issues involved in winding-up are best worked out through decisive action by a new president, and presidential energy to ensure a prompt and just resolution of the habeas cases now being litigated in the District of Columbia federal courts under *Boumediene v. Bush*, 553 U.S. – (2008). An independent commission would be an appropriate response to the challenge of determining with precision why and how our national security policies have gone awry *in the past*—not only for the historical record but also to guard against the repetition of error.¹ It is not, however, the right tool for determining speedy and just resolution of *forward-looking* action on Guantánamo. To the contrary, a commission would engender harmful delay and undermine efforts that could begin even before an inauguration, and which a new president must undertake to restore America's sullied international reputation.

Guantánamo Bay has become a symbol of American shame around the world—much as Robben Island became emblematic of the South African apartheid regime—because it symbolizes American disregard for international law, and especially the laws of war. By repudiating the 1949 Geneva Conventions in February 2002, the White House determined unilaterally that it was under no obligation to sift those captured in Afghanistan and elsewhere to ascertain if they had been properly detained.² It hence swept in indiscriminately the soldier and the shepherd. Further, because it relied on proxy captors (including foreign intelligence services and even bounty hunters), the Administration netted a mixture of individuals properly subject to military detention and people whose detention is not authorized by the laws of war. This threshold failure to separate those who can be held lawfully from those who cannot has poisoned the well of wartime detention. It destined the Guantánamo project to harmful controversy and moral indictment. Worse, having detained some innocents and some enemies without means to discriminate between them, the Administration has relied on coercive interrogation—often in violation of the Army's own Uniform Code of Military Justice—

¹ See Written Testimony of Frederick A.O. Schwarz, Jr., Senate Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights, and Property Rights, "Restoring The Rule Of Law," Sept. 16, 2008, at pp. 2-10.

² F. Schwarz and A. Huq, *Unchecked and Unbalanced: Presidential Power in a Time of Terror* (The New Press, 2007), pp. 75-81.

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to obtain flawed “intelligence” to justify otherwise illegal detentions. The result is abuse heaped on, and deployed to justify, error.

Guantánamo must be closed now because its lawlessness soils our reputation, making us both less free and less safe. But closing it is not enough. No one will be fooled or fobbed off by a closure that is lawless or morally flawed. The only way to restore America’s reputation, the credibility of its moral leadership, is through decisive and just presidential action rooted in the rule of law.

A new president must quickly seize the moral high ground on Guantánamo. He must release speedily, for example, all detainees whose “enemy combatant” designation has been disavowed. He must declare that the base will be closed expeditiously. Happily, he already has in place a trustworthy and respected mechanism to separate those who are lawfully detained from those who must be released: the federal district courts. Habeas proceedings for Guantánamo detainees have now been underway since July before Chief Judge Hogan and other members of the D.C. District Courts. Through habeas, the federal courts will achieve what the Administration has delayed and prevaricated against for years. Through habeas, the federal courts will attain what some novel commission would only—at best—defer: just resolution of individual cases based on facts assessed by an independent adjudicator. Only through habeas will we have a fair and respected accounting of who can properly be held, and who must be released.

A new president must take the initiative to speed the *accurate* resolution of these cases. Their resolution has been delayed by the government’s failure at the end of August to file timely returns to the pending habeas petitions. It seems that the Bush Justice Department is likely to succeed in running out the clock, ensuring that it never has to explain its gross and harmfully erroneous detention decisions. But, that does not mean a new president cannot act decisively, by instructing that necessary resources are devoted to resolving the habeas proceedings fairly and expeditiously, and then taking appropriate action based on their results. The next administration thus should direct the Justice Department to root out flawed detention decisions and decline to oppose the habeas petitions in such cases. Further, in each case the government should present to the courts the most accurate possible reflection of the facts, not the strongest case the government can devise to justify detention. Because we find ourselves in a struggle against terrorism seemingly without end, it is imperative that our government’s detention decisions—which might condemn a human being to indefinite captivity—are correct.

Once the new president knows who ought not to be detained, he must act decisively to restore America’s reputation and credibility by working with other nations to facilitate their release. The best way to restore international trust, which will be necessary to negotiate solutions for placing detainees who cannot be returned to their native lands for human rights reasons, is to hasten fair proceedings, and then to ask third countries to give haven to those cleared through those independent proceedings. Fair procedures thus build political capital, which in turn can be used to create resolutions. For those detainees who have been wrongfully detained, and for whom no other nation can serve as safe sanctuary, the new president must have the moral strength to insist that they be given a home here in the United States. However hard this is, however much

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opposition this faces, there is no other just course. Only such swift, decisive, just action can claim the moral high ground that the next American executive must occupy.

For those detainees who are properly detained under the laws of war, a new president must identify facilities that can hold them that are not marked by the enduring shame of Guantánamo. This is a practical problem. It requires no new law, and is best done by expeditious agency action.

A commission to determine the fate of the Guantánamo detainees is a recipe for delay and deepening national embarrassment. It cannot do the difficult diplomatic work that our State Department must undertake to repatriate detainees eligible for release. Nor is it likely to provide the moral strength that a true national leader must display in overcoming opposition to admitting to the U.S. detainees with nowhere else to go. To the contrary, it would flag an abdication of leadership. Most importantly, it places the burden of further unnecessary delay on innocent detainees who have been wrongfully detained for as long as six years. No august deliberative body can make up for the hard diplomatic labor, the careful lawyering, and the attention to practical detail that must go into any just resolution of the Guantánamo crisis.

In my testimony, I argued for the creation of a commission to examine *what has already happened* and how to prevent the recurrence of abuses—and not as a way to determine future policy.³ This work of accountability unquestionably must encompass Guantánamo—how and why both international and federal statutory law were violated; how abuse spread; who made key decisions. But, a backward-looking inquiry must not defer the reckoning, a reckoning whose delay has already cost us dearly.

2. Many officials in the executive branch are granted the authority to classify and declassify. This means that if they disclose previously classified information, it is automatically declassified - and the “declassifier” faces no exposure to civil or criminal liability. By contrast, members of Congress are not granted this authority. This puts Congress at an extreme disadvantage when it is performing its constitutionally mandated oversight role. It also raises the possibility for abuse: executive officials can declassify material selectively for their own political and partisan purposes. Making matters worse, members of Congress, like other citizens, are prohibited by law from declassifying other information that would reveal the inaccuracies or distortions propagated by the executive branch.

At the hearing, I raised the possibility of granting the Chairman and Ranking Member of the Judiciary and Intelligence Committees the authority to declassify. Do you support this approach? If not, can you offer another approach to address this problem?

The executive branch’s selective declassification for “political and partisan purposes” is without question a perversion of our democratic system. It should be

³ Schwarz testimony, *supra* note 1

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addressed. While individual Members of Congress currently are not entitled to declassify information, each House of Congress does possess the power to confer this authority on its Members or committees. Extending limited declassification authority, albeit to be used sparingly, to the judiciary and intelligence committee chairs presents one promising means of addressing the problem. It is a useful, though incomplete response. In my view, a sustainable and enduring solution also lies in fundamental reforms that eliminate excessive secrecy.¹

Our constitutional order rests on a fundamental norm of presumptive openness and free flow of information. Without this openness, democracy cannot operate. Information flow is crucial not only to ensure that Congress possesses the facts it needs to legislate and conduct oversight, but also to guarantee full—and fully informed—public debate. This is most clearly the case in sensitive areas of national security policy, which often touch on core American values and implicate fundamental constitutional rights.

Selective declassification by the executive alone presents a grave threat to effective governance and oversight. Consider one worst-case scenario: A document is classified that contains evidence of criminal conduct. The executive releases an innocuous portion of the document but fails to reveal the impropriety. Not only is criminal conduct being concealed, but disclosing information that casts executive policies or proposals in a favorable light while withholding information supporting counterarguments, also yields a distortion of public opinion, spinning the debate in favor of policies sanctioned by the executive. Absent similar declassification authority, Congress cannot rebut selective disclosures.

We have seen in the last eight years the disastrous results of policies endorsed and publicly defended on the basis of partial information: A war initiated to retaliate against a dictator for his alleged role in the events of 9/11, though he actually played no part in that attack, and to eliminate the threat of chemical/biological/nuclear weapons that did not exist; detention and interrogation policies that secretly disregarded federal statutes barring torture, the laws of war, and basic human dignity; rendition to torture; and lawless surveillance policies that violated the privacy rights of unknown numbers of Americans even as Congress drew up and debated careful amendments to the existing surveillance statutes.

A concrete example shows there is a link between the first question you ask and this one. In early 2002, senior Bush Administration officials variously described the Guantánamo detainees as “among the most dangerous, best trained, vicious killers on the face of the earth”; “the worst of a very bad lot”; and “very dangerous people who would gnaw hydraulic lines in the back of a [plane] to bring it down.”⁵ We now know—

¹ Senator Feingold, who chairs your subcommittee, offered remarks on the Senate floor summarizing the hearing at which I appeared several days after it took place. In those remarks, he noted the common concern emphasized by most witnesses who offered testimony that day: a concern over excessive secrecy. Remarks on the Senate Floor of U.S. Senator Russell Feingold *On Restoring the Rule of Law*, Sept. 25, 2008 (on file with the Brennan Center for Justice).

⁵ Joseph Margulies, *Guantánamo and the Abuse of Presidential Power* (Simon & Schuster, 2006), p. 65.

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not least from the number of people released already from Guantánamo—that these characterizations were at best partial and at worst misleading. For the Administration to fail to correct these initial sweeping claims is an example of the phenomenon you focus on in your second question.

But finding an effective solution to the problem of selective declassification is far more difficult than diagnosis of the problem. Liberal declassification policy, unless carefully implemented, can hazard disclosing information whose publication in fact poses security risks. Any measure that Congress undertakes to combat selective executive declassification must take into account this danger. One option short of retaliatory declassification is simply to call attention to the practice as it is happening: When the executive declassifies information in a way that is misleading, Members of Congress can—and should—state publicly that they have seen the information at issue and that the executive’s partial release is misleading. Nonetheless, selective declassification is a remedy for selective executive declassification when carefully and responsibly used.

When I served as Chief Counsel to the Select Committee to Study Government Operations with Respect to Intelligence Activities (Church Committee) we faced a similar dilemma. The Committee had uncovered an operation known as Project SHAMROCK, in which for 30 years the National Security Agency was secretly given access to all international telegrams of Americans. Great debate ensued within the Committee over whether the names of the telegraph companies involved—which was classified information at the time—should be disclosed publicly.⁶ The Church Committee ultimately determined, over the strong opposition of the White House, not only that the Committee itself had the power to declassify information, but that the names should in fact be made public.⁷

Similarly, both the Senate and House may confer on their Members or committees the power to declassify information.⁸ I agree that extending declassification authority to the Chairmen of the Judiciary Committees and Select Committees on Intelligence presents a possible advance on the current troubling situation. Ideally, enabling congressional committee chairs to declassify information when they certify the need to do so in response to the executive’s selective declassification would dissuade the executive from employing a strategy of selective—and misleading—declassification. Even if it does not, however, Congress must be sure that it uses this new authority responsibly. There is no reason to believe those elected to Congress are any less capable than those elected to the White House of acting responsibly. But, certain precautions are nonetheless warranted.

⁶ I. Britt Snider, *Recollections from the Church Committee’s Investigation of NS-A*, STUDIES IN INTELLIGENCE, Winter 1999/2000, at 47.

⁷ *Hearings Before the Senate Select Committee to Study Governmental Operations With Respect to Intelligence Activities*, 94th Cong. 47–55 (1975). This power was conferred on the Committee by S. Res. 21, 94th Cong. (1975); Snider, *supra* note 6, at 49–50.

⁸ The Senate and House Select Committees on Intelligence currently possess this power, subject to strict procedural requirements. S. Res. 400, 94th Cong., § 8 (1976) (as amended); Rules of the House of Representatives, Rule X, § 11(f).

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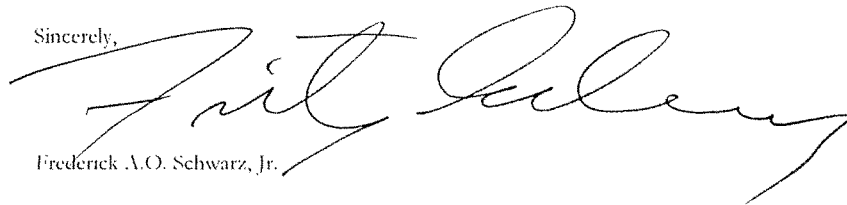
First, disclosure power ought to be held only by a narrow set of individuals. A new declassification authority should be extended only to the Chairman of the Senate and House Judiciary Committees and the Chairman of the Senate and House Select Committees on Intelligence, who would presumably exercise their power only after discussion with colleagues.⁷

Second, no decision to declassify should be made without consulting the executive agency that made the initial decision to classify—a practice we followed while I was working on the Church Committee. While much information is classified unnecessarily, there is of course some information that is properly classified and should remain confidential. Congress should declassify information only when the public interest in disclosure outweighs the need to protect the information. Professionals in the relevant agency (as opposed to political appointees who are in the White House) should be given an opportunity to highlight possible negative repercussions from a disclosure. Only after all the risks of declassification are explored should a committee chair be permitted to determine whether continued classification is necessary. From my experience, I am persuaded that it is both wrong and inappropriate to believe that persons chosen by the people for national elected office, and by their peers to chair their respective committees, would not make this kind of judgment fairly and responsibly.

In my testimony, I urged Congress to tackle the problem of over-classification and other forms of executive secrecy. Finding an effective means to combat over-classification will help solve the problem you have described. I would therefore urge the Senate to undertake comprehensive reappraisal of secrecy problems, both as a way to reduce the impact of selective executive declassification and as a means of limiting the broader harms resulting from excessive executive secrecy.

I look forward to discussing and working with you further on these issues.

Sincerely,



Frederick A.O. Schwarz, Jr.

cc: Senator Russell Feingold

⁷ You also might consider conferring this authority on the Ranking Members of the respective committees in times of unified government. When the President and the Chairmen hail from the same political party, incidents of misleading selective declassification are less likely to be challenged. Giving the Ranking Members the same power as the Chairmen in this regard will both deter and respond to misleading executive declassification even when both political branches are controlled by the same party.

Answers from Suzanne E. Spaulding
to
Questions for the Record of Senator Sheldon Whitehouse
 Hearing before the
 Senate Judiciary Committee
 Subcommittee on the Constitution
 on
“Restoring the Rule of Law”
 Tuesday, September 16, 2008

1. *There is broad bipartisan support for closing the detention facility at Guantanamo Bay, Cuba. The question we face is how to close it. Doing so will raise complicated military, intelligence, judicial, diplomatic, correction and civil liberties issues.*

Do you support the establishment of an independent commission on how to close Guantanamo Bay? If so, what expertise should the members of that commission have? What powers should the commission have in order to accomplish its work?

Promptly resolving the status of detainees in Guantanamo is important, not only as a matter of justice but also as a step toward restoring our credibility. The issues involved in closing Guantanamo are, as noted in the question, extremely complicated. The challenge, then, is how best to address these issues in a way that is timely and credible. Having some of the issues addressed by an independent commission may lend credibility but it will be important not to allow it to become a cause, or excuse, for delay.

Habeas petitions are currently making their way through the courts. The Supreme Court, in *Boumediene v. Bush*, 553 U.S. ____ (2008), made it clear that, “While some delay in fashioning new procedures is unavoidable, the costs of delay can no longer be borne by those who are held in custody.” In response, the District Court has indicated its intention to move these cases along expeditiously. Congress should take care not to introduce any element that might further delay the resolution of these petitions.

Moreover, having outsiders involved in a review of individual detainee files could raise complications for later prosecutions and those issues should be carefully considered.

With those cautions in mind, it may make sense to have an independent commission or panel provide advice to an Executive branch task force that is charged with quickly reviewing the files, considering the issues, and making recommendations to the President. Alternatively, an independent commission could make general recommendations on procedures for handling detainees who are ultimately not cleared for release or granted habeas relief.

2. *Many officials in the executive branch are granted the authority to classify and declassify. This means that if they disclose previously classified information, it is automatically declassified - and the "declassifier" faces no exposure to civil or criminal liability. By contrast, members of Congress are not granted this authority. This puts Congress at an extreme disadvantage when it is performing its constitutionally mandated oversight role. It also raises the possibility for abuse: executive officials can declassify material selectively for their own political and partisan purposes. Making matters worse, members of Congress, like other citizens, are prohibited by law from declassifying other information that would reveal the inaccuracies or distortions propagated by the executive branch.*

At the hearing, I raised the possibility of granting the Chairman and Ranking Member of the Judiciary and Intelligence Committees the authority to declassify. Do you support this approach? If not, can you offer another approach to address this problem?

Selective declassification by the Executive branch has long vexed Members of Congress, who lack similar authority, on their own, to declassify intelligence information that might provide the public with a more accurate or complete understanding.

Congress currently has authority, pursuant to Senate Resolution 400 and Rule X in the House, to declassify information that has been classified by the Executive branch. The process is cumbersome, however, and has never been used to declassify information. It requires a vote by the Intelligence committee that the public interest would be served by such a disclosure. The President is then given five days to object to the disclosure, in which event the committee must vote again to refer the question to entire House or Senate, which must go into closed session to consider and vote on whether to release the information.

Although this authority has apparently not been exercised to release information, it does seem to have given Congress some leverage over the years in negotiations with the Executive branch over how much information can be shared with the public. Congress also has other sources of leverage, of course, including the power of the purse and its confirmation authority.

If Congress concludes that the current process for declassification is too cumbersome and the alternative sources of leverage are insufficient, it can certainly change the procedures. As it considers alternative options, however, it should be mindful that it does not open itself up to charges of carelessly disclosing sensitive information for political purposes. Both Congress and the Executive branch have been accused of using intelligence for political purposes over the years. This has ultimately harmed our national security by undermining the credibility of intelligence in the eyes of the American public and with countries overseas whose cooperation we need to achieve our objectives.

Requiring that any Congressional decision to release classified information is bipartisan will help reduce charges of politicization. Moreover, the more Members from each side of the aisle who agree with the decision to release the information, the better. From that standpoint, a vote by the full committee is preferable to a decision just by the committee's leadership. Congress might also consider changes to the current procedures to make them less cumbersome, at least under compelling circumstances (e.g., seeking release of information relevant to intelligence that the Executive Branch has selectively declassified, where the committee determines release is essential to provide the public with a more accurate understanding on an issue of significant public interest). The procedures could provide, for example, an alternative process in which the chamber leadership can approve release, following a vote by the committee, rather than requiring the entire chamber to vote.

Another option is to authorize the Public Interest Declassification Board (or a new National Declassification Center, as recommended by the PIDB), or some other independent adjudication panel, to review and approve requests from Members of Congress to declassify information, without needing Presidential approval.

**Prof. Robert F. Turner's Responses to
Questions for the Record
of Senator Sheldon Whitehouse**
Hearing before the
Senate Judiciary Committee
Subcommittee on the Constitution
on
"Restoring the Rule of Law"
Tuesday, September 16, 2008

- 1. There is broad bipartisan support for closing the detention facility at Guantanamo Bay, Cuba. The question we face is *how* to close it. Doing so will raise complicated military, intelligence, judicial, diplomatic, correctional and civil liberties issues.**

Do you support the establishment of an independent commission on how to close Guantanamo Bay? If so, what expertise should the members of that commission have? What powers should the commission have in order to accomplish its work?

You may recall, Senator Whitehouse, that I appeared before you on September 25 of last year in your capacity as a member of the Senate Select Committee on Intelligence during a hearing on "Constitutional and International Law Implications of Executive Order 13440 Interpreting Common Article 3 of the 1949 Geneva Conventions."¹ My central theme was that international law clearly requires that all detainees during armed conflict be treated "humanely," and the Constitution equally clearly vests in Congress the power "To define and punish . . . Offences against the Law of Nation." I was asked to testify because I had co-authored a very critical piece in the *Washington Post* entitled "War Crimes and the White House."²

¹ My prepared statement is available online at: <http://www.virginia.edu/cnsl/pdf/Turner-SSCI-testimony-9-25-07.pdf>

² Available online at: <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/25/AR2007072501881.html?hpid=opinionsbox1> .

I mention this to emphasize that I believe we are in full accord on the issue of detainee abuse, as I believe that the incidents of water boarding and other inhumane interrogation were a horrible blunder both because they clearly violated international law and because, as a matter of public policy, they abandoned the moral high ground that is so essential if we are to retain the support of our own people and of people of good will around the world.

I have not personally been to Guantanamo, and thus I cannot with any certainty tell you what has been or is going on there. But I have spoken with numerous military JAG officers – men and women who were as outraged by reports of abusive treatment as we were – and have been told that today Guantanamo is a model facility where all detainees are well treated. Further, they assure me that only a tiny fraction of those detained at Guantanamo were ever abused and that much of the water boarding took place at other locations.

I mention this because, in my view, the issue ought to be stopping abusive interrogation and ensuring that it does not happen again – and there is nothing about the facilities at Guantanamo that makes them inherently evil or otherwise promotes abusive treatment. While I recognize that Guantanamo may symbolize abusive treatment, my sense is that a lot of that symbolism stems not from a high level of abuse there but rather from confusion about the law of armed conflict and the Third Geneva Convention – which clearly permits detention for the duration of hostilities of enemy combatants captured during armed conflict. As Justice O'Connor wrote for the plurality in *Hamdi*:

The threshold question before us is whether the Executive has the authority to detain citizens who qualify as “enemy combatants.” . . .

The AUMF authorizes the President to use “all necessary and appropriate force” against “nations, organizations, or persons” associated with the September 11, 2001, terrorist attacks. 115 Stat. 224. There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF. We conclude that detention of individuals falling into the limited category we are considering, for the

duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the “necessary and appropriate force” Congress has authorized the President to use.³

Not only is detaining enemy combatants for the duration of an armed conflict without any necessity to charge or convict them of criminal activity (although that is also an option) permitted, but if they are to be tried, the Third Convention declares that, with certain exceptions, “A prisoner of war shall be tried only by a military court” So much of the outrage – within the United States and around the world – expressed about holding enemy combatants at Guantanamo without being formally charged with a crime and taken before a federal magistrate is based upon ignorance of the law.

It is in my view imperative that the new President makes it clear that abuse of detainees will not be tolerated. I am honored to be serving on a drafting committee⁴ to prepare a new Executive Order designed for that precise purpose. But once that is done, where the detainees are lawfully held ought to be a separate issue decided by considerations of security, costs, and similar issues. (I would feel differently if Guantanamo had in reality been a modern-day Auschwitz in which large numbers of detainees had been murdered, water boarded, or otherwise gravely mistreated – but my strong sense is that is factually not true.) And, in particular given our current economic difficulties, to spend large sums of money building new facilities in Kansas, Rhode Island, or another location within the continental United States – a location almost certain to be less secure and more vulnerable to escape or terrorist attacks in an effort to free the detainees – makes little sense to me.

Ultimately, I would of course defer this decision to the new President. I see no benefit in spending resources on a “commission” to tell the President whether to close the

³ *Hamdi v. Rumsfeld*, 542 U.S. 507, 516-17 (2004).

⁴ Under the auspices of the Center for Victims of Torture, the drafting committee consists of retired Rear Admiral John Hutson (Dean of Franklin Pierce Law Center and former Judge Advocate General of the Navy), Yale Law School Dean Harold Koh, former Special Counsel to President Johnson Harry McPherson, Human Rights First CEO Elisa Massimino, former Department of the Navy General Counsel Alberto Mora, former Senior Advisor to Secretary of State Albright, Jim O’Brien, Former DoD General Counsel and State Department Legal Adviser William Taft IV, and myself.

Guantanamo detention facility or how to do so. (Closing it would not seem to be that difficult a task once alternative facilities are available, and the military is quite capable of dealing with these logistical issues without a panel of distinguished non-specialists spending months and money playing “amateur hour.”) To me, the issues are:

1. Is it really desirable to close what I am told is a quite good detention facility, irrespective of public or congressional opinion?
2. If the answer to question one is ‘yes,’ then the President or Secretary of Defense ought to task the military (perhaps in consultation with experts in the Bureau of Prisons or other serious experts) to make it happen. Moving the detainees may waste a fair amount of money to produce a somewhat less secure situation, but if that’s what the President wants it can be done without any need for a new commission.

2. **Many officials in the executive branch are granted the authority to classify and declassify. This means that if they disclose previously classified information, it is automatically declassified- and the “declassifier” faces no exposure to civil or criminal liability. By contrast, members of Congress are not granted this authority. This put Congress at an extreme disadvantage when it is performing its constitutionally mandated oversight role. It also raises the possibility for abuse; executive officials can declassify material selectively for their own political and partisan purposes. Making matters worse, members of Congress, like other citizens, are prohibited by law from declassifying other information that would reveal the inaccuracies or distortions propagated by the executive branch.**

At the hearing, I raised the possibility of granting the Chairman and Ranking Member of the Judiciary and Intelligence Committees the authority to declassify. Do you support this approach? If not, can you offer another approach to address this problem?

With all due respect, Senator, I fear you misunderstand both the proper constitutional role of the Senate in foreign affairs and the classification process itself. In my prepared statement I quoted Thomas Jefferson as observing in 1790 that, because the Constitution had vested “the executive Power” in the President in Article II, Section 1, “[t]he transaction of business with foreign nations is Executive altogether” and thus “belongs then to the head of that department” save for the “exceptions” specially submitted to the Senate.”⁵ On the issue you have raised, I should perhaps quote more from that landmark Jefferson memorandum:

*The Senate is not supposed by the Constitution to be acquainted with the concerns of the Executive department. It was not intended that these should be communicated to them; nor can they therefore be qualified to judge of the necessity which calls for a mission to any particular place, of the particular grade, more or less marked, which special and secret circumstances may call for. All this is left to the President. They are only to see that no unfit person be employed.*⁶

In February 1994 I testified before the House Permanent Select Committee on Intelligence and provided considerable background on the history of trying to safeguard intelligence and other national security information.⁷ In that testimony I note the historic recognition that Congress (and, before we had a Constitution, the Continental Congress) could not be trusted with Executive Branch secrets. Thus, in 1776 Benjamin Franklin and the four other members of the Committee of Secret Correspondence unanimously concluded that information about a major French covert operation could not be shared with the Continental Congress, because – as Franklin wrote at the time – “We find by fatal experience that Congress consists of too many Members to keep secrets.”

The testimony also quotes John Jay, in *Federalist* No. 64, as explaining that important sources of foreign intelligence would provide us with valuable information if they could

⁵ *Jefferson's opinion on the powers of the Senate Respecting Diplomatic Appointments*, in 18 PAPERS OF THOMAS JEFFERSON 378, 379 (1961).

⁶ *Id.* at 379 (emphasis added).

⁷ A copy of my prepared statement is available online at: http://www.fas.org/irp/congress/1994_hr/turner.htm

be “relieved of apprehensions of discovery,” and because Congress could not be trusted to keep secrets the new Constitution had left the President “able to manage *the business of intelligence* as prudence might suggest.” In my formal presentation in this hearing, I note the deferential language used by the very First Congress (and repeated for many years thereafter) in appropriating funds for foreign affairs and intelligence – telling the President to account only for the “amount” of sensitive expenditures that in his sole judgment ought not be made public.

Just two decades ago, the Supreme Court recognized that that the President is empowered by the Constitution itself to protect national security information. In *Department of the Navy v. Egan*, the Court explained:

The President, after all, is the “Commander in Chief of the Army and Navy of the United States.” U.S. Const., Art. II, 2. *His authority to classify and control access to information bearing on national security* and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to such information *flows primarily from this constitutional investment of power in the President* and exists quite apart from any explicit congressional grant. . . . This Court has recognized the Government’s “compelling interest” in withholding national security information from unauthorized persons in the course of executive business. . . . The authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief.⁸

Consider also Justice Jackson’s discussion of presidential power over national security information in *Chicago & Southern Air Lines v. Waterman*, where he wrote for the majority:

“The President, both as Commander-in-Chief and as the Nation’s organ for foreign affairs, has available intelligence services whose reports neither are nor ought to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit in camera in order to be taken into executive

⁸ *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988) (emphasis added).

confidences.⁹

Yet another case on point is In *United States v. Reynolds*, where the Court said:

When the Secretary of the Air Force lodged his formal "Claim of Privilege," he attempted therein to invoke the privilege against revealing military secrets, a privilege which is well established in the law of evidence. The existence of the privilege is conceded by the court below, and, indeed, by the most outspoken critics of governmental claims to privilege.

Judicial experience with the privilege which protects military and state secrets has been limited in this country. English experience has been more extensive, but still relatively slight compared with other evidentiary privileges. Nevertheless, the principles which control the application of the privilege emerge quite clearly from the available precedents. The privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer. The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect. . . .

It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers. . . .

In each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but *even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.*¹⁰

⁹ *Chicago & Southern Air Lines v. Waterman*, 333 U.S. 103, 111 (1948).

¹⁰ *United States v. Reynolds*, 345 U.S. 1, 7-8 (1952) (emphasis added).

Further information on this matter can be found in my chapter on “Access to National Security Information” in the second edition of *National Security Law*.¹¹ It notes that the issue of the President’s authority to deny classified information to Congress dates back to 1792, when the House of Representatives instructed Secretary of War Henry Knox to turn over documents related to a failed military expedition against the Miami Indians by Major General Arthur St. Clair. Washington convened his cabinet to determine how to respond to this first ever request for presidential materials related to national security by a congressional committee. The President wanted to discuss whether any harm would result from public disclosure of the information and, most pertinently, whether he could rightfully refuse to submit documents to Congress. Along with Treasury Secretary Alexander Hamilton, Knox, and Attorney General Edmund Randolph, Secretary of State Thomas Jefferson attended the 2 April 1792 cabinet meeting. Jefferson later recalled the group’s determination:

We had all considered, and were of one mind, first, that the House was an inquest, and therefore might institute inquiries. Second, that it might call for papers generally. Third, that the Executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public: consequently were to exercise a discretion. Fourth, that neither the committees nor House has a right to call on the Head of a Department, who and whose papers were under the President alone; but that the committee should instruct their chairman to move the House to address the President.

Washington eventually determined that public disclosure of the information would not harm the national interest and that such disclosure was further necessary to vindicate General St. Clair. Although Washington chose to negotiate with Congress over the investigating committee’s request and to turn over relevant documents to Congress, his administration had taken an affirmative position on the right of the Executive Branch to withhold national security information from Congress.

¹¹ Robert F. Turner, *Access to National Security Information*, in JOHN NORTON MOORE AND ROBERT F. TURNER, EDS., *NATIONAL SECURITY LAW*, Chapter 22 at 981-1023 (2005).

On January 17, 1794, the Senate advanced a motion directing Secretary of State Edmund Randolph “to lay before the Senate the correspondence which have been had between the Minister of the United States at the Republic of France [Gouverneur Morris], and said Republic, and between said Minister and the Office of Secretary of State.” The Senate later amended the motion to address the President instead of Secretary Randolph. Significantly, the amended version also “requested” rather than “directed” that such information be forwarded to Congress. Believing that disclosure of the correspondence would be inappropriate, Washington sought the advice of his Cabinet as to how to handle the Senate’s request. On January 28, 1794, three of Washington’s cabinet members expressed their opinions:

General Knox is of the opinion, that no part of the correspondence should be sent to the Senate. Colonel Hamilton, that the correct mode of proceeding is to do what General Knox advises; but the principle is safe, by excepting such parts as the president may choose to withhold. Mr. Randolph, that all correspondence proper, from its nature, to be communicated to the Senate, should be sent; but that what the president thinks is improper, should not be sent.

Attorney General William Bradford wrote separately that “it is the duty of the Executive to withhold such parts of the said correspondence as in the judgment of the Executive shall be deemed unsafe and improper to be disclosed.” On 16 February 1794 Washington responded as follows to the Senate’s request:

After an examination of [the correspondence], I directed copies and translations to be made; except in those particulars, in my judgment, for public considerations, ought not to be communicated. These copies and translations are now transmitted to the Senate; but the nature of them manifest the propriety of their being received as confidential.

Washington allowed the Senate to examine some parts of the correspondence, subject to his approval. He believed that information damaging to the “public interest” could constitutionally be withheld from Congress. The Senate never challenged the President’s authority to withhold the information.

In 1796 John Jay completed U.S. negotiations with Great Britain over unsettled issues from the American Revolution. Because many considered the settlement unfavorable to the United States, Congress took a keen interest in the administration's actions in the negotiations. Not only did the Senate debate ratification of the Jay Treaty (and give its consent to ratification by the narrowest possible margin of 20-10), the House of Representatives set out to conduct its own investigation. On March 24, 1796, the House passed a resolution requesting from Washington information concerning his instructions to the U.S. minister to Britain regarding the treaty negotiations. That resolution raised the issue of the House's proper role in the treaty-making process. Washington refused to comply with the House request and explained his reasons for so deciding:

The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers. The necessity of such caution and secrecy was one cogent reason for vesting the power of making treaties in the President, with the advice and consent of the Senate, the principle on which that body was formed confining it to a small number of members. To admit, then, a right in the House of Representatives to demand and to have as a matter of course all the papers respecting a negotiation with a foreign power would be to establish a dangerous precedent.

In conclusion, Washington reasoned that "the boundaries fixed by the Constitution between the different departments should be preserved," declaring "a just regard to the Constitution and to the duty of my office . . . forbids a compliance with your request."

During this debate, Madison argued that each Department was to judge for itself what documents to share with the other. Only a single member of the House argued the Congress had an absolute right to Executive documents—based upon its power of

impeachment. However, several members argued that had the dispute actually involved a possible impeachable offense such a right to evidence might exist.

The Supreme Court referred to this debate in the landmark 1936 *Curtiss-Wright* case:

Moreover, he [the President], not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results. Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiation of the Jay Treaty—a refusal the wisdom of which was recognized by the House itself and has never since been doubted. . . .

The marked difference between foreign affairs and domestic affairs in this respect is recognized by both houses of Congress in the very form of their requisitions for information from the executive departments. In the case of every department except the Department of State, the resolution directs the official to furnish the information. In the case of the State Department, dealing with foreign affairs, the President is requested to furnish the information “if not incompatible with the public interest.” A statement that to furnish the information is not compatible with the public interest rarely, if ever, is questioned.¹²

As recently as 1957, Professor Corwin wrote that “the increase in the membership of the Senate between 1789 and 1795 from twenty-two to thirty-two members” foreshadowed “a body too numerous to trust safely with some kinds of state secrets and too unwieldy for intimate consultations. . . .”¹³ Corwin explained:

In short, the Senate’s role in treaty making is nowadays simply the power of saying whether a proposed treaty shall be ratified or not, the act of ratification being the President’s. Its power is that of *veto*, which may be exercised outright, or conditionally upon the nonacceptance by the president or the other government or governments concerned of such amendments or reservations as it chooses to stipulate. . . .

¹² *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320-21 (1936).

¹³ EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787-1957* at 211 (4th rev. ed. 1957).

So far as practice and weight of opinion can settle the meaning of the Constitution, it is today established that the President alone has the power to negotiate treaties with foreign governments; that he is free to ignore any advice tendered him by the Senate as to a negotiation; and that *he is final judge of what information he shall entrust to the Senate as to our relations with other governments.*¹⁴

Some modern students of “Executive Privilege” point to the 1974 Watergate case, *United States v. Nixon*, as evidence that traditional concepts of Executive Privilege have been narrowed. But in *Nixon* the Supreme Court *repeatedly* distinguished its holding from a setting involving national security secrets, emphasizing that the President did “not place his claim of privilege on the ground that they are military or diplomatic secrets.” The *Nixon* Court affirmed that the doctrine of Executive Privilege was “constitutionally based” and noted that “The President’s need for complete candor and objectivity from advisers calls for great deference from the courts.” But where issues of national security are not involved, the privilege is not absolute and courts must *balance* the competing claims in the interest of justice. Nothing the Court said in *Nixon* called into question its earlier decision in *Reynolds* that “even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.”¹⁵

Now, if it is true that Executive Branch officials are “declassi[fy]ing material selectively for their own political and partisan purposes,” that is certainly regrettable. But, until your and my lifetimes—and, in noting this, I do not mean to imply any causation on either of our part’s—it was understood by all three branches that the power to protect Executive Branch national security secrets was vested exclusively in the President by the Constitution, and that the President could not be deprived of this power without the Constitution being violated or amended.

¹⁴ *Id.* 211-12 (**bold italics added**).

¹⁵ *United States v. Reynolds*, 345 U.S. 1, 7-8 (1952) (emphasis added).

Are there cases where a senior Executive Branch official makes a decision to disclose classified information while testifying before Congress? Absolutely. But, by itself, that fact does not suggest any wrongdoing. Assuming that the individual (e.g., the Secretary of State or Director of the Central Intelligence Agency) has been authorized by the President to classify national security information, he or she may also be authorized by the President to declassify information while testifying before Congress. Section 3.1 of Executive Order 13,292 provides:

It is presumed that information that continues to meet the classification requirements under this order requires continued protection. In some exceptional cases, however, *the need to protect such information may be outweighed by the public interest in disclosure of the information, and in these cases the information should be declassified.* When such questions arise, they shall be referred to the agency head or the senior agency official. That official will determine, as an exercise of discretion, whether the public interest in disclosure outweighs the damage to the national security that might reasonably be expected from disclosure.¹⁶

I would have to see the specific context to go beyond a generalization, but I have often heard Senators and Representatives complain about Executive Branch “leaks” in settings where an official who has been delegated discretion to declassify certain information by the President makes a decision to make previously classified information available in a public hearing – and, as the Executive Order makes clear, that is not a “leak” (defined as an “unauthorized disclosure” of classified information). The President has empowered the witness to make that decision at his or her discretion.

I would add that senior Executive Branch officials entrusted by the President with such discretion might also lawfully discretely provide such information to a member of the news media for the purpose of making it public. Obviously, depending upon the context, such a tactic might be viewed as “unfair” or “partisan” by a legislator whose argument was refuted by such a disclosure. But as a matter of constitutional law, the President has classification authority and the legal right to delegate that authority to Executive Branch

¹⁶ E.O. 13, 292, March 25, 2003, §3.1, available on line at: <http://www.fas.org/sgp/bush/eoamend.html>.

subordinates. And the current President has empowered certain senior officials to make a decision to disclose classified information when justified by “the public interest.”

In modern history, presidents have elected to grant security clearances at various levels to congressional staff members and to share highly-classified information with Members of Congress as well. This practice has led to some serious problems, especially when Members either carelessly or for partisan reasons disclose intelligence secrets. When I was serving as Acting Assistant Secretary of State for Legislative Affairs I had to deal with a very serious “leak” by a Member of the House of Representatives who without thinking disclosed the name of our CIA Station Chief in an important country. The wrongdoer was a very junior member of the incumbent President’s own party, and, in an effort to be “courteous” to all of the embassy officials who had taken time from their busy schedules to meet with and brief him while on a junket, he placed their names into the *Congressional Record* – in this case followed by the identification “Intelligence.” The Station Chief had a perfectly effective cover assignment, but when he was identified as an intelligence officer we had to pull him out of the country for his own safety.

I think it is important for legislators to understand that you have no *constitutional right* to access to classified Executive Branch information. Indeed, had I been in the Department of State when Senator Joe Biden admitted to Britt Hume¹⁷ that he had blocked covert operations while a member of the Senate Select Committee on Intelligence by threatening to “leak” them, I would have strongly urged that the President inform the Senate leadership and Senator Biden that he would no longer be given access to classified information.

Although I don’t remember the details or my source, my recollection is that President Franklin Roosevelt made a decision to deny classified information to a key member of the House of Representatives who had a problem with alcohol. In 1948 President Truman

¹⁷ Brit Hume, *Mighty Mouth: Joe Biden Turns up the Volume*, NEW REPUBLIC, Sept, 1, 1986 at 17, 20 (“Biden says he ‘twice threatened to go public with covert action plans by the Reagan administration that were harebrained,’ and thereby halted them.”).

denied a passport to a Member of Congress who wanted to go to Greece to support a movement dedicated to overthrowing the government of that country.¹⁸

In closing, let me make two additional points in response to your second question. First, you express concern that a person who improperly discloses (“leaks”) classified information “faces no exposure to civil or criminal liability.” While I have shown that the President by Executive Order has authorized certain senior Executive Branch officials to make a discretionary determination that the public interest warrants the declassification of certain information, and thus at least some of the instances that have clearly frustrated you were likely fully authorized by the President, you have hit on a bigger problem. Although in 2000 both houses of Congress approved a statute attaching criminal penalties to the publication of classified information that had been disclosed without proper authorization, under pressure from CNN and other powerful media sources President Clinton decided to veto the bill. If he (or she) learns their identity, the President may fire an Executive Branch employee who discloses classified information without proper authorization; but only *Congress* can attach criminal penalties. I would strongly support carefully drafted legislation towards this end. Great harm has been done to this country by the publication of classified information, and American lives may still be lost as a result.

Secondly, while Congress may no more empower its leaders to “declassify” documents provided by the Executive Branch that have been properly classified pursuant to the constitutional power of the President – any more than it can interfere with the internal workings of the Judicial Branch by claiming a right to control that co-equal branch of government so as to affect the outcome of pending cases – it is not clear that Congress could not establish a “classification” scheme of its own to control sensitive Legislative Branch documents. Indeed, I suspect such powers may already be in use protecting certain personnel decisions or perhaps deliberations of the Foreign Relations Committee on sensitive treaty matters or the Armed Services Committee on military matters.

¹⁸ NY TIMES, Apr 11, 1948 at E9. *See also, Haig v. Agee*, 453 U.S. 280, 302 (1981).

In the *Curtiss-Wright* decision, the Supreme Court referred to:

. . . the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, *like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.*¹⁹

The italicized words are of tremendous importance in assessing the separation of constitutional powers. Congress has a great deal of discretion in its internal rulemaking, most of which is beyond the reach of the other branches. But Congress may *not*, consistent with the Oath of Office taken by its members, use its internal rule-making power for the purpose of depriving the President of his exclusive power to classify military secrets and other national security information.

Under its Article I, Section 8, power “To make all Laws which shall be necessary and proper for carrying into Execution . . . Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof,” Congress may clearly enact criminal legislation punishing unauthorized disclosure of classified information. Ideally, in my view, such criminal sanctions should apply fully to “journalists”²⁰ and to members and employees of all three branches of government.

My prepared testimony in this hearing was focused upon “congressional lawbreaking.” I’ve been involved with Washington relationships for well over three decades, and my experience suggests that, for many on the Hill, their view of presidential power is largely

¹⁹ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936) (my emphasis).

²⁰ I use quotation marks because I know of no acceptable definition of the term, and I have serious concerns about the power of Congress to define the term meaningfully consistent with the First Amendment. I submit the First Amendment protects the freedom of the press rights of a tiny weekly in Peoria as much as it does those of the *Wall Street Journal* and *New York Times*, and if you try to protect anyone who “gets paid to write for a publication” – ignoring for the fact that First Amendment rights do not depend upon getting paid – you are likely to empower drug dealers, organized crime figures, and foreign terrorists to gain immunity simply by establishing house organ monthly periodicals and designating their most valuable couriers, lieutenants, or hit-men as “journalists” who are protected by a “shield” law.

derived from their relationship with the incumbent at the other end of Pennsylvania Avenue. I thought very highly of Senator John Tower when he chaired the Armed Services Committee (indeed, he authored the foreword to my first book on the War Powers Resolution). But as soon as Jimmy Carter became President, when Sam Nunn dropped the knife he had been using to try to gut the policies of Republicans Nixon and Ford, John Tower quickly picked it up and went after Carter's claims of constitutional power. As I am writing this, no one knows with any certainty who will prevail in next month's election. This is an excellent time for legislators to stop thinking as Republicans or Democrats and start thinking as Americans about these important issues of separation of powers.

SUBMISSIONS FOR THE RECORD

Statement of Charles J. Cooper

**Hearing before the
Senate Judiciary Committee
Subcommittee on the Constitution**

“Restoring the Rule of Law”

September 16, 2008

Thank you, Senator Feingold, and members of the Subcommittee, for inviting me to testify today on important issues of separation of powers and, more particularly, the scope and nature of executive power under our Constitution. In holding this hearing, this Committee furthers a debate that began with the Founders and has focused the attention of virtually every President, every Congress, and every generation of Americans since that time. In the past seven years, the debate has taken on a special urgency because the challenges we face in the post-9/11 world are unprecedented and dire, and the need for government action is great.

Before discussing the particular separation-of-powers issues that have been at the forefront of debate, I think that it is important to remember the extraordinary context in which these issues have arisen. Just five days ago we marked the seventh anniversary of the September 11th terrorist attacks and entered into the eighth year of an out-and-out war with those who seek the destruction of our nation and our way of life. We are at war. To be sure it is not the same kind of war this nation has confronted in the past, but it is a war nonetheless. And in times of war there is one constitutional officer charged with day-in, day-out responsibility to protect the lives, liberty, and property of the American people: the Commander-in-Chief. The President is constitutionally obliged to prosecute this war so as to protect our nation and to secure our freedom and way of life.

Daily, then, the war-time President must strive to strike and maintain a delicate balance between ordering measures deemed necessary to protect us from terrorists and keeping faith with the Constitution that grants and cabins his powers, and that guarantees our liberties. The questions of executive power that this Administration has faced, and that we will discuss today, are not academic. The average American is not privy to the threat assessment that the President reads each and every morning, but these reports make the President and his advisors painfully aware of the gravity of their decisions and the urgent circumstances in which they must be made. As each decision comes across the President's desk he is faced with the stark reality that lives—living, breathing, American lives—are genuinely at constant risk. That the questions are difficult does not diminish their imperative nature: the war-time Executive must act, often without the benefit of time for prolonged study and reflection. And there is no denying that his national security decisions sometimes must be shrouded in secrecy, must call for harsh and intrusive measures, and must place American lives at risk. In dangerous

times such as these, with regard to difficult decisions such as these, can the imperative to grant the Executive the benefit of genuine legal doubt be any greater? Like Robert Jackson, the former Attorney General and Supreme Court Justice, I believe the President, especially in time of war, is surely entitled to "the benefit of a reasonable doubt as to the law."¹

This has traditionally been the view of the President's legal advisors in the Office of Legal Counsel; certainly it was OLC's view during the time when I served in that office in the Reagan Administration. To be sure, the President must be able to rely on OLC for *independent* legal analysis and advice; advocacy in defense of an Administration policy or action is a responsibility that falls on other components of the Department. OLC is obliged to "provide advice based on its best understanding of what the law requires," and the office's faithful performance of that function will at times require it to advise that "the law precludes an action that [the] President strongly desires to take."² But OLC is not a court, and its independence does not entail the neutrality that is the hallmark of judicial independence. "OLC differs from a court in that its responsibilities include *facilitating* the work of the Executive Branch and the *objectives* of the President, consistent with the requirements of the law."³ Indeed, "OLC must take account of the administration's goals and assist their accomplishment within the law."⁴ Thus, OLC should maintain a relationship of what I call "friendly independence" to the Administration and the President it serves.

OLC often confronts legal issues that do not have black or white answers; many are close and difficult questions of law, and the answer is sufficiently uncertain—sufficiently gray—that OLC cannot properly, conscientiously say that the proposed Executive Branch action is legally precluded. If the answer falls in the gray area—it is neither yes or no, but maybe yes and maybe no—then the action is not controlled by law, and the President is free to choose the course that best serves his purpose and goals, in full view of the legal risks.

Before leaving the subject of OLC, I feel bound also to say this: I cannot imagine a more important, yet more difficult, more trying, more thankless, and, indeed, more perilous job for a lawyer than being a legal advisor to the President and the Administration in the weeks and months following 9-11. I give thanks that I was not confronted with so grave and difficult a responsibility during my time at OLC, and I am grateful to the men and women who have served their country in that office in these awful circumstances.

¹ See JACK L. GOLDSMITH, *THE TERROR PRESIDENCY* 35 (2007) (quoting EUGENE C. GERHART, *AMERICA'S ADVOCATE: ROBERT H. JACKSON* 221-22 (1958)).

² *Guidelines for the President's Legal Advisors*, 81 *INDIANA L. J.* 1345, 1348-49 (2006).

³ *Id.*

⁴ *Id.*

I turn now to the bill of particulars that the Administration's harshest critics have offered in support of the charge that this Administration has abandoned the rule of law. At least four areas appear to be the focus of their concern: (1) the manner of detention and prosecution of foreign terrorists and enemy combatants held at Guantanamo Bay, (2) the use of aggressive interrogation techniques on high-value terrorist detainees, (3) the reworking of our intelligence and investigatory apparatus in the wake of the failures demonstrated by 9/11, including the PATRIOT Act and the use of warrantless electronic surveillance, and (4) the "politicizing" of the Department of Justice—that is, the President's exercise of his prerogative in the hiring, firing, and direction of subordinates, including U.S. Attorneys.

The truth is that each of these areas present close and difficult questions. I am a Republican and, in general, a supporter of President Bush's policies, but on occasion I too have been among the critics of this Administration's positions concerning the scope of executive authority. For example, the President's attempt to direct state courts to "give effect" to a ruling of the International Court of Justice was, to my mind, well beyond the scope of his powers under the Constitution and the relevant treaty.⁵ Similarly, I believe that the President's directive to Harriet Miers and Joshua Bolten not to appear before Congress pursuant to a valid subpoena goes beyond the proper scope of the executive privilege.⁶ Even the President's closest advisors must, I believe, appear in obedience to a congressional subpoena and assert any appropriate privilege on a question-by-question basis. But my disagreement with the Administration on these issues does not bring me to the conclusion that the President has forsaken the rule of law.⁷ To the contrary, these are not easy questions, and the President presents reasoned and reasonable arguments in support of his positions. One of these issues—whether the President has authority to direct state courts to obey a judgment of the ICJ—was resolved by the Supreme Court just last Term, and while the President's position was rejected by a majority of the Court, three Justices dissented and one concurred only in the Court's judgment. It cannot reasonably be said, therefore, that the President's legal position was unreasonable.⁸

So while the Bush Administration, in my view, may have erred in its answer to certain separation-of-powers questions, it is entirely proper and natural for the Administration generally to favor, and to jealously protect, the powers and prerogatives of the office of the Presidency. That each branch of government will be alert to and guard against encroachment by the others is a fundamental premise on which the separation of powers is based. Indeed, the Clinton Administration was itself sharply criticized for its "absolutist pretensions" in military matters, and his Office of Legal

⁵ See *Medellin v. Texas*, 128 S. Ct. 1346, 1355 (2008).

⁶ See *Committee on the Judiciary v. Miers*, 558 F.Supp.2d 53 (D.D.C. 2008).

⁷ I have studied these two issues deeply enough to have formed an opinion on them; I have not done so on any other issue discussed in this testimony.

⁸ The question whether the executive privilege exempts close White House advisors from the compulsion of a lawful congressional subpoena is pending before the Court of Appeals for the District of Columbia Circuit.

Counsel was no shrinking violet when it came to enunciating a robust vision of executive power.⁹ During the Clinton Administration, OLC approved the CIA's original rendition program,¹⁰ the attempted assassination of Osama bin Laden,¹¹ the use of presidential signing statements,¹² and presidential override of statutes impinging on what might be called unitary executive powers.¹³

The closeness of the questions that have confronted this Administration in the War on Terror is perhaps best reflected in the recent cases dealing with the detention and prosecution of foreign terrorists and enemy combatants. The debate over these issues, more than any other separation-of-powers issue in the last eight years, has been settled in our courts. And in the federal courts of appeals—that is, in the courts that are bound to follow faithfully Supreme Court precedent—the Administration is *undefeated* in the major War on Terror Cases. In those cases—*Rasul*,¹⁴ *Hamdi*,¹⁵ *Hamdan*,¹⁶ and *Boumediene*¹⁷—of the twelve votes cast by courts of appeals judges, eleven of them came down on the side of the Administration. That striking judicial endorsement of the Administration's positions surely establishes that they were well grounded in Supreme Court precedent and fell squarely within the mainstream of constitutional thought on these issues.

⁹ GOLDSMITH, *supra* note 1, at 36-37 & nn. 20-22 (citing David Gray Adler, *Clinton, the Constitution, and the War Power*, in *THE PRESIDENCY AND THE LAW: THE CLINTON LEGACY* 46 (David Gray Adler & Michael A. Genovese eds., 2002)).

¹⁰ *See id.*

¹¹ *See id.* at 36, 104, 106.

¹² Memorandum from Walter Dellinger, Assistant Attorney General, to Bernard N. Nussbaum, Counsel to the President (Nov. 3, 1993).

¹³ *See, e.g.*, Memorandum from Walter Dellinger, Assistant Attorney General, to Abner J. Mikva, Counsel to the President, Presidential Authority to Decline to Execute Unconstitutional Statutes, (Nov. 2, 1994) ("Let me start with a general proposition that I believe to be uncontroversial: there are circumstances in which the President may appropriately decline to enforce a statute that he views as unconstitutional."); *id.* ("The President has enhanced responsibility to resist unconstitutional provisions that encroach upon the constitutional powers of the Presidency."); Memorandum from Walter Dellinger, Assistant Attorney General, to Alan J. Kreczko, Special Assistant to the President and Legal Advisor to the National Security Council, Placing of United States Armed Forces under United Nations Operational or Tactical Control (May 8, 1996) ("The proposed amendment unconstitutionally constrains the President's exercise of his constitutional authority as Commander-in-Chief. Further, it undermines his constitutional role as the United States' representative in foreign relations.").

¹⁴ *Rasul v. Bush*, 542 U.S. 466 (2004).

¹⁵ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

¹⁶ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

¹⁷ *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

One can hardly fault the Administration, for example, for failing to predict the *Boumediene* Court's abandonment of a venerable case like *Eisentrager*.¹⁸ As Justice Scalia explained:

The President relied on our settled precedent in *Johnson v. Eisentrager* . . . when he established the prison at Guantanamo Bay for enemy aliens. Citing that case, the President's Office of Legal Counsel advised him "that the great weight of legal authority indicates that a federal district court could not properly exercise habeas jurisdiction over an alien detained at [Guantanamo Bay]." . . . Had the law been otherwise, the military surely would not have transported prisoners there, but would have kept them in Afghanistan, transferred them to another of our foreign military bases, or turned them over to allies for detention. Those other facilities might well have been worse for the detainees themselves.¹⁹

Justice Scalia also explained, convincingly I think, why *Eisentrager* was faithful to the Constitution and the *Boumediene* majority was not.²⁰ But quite apart from the merits of the *Boumediene* decision, as a policy matter it represents a clear and present threat to our military's effectiveness in fighting the War on Terror. As Chief Justice Roberts asked, who wins with the Court's usurpation of the political branches' prerogative of "control over the conduct of this Nation's foreign policy?"²¹ The Chief Justice offered an answer that is appropriate to the title of today's hearing: "Not the rule of law, unless by that is meant the rule of lawyers, who will now arguably have a greater role than military and intelligence officials in shaping policy for alien enemy combatants."²² Indeed, in the vacuum created by the Court's decision, it is not at all clear what law applies to the detainees, what rights they have, or how our military personnel may conduct captures and detentions anywhere in the world. As Justice Jackson aptly explained in *Eisentrager*: "It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States."²³

The *Boumediene* case also demonstrates another critical point: the Supreme Court overturned the Military Commission Act of 2006, which was *Congress's* carefully considered statutory framework for prosecuting the Guantanamo detainees. In other

¹⁸ *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

¹⁹ 128 S. Ct. at 2294 (Scalia, J., dissenting).

²⁰ *See id.* at 2303-06.

²¹ *Id.* at 2293 (Roberts, C.J., dissenting).

²² *Id.* *See also id.* at 2302 (Scalia, J., dissenting) ("It is a sad day for the rule of law when such an important constitutional precedent is discarded without an *apologia*, much less an apology.")

²³ *Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950).

words, *both* political branches made a constitutional determination regarding a proper course of action with regard to the detainees, only to have it, in the words of Chief Justice Roberts, “unceremoniously brushed aside”²⁴ by five Justices who no longer thought a well-settled World-War-II-era decision was worthy of respect. Worse still is that the statute eviscerated by *Boumediene* resulted from the precise legislative process that four members of the *Boumediene* majority had recommended just two years earlier in Justice Breyer’s *Hamdan* concurrence, which stated that “nothing prevents the President from returning to Congress to seek the authority [for the trial by military commissions] he believes necessary.”²⁵ Thus, the *Boumediene* majority essentially ignored Justice Jackson’s famous formulation in the *Steel Seizure Case* that when the President acts pursuant an act of Congress his authority is “at its maximum” and should be accorded “the strongest of presumptions and the widest latitude of judicial interpretation.”²⁶

Indeed, prior to the War on Terror cases, the Supreme Court had uniformly accorded the President great deference in the area of national security and foreign and military affairs. This bedrock constitutional principle was recognized by Alexander Hamilton in *The Federalist*,²⁷ and has been respected by Justices of all eras and ideological stripes, from Chief Justice Marshall during his congressional career,²⁸ to Justice Story in his famous *Commentaries*,²⁹ to Justice Grier in *The Prize Cases*,³⁰ to

²⁴ 128 S. Ct. at 2293 (Roberts, C.J., dissenting).

²⁵ *Hamdan v. Rumsfeld*, 548 U.S. 557, 636 (2006) (Breyer, J., concurring).

²⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring).

²⁷ THE FEDERALIST NO. 74 (Hamilton) at 446 (1788) (Clinton Rossiter ed., 1961) (“Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of common strength; and the power of directing and employing the common strength, forms a usual and essential part in the definition of the executive authority.”).

²⁸ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (quoting *Annals*, 6th Cong., col. 613) (“The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.”).

²⁹ 3 J. STORY, COMMENTARIES ON U.S. CONSTITUTION §1485 (“The command and application of the public force, to execute the laws, to maintain peace, and to resist foreign invasion, are powers so obviously of an executive nature, and require the exercise of qualities so peculiarly adapted to this department, that a well-organized government can scarcely exist, when they are taken away from it.”); *id.* (“Of all the cases and concerns of government, the direction of war most peculiarly demands those qualities, which distinguish the exercise of power by a single hand.”); *id.* (“Unity of plan, promptitude, activity, and decision, are indispensable to success; and these can scarcely exist, except when a single magistrate is entrusted exclusively with the power.”).

³⁰ 67 U.S. (2 Black) 635, 670 (1863) (“Whether the President in fulfilling his duties, as Commander-in-[C]hief, in suppressing an insurrection, has met with such

Justice Sutherland in the *Curtiss-Wright* opinion,³¹ to Justice Douglas in *Pink v. New York*,³² to Justice Jackson in the *Steel Seizure Cases*³³ and *Eisentrager*,³⁴ to Justice Blackmun in *Department of the Navy v. Egan*,³⁵ to Chief Justice Rehnquist in *Regan v. Wald*.³⁶ As Justice Sutherland explained, the President “has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war.”³⁷ Perhaps the most striking, and alarming, feature of the majority opinions in the recent War on Terror cases is that they either entirely ignore, or only faintly hint at, this canonical separation of powers principle. That a bare majority of the Supreme Court has now effectively cast aside this long history of deference in an area so critical to our national security is, I submit, the most significant development in the separation-of-powers area to come out of the last eight years. If you want to know my advice on what the next President and Congress should do to ensure that the rule of law as embodied in our Constitution will be respected, it is this: appoint and confirm judges and Justices who will respect the rule of law and the constitutional prerogatives of the other branches of government.

One last point while we are on the subject of the Supreme Court. A large majority of the Court’s decisions reverse the opinions of lower court judges, and the Court invalidates congressional statutes virtually every Term. In other words, every

armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted.”).

³¹ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (“In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation.”).

³² 315 U.S. 203, 229-30 (1942) (noting that the President “is the sole organ of the federal government in the field of international relations” and that “[e]ffectiveness in handling the delicate problems of foreign relations requires no less”) (quotations marks omitted).

³³ 343 U.S. at 645 (Jackson, J., concurring) (“I should indulge the widest latitude of interpretation to sustain his exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society.”).

³⁴ See, e.g., 339 U.S. at 789 (“Certainly it is not the function of the Judiciary to entertain private litigation—even by a citizen—which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region.”).

³⁵ 484 U.S. 518, 529-30 (1988) (“[C]ourts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.”).

³⁶ 468 U.S. 222, 243 (1984).

³⁷ *Curtiss-Wright Export Corp.*, 299 U.S. at 320; see also *id.* (“He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results.”).

Term, the Supreme Court declares that Congress and dozens of lower court judges got the law wrong. Yet where are the hearings asking how we can restore the rule of law in Congress and the lower courts? Where are the accusations that members of Congress who vote for unconstitutional statutes, and lower court judges who uphold them, have demonstrated contempt for the rule of law? Where are the calls for investigations of these public officials? The answer is obvious: these judges and members of Congress are presumed to make good faith efforts to interpret the law honorably and to the best of their abilities. The rule of law necessarily involves interpretation—by members of all three branches. Disagreement is inevitable. Why, then, the hue and cry when it is the President, rather than the Congress or a judge, who is alleged to get it wrong?

The second item in the bill of particulars against the Bush Administration—the use of aggressive interrogation techniques on high-value terrorist detainees—has not been litigated by the courts, but has understandably been the subject of intense controversy and congressional scrutiny. Indeed, it is in this area that the Administration and its lawyers have faced the harshest criticism, with the most pointed vitriol directed at Professor John Yoo, the author of the August 2002 and March 2003 OLC opinions on this subject. Some of the criticism of the analysis in those opinions appears to me to be well taken, and the OLC itself—prior to any public disclosure of the memoranda—developed misgivings about the reasoning in the opinions and rightly set about the process of modifying them. Thus, while the Yoo memoranda do represent an instance of the Executive Branch erring in its legal analysis, the full story of these memoranda reflects legal advisors of the Executive Branch making difficult and close legal calls under exigent circumstances, continually reassessing those decisions with the benefit of further study and experience, and then making any corrections that are warranted. This is respect for the rule of law at work.

And let me reemphasize that the Executive Branch lawyers who worked on this issue, both in the immediate aftermath of 9/11 and beyond, acted under some of the most trying circumstances imaginable for a lawyer. As Professor Jack Goldsmith, the Assistant Attorney General who withdrew the Yoo memoranda, explained: “When the original opinion was written in the weeks before the first anniversary of 9/11, threat reports were pulsing as they hadn’t since 9/11.”³⁸ And while some of the reasoning of Professor Yoo’s memoranda has been officially repudiated by OLC, I am aware of no evidence that he, or any of the other lawyers in the Justice Department who were involved in preparing the memoranda, acted in bad faith in performing their duties. Indeed, the initial decisions made by the Bush Administration with regard to specific interrogation techniques have withstood the further legal scrutiny of three successive generations of leadership in OLC.

Which brings me to something that the next administration and Congress, in my opinion, most assuredly should not do: threaten well-meaning Executive Branch officials from the prior administration with ethical inquiries and criminal investigations. I can offer no better advice on this front than that of Professor Alan Dershowitz, who just last week

³⁸ GOLDSMITH, *sup ra* note 1, at 165.

said this: "The real question is whether investigating one's political opponents poses too great a risk of criminalizing policy differences—especially when these differences are highly emotional and contentious, as they are with regard to Iraq, terrorism and the like. The fear of being criminally prosecuted by one's political adversaries has a chilling effect on creative policy making and implementation."³⁹ The notion that Executive Branch lawyers are open to ethical investigation and criminal prosecution whenever their advice sparks controversy and disagreement is a recipe for denuding the Justice Department and other agencies of the best and brightest in the legal profession. Even tranquil times, let alone times of war and national peril, engender serious debate and vigorous disagreement over matters of policy and law. If disagreement between lawyers is sufficient to provoke criminal investigation or bar discipline proceedings, why would anyone—of either party or no party—elect to serve as a lawyer for the government?

Lastly on the subject of harsh interrogation techniques, let me say a bit about the substance. Senator Schumer had this to say in 2004:

I think there are probably very few people in this room or in America who would say that torture should never, ever be used, particularly if thousands of lives are at stake. Take the hypothetical: If we knew that there was a nuclear bomb hidden in an American city and we believed that some kind of torture, fairly severe maybe, would give us a chance of finding that bomb before it went off, my guess is most Americans and most senators, maybe all, would say, "Do what you have to do." [I]t's easy to sit back in the armchair and say that torture can never be used. But when you're in the foxhole, it's a very different deal. And I respect—I think we all respect the fact that the President's in the foxhole every day.⁴⁰

Senator Schumer's forthright observations on this issue underscore just how difficult these decisions are for the President, sometimes even in the face of statutory prohibitions. Congress has now outlawed any "cruel, inhuman, or degrading treatment,"⁴¹ apparently including waterboarding, but suppose a situation arose in which a detainee had information that might prevent a nuclear attack in this city. And suppose further that the President was told that waterboarding the detainee would probably prove effective in immediately eliciting the information? Should the President reject the tactic in unblinking obedience to the statute, at the risk of catastrophic loss to our Nation? Or do his powers as Commander-in-Chief exempt him from the requirements of the statute in such a dire emergency? This was certainly President Lincoln's view,

³⁹ Alan M. Dershowitz, *Indictments Are Not the Best Revenge*, WALL STREET JOURNAL, Sept. 12, 2008, at A17, available at http://online.wsj.com/article/SB122117524229925725.html?mod=opinion_main_comments.

⁴⁰ Hearing Before the Senate Judiciary Committee, 108th Cong. 33-34 (June 8, 2004) (Statement of Charles E. Schumer).

⁴¹ 42 U.S.C. § 2000dd.

and he famously defended his suspension of the writ of habeas corpus by asking whether we should allow "all the laws but one to go unexecuted and the Government itself go to pieces lest that one be violated."⁴² Yet there are some today who argue that the Constitution does not grant the President this power; that he acts at his peril if he elects to order measures that would violate the law. I am not certain that this view is wrong, but I am certain that it is not self-evidently correct, and anyone who says it is displays far more constitutional hubris than the lawyers in this Administration. In any event, the notion that executive officials ought to be prosecuted, held liable in a civil court, or face bar discipline proceedings for venturing to answer such questions is indeed chilling, and misguided.

The third item in the bill of particulars—the reworking of our intelligence and investigatory apparatus in the wake of the failures demonstrated by 9/11—encompasses a range of critiques that have been leveled over the past eight years, but I would like to focus on two. First, the PATRIOT Act, which corrected for some of the problems that hampered our investigative and intelligence agencies prior to 9/11, has often been cited as a favorite example of the Administration's overreaching. But the Administration's support for that measure was hardly outside the constitutional mainstream. Ninety-eight members of this body voted for the first version of that Act, and eighty-nine members voted in favor of its reauthorization. Senators who cast their "aye" votes presumably did so in fidelity to their view of what is both wise as a matter of policy and permissible as a matter of constitutional law.

Second, the Terrorist Surveillance Program has often been cited by the Administration's critics as a prime example of executive lawlessness. Under this program, as I understand it, the NSA intercepted international communications into and out of the United States for which there was probable cause (or at least a reasonable basis) to believe that at least one party to the communication was a member or agent of al Qaeda or associated terrorist organizations. From the outset, this program was apparently briefed to key members of Congress and to the full membership of the Intelligence Committees of both Houses. Later, Congress temporarily approved the surveillance program, thus qualifying it for the "strongest of presumptions" of constitutionality. But even absent that congressional authorization, there are plausible, even if debatable, legal arguments to be made in favor of the program, both statutory and constitutional.⁴³ Given the obvious importance of the program to vital national security interests, this surely must be a decision on which the President is entitled to the benefit of reasonable legal doubt. Moreover, while many of the details surrounding this program and its authorization are still unknown, what has come to light shows the Justice Department constantly reevaluating its decisions: when serious concerns were

⁴² WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE, CIVIL LIBERTIES IN WARTIME*, at 38 (1998) (quoting President Abraham Lincoln, Message to a Special Session of Congress (July 4, 1861)).

⁴³ See United States Department of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* (Jan. 19, 2006), available at <http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf>.

raised within the Justice Department about the legality of the program, Attorney General Ashcroft and his subordinates apparently insisted that it be modified to place it on firmer constitutional footing. Again, this is a virtue to be celebrated, not a vice to be criticized.

The fourth and final particular I would like to address is the charge that the Department of Justice has been "politicized" by this Administration. I am unaware of any Administration, at least during my time in Washington, that has escaped this charge. Quite often this charge is baseless political rhetoric. The Attorney General, along with the Department he leads, sits at the right hand of the President. No Cabinet official, and no department or agency, is more essential to the President's exercise of his constitutional duty to "take care that the laws be faithfully executed." The President is entitled to appoint his supporters in the Department, and to have the Department pursue the policies and initiatives that he deems necessary and proper to execute the law. This includes his ability to set the law-enforcement priorities of the Department. Setting such priorities is why we elect Presidents, and they do not "politicize" the Justice Department when they do so.

Nonetheless, the fact that it is *de rigueur* for the opponents of an Administration to level the "politicization" charge does not mean that it can never have any genuine merit. The Department of Justice was brought low by the U.S. Attorneys fiasco, and I, along with many other former Justice Department officials, were deeply saddened to witness the spectacle unfold. Again, I believe that a President is entitled to appoint his supporters to the key positions in Executive Branch departments and agencies, including key positions in the Justice Department. And it is in the very nature of such "at-will" positions that the President is free to replace incumbents, even those who are serving honorably and well, and that he need not provide his reasons for his decision. But if his subordinates do provide reasons to a congressional committee for a decision to replace an incumbent appointee, they are not entitled to dissemble and to mislead, and if there is credible evidence that an incumbent appointee has been removed for a corrupt reason—say, for refusing to corrupt the prosecutorial process with partisan political considerations—that evidence should be investigated and followed wherever it may lead.

In sum, this Administration's record on separation-of-powers must be reviewed and judged in the context of the extraordinarily difficult and perilous times in which it was made. While I readily admit that this Administration, like *all* administrations, has made some errors, the record simply does not support the charge that the Administration has been indifferent to, let alone contemptuous of, the rule of law. To the contrary, I submit that it is the Administration's harshest critics who have advanced a vision of Executive powers that falls outside our constitutional norms and historical traditions. They advance an "internationalist" theory of separation of powers that relies on the political and legal norms of a carefully-selected cadre of western European countries, not a theory rooted in our Constitution, our Nation's history, our Supreme Court's precedent, and the political sentiments of our people. They advance a theory of executive minimalism never accepted by *any* administration, Republican or Democrat, and one that I strongly suspect, and hope, will not be accepted by the next Administration, be it the McCain or the Obama White House.

Statement of Mickey Edwards
Woodrow Wilson School of Public and International Affairs
Princeton University
Former Chairman, House Republican Policy Committee
United States House of Representatives

Before the Senate Judiciary Committee
Subcommittee on the Constitution
On the Subject of Restoring the Rule of Law

September 16, 2008

Mr. Chairman and members of the Committee:

Thank you for the opportunity to discuss questions of the Rule of Law as they pertain in particular to the prerogatives and obligations of the members of this Committee and to the members of Congress as a whole. I have become increasingly concerned about the direction in which the Congress has moved in regard to its constitutional responsibilities and have attempted, as a member of the Constitution Project's Board of Directors, and in my studies as a faculty member both at Harvard and Princeton, to understand what has gone wrong and what the Congress must do to fulfill its obligations within our unique system of government.

There are a great many salient questions facing the American people and those of you who are charged with the responsibility of enacting the nation's laws: access to affordable health care; repair of an aging infrastructure; reducing energy dependence; ensuring the national security. But not one of those issues – and not all of them combined – is as important now or for the future as securing our position as a nation governed by the rule of law. In our case,

as a nation, the principal law that governs us and to which all other laws are subordinate is the United States Constitution which spells out the powers, and the limits on the powers, of the government as a whole and the component parts of the government.

There has been a great deal of criticism directed at the current President of the United States over actions viewed by many – and by me – as overstepping the proper bounds of his authority and violating the Constitution. I have no intention of renewing those criticisms here today. If the President has attempted to enhance his authority beyond proper constitutional boundaries, it is in part because he has fallen victim to the natural inclinations of those in power, and who are charged with important responsibilities, to seek to broaden their powers. I am not here to point a finger of blame at George W. Bush.

However, there is no doubt that we have seen the Constitutional system of separated powers disregarded and its protections cast aside, and if we are to set aside for the moment our criticisms of the current President, who are we to blame?

Let me be both candid and clear: the current greatest threat to our system of separated powers and the protections it affords stems not just from executive overreaching but equally from the Congress. America's founders envisioned a system in which each of the branches of government would guard its prerogatives and meet its obligations, each acting to serve the nation through the empowerment the Constitution grants and to protect our liberties through the constraints the Constitution imposes.

For most of the past eight years, and for many years before that, the Congress has failed to lived up to its assigned role as the principal representative of the people. Congress's constitutional role includes primary authority over spending priorities, tax policies, and the choice over whether or not to go to war. All of

these decisions require the gathering of the information necessary to act judiciously. All of these decisions require a willingness to see to it that those decisions are complied with.

But in recent years, instead of fulfilling this important trust, Congress has too often been silent. When the President of the United States, in a direct challenge to Article 1, Section 7 of the Constitution, declared in a variety of signing statements that he would decide for himself whether he was bound by the laws he signed, both houses of Congress held hearings but failed to pursue the matter any further. Particularly distressing was the reaction of nearly half the members of the House Judiciary Subcommittee who indicated no concern about a President's declaration that he had the right to disregard the laws the Congress had passed.

When the President declared that he had the authority to disregard the requirement that his Administration obtain a judicial warrant before conducting electronic surveillance on American citizens the Congress again held hearings but never demanded compliance with its requests for full disclosure about how the program was being conducted. Ultimately, the Congress acquiesced to the President's demands that the law be changed without ever obtaining the information it needed to legislate intelligently.

When the President declared that the Congress could not question members of his staff in an attempt to determine whether laws had been broken or new laws were needed, nearly half the members of the House – members of my party, a party which had always held itself to favor a strict construction of the Constitution -- walked out rather than hold White House staff members in contempt. When the Justice Department refused to enforce a congressional finding of contempt, the Congress of the United States was forced to file a civil suit, as any citizen might do, as though it were not an equal branch of government.

When the Congress has required information about the undertaking of covert actions by the Administration or when it needs access to information the Executive has designated as classified, the Congress has permitted the Executive to dictate who among the members of Congress and their staffs may have access to that information. The result is the situation in which information is available to hundreds of Executive Branch staff members but withheld not only from congressional staff members but from members of Congress themselves. And with this, the Congress meekly complies.

Every member of Congress takes an oath of office to uphold and defend the Constitution. Republican members do not take an oath to defend a Republican president and Democratic members do not take an oath to defend a Democratic president. Once that oath of office is taken, loyalty to the Constitution takes primacy over loyalty to party or individual. But that is not what has happened in recent years.

Here is the challenge, stated as candidly as I can state it. Each year the presidency grows farther beyond the bounds the Constitution permits; each year the Congress fades farther into irrelevance. As it does, the voice of the people is silenced. This cannot be permitted to stand. The Congress is not without power. It can refuse to confirm people the President suggests for important offices; it can refuse to provide money for the carrying out of Executive Branch activities; it can use its subpoena power and its power to hold hearings and above all, it can use its power to write the laws of the country.

Do members of the Senate recall that the Constitution states that the determination of what is to be done with prisoners of war is a decision to be made by the Congress, not the Executive? Do members of Congress understand that the President is the head of state but he is not the head of government? Do they understand

that they are members not merely of a separate branch of government, but of a branch that is completely the equal of the presidency and in many areas – taxing, spending, the power to declare war – the pre-eminent branch?

I spent sixteen years as a member of Congress. I sat in meetings with the President of the United States in which I, along with other leaders of my party – the Republican party – informed a Republican President that we would not support going to war unless that decision was made by the Congress. I sat in meetings of the Appropriations Committee in which we took Executive Branch spending priorities as suggestions and decided for ourselves whether to change those priorities. I sat in sessions in which Democratic leaders in Congress led the fight against the proposals of Democratic presidents. The oath of office changed everything: we crossed the line from partisans to members of the lawmaking branch of government.

Do not let it be said that what the Founders created, you have destroyed. Do not let it be said that on your watch, the Constitution of the United States became not the law of the land but a suggestion. You are not a parliament; you are a Congress – separate, independent, and equal. And because of that you are the principal means by which the people maintain control of their government. Defend that right, and that obligation, or you lose all purpose in holding these high offices. That is how you preserve and defend the rule of law in the United States.

END

Opening Statement of U.S. Senator Russ Feingold
Hearing on "Restoring the Rule of Law"
Senate Judiciary Committee, Subcommittee on the Constitution
As Prepared For Delivery

September 16, 2008

"Tomorrow, September 17, is the 221st anniversary of the day in 1787 when 39 members of the Constitutional Convention signed the Constitution in Philadelphia. It is a sad fact as we approach that anniversary that for the past seven and a half years, and especially since 9/11, the Bush Administration has treated the Constitution and the rule of law with a disrespect never before seen in the history of this country. By now, the public can be excused for being almost numb to new revelations of government wrongdoing and overreaching. The catalogue is breathtaking, even when immensely complicated and far reaching programs and events are reduced to simple catch phrases: torture, Guantanamo, ignoring the Geneva Conventions, warrantless wiretapping, data mining, destruction of emails, U.S. Attorney firings, stonewalling of congressional oversight, abuse of the state secrets doctrine and executive privilege, secret abrogation of executive orders, signing statements. This is a shameful legacy that will haunt our country for years to come.

"There can be no dispute that the rule of law is central to our democracy and our system of government. But what does 'the rule of law' really mean? Well, as Thomas Paine said in 1776: 'In America, the law is king.' That, of course, was a truly revolutionary concept at a time when the King, quite literally, was the law.

"Over 200 years later, we still must struggle to fulfill Paine's simply stated vision. It is not always easy, nor is it something that once done need not be carefully maintained. Justice Frankfurter wrote that law:

is an enveloping and permeating habituation of behavior, reflecting the counsels of reason on the part of those entrusted with power in reconciling the pressures of conflicting interests. Once we conceive 'the rule of law' as embracing the whole range of presuppositions on which government is conducted . . . , the relevant question is not, has it been achieved, but, is it conscientiously and systematically pursued.

"The post-September 11th period is not, of course, the first time that events have caused great stress for the checks and balances of our system of government. As Berkeley law professors Daniel Farber and Anne Joseph O'Connell write in testimony submitted for this hearing: 'The greatest constitutional crisis in our history came with the Civil War, which tested the nature of the Union, the scope of presidential power, and the extent of liberty that can survive in war time.' But as legal scholar Louis Fisher of the Library of Congress describes in his testimony, President Lincoln pursued a much different approach than our current President when he believed he needed to act in an extra-constitutional manner to save the Union. He acted openly, and sought Congress's participation and ultimately approval of his actions. According to Dr. Fisher:

[Lincoln] took actions we are all familiar with, including withdrawing funds from the Treasury without an appropriation, calling up the troops, placing a blockade on the South, and suspending the writ of habeas corpus. In ordering those actions, Lincoln never claimed to be acting legally or constitutionally and never argued that Article II somehow allowed him to do what he did. Instead, Lincoln admitted to exceeding the constitutional boundaries of his office and therefore needed the sanction of Congress.... He recognized that the superior lawmaking body was Congress, not the President.

“Each era brings its own challenges to the conscientious and systematic pursuit of the rule of law. How the leaders of our government respond to those challenges at the time they occur is, of course, critical. But recognizing that leaders do not always perform perfectly, that not every President is an Abraham Lincoln, the years that follow a crisis are perhaps even more important. And soon, this Administration will be over. So the obvious question is: ‘Where do we go from here?’ I believe that one of the most important things that the next President must do, whoever he may be, is take immediate and concrete steps to restore the rule of law in this country. He must make sure that the excesses of this Administration don’t become so ingrained in our system that they change the very notion of what the law is.

“That, of course, is much easier said than done. It’s not simply a matter of a new President saying, ‘Ok, I won’t do that anymore.’ This President’s transgressions are so deep and the damage to our system of government so extensive that a concerted effort from the executive and legislative branches will be needed. And that means the new President will, in some respects, have to go against his institutional interests.

“That is why I called this hearing – to hear from legal and historical experts on how the next President should go about tackling the wreckage that this President will leave. I’ve asked our two panels of experts who will testify to be forward-looking – to not only review what has gone wrong in the past seven or eight years, but to address very specifically what needs to be set right starting next year and how to go about doing it.

“In addition to the testimony of the witnesses here today, I solicited written testimony from advocates, law professors, historians and other experts. So far we have received nearly two dozen submissions from a host of national groups and distinguished individuals. I want to thank each and every person who made the effort to prepare testimony for this hearing. You have done the country a real service.

“All of this testimony will be included in the written record of the hearing, which I plan to present to the incoming Administration. The submissions we have received so far can be seen on my website at feingold.senate.gov. I hope that many of these recommendations, along with the testimony we will hear today, will serve as a blueprint for the new President so that he can get started right away on this immense and extremely important job of restoring the rule of law.”

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Statement of Harold Hongju Koh
Dean and Gerard C. & Bernice Latrobe Smith Professor of International Law
Yale Law School
Before the Senate Judiciary Committee, Subcommittee on
The Constitution on
Restoring the Rule of Law
September 16, 2008

Mr. Chairman and Members of the Subcommittee:

Thank you for inviting me to testify today on how the next President and Congress may best act to restore the rule of law, especially in the national security arena. I am the Dean and Gerard C. & Bernice Latrobe Smith Professor of International Law at Yale Law School, where I have taught since 1985 in the areas of international law, human rights, and the law of U.S. foreign relations.¹ I have twice served in the United States government: as an Attorney-Adviser at the Office of Legal Counsel of the U.S. Department of Justice from 1983-85, and as Assistant Secretary of State for Democracy, Human Rights and Labor from 1998-2001. On several prior occasions, I have addressed various aspects of this subject before Congress when testifying before this and other committees.²

Seven years ago, our country was properly viewed with universal sympathy as the victim of a brutal attack. Tragically, the current Administration chose to respond with an series of unnecessary, self-inflicted wounds, which have gravely diminished our global standing and damaged our reputation for respecting the rule of law. The infamous list includes: Abu Ghraib; Guantanamo; torture and cruel treatment of detainees; indefinite detention of "enemy combatants;" military commissions; warrantless government wiretapping and datamining; evasion of the Geneva Conventions and international human rights treaties; excessive government secrecy and assertions of executive privilege; attacks on the United Nations and its human rights bodies, including the International Criminal Court; misleading of Congress; and the denial of habeas corpus (recently

¹ A brief curriculum vitae is attached as an appendix to this testimony. Although I sit on a law school faculty as well as on the boards of directors of a number of organizations, the views expressed here are mine alone, not those of my colleagues or of any of the institutions with which I am affiliated.

² See Statement of Harold Hongju Koh Before the House Committee on Foreign Affairs regarding The 2006 Country Reports on Human Rights Practices and the Promotion of Human Rights in U.S. Foreign Policy, March 29, 2007, available at <http://www.internationalrelations.house.gov/110/koh032907.pdf>; Statement of Harold Hongju Koh before the Senate Committee on the Judiciary Regarding *Hamdan v Rumsfeld*: Establishing a Constitutional Process, July 11, 2006, available at http://www.law.yale.edu/documents/pdf/Deans_Office/KOH_Hamdan_TESTIMONY.pdf; Statement of Harold Hongju Koh before the Senate Committee on the Judiciary Regarding Wartime Executive Power and the National Security Agency's Surveillance Authority February 28, 2006, available at <http://www.law.yale.edu/documents/pdf/HHKNSAtestfinal.pdf>; Statement of Harold Hongju Koh before the Senate Judiciary Committee Regarding The Nomination of the Honorable Alberto R. Gonzales as Attorney General of the United States, January 7, 2005, available at <http://www.law.yale.edu/documents/pdf/KohTestimony.pdf>.

rejected by the U.S. Supreme Court) for suspected terrorist detainees on Guantanamo.³ I know that other witnesses--including law professors, historians, and advocates -- have submitted written testimony for the record of this hearing, documenting many of the legal violations that have occurred during recent years, a sorry historical record that has also been documented by numerous book-length accounts.⁴

Given this extensive record, let me focus my testimony on two issues: first, the distorted constitutional vision, based on claims of unfettered executive power, that this Administration has invoked to justify many of its policies; and second, specific steps -- combining executive orders, proposed legislation, agency reorganization, and foreign policy action-- that the next President and Congress should take to reverse the damage and restore the Framers' vision of checks and balances in national security affairs.

I. *A Distorted Constitutional Vision*

Before September 11, as a matter of constitutional law, U.S. national security policy was generally conducted within four widely accepted premises.⁵ First, under our Constitution, executive power operates within a constitutional framework of checks and balances, resting on the vision of shared institutional powers set forth in Justice Robert Jackson's famous concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*.⁶ That vision of shared powers rests on the simple notion that constitutional checks and balances do not stop at the water's edge. In a global world, we need an energetic executive, but checked by an energetic Congress and overseen by a vigilant judicial branch.

Second, there are no law-free zones, practices, courts, or persons. Third, we accept no infringement on our civil liberties without a clear statement by our elected representatives.⁷ Fourth and finally, with the exception of a few political rights, such as

³ See *Boumediene v. Bush*, 553 U.S. -- (2008); 128 S.Ct. 2229 (2008).

⁴ See, e.g., Frederick A.O. Schwarz, Jr. and Aziz Z. Huq, *Unchecked and Unbalanced: Presidential Power in a Time of Terror* (2007); Charlie Savage, *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy* (2007); Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* (2007); Barton Gellman, *Angler: The Cheney Vice Presidency* (2008); Eric Lichtblau, *Bush's Law: The Remaking of American Justice* (2008); Jane Mayer, *The Dark Side: The Inside Story of How The War on Terror Turned into a War on American Ideals* (2008); James Risen, *State of War: The Secret History of the CIA and the Bush Administration* (2006).

⁵ See generally Harold Hongju Koh, *Setting the World Right*, 115 *Yale L.J.* 2350 (2006), from which this Part derives. For a historical review of the evolution of the Constitution's allocation of powers regarding national security matters, see generally Harold Hongju Koh, *The National Security Constitution. Sharing Power After the Iran-Contra Affair* (1990).

⁶ 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring). In *Dames & Moore v. Regan*, 453 U.S. 654, 661 (1981), a majority of the Court adopted Justice Jackson's tripartite framework.

⁷ Under the "clear statement" doctrine of *Kent v. Dulles*, 357 U.S. 116 (1958), courts must carefully scrutinize statutes cited by the executive for signs not only that Congress has consented to the President's actions, but also to determine whether the President and Congress acting together have made a clear determination to infringe on individual rights. When individual rights are at stake, courts should "construe narrowly all delegated powers that curtail or dilute them." *Id.* at 129; accord *Greene v. McElroy*, 360 U.S. 474, 507-08 (1959).

the right to vote or serve on a jury, noncitizens are not systematically disadvantaged vis-à-vis citizens, especially with respect to economic, social, and cultural rights.⁸

Today, only seven years later, each part of this constitutional vision has been stood on its head. First, in defense of the various policies described above, the Bush Administration has consistently asserted a constitutional theory of unfettered executive power, based on extraordinarily broad interpretations of Article II's "Commander-in-Chief" Clause and the Supreme Court's decision in *United States v. Curtiss-Wright Export Corp.*, which called the President the "sole organ of the federal government in the field of international relations."⁹ Under this vision, the President's Article II powers are paramount, Congress exercises minimal oversight over executive activity, government secrecy prevails, and the Solicitor General regularly urges the courts to give extreme deference to the President, citing the judiciary's "passive virtues." Second, the Bush Administration has consistently rejected the universalism of human rights in favor of executive efforts to create law-free zones, such as Guantánamo; executive courts, such as military commissions; extralegal persons, who are labeled enemy combatants; and law-free practices, such as extraordinary rendition, all of which it claims are exempt from judicial review. The Administration has regularly opposed judicial efforts to incorporate international and foreign law into domestic legal review so as to insulate the U.S. government from charges that it is violating universal human rights norms. Third, we have increasingly heard claims that the executive can infringe upon our civil liberties without clear legislative statements, relying on such broadly worded laws as the Authorization for Use of Military Force Resolution (AUMF) of September 2001 to justify secret National Security Agency surveillance, indefinite detentions, and torture of foreign detainees.¹⁰ Fourth, the conduct of the war on terror has deeply exacerbated distinctions between citizens and aliens within American society with respect to political, civil, social, and economic rights, and contributed to pronounced scapegoating of Muslim, Middle Eastern, and South Asian aliens.

The last straw has been the startling argument that executive action should be treated as a kind of law unto itself. Remarkably, the President's lawyers have recently argued, the policy rationale for executive action has somehow *created* the legal justification for executive unilateralism. Take, for example, the surprising revelation that the President had ordered the National Security Agency (NSA) to engage in nearly four

⁸ Indeed, in *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971), the Supreme Court went so far as to say that its decisions had "established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate." (internal citations omitted).

⁹ 299 U.S. 304, 320 (1936). When I served as a Justice Department attorney in the early 1980's, Justice Sutherland's description of the president's powers was jokingly called the "*Curtiss-Wright*, so I'm right cite"—a statement of deference to the president so sweeping as to be worthy of frequent citation in any U. S. government national security brief. But see Koh, *National Security Constitution*, *supra* note 5, at 93-96, explaining why the *Curtiss-Wright* decision and vision are deeply flawed.

¹⁰ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (codified at 50 U.S.C. § 1541 note (Supp. III 2003)).

years of secret, warrantless domestic surveillance of uncounted American citizens and residents, notwithstanding the statutory directive that domestic intelligence wiretapping be conducted exclusively within the terms of the 1978 Foreign Intelligence Surveillance Act (FISA).¹¹ The Bush Administration first claimed the necessity of wiretapping telephone calls involving al Qaeda, but ended up asserting that a presidential determination that the executive action was necessary not only overrode the FISA but also rendered application of that statute unconstitutional.¹² In January 2005, before the NSA program came to light, when Alberto Gonzales was being confirmed as Attorney General, the Chair of this subcommittee, Senator Feingold, asked Mr. Gonzales whether he believed the President could violate existing criminal laws and spy on U.S. citizens without a warrant. Mr. Gonzales dismissed the question as a “hypothetical situation,” but answered that it was “not the policy or the agenda of this president to authorize actions that would be in contravention of our criminal statutes.”¹³ But when later questioned about this during hearings on NSA surveillance, he answered that he had not misled Congress because once the President had authorized an action, in effect, it had *become* legal under the President’s constitutional powers and thus could not contravene any criminal statutes.¹⁴

Similarly, in its infamous, now-overruled August 2002 “Torture Opinion,” the Justice Department’s Office of Legal Counsel opined that: (1) even criminal prohibitions against torture do “not apply to the President’s detention and interrogation of enemy combatants pursuant to [the President’s] Commander-in-Chief authority,” (2) “[a]ny effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution’s sole vesting of the Commander-in-Chief authority in the President;” and (3) that executive officials can escape prosecution for torture on the ground that “they were carrying out the President’s Commander-in-Chief powers,” reasoning that such orders would preclude the application of a valid federal criminal statute “to punish officials for aiding the President in exercising his exclusive constitutional authorities.”¹⁵

¹¹ 18 U.S.C. § 2511(2)(f) (2000). See generally Koh, February 28, 2006 testimony, *supra* note 2 (criticizing the legal authority for this practice)

¹² “The President has determined that the speed and agility required to carry out the NSA activities successfully could not have been achieved under FISA. Because the President also has determined that the NSA activities are necessary . . . FISA would impermissibly interfere with the President’s most solemn constitutional obligation” to defend the country and therefore would be “unconstitutional as applied.” U.S. Dep’t of Justice, Legal Authorities Supporting the Activities of the National Security Agency Described by the President 34-35 (Jan. 19, 2006) [hereinafter DOJ White Paper], *available at* <http://www.fas.org/irp/nsa/doj011906.pdf>.

¹³ Confirmation Hearing on the Nomination of Alberto Gonzales To Be Attorney General of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 116-17 (2005).

¹⁴ Wartime Executive Power and the National Security Agency’s Surveillance Authority: Hearing Before the S. Comm. on the Judiciary, 109th Cong. (2006) (statement of Alberto Gonzales, Att’y Gen. of the United States).

¹⁵ Memorandum from Jay S. Bybee, Assistant Attorney Gen., to Alberto Gonzales, Counsel to the President, 35, 39 (Aug. 1, 2002), *available at* <http://www.washingtonpost.com/wpsrv/nation/documents/dojinterrogationmemo20020801.pdf>; *see also id.* at 39 (“Congress can no more interfere with the President’s conduct of interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield.”). For a critical analysis of this opinion, see Harold Hongju Koh, *A World Without*

To students of constitutional history, this line of argument evoked eerie memories of Richard Nixon's comment: "[W]hen the president does it, that means that it is not illegal."¹⁶ If this is true, then the President's word alone is law, and the carefully prescribed system of checks and balances prescribed in the Constitution no longer exist.

II. Recommendations for the Next Administration and Congress¹⁷

The Bush Administration's "War on Terror" has done serious and extensive damage to civil liberties and the rule of law in the name of national security. The Administration's obsession with defining our human rights policy through the "war on terror" has clouded our human rights reputation, given cover to abuses committed by our allies in that "war," blunted our ability to criticize and deter gross violators elsewhere in the world, and made us less safe and less free. Thankfully, some of these policies have been rebuffed by the current Supreme Court, even though seven members of that court were appointed by the President's own party.¹⁸ Moreover, they have yielded strikingly few convictions or proven security benefits, while costing tens of millions to maintain Guantanamo as an offshore prison camp and devastating America's global reputation for commitment to the rule of law.¹⁹

Even before his inauguration, the next President should unambiguously signal his intention to reverse this trend.²⁰ Upon taking office, the new Administration should move decisively to restore respect for the rule of law in national security policy with a package of executive orders, proposed legislation, agency shakeups, and concrete foreign policy actions.

Torture, 43 Colum. J. Transnat'l L. 641 (2005), based on testimony at <http://www.law.yale.edu/documents/pdf/KohTestimony.pdf>.

¹⁶ *Excerpts from Interview with Nixon About Domestic Effects of Indochina War*, N.Y. TIMES, May 20, 1977, at A16.

¹⁷ This Part derives from a forthcoming chapter in *Change for America. A Progressive Blueprint for the 44th President* (Basic Books 2009) (Mark Green & Michele Jolin, eds.).

¹⁸ See *Boumediene v. Bush*, 553 U.S. -- (2008); 128 S.Ct. 2229 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

¹⁹ See David Bowker & David Kaye, *Guantanamo by the Numbers*, New York Times, Nov. 10, 2007 (enumerating financial costs of Guantanamo).

²⁰ At this writing, both presidential candidates have expressed willingness to change direction on some of these issues. Compare Senator John McCain, Op-ed, *Financial Times*, March 18, 2008, available at http://www.cfr.org/publication/15755/mccains_oped_on_the_us_and_europe.html?breadcrumb=%2Fcampaign2008%2Fspeeches%3Fpage%3D3 ("We Americans recall the words of our founders in the declaration of independence, that we must pay "decent respect to the opinions of mankind". . . . We all have to live up to our own high standards of morality and international responsibility. We cannot torture or treat inhumanely the suspected terrorists that we have captured. We will fight the terrorists and at the same time defend the rights that are the foundations of our society.") with Speech by Senator Barack Obama, Ohio State University, February 27, 2008, available at <http://irregulartimes.com/index.php/archives/2008/02/27/recording-of-barack-obama-speech-in-columbus-february-27-2008/> ("We are going to lead by example, by maintaining the highest standards of civil liberties and human rights, which is why I will close Guantanamo and restore habeas corpus and say no to torture. . . . Because if you are ready for change, then you can elect a president who has taught the Constitution, and believes in the Constitution, and will obey the Constitution of the USA.")

In undoing the damage of the last seven years, the new Administration faces three major challenges. First, the scale of government national security activity has been so extensive and extreme that it will be difficult to undo over time, and even more difficult to undo quickly. Even a recognized policy fiasco such as Guantanamo—which President Bush, his Secretaries of State and Defense, and his Attorney General now all concede should be closed—has lingered, in part because of the complex interagency and diplomatic negotiations needed to avoid sending detainees who never should have been brought to Guantanamo from now being dispersed to locations where they could be subject to even crueller treatment.

Second, in public discourse, a nonevent -- the absence of a major terrorist attack on U.S. soil since September 11-- has been repeatedly offered as proof that the Bush Administration's infringements of law and civil liberties were somehow necessary. Those who have criticized the Government's extreme practices have been branded as unpatriotic, naïve, or soft on national security.

Third, all three branches of government participated in the warping of sound constitutional process. Journalistic accounts confirm that a dysfunctional process arose within the executive branch, which excluded all but the most extreme voices. This "groupthink" drowned out moderate government voices and a cloak of secrecy kept extreme policies from being reviewed effectively by good lawyers.²¹ Rather than being part of the solution, the two other branches of government were too often been part of the problem. A compliant Congress repeatedly blessed unsound executive policies by enacting nominal, loophole-ridden "bans" on torture and cruel treatment and rubberstamping, without serious hearings, presidentially introduced legislation ranging from the Patriot Act, to the Military Commissions Act, to the most recent amendment of the Foreign Intelligence Surveillance Act (FISA). The lower courts in which 9/11 litigation has been concentrated have accepted many of the government's most extreme claims regarding state secrets and immunity. Even when the Supreme Court has set welcome limits on executive overreaching, it has acted late and through sharply divided decisions.

Significantly, civil society—not government--has led the resistance to the Administration's extreme tactics on each of these issues.²² The new Administration should reassure civil society that it genuinely respects the rights of the people. The new President should promise that in the future, national security policies will not be set by closed, secret "war councils," but rather, through transparent processes designed to bring diverse experiences and viewpoints before key policymakers. Upon election, the new

²¹ See sources cited in note 4, *supra*.

²² The media uncovered Abu Ghraib. The organized bar offered representation to detainees and challenged policies in court. Career Justice Department officials resisted the government wiretapping program. Career military officers spoke out against torture and for the Geneva Conventions. Librarians across America protested the extension of the Patriot Act to library records.

Administration should immediately signal its new direction by taking four steps.

A. Closing Guantanamo. First, as soon as the transition teams are appointed, the Justice, State, Defense, Intelligence and White House teams should work closely with their Bush Administration counterparts to identify steps needed to close the Guantanamo prison camp as soon as possible.²³ To fully close Guantanamo, each detainee's case should be individually reviewed to determine: (1) which detainees have committed crimes against the U.S. and thus should be brought to U.S. soil (presumably to supermax prisons) for prosecution in regular federal or military courts; (2) if they cannot be properly tried for crimes against the U.S., which detainees should be transferred for prosecution in their home country or a third country, in accordance with applicable extradition principles; (3) which detainees have committed no crimes against the U.S. and thus should be repatriated to their home country for release, consistent with U.S. obligations under international human rights and humanitarian law; and (4) which detainees have committed no crimes against the U.S., but must be resettled in third countries (or granted asylum), rather than returned home, where they face substantial risk of torture or other forms of persecution.²⁴

With respect to the last three groups, immediately after the 2008 election, the incoming State Department transition team should ask the outgoing administration to appoint a high-level confidant of the President-elect as a special envoy. That special envoy should be dispatched abroad to advise nations whose citizens comprise significant parts of the Guantanamo population that the strength of their diplomatic relations with the new Administration will depend vitally upon their willingness, where possible, to repatriate their citizens *before* the inauguration with meaningful and enforceable diplomatic assurances -- in writing, and monitored by visitations by U.S. diplomats, the International Committee of the Red Cross, and human rights nongovernmental organizations-- that repatriated detainees will not be subjected to torture or cruel treatment.

²³ In a parallel case, the Carter Administration and the Reagan transition team worked closely together in 1980 to secure the release of the Iranian Hostages on inauguration day, allowing the new administration to take office free of this albatross. When President Clinton was elected in 1992, by contrast, his transition team did not persuade the first Bush Administration to clear Guantanamo of Haitian refugees or to terminate Bush's policy of directly returning refugees to Haiti, saddling the new administration with the standing policy, which then was not reversed until nearly two years later.

²⁴ Any ongoing military commissions cases should be terminated, and the suspects recategorized into one of these four categories. These categories derive from detailed recommendations set forth in the Joint Scholars' Statement of Principles for a New President on U.S. Detention Policy: An Agenda for Change, of which I am a co-signatory (and which has been submitted as prepared testimony into the record of this hearing and is available at www.yale.edu). That Statement draws in turn upon detailed reports by KEN GUDE, HOW TO CLOSE GUANTANAMO, CENTER FOR AMERICAN PROGRESS (June 2008), <http://www.americanprogress.org/issues/2008/06/pdf/guantanamo.pdf>; HUMAN RIGHTS FIRST, HOW TO CLOSE GUANTANAMO: BLUEPRINT FOR THE NEXT ADMINISTRATION, <http://www.humanrightsfirst.org/pdf/080818-USLS-gitmo-blueprint.pdf> (August 2008); and SARAH E. MENDELSON, CLOSING GUANTANAMO: FROM BUMPER STICKER TO BLUEPRINT, CENTER FOR STRATEGIC & INTERNATIONAL STUDIES, http://www.csis.org/media/csis/pubs/080715_draft_csis_wg_gtmo.pdf (July 13, 2008).

At the same time, the Defense Department should begin shutting down facilities on Guantanamo to demonstrate that the United States will no longer inappropriately use the naval base as an offshore prison camp. The DOD's Office of Detainee Affairs should be brought under the supervision of a senior legal counsel position on human rights and humanitarian law created within the Defense Department's General Counsel's Office. A similar legal counsel position should also be created within the General Counsel's Office at the Department of Homeland Security.

The Justice Department should appoint a point person to deal collectively with Guantanamo habeas counsel, and to file judicial statements of interest seeking delay of pending habeas petitions in cases where there is a high likelihood of imminent diplomatic release. Incoming attorneys to the White House Counsel's office, the Defense Department's General Counsel's office and the Justice Department's Office of Legal Counsel should also be given access to all classified legal opinions issued by those offices to determine which opinions should be withdrawn as based on inappropriate legal theories.

B. Executive Orders. Second, as soon as the new President takes office, he should issue executive orders: (1) ordering the relevant agencies to begin formally closing the prison camp at Guantanamo by a date certain; (2) directing compliance by all U.S. officials with the Geneva Conventions and the Convention Against Torture, which are ratified treaties that are part of U.S. law; (3) unequivocally banning the use of torture and cruel, inhuman or degrading treatment (including waterboarding) by any person employed by or under contract to the United States government anywhere in the world; and (4) clarifying that the new Administration will not construe the vaguely worded Authorization for the Use of Military Force (AUMF) Resolution to override existing legislation or to infringe upon or modify pre-existing legal rights.²⁵

As part of that package of executive orders, the President should further immediately: (5) establish as part of the National Security Council structure, a National Security Law Committee (NSLC).²⁶ This new entity would serve as the decisionmaking body for national-security related legal issues, such as surveillance policy, detention and interrogation practices, rules of engagement and others. The NSLC would be chaired by the Attorney General and report directly to the President through the Attorney General, and would include the Secretaries of State, Defense, the National Intelligence Advisor, and the Director of Homeland Security; and (6) create an independent commission, modeled perhaps on the 9/11 commission, to investigate -- and if appropriate, to recommend accountability measures to address -- torture, human rights abuses, and other legal violations that may have been committed or authorized by U.S. government officials during the past seven years.

²⁵ Authorization for Use of Military Force Resolution, September 18, 2001, Pub. Law No. 107-40, S. J. RES. 23, 107th CONG., 115 Stat. 224 (2001).

²⁶ For elaboration, see the forthcoming chapter by Samuel Berger and Thomas Donilon in *Change for America: A Progressive Blueprint for the 44th President* (Basic Books 2009) (Mark Green & Michele Jolin, eds.), to which I owe this suggestion.

(7) Finally, the new President should publicly forswear future executive or legislative efforts to avoid habeas corpus by moving detainees to offshore locations, through extraordinary rendition to “black sites.” The Supreme Court recently made clear that “the political branches [do not] have the power to switch the Constitution on or off at will” by moving detainees around to various “law-free zones.”²⁷

Taken together, these executive orders should send the unequivocal message that the United States does not accept double standards in human rights. Like much of international law, the Geneva and Torture Conventions are not about our adversaries and who they are; rather, they are about us and who we are and how we are obliged to treat all detainees, however they may behave: with basic humane treatment, as a matter of universal principle. If we truly believe that human rights are universal, we are obliged to respect them, even for suspected terrorists.

C. National Security Legislation. The new President should also ask Congress to create a bipartisan, bicameral standing committee on liberty and security legislation. At the earliest opportunity, the new President should work with these congressional leaders to introduce “national security charter” legislation to support a continuing fight against terrorists, while at the same time defending the basic rights that form the foundation of our society.²⁸ This legislation should be considered in thoughtful hearings (similar to those conducted in first adopting the Foreign Intelligence Surveillance Act in the late 1970s) aimed at dismantling bad policies adopted since September 11, without adopting the new bad policies that some are offering to replace them. Such legislation should: (1) repeal the Military Commissions Act, or at a minimum, revise it drastically to repair the inadequacies in that law’s procedures identified by the Supreme Court in its 2006 decision in *Hamdan v. Rumsfeld*;²⁹ and (2) revise classified information procedures to enable more effective terrorism prosecutions in standing civilian courts.

Any new national security legislation should resist authorizing a new system of preventive detention or creating a special “terror court” of the kind being urged by some commentators.³⁰ A recent empirical report by former prosecutors (released by Human

²⁷ *Boumediene v. Bush*, 553 U.S. __, __ (2008); 128 S.Ct. 2229 (2008) (slip op. at 36) (ruling that the Guantánamo detainees have a constitutional right to habeas corpus). On the same day, the Court ruled that the writ of habeas corpus runs to all U.S. citizens being held anywhere under American command and control. As the concurring opinion in that case noted, nothing in the Court’s opinion “should be read as foreclosing [judicial] relief for a citizen of the United States who resists transfer ... from the American military [or presumably civilian intelligence] ... to a foreign country for prosecution in a case in which the possibility of torture is well documented, even if the Executive fails to acknowledge it.” *Munaf v. Geren*, 553 U.S. __ (2008) (Souter, J., joined by Breyer, and Ginsburg, JJ., concurring) at 2.

²⁸ I have previously described what such national security legislation could look like in Harold Hongju Koh, *The National Security Constitution*, *supra* note 5.

²⁹ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

³⁰ See, e.g., Benjamin Wittes & Mark Gitenstein, *A Legal Framework for Detaining Terrorists: Enact a Law to End the Clash over Rights*, The Brookings Institute: Opportunity ’08, at 12 (Nov. 15, 2007), available at:

http://www.brookings.edu/papers/2007/~media/Files/Projects/Opportunity08/PB_Terrorism_Wittes.pdf; Andrew McCarthy & Alykhan Velshi, *We Need a National Security Court*, in *Outsourcing American Law* 43 (forthcoming), available at http://www.defenddemocracy.org/usr_doc/NationalSecurityCourt.doc. Jack

Rights First) extensively reviews more than more than 120 international terrorism cases pursued in the federal courts over the past fifteen years and concludes that the existing federal civilian courts can be adapted to the task of trying terrorist suspects.³¹ The Supreme Court has now twice indicated that rulings of regularly constituted courts are more likely than those of *ad hoc* courts to survive judicial scrutiny.³²

These sources suggest that our standard for American justice should be the due process of law required by the Constitution and international law, not "at least it's better than Guantanamo." The goal of the next Administration and Congress should be to end debacles like Guantánamo, not to set its worst features in concrete. Any tailor-made "terror court" would plainly fail the most relevant test of "credible justice"-- justice that potential allies in the Mideast might find convincing. Few abroad will likely respect the judgments of an extraordinary court designed to convene in secret to punish a particular class of suspect-- particularly those of the Muslim faith-- for crimes that could not be prosecuted in a standing, open, regularly constituted court. Nor should we promote a system of preventive detention that is likely to become a breeding ground for terrorists, as occurred in the British prisons for the Northern Irish, particularly if those courts will never win credibility abroad and may eventually be found unconstitutional in any event. As a nation, we should not accept that indefinite detention without trial, abusive interrogation, and other unacceptable practices have somehow become necessary features of a post-9/11 world. We should appoint good judges and give our standing civilian and military courts their proper role in the system of separation of powers, not further damage our reputation abroad by trying to appoint antiterror judges or creating tribunals that will be widely perceived as rubber stamps for executive action.³³

The arrival of a new Congress along with the new President in 2009 should also create an occasion for revisiting the foreign intelligence surveillance amendments of 2008.³⁴ Unlike the controversial legislation enacted hastily in 2008, the previous version of FISA resulted from extensive hearings and bipartisan legislative process following the resignation of President Nixon during Watergate. Similar legislative hearings should be held early in the next Congress, with greater emphasis on examining the impact of widespread datamining and government surveillance on privacy protections and less emphasis on narrow demands for immunity by telephone and internet service providers. Such hearings should also evaluate, on a thirty-year record, the proven strengths and

Goldsmith & Neal Katyal, Op-Ed., *The Terrorists' Court*, N.Y. Times, July 11, 2007 (urging that detention determinations be made by life-tenured Article III judges, selected by the Chief Justice of the U.S. Supreme Court, similar to the selection of judges who serve on the Foreign Intelligence Surveillance Court).

³¹ See Richard B. Zabel and James J. Benjamin, Jr., *In Pursuit of Justice. Prosecuting Terrorism Cases in the Federal Courts* (MAY 2008) (available at <http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf>) [hereinafter *In Pursuit of Justice*] (including quantitative analysis and based upon interviews with judges, prosecutors and defense lawyers with firsthand experiences in terrorism cases).

³² *Hamdan v. Rumsfeld*, *supra* note 29 (underscoring value of proceeding in regularly constituted courts); *Boumediene v. Bush*, *supra* note 27.

³³ Other specific policy suggestions for detention policy are elaborated in the Joint Scholars' Statement of Principles for a New President on U.S. Detention Policy: An Agenda for Change, *supra* note 24.

³⁴ If there were political will to do the job seriously, careful legislative hearings could also reexamine the impact of the Patriot Act on civil liberties before it becomes a permanent part of our legal landscape.

weaknesses of the Foreign Intelligence Surveillance Court as a specialized judicial institution designed to protect both privacy and national security concerns.

D. Supporting International Law and Institutions: Finally, respect for the rule of law should not be limited to domestic constitutional law. The next President should recall the words of our founders in the Declaration of Independence to pay “decent respect to the opinions of mankind” by supporting, not attacking, the institutions and treaties of international human rights law.³⁵ Despite the Bush Administration’s vocal opposition to the International Criminal Court (ICC), for most of its second term, the Administration has pursued a policy of *de facto* acceptance of the Court’s existence, passively supporting the prosecutions of high-level leaders in Sudan and war criminals in Uganda and the Congo. To make this policy official, at the earliest opportunity, the new Secretary of State should withdraw the Bush Administration’s May 2002 letter to the United Nations “unsigned” the U.S. signature to the Rome Treaty creating the ICC, restoring the *status quo ante* that existed at the end of the Clinton Administration.³⁶

The new Administration should publicly support the efforts of the ICC Prosecutor to convict those most responsible for the genocide in Darfur and provide prosecutorial and intelligence resources to the Prosecutor’s staff, much as the U.S. government provided for the prosecutorial staff at the International Criminal Tribunals for Yugoslavia and Rwanda.³⁷ The new Administration should also declare its commitment to preventing future genocides and mass atrocities by adopting the recommendations of the Genocide Prevention Task Force of the Holocaust Museum, co-chaired by former Secretaries of State and Defense Madeleine Albright and William Cohen.³⁸ In addition, the Administration should reengage diplomatically with the Contracting Parties to the ICC to seek resolution of outstanding U.S. concerns and pave the way for eventual U.S. ratification of the Rome Treaty.

To further signal its support for accountability for human right violations, the new Administration should move the State Department’s Ambassador-at-Large for War Crimes into a standing bureau, the Bureau of Democracy, Human Rights and Labor, and clarify that the Ambassador-at-Large’s mandate includes both genocide monitoring and prevention coordination. At the same time, the Administration should broaden the

³⁵ See, e.g., the comments of Senator McCain, *supra* note 20.

³⁶ See Letter from John R. Bolton, Under Secretary of State for Arms Control and International Security, to Kofi Annan, U.N. Secretary General (May 6, 2002), available at <http://www.state.gov/r/pa/prs/ps/2002/9968.htm>. Although the United States did not initially accede to the Rome Statute of the International Criminal Court, President Clinton ultimately signed the treaty on December 31, 2000, just before leaving office. See *Clinton’s Words: “The Right Action,”* N.Y. TIMES, Jan. 1, 2001, at A6.

³⁷ For example, the United States could provide evidence or experienced prosecutors to support ICC prosecutions—as was done when the United States made classified evidence available to the International Criminal Tribunal for the former Yugoslavia (ICTY) to support the indictment of Slobodan Milosevic—as well as cooperate in the extradition to the ICC of suspects located on U.S. territory. Such cooperation would help shift the United States toward a more pragmatic long-term policy of cooperating with the ICC. See generally Harold Hongju Koh, *Foreword: On American Exceptionalism*, 55 Stanford L. Rev. 1479, 1509 (2004).

³⁸ See <http://www.ushmm.org/conscience/taskforce/>

mandates of the anti-trafficking and war crimes units of the Justice Department's Criminal Division. In addition, the Attorney General should appoint a point person in the Justice Department's Civil Rights Division to play the role played by that division during the Carter and Clinton Administrations of monitoring (and where appropriate, supporting) accountability efforts of human rights victims in Alien Tort Claims Act and Torture Victim Protection Act cases. The transition team for the Civil Division of the Justice Department should also survey pending human rights cases against former U.S. government officials to ensure that overly expansive claims of state secrets or immunity have not been asserted.

Finally, at the earliest opportunity, the new Administration should signal its willingness to endorse universal standards by re-engaging in the Kyoto Protocol process and moving the long-overdue ratifications of a number of key treaties.³⁹ The new Administration should also signal its readiness to resume a leading role on human rights issues by promoting and ratifying the new U.N. Conventions on Disability Rights and Against Forced Disappearances, seeking a seat on the new United Nations Human Rights Council, and engaging with the UN Secretary-General and High Commissioner for Human Rights to develop and promote a common human rights agenda for the next decade.

In short, the new Administration should clearly announce that it will not allow its policy toward international law and human rights to be subsumed entirely by the War on Terror. As recent months have shown, there are simply too many other global issues--ranging from the global economy, to energy policy, to climate change, to public health--that demand America's urgent attention. The new President should clearly announce his intent to engage those issues in a way that lives up to America's historically high standards of international responsibility and respect for the rule of international law.

III. *Conclusion*

Since all of us have been alive, the United States has been recognized as the world's human rights leader. From World War II until September 11, ours was universally regarded as a nation that valued human rights and the rule of law, that spoke out against injustice and dictatorship in other countries, and that tried to practice what we preached. Of course, we were never perfect, but we were usually thought to be sincere. Other countries would listen to what Americans had to say because we were powerful, but they thought us powerful in part because they thought us principled.

Ours is a country built on human rights. Quite simply, our commitment to human rights and the rule of law define who we are, as a nation and a people. If this country no longer stands for these principles, we really don't know who we are anymore.

³⁹ The most obvious candidates are the U.N. Convention on the Law of the Sea, the American Convention on Human Rights, the UN Convention for the Elimination of Discrimination Against Women (CEDAW), the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Rights of the Child (which remarkably, only one other nation in the world has not yet ratified).

As difficult as the last seven years have been, they loom far less important in the grand scheme of things than the next eight, which will determine whether the pendulum of U.S. policy swings back from the extreme place to which it has been pushed, or stays stuck in a “new normal” position under which our policies toward national security, law and human rights remain wholly subsumed by the “War on Terror.” To regain our global standing, the next President and Congress must unambiguously reassert our historic commitments to human rights and the rule of law as a major source of our moral authority.

Thank you. I look forward to answering any questions you may have.

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**TESTIMONY OF
ELISA MASSIMINO**

**EXECUTIVE DIRECTOR AND CHIEF EXECUTIVE OFFICER
HUMAN RIGHTS FIRST**

**HEARING ON
RESTORING THE RULE OF LAW**

**BEFORE THE
UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS AND PROPERTY RIGHTS**

September 16, 2008

I. Introduction

Chairman Feingold, Ranking Member Brownback and Members of the Subcommittee, thank you for inviting me to be here today to share the views of Human Rights First on what must be done to restore the rule of law in the area of detention and prisoner treatment policy. We are grateful for the Subcommittee's persistent attention to these important matters, and we look forward to continuing to work with Subcommittee Members into the next Congress and the next Administration to ensure that U.S. detention and interrogation policies uphold the government's domestic and international legal obligations and respect American values.

My name is Elisa Massimino, and I am the Chief Executive Officer and Executive Director of Human Rights First. Human Rights First works in the United States and abroad to promote a secure and humane world by advancing justice, human dignity and respect for the rule of law. We support human rights activists who fight for basic freedoms and peaceful change at the local level; protect refugees in flight from persecution and repression; help build a strong international system of justice and accountability; and work to ensure that human rights laws and principles are enforced in the United States and abroad.

For nearly thirty years, Human Rights First has been a leader in the fight against torture and other forms of official cruelty. Human Rights First was instrumental in drafting and campaigning for passage of the Torture Victims Protection Act and played an active role in pressing for United States ratification of the Convention Against Torture and other forms of Cruel, Inhuman or Degrading Treatment or Punishment. We worked for passage of the 1994 federal statute that makes torture a felony and for passage of the 2005 McCain Amendment, which reinforces the ban on cruel, inhuman or degrading treatment of all detainees in U.S. government custody, regardless of their location or legal status. We fought efforts by the current administration to weaken the humane treatment requirements of the Geneva Conventions, and have advocated for measures that would enforce existing prohibitions on torture and other official cruelty. Over the past seven years, Human Rights First has published a number of groundbreaking reports on U.S. detention and interrogation policy including: *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts*; *Tortured Justice: Using Coerced Evidence to Prosecute Terrorist Suspects*; *Leave No Marks: Enhanced Interrogation Techniques and the Risk of Criminality* (a joint report with Physicians for Human Rights); *Behind the Wire: An Update to Ending Secret Detentions*; and *Command's Responsibility: Detainee Deaths in U.S. Custody in Iraq and Afghanistan*. These reports document a system of interrogation, detention and trial of prisoners that bears none of the hallmarks – consistency, predictability and transparency – of the rule of law.

II. What is at Stake

Restoring our Nation's commitment to the rule of law must be a top priority for the next president of the United States. Words will be important; but, particularly because of the way the current administration has sought to distort, obscure and evade the clear language of the law, words will not be enough. The actions of the next

administration will either confirm Vice President Cheney's assertion that the drift away from the rule of law – which necessitates today's hearing – is "the new normal," or they will prove him wrong. The world will be watching what we do.

Indeed, the world has been watching all along. The erosion of human rights protections in the United States in the aftermath of September 11 has had a profound impact on human rights standards around the world. Over the last seven years, the United States has become identified with its selective observation of international human rights treaties to which it is bound, a pattern that has weakened the fabric of human rights norms and emboldened other governments to do the same. A growing number of countries have adopted sweeping counterterrorism measures into their domestic legal systems, at times significantly expanding on the substance of U.S. measures while explicitly invoking U.S. precedent. Opportunistic governments have co-opted the U.S. "war on terror," citing support for U.S. counterterrorism policies as a basis for internal repression of domestic opponents. In some instances, U.S. actions have encouraged other countries to disregard domestic and international law when such protections stand in the way of U.S. counterterrorism efforts.

In the course of my work I often meet with human rights colleagues from around the world, many of them operating in extremely dangerous situations. When I ask how we can support them as they struggle to advance human rights and democratic values in their own societies, invariably their answer is: "get your own house in order. We need the United States to be in a position to provide strong leadership on human rights."

The next president will have an opportunity to restore that leadership. This December, we mark the 60th anniversary of the Universal Declaration of Human Rights. Adopted by the United Nations in 1948, the Declaration calls on member states to recognize "the inherent dignity . . . and equal and inalienable rights of all members of the human family." If the president-elect embraces the agenda set out in this testimony, we will be able to celebrate that anniversary as the beginning of a return by the United States to respect for the most fundamental human rights principles.

You have asked me to focus today on concrete steps the United States must take in order to realize a return to the rule of law in two key areas: enforcing the prohibitions on torture and other cruel and inhuman treatment of prisoners; and abandoning the failed experiment at Guantánamo in favor of the proven effectiveness—and due process—of our federal criminal justice system. Taking these steps will go a long way toward restoring the essential moral authority of the United States as a leader for human rights and will strengthen national security by contributing to a more effective counterterrorism strategy.

III. Ending Torture and Policies that Facilitate Torture: The Case for a Clean Break

U.S. detention and interrogation policy over the past seven years has been marked by ongoing violations of fundamental humane treatment standards rationalized by a series of secret legal opinions that have stretch the law beyond recognition. Such violations

range from abusive interrogations sanctioned by Department of Justice memoranda to renditions of individuals to torture and the maintenance of a secret detention system shielded even from the confidential visits of the International Committee of the Red Cross (ICRC). The return to a detention policy that is firmly rooted in the rule of law—not in loophole lawyering—is essential both to restoring the moral authority of the United States and to ensuring the success and sustainability of U.S. counterterrorism efforts going forward.

Abusive detention policies have inhibited intelligence cooperation with close allies¹ and interfered with the ability of allied governments to coordinate detention operations with our military.² Forty-nine retired general and flag officers have joined in urging the United States to end these immoral, ineffective, and un-American practices, which increase the risk of abuse against U.S. military personnel captured by the enemy, now and in future wars.³

On the battlefield in Afghanistan and Iraq, the military has learned the importance of ensuring that prisoners are treated humanely. The joint Army-Marine Corps Counterinsurgency Manual issued in June 2006 makes clear that in order to gain the popular support it needs to confront insurgency threats, the United States must send an unequivocal message that it is committed to upholding the law and basic principles of human dignity:

Efforts to build a legitimate government through illegitimate action—including unjustified or excessive use of force, unlawful detention, torture, or punishment without trial—are self-defeating, even against insurgents who conceal themselves amid noncombatants and flout the law. . . . Any human rights abuses or legal violations committed by U.S. forces quickly become known throughout the local population and eventually around the world because of the globalized media and work to undermine the COIN [Counterinsurgency] effort.⁴

General David Petraeus, then-Commander, Multi-National Force-Iraq, reiterated this message in a May 2007 open letter to the troops serving under his command:

This fight depends on securing the population, which must understand that we—not our enemies—occupy the moral high ground. . . . In everything

¹ See e.g. Hearing of the S. Comm. on Armed Services, 110th Cong. 5 (2008) (written statement of Alberto J. Mora) *Available at* <http://armed-services.senate.gov/statemnt/2008/Junc/Mora%2006-17-08.pdf>; CBC NEWS, *The Controversy Over Detainees*, April 27, 2007 *at* <http://www.cbc.ca/news/background/afghanistan/detainees.html>; Glenn Kessler, *Europeans Search for Conciliation With U.S.*, WASHINGTON POST, Dec. 9, 2005 *available at* <http://www.washingtonpost.com/wpdyn/content/article/2005/12/08/AR2005120800995.html>.

² See e.g. Raymond Bonner & Jane Perlez, *British Report Criticizes U.S. Treatment of Terror Suspects*, N.Y. TIMES, July 28, 2007.

³ Letter from 49 Admirals and Generals to the Senate Armed Services Committee, Sept. 12, 2006 *available at* <http://www.humanrightsfirst.org/media/etn/2006/alert/107/index.htm>.

⁴ U.S. Department of Defense, FM 3-24/MCWP 3-33.5, *Counterinsurgency*, (Dec. 2006), p. 1-19.

we do we must observe the standards and values that dictate that we treat noncombatants and detainees with dignity and respect.⁵

The costs of the current policy of official cruelty are now manifest and include loss of leadership internationally and damage to the war effort. The next president of the United States should also understand the strategic security *gains* to be reaped from shifting to a policy of complete, consistent and transparent compliance with human rights norms. Accordingly, the U.S. government should strictly uphold the existing ban on torture and other cruelty.

A. Uncovering Lessons Learned

Through extensive document requests and multiple hearings, Congress has already shed much light on the extent of abuse of detainees in U.S. custody.⁶ But there is much the American people still do not know about the parameters of the CIA secret detention and interrogation program and how abusive interrogation techniques came to be approved at the highest levels of government. There must be a thorough, comprehensive and sober examination—across all agencies involved—of policies and practices that led to the official sanctioning of torture and other cruelty in order to inoculate against future abuse, identify the most effective means of prevention and demonstrate that the United States is now committed to treating all prisoners humanely.

The current administration has engaged in a shell game of legal justifications to rationalize its policy of official cruelty and secret detentions.⁷ A true accounting of past abuses will require that these relevant legal opinions, including those no longer in force, be made public. The next president should direct the appropriate agency heads to review the classification of these documents—where classification is an issue—and to the maximum extent possible publicly release memoranda and documents authorizing or providing legal clearance of secret detention, rendition and coercive interrogations by all agencies. It is imperative that the public and Congress have a full understanding of the faulty reasoning that was used to circumvent humane treatment standards so that these standards can be effectively fortified in the future.

In order to facilitate this exercise, the next President should work with Congress to appoint a non-partisan commission of distinguished Americans to examine, and

⁵ David H. Petraeus, General, United States Army, Commanding, *Letter to Soldiers, Sailors, Airmen, Marines and Coast Guardsmen serving in Multi-National Force-Iraq*, May 10, 2007.

⁶ See e.g. Senate Judiciary Committee Hearing on Coercive Interrogation Techniques, 110th Congress (June 10, 2008); House Foreign Affairs Subcommittee on International Organizations, Human Rights, and Oversight Hearing on Extraordinary Rendition, 110th Congress (June 10, 2008); House Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties and House Foreign Affairs Subcommittee on International Organizations, Human Rights, and Oversight Joint Hearing on the Maher Arar Deportation Investigation, 110th Congress (June 5, 2008); Senate Judiciary Committee Hearing on Improving Detainee Policy, 110th Congress (June 4, 2008); House Foreign Affairs Subcommittee on International Organizations, Human Rights, and Oversight Holds Hearing on the FBI's Role at Guantánamo Bay, 110th Congress (June 4, 2008).

⁷ See e.g. Scott Shane, D. Johnston and James Risen, Secret U.S. Endorsement of Severe Interrogations, N.Y. TIMES, Oct. 4, 2007.

provide a comprehensive report on, policies and actions related to the detention, treatment, and transfer of detainees after 9/11 and the consequences of those actions, and to make recommendations for future policy in this area

B. The Way Forward

If the United States is to reclaim what General Petraeus referred to as the “moral high ground” in our counterterrorism and counterinsurgency efforts, then it must both decisively abandon abusive practices and take bold steps to reinforce existing prisoner treatment standards—including the Convention against Torture, Common Article 3 of the Geneva Conventions, the domestic Anti-Torture Statute, the McCain Amendment, and other applicable laws. To demonstrate a renewed commitment to humane treatment standards, and to ensure clarity about what the United States means when it pledges to the world that it will treat prisoners humanely, the next president should take the following concrete steps:

- **Revoke and repudiate all existing orders and legal opinions that authorize cruel interrogations or secret detention or imply that legal standards of humane treatment differ when applied to the CIA.** This would include revoking Executive Order 13440, which authorizes the CIA to maintain a secret detention program using interrogation techniques that have been rejected by our own military as unlawful and unproductive. In addition, the next president should revoke the reported September 17, 2001 Executive Order, and any other directive not yet made public which authorizes the CIA detention and interrogation program. The next president should enforce a single standard of humane treatment of prisoners across all government agencies, based on the military’s Golden Rule standard: we must not engage in conduct that we would consider unlawful if perpetrated by the enemy against captured Americans.
- **End the practice of holding “ghost prisoners” and acknowledge such practices as illegal.** Timely notification and access to *all* detainees in the custody of *any* U.S. government agency should be required to be given to the ICRC (such a requirement is included in this year’s Senate intelligence authorization bill). In addition, the next president should sign, and the United States should ratify, the International Convention for the Protection of all Persons from Enforced Disappearances.
- **Sign and request advice and consent of the Senate to ratification of the Optional Protocol to the Convention Against Torture.** The Optional Protocol requires states party to the treaty to allow visits by experts of the UN Committee Against Torture to prisons and other facilities where people are being deprived of their liberty. The object of the Optional Protocol is to prevent torture and other unlawful abuse of prisoners, and its ratification by the United States would send a clear message to the world that the United States is serious about upholding its obligations to treat prisoners humanely.

- **Urge Congress to enact legislation requiring the videotaping of all intelligence interrogations of individuals in the custody of the military or intelligence community.** Such recording, as is provided for in the House version of National Defense Authorization Act for Fiscal Year 2009, would actually *strengthen* intelligence-gathering, as it would allow the careful examination of body language, and source and collector interaction, and could be used for training effective interrogation techniques. Videotaping also would simultaneously help to deter abuse of detainees and protect interrogators from spurious claims of abuse.
- **Invest in efforts by the intelligence community to pursue effective means of intelligence gathering that rely on humane treatment.** In June 2008 Human Rights First hosted a forum for 15 senior interrogators, interviewers and intelligence officials with more than 350 years collective field experience in the U.S. military, the FBI and the CIA. These intelligence experts unanimously agreed that more resources are needed to support the *non-coercive*, traditional, rapport-based interrogation approaches that provide the best possibility for obtaining accurate and complete intelligence, instead of ineffective cruelty that actually can impede efforts to elicit actionable information.⁸ Such resources should support efforts such as further professionalizing the interrogation field, researching best practices and lessons learned, and developing language and cultural skills.
- **Support legislation to ensure that the government has jurisdiction over U.S. government civilians and contractors implicated in detainee abuse.** The Attorney General has expressed concern that current law does not provide sufficient jurisdiction over U.S. government contractors for violent abuses committed overseas. Congress should clarify and expand the Military Extraterritorial Jurisdiction Act to ensure effective enforcement of prohibitions on torture and other abuse committed by civilian personnel of the U.S. government. The U.S. government should neither send nor employ any civilians abroad to interrogate prisoners without ensuring that it has the ability—and devotes the resources necessary—to prosecute such individuals when they are implicated in serious abuse.
- **Declare a moratorium on extraordinary renditions and develop with Congress effective law and regulations to ensure that the United States is not complicit in torture.** Recent experience has demonstrated that existing rendition procedures, including those that permit reliance on bare assurances from the receiving governments, are woefully insufficient to ensure that individuals are safeguarded from transfer to torture. Many Members of Congress, including members of this committee, have offered proposals to enforce the obligation of

⁸ See Human Rights First, Press Release: Top Interrogators Declare Torture Ineffective in Intelligence Gathering, June 24, 2008 available at <http://www.humanrightsfirst.org/media/ctn/2008/alert/313/> (Contains a list of principals on interrogation and humane treatment that all 15 participants agreed to); see also attached Principles for Effective Interrogation.

United States under Article 3 of the Convention Against Torture in the context of renditions. Going forward, Congress and the Executive Branch must work together to devise an effective process that ensures the rendered individual an opportunity to present his fear of torture to an independent decision-maker.

These steps, if adopted, will begin to repair the damage done to America's moral leadership and will send an important signal that the United States is reclaiming our values, ideals, and commitment to humane treatment standards.

IV. Guantánamo: A Failed Experiment

The decision to send detainees to the Guantánamo Bay detention camp was driven in large part by a desire to insulate the detention, interrogation and trial of terrorism suspects there from judicial scrutiny and the rule of law. Early on, one Administration official called Guantánamo "the legal equivalent of outer space." The Administration's goal—to create a law-free zone in which certain people are considered beneath the law—was illegitimate and unworthy of this Nation. Any policy designed to implement it was destined for failure.

And the government's policy at Guantánamo *has* failed, in several important respects. First and most obviously, Guantánamo has failed as a legal matter. The Supreme Court has rejected the government's detention, interrogation and trial policies at Guantánamo each time it has examined them. In its third such decision in June 2008, *Boumediene v. Bush*, the Court ruled that prisoners at Guantánamo have a right to habeas corpus, thereby invalidating the Administration's position that Guantánamo lies beyond the reach of the U.S. Constitution and the federal courts.

One of the foremost obligations of the current Administration since September 11 has been to provide a legal process that could bring those implicated in the horrific acts of that day to justice. But the military commissions at Guantánamo have failed to hold terrorist suspects accountable for the most serious offenses. In more than six years, only one military commission trial has been conducted; none of the suspects implicated in the 9/11 attacks have been tried.

Second, fueled by the assertion that it was a "legal black hole," Guantánamo became a laboratory for a policy of torture and calculated cruelty that later migrated to Afghanistan and Iraq and was revealed to the world in the photographs from Abu Ghraib. These policies aided jihadist recruitment and did immense damage to the honor and reputation of the United States, undermining its ability to lead and damaging the war effort.

Third and perhaps most importantly, the policy at Guantánamo has backfired in terms of our counterterrorism strategy. Labeling Guantánamo prisoners as "combatants" engaged in a "war on terror" ceded an important advantage to al Qaeda, supporting their claim to be "warriors" engaged in a worldwide struggle against the United States and its allies rather than the criminals that they truly are. Accused 9/11 planner Khalid Sheikh Mohammed revealed in this status at his "combatant status review tribunal" hearing at

Guantánamo in March 2007: “For sure I am [America’s enemy],” he said. “[T]he language of any war in the world is killing . . . the language of war is victims.”⁹

Those whose job it is to take the fight to al Qaeda understand what a profound error it was to reinforce al Qaeda’s vision of itself as a revolutionary force engaged in an epic battle with the United States. The new Army-Marine Corps counterinsurgency manual, drafted under the leadership of General Petraeus and incorporating lessons learned in a variety of counterinsurgency operations (including Iraq), stresses repeatedly that defeating non-traditional enemies like al Qaeda is primarily a *political struggle*, and one that must focus on isolating and delegitimizing the enemy rather than elevating it in stature and importance. As the Manual states: “It is easier to separate an insurgency from its resources and let it die than to kill every insurgent. . . . Dynamic insurgencies can replace losses quickly. Skillful counterinsurgents must thus cut off the sources of that recuperative power.”¹⁰

But U.S. counterterrorism policy has taken just the opposite approach. Prolonged detention without charge at Guantánamo, interrogations that violate fundamental human rights norms, and unjust military commissions have impaired counterterrorism cooperation with our allies and nurtured the “recuperative power” of the enemy.

There is now widespread agreement—even among many who initially supported the decision to detain prisoners at Guantánamo—that Guantánamo should be closed. Secretary of State Rice, Secretary of Defense Gates, and President Bush have all said they would like to close Guantánamo. Senators McCain and Obama have each vowed to close the facility as president.

Closing Guantánamo will require comprehensive policy changes and a major investment of domestic and political capital. After seven years of error upon error, the policies underlying the existence of Guantánamo are embedded in law and executive pronouncements. Reversing this will require bold action.

It will be up to the next Congress and Administration to make the difficult choices that will lead us out of the trap that Guantánamo has become, and to construct a counterterrorism policy that instead conforms to the logic of counterinsurgency operations, to international human rights standards, and to the rule of law.

A. Close Guantánamo: Empty the Detention Facility within a Year

In July 2007, President Bush said: “I’d like to close Guantánamo, but I also recognize that we’re holding some people there that are darn dangerous and that we better have a plan to deal with them in our courts.” More than a year later—and despite growing recognition, even inside the current Administration, that Guantánamo is hurting

⁹ By contrast, when Federal District Judge William Young sentenced Richard Reid to life plus 110 years in federal prison in 2003, this is what he said: “You’re a big fellow. But you’re not that big. You’re no warrior. I know warriors. You are a terrorist. A species of criminal guilty of multiple attempted murders.”

¹⁰ U.S. Department of Defense, FM 3-24/MCWP 3-33.5, Counterinsurgency, (December 2006), p. 1-23.

U.S. interests—paralysis has set in, and no one in the Administration appears to be prepared to move.

In August 2008, Human Rights First unveiled the attached detailed, multi-phased blueprint for closing Guantánamo during the first year of the next Administration.¹¹ Our blueprint sets forth a series of recommendations in three phases—one month, six months, and twelve months into the next Administration—based on our extensive study of Guantánamo, military commissions and the federal criminal justice system.

Human Rights First observers have made 25 trips to Guantánamo and have attended nearly every military commission hearing since the proceedings began in 2004. Beginning in November 2007, Human Rights First participated in an inter-disciplinary and nonpartisan Working Group on Guantánamo and Detention Policy convened by the Center for Strategic and International Studies (CSIS). CSIS has issued an important and detailed plan for closing Guantánamo drawn from the findings of the working group.¹²

Human Rights First's blueprint for closing Guantánamo is based on our belief that Guantánamo has become a symbol of injustice, of expediency over fundamental fairness, and of this country's willingness to set aside its core values and beliefs. But, if the prison facility is closed, but the policies pursued there persist in another venue, the objectives prompting the closure of Guantánamo will not be achieved. Creating a state-side replica of the system for detaining and trying suspects at Guantánamo, as some have proposed, would raise serious practical and constitutional questions, and would likely perpetuate the same bureaucratic incentives that resulted in prolonged detention without trial at Guantánamo.

Part of the current problem with Guantánamo is that the system lacks incentives to force decisions about who to transfer and who to try. Under current policy, Guantánamo prisoners can be held without trial for an indefinite period. If they are tried and convicted in a military commission, they remain in detention—perhaps even after their sentences are served; if they are tried and acquitted, they may also remain in detention.

The next president should announce his intention to empty the Guantánamo facility within one year. Setting a firm and definitive deadline for closing Guantánamo would change the existing incentive structure and create a new sense of urgency to separate those whom the United States suspects of having committed crimes from the rest.

The remaining prisoners at Guantánamo fall into three groups:

¹¹ See "How to Close Guantánamo: Blueprint for the Next Administration," <http://www.humanrightsfirst.org/pdf/080818-USLS-gitmo-blueprint.pdf>.

¹² See "Closing Guantánamo: From Bumper Sticker to Blueprint," <http://www.csis.org/hrs/gtmreport/>.

- **Prisoners suspected of having committed crimes against the United States.** These should be prosecuted in regular criminal courts or in court-martial proceedings under the Uniform Code of Military Justice (UCMJ).
- **Prisoners suspected of having committed crimes in their home countries or third countries.** These should be transferred for prosecution in accordance with international human rights obligations and humanitarian laws.¹³
- **Prisoners not suspected of any criminal activity.** These should be repatriated to their home countries whenever possible in accordance with international human rights and humanitarian law obligations. Those who face a substantial likelihood of torture in their own countries should be resettled in third countries.

To succeed, this plan requires the cooperation of third countries. U.S. allies, particularly European leaders who have called most loudly for the prison to be closed, must help and not just criticize. It is true that the United States climbed into this box alone, but those of our allies who truly want to see the end of Guantánamo will have to help us get there. To the extent Guantánamo and other failures of the current Administration's counterterrorism policy have promoted terrorist recruitment, this is more than just a U.S. problem now. And our allies have a shared interest and responsibility to help fix it.

The next president and next Congress will need to take swift action that demonstrates to the international community their complete rejection of this Administration's policies and their clear intention to close Guantánamo and steer a new course:

- **Immediately improve conditions of confinement at Guantánamo.** Increasing access to family members through video- and tele-conferencing, improving access to counsel, and reducing the use of solitary confinement will ease the burden of isolation experienced by many Guantánamo prisoners and bring U.S. policy more in line with international treatment obligations. In addition, providing prisoners' families access to regular health assessments and other appropriate data, as is done for the families of U.S. detainees in Iraq, will inspire international confidence that the United States is treating prisoners with appropriate care.
- **Resettle some Guantánamo prisoners in the United States.** Then-Secretary of Defense Donald Rumsfeld's early pronouncements that all Guantánamo prisoners are all dangerous terrorists engendered reluctance on the part of other countries to

¹³ Facilitating the transfer of some detainees for criminal prosecution is essential to closing Guantánamo, but those transfers must be conducted responsibly. "Arbitrary Justice," a recent Human Rights First report, studied the transfer of prisoners from Bagram and Guantánamo to the Afghan government for criminal prosecution and found that the criminal trials held in Afghanistan fail to meet international or Afghan fair trial standards. See <http://www.humanrightsfirst.info/pdf/USLS-080409-arbitrary-justice-report.pdf> In the future, countries should be pressed to conduct prosecutions in accordance with international fair trial standards. The U.S. government should assist in this effort by providing these countries with information in its possession, including witness names and statements, interrogation reports and exculpatory evidence.

accept prisoners now found years later to pose no danger. Our failure to resettle any such prisoners here in the United States has only compounded that reluctance. A small number of prisoners who have not committed crimes against the United States, and whose individual circumstances make them eligible for relief, should be resettled here.¹⁴ This would send an important message and likely would increase the willingness of third countries to accept some prisoners themselves. It may also be necessary to convince other countries to accept their *own* citizens and legal residents.

- **Manage effectively the risk posed by repatriation and resettlement.** Releasing some of the prisoners at Guantánamo will require an assumption of some risk. But that risk can be managed, and it is undoubtedly less than the risk posed by the continued detention of more than 200 Guantánamo prisoners without criminal charge. Risk management can be achieved by performing individualized risk assessments of detainees selected for repatriation and resettlement; obtaining appropriate security assurances from receiving countries; making transfers on a rolling basis to ease the burden on home countries; and passing legislation to invest in reintegration programs modeled after the Saudi rehabilitation program, which led to the transfer of more than 100 Saudis out of Guantánamo.

B. Repeal the MCA and Terminate the Military Commissions

In March of last year, I testified before the House Armed Services Committee and urged that terrorist suspects at Guantánamo be tried in regular federal courts or pursuant to the Rules of Courts-Martial under the UCMJ. Such trials would satisfy the requirement of the laws of war—and of our own laws—that sentences be carried out pursuant to a “previous judgment pronounced by a *regularly constituted court* affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”¹⁵ That remains our view.

¹⁴ For example, the Uighers are one group of detainees that could be settled in the United States. The United States has small Uigher communities in Los Angeles, San Francisco, New York and Washington, D.C., and these communities have already agreed to provide assistance. If the United States takes some Uighers, other countries with Uigher communities, such as Canada and Germany, may be willing to negotiate resettlement agreements for those Uighers who remain.

¹⁵ See Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field, Aug. 12, 1949, *entered into force* Oct. 21, 1950, 6 *U.S.T.* 3217, 75 U.N.T.S. 31, *available at* <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/fe20c3d903ce27e3c125641e004a92f3>; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, *entered into force* Oct. 21, 1950, 6 *U.S.T.* 3217, 75 U.N.T.S. 85, *available at* <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/44072487ec4c2131c125641e004a9977>; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, *entered into force* Oct. 21, 1950, 6 *U.S.T.* 3316, 75 U.N.T.S. 135, *available at* <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6fef854a3517b75ac125641e004a9e68>; Geneva Convention Relative to the Protection of Civilian Persons in Times of War, Aug. 12, 1949, *entered into force* Oct. 21, 1950, 6 *U.S.T.* 3516, 75 U.N.T.S. 287, *available at* <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6756482d86146898c125641e004aa3c5>.

Human Rights First opposed the Military Commissions Act (MCA). Even some Members of Congress who voted for it did so while expressing the hope that the courts would step in to remedy its many defects.

Congress should not wait for the courts to come to the rescue, nor should it merely tinker with the machinery of military commissions. Instead, Congress should repeal the MCA and embrace its responsibility to ensure that suspected terrorists are brought to justice in proceedings worthy of this country.

The defects of the MCA are many and have been well-documented by Human Rights First¹⁶ and others. They include permitting coerced evidence, rules for classified evidence that prevent the defendant from seeing evidence that may show innocence or lack of responsibility, and violating the basic due process requirement that a person cannot be held criminally responsible for an action that was not legally prohibited at the time it was taken.

One of the most telling indictments of the military commissions is the way the system looks up close in actual practice. Recently Human Rights First observers attended the first military commission trial held at Guantánamo, of Salim Hamdan. There is no question that the defects in the MCA infected Hamdan's trial. Though the judge excluded some of Hamdan's statements obtained following coercive interrogations at Bagram, he admitted other statements extracted under abusive conditions at Guantánamo, conditions that included sleep deprivation and sexual humiliation.

The MCA itself is just one component of the problem. The military commission system has shown itself vulnerable at every turn to unlawful influence, manipulation and political pressure. Air Force Brig. Gen. Thomas Hartmann, the Pentagon's chief legal advisor to the military commissions, has already been disqualified from his role in three Guantánamo trials because of the perception that he is biased toward the prosecution. Gen. Hartmann still has legal advisor status in fourteen other cases, but defense lawyers in several of those cases also have filed motions to disqualify him based on unlawful command influence.

The military commissions at Guantánamo are staffed by many talented, dedicated and honorable service personnel. But the system itself is illegitimate, and no amount of good will or good lawyering can change that. It is abundantly clear from our observations of trial proceedings there why Common Article 3 of the Geneva Conventions requires, as a prerequisite for passing sentences and carrying out executions, trials by a "regularly constituted court." The system in operation at Guantánamo does not come close to passing that test.

¹⁶ See "Tortured Justice: Using Coerced Evidence to Prosecute Terrorist Suspects," <http://www.humanrightsfirst.info/pdf/08307-etn-tortured-justice-web.pdf>

C. Try Suspects in Federal Criminal Courts

Some say the answer to the failings of the military commissions lies in creating yet another substitute system for detaining and trying terrorist suspects. But such a detour risks embroiling the next President in prolonged legal challenges that would obviate many of the advantages of closing Guantánamo and ending military commissions. Most importantly, no new system has been proven necessary.

Last year, Human Rights First asked two former federal prosecutors from the Southern District of New York—Richard Zabel and James Benjamin, now partners at Akin Gump Strauss Hauer & Feld—to carefully examine and evaluate international terrorism prosecutions brought in the federal courts. Their report, *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts*, published by Human Rights First in May 2008, examines more than 120 terrorism cases prosecuted over the past 15 years, ranging from epic mega-trials for completed acts of terrorism to individual, pre-emptive prosecutions focused on prevention.¹⁷ It draws on the personal perspectives of judges, prosecutors and defense lawyers with firsthand terrorism litigation experience, as well as the views of security experts and academics. The focus of the examination is on the legal and practical issues that confront courts, law enforcement, and Congress regarding terrorism-related crimes. *In Pursuit of Justice* concludes that the federal system has capably handled important and challenging terrorism cases without compromising national security or sacrificing rigorous standards of fairness and due process.

The report found that:

- Prosecutors have invoked a host of specially-tailored anti-terrorism laws and longstanding, generally-applicable federal criminal statutes to obtain convictions in terrorism cases.
- Courts have consistently exercised jurisdiction over defendants brought before them, even those defendants apprehended by unconventional or forcible means.
- Existing criminal statutes and immigration laws provide an adequate basis to detain and monitor suspects in the vast majority of known cases.
- Applying the Classified Information Procedures Act (CIPA), courts have successfully balanced the need to protect national security information, including the sources and means of intelligence gathering, with defendants' fair trial rights.
- *Miranda* warnings are not required in battlefield and non-custodial interrogations or interrogations conducted purely for intelligence-gathering purposes, and *Miranda* requirements have not impeded successful criminal terrorism prosecutions.

¹⁷ "In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts," <http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf>

- The Federal Rules of Evidence, including rules that govern the authentication of evidence collected abroad, provide a common-sense, flexible framework for guiding admissibility decisions.
- The Federal Sentencing Guidelines and other applicable sentencing laws prescribe severe sentences for many terrorism offenses, and experience shows that terrorism defendants have generally been sentenced to lengthy periods of incarceration.
- Courts are well able to assure the safety and security of trial participants and observers.

The justice system is not perfect, of course. Some terrorism cases have posed difficult challenges for the federal courts. But these challenges have not prevented the trials from proceeding successfully. To the contrary, the federal system has proved to be highly adaptive and flexible in delivering justice in these cases.

Many judges support our view that the federal system adequately meets the special challenges presented by terrorism prosecutions. In testimony before the Senate Judiciary Committee in June 2008, Judge John Coughenour, who presided over the trial of the trial of “millennium bomber” Ahmed Ressam, remarked: “It is my firm conviction, informed by 27 years on the federal bench, that the United States courts, as constituted, are not only an adequate venue for trying suspected terrorists but also a tremendous asset against terrorism. Indeed, I believe it would be a grave error with lasting consequences for Congress, even with the best of intentions, to create a parallel system of terrorism courts unmoored from the values that have served us so well for so long.” Similarly, during a speech at American University’s Washington College of Law in February 2008, Judge Leonie Brinkema, presiding judge in the trial of Zacarias Moussawi, said: “I think that we need to seriously think about the implications of getting away from the standard criminal justice model for these cases. ... [We must not be] so overcome with fear that we jettison fundamental principles of our legal and political system. It’s something that we absolutely have to remember. You can address the terrorist threat with tools that we have if the people who are running those tools do their job.”

While *In Pursuit of Justice* does not respond directly to the proposals of those who advocate a substitute justice system—such as “preventive detention” or a “national security court”—I would note here two significant disadvantages of such schemes:

First, it has become increasingly clear that many prisoners were sent to Guantánamo, rather than being indicted and tried in federal court, because sending them to Guantánamo relieved the government of the burden of doing the hard work of investigation and prosecution. A new system of indefinite or “preventive” detention would continue to relieve the government of this burden; in fact, it would undercut the incentive to use the criminal justice system at all. But if U.S. counterterrorism policy consists of detaining indefinitely everyone who harbors hostility toward the United States, we must face the reality that several hundred men at Guantánamo are just a drop in that bucket, and that holding them there without charge or fair trials will eventually

mean that we will need to get many more, and much bigger, buckets. Second, creating a national security court would require devising from scratch the procedures, precedents, and body of law that would govern such a court. We already have walked down that path *twice* since 9/11—with the current Administration's unilateral creation of its original military commissions in 2002, and with the MCA. The disarray that has plagued the military commissions at Guantánamo—with abundant litigation and internal dissension within the military command structure—does not bode well for a new system. By contrast, federal courts have amassed many years of experience, a reservoir of judicial wisdom, and a broadly experienced bar to guide the course of particular cases.

Human Rights First continues to study these issues carefully. We urge Congress and the next Administration to consider them as well, and to explore any continuing gaps and shortcomings in the law that can be remedied by revision rather than with the creation of an entirely new court system.

V. Conclusion

The current Administration's misguided embrace of indefinite detention, torture and deeply flawed military commissions has greatly damaged the reputation of the United States, fueled terrorist recruitment and undermined international cooperation in counterterrorism operations. Repairing our reputation as a nation committed to the rule of law will require bold action, including finally closing the detention facility in Guantánamo and demonstrating — in deed, not just in word—an unequivocal commitment to treating all prisoners humanely.

The next Congress and the next Administration will have a window of opportunity to signal to the American people and to the world that the policies of the last seven years were an aberration and that the United States is serious about restoring the rule of law, upholding our Constitution and respecting the international rules and laws our country played such a central role in formulating.

The stakes are incredibly high. In the balance hangs the ability of the United States to: maintain the integrity of our counterterrorism policy; improve intelligence cooperation with allies; support the human intelligence community in employing proven, effective methods for gathering actionable information; and re-establish the moral authority necessary to restore the United States as a world leader in upholding human rights.

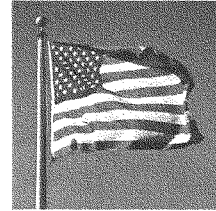
Thank you for your attention to these important matters.

Principles for Effective Interrogation

Developed by Senior Interrogators and Former Intelligence Officials

Summer, 2008

The principles below were developed by 15 individuals who served as senior interrogators, interviewers and intelligence officials in the United States military, the Federal Bureau of Investigation, and the Central Intelligence Agency. The group met at a forum hosted by Human Rights First on June 17 and 18, 2008, in Washington, D.C. to discuss the most effective ways to obtain timely and credible information from suspected terrorists and other individuals who threaten the security of the United States.



We believe:

1. **Non-coercive, traditional, rapport-based interviewing approaches provide the best possibility for obtaining accurate and complete intelligence.**
2. **Torture and other inhumane and abusive interview techniques are unlawful, ineffective and counterproductive. We reject them unconditionally.**
3. **The use of torture and other inhumane and abusive treatment results in false and misleading information, loss of critical intelligence, and has caused serious damage to the reputation and standing of the United States. The use of such techniques also facilitates enemy recruitment, misdirects or wastes scarce resources, and deprives the United States of the standing to demand humane treatment of captured Americans.**
4. **There must be a single well-defined standard of conduct across all U.S. agencies to govern the detention and interrogation of people anywhere in U.S. custody, consistent with our values as a nation.**
5. **There is no conflict between adhering to our nation's essential values, including respect for inherent human dignity, and our ability to obtain the information we need to protect the nation.**

Signed by:

Frank Anderson

Frank Anderson worked for the CIA from 1968 until 1995. He served three tours of duty in the Middle East as an agency station chief, headed the Afghan Task Force (1987-1989), and was chief of the Near East Division. He now runs a consulting practice that focuses on the Middle East.

Jack Cloonan

Jack Cloonan served as a special agent with the FBI from 1977 to 2002. He began investigating Al Qaeda in the early 1990's and served as a special agent for the Bureau's Osama bin Laden unit from 1996 to 2002.

**Colonel (Ret.) Stuart A. Herrington,
US Army**

Stu Herrington served thirty years as an Army intelligence officer, specializing in human intelligence/ counterintelligence. He has extensive interrogation experience from service in Vietnam, Panama, and Operation Desert Storm. He has traveled to Guantanamo and Iraq at the behest of the Army to evaluate detainee exploitation operations, and he recently taught a three-day seminar on humane interrogation practices to the Army's 201st MI Battalion, Interrogation, during its activation at Ft. Sam Houston, Texas

Pierre Joly

Pierre Joly has more than 39 years of military intelligence experience. He currently serves as the Vice President of Phoenix Consulting Group where he leads more than 350 employees involved in providing human intelligence training to members of the intelligence community and law enforcement agencies of the United States. Immediately before joining Phoenix he served as the Chief of Controlled Operations at DIA from 2005- 2006 and the Chief of Operations for the Iraq Survey Group in Baghdad from 2003-2004

**Brigadier General (Ret.) David Irvine,
US Army**

General Irvine enlisted in the 96th Infantry Division, United States Army Reserve, in 1962. He received a direct commission in 1967 as a strategic intelligence officer. He maintained a faculty assignment for 18 years with the Sixth U.S. Army Intelligence School, and taught prisoner of war interrogation and military law to soldiers, Marines, and airmen. He retired in 2002, and his last assignment was Deputy Commander for the 96th Regional Readiness Command. General Irvine served 4 terms as a Republican legislator in the Utah House of Representatives, has served as a congressional chief of staff, and served as a commissioner on the Utah Public Utilities Commission.

Steven M. Kleinman

Steve Kleinman is an active duty intelligence officer who has twenty-five years of operational and leadership experience in human intelligence, special survival training, and special operations. He has served as a case officer, as a strategic debriefer, and as an interrogator during Operations JUST CAUSE, DESERT STORM, and IRAQI FREEDOM. He previously served as the DoD Senior Intelligence Officer for Special Survival Training and is currently assigned as the Reserve Director of Intelligence, Surveillance, and Reconnaissance at the Air Force Special Operations Command. As an independent consultant, his engagements have included serving as a senior advisor to the Intelligence Science Board's Study on Educating Information and as a member of the faculty for the U.S. Army Behavioral Science Consulting Team Course.

Dr. George Mandel

Dr. George Mandel, born in Berlin, Germany, came to the US in 1937. He was inducted into the U.S. Army in 1944, and after basic training was transferred to Camp Ritchie, MD, for training in military interrogation because of his knowledge of German. He was then transferred to P.O. Box 1142, outside of Washington, D.C. where he conducted interrogations of German scientists brought to this country as prisoners of war. After a brief stint at Fort Strong, outside of Boston, he returned to 1142 to continue his previous work in military intelligence until the end of the War in Europe. After discharge in 1946 he returned briefly to 1142, and then entered graduate school at Yale University, specializing in organic chemistry. After receiving his Ph.D. he began his career in biochemical pharmacology, at George Washington University School of Medicine, starting as Research Associate in 1949, and promotion to the ranks of Professor. He became chairman of the Department of Pharmacology in 1960, stepped down from that position in 1996 and currently is working there as Professor of Pharmacology & Physiology. His research work has been in drug metabolism, cancer chemotherapy and carcinogenesis.

Joe Navarro

For 25 years, Joe Navarro worked as an FBI special agent in the area of counterintelligence and behavioral assessment. A founding member of the National Security Division's Behavioral Analysis Program, he is on the adjunct faculty at Saint Leo University and the University of Tampa and remains a consultant to the intelligence community. Mr. Navarro is the author of a number of books about interviewing techniques and practice including *Advanced Interviewing* which he co-wrote with Jack Schafer and *Hunting Terrorists: A Look at the Psychopathology of Terror*. He currently teaches the Advanced Terrorism Interview course at the FBI.

Torin Nelson

Torin Nelson is a veteran Human Intelligence (HUMINT) Specialist and interrogator with 16-years of experience working with military and government agencies. He has worked in major theaters of operation in Eastern Europe, the Balkans, Iraq, Afghanistan, and Guantanamo Bay, Cuba. Mr. Nelson has worked in tactical and strategic environments, both as a soldier and civilian advisor. Primary assignments include the 66th Military Intelligence and 300th Military Intelligence Brigades. He has also worked for the US Army Intelligence Center, Southern European Task Force (SETAF), the On-Site Inspection Agency (OSIA, later DTRA), Combined Joint Task Force 170 (later CJTF-Gitmo), CFLCC (Iraq), CJTF-76 (later -82/-101) (Afghanistan), NATO (IFOR, SFOR, and ISAF), as well as numerous military to military joint training exercises. Mr. Nelson is one of the founding members at the Society for Professional Human Intelligence (SPHI). He is currently working in the Middle East as a senior interrogator and mentor.

William Quinn

William Quinn served in the United States Army from 2001 to 2006 as a human intelligence collector, interrogator, and Korean linguist. He was deployed to Iraq from February 2005 to February 2006 in support of Operation Iraqi Freedom, and was stationed at Abu Ghraib and Camp Cropper. Will is currently studying International Politics and Security Studies at Georgetown University and is a cadet in Army ROTC.

Buck Revell

Mr. Revell served a 30-year career (1964-1994) in the FBI as a Special Agent and senior executive. From 1980 until 1991, Mr. Revell served in FBI Headquarters first as Assistant Director in charge of Criminal Investigations (including terrorism), then as Associate Deputy Director he was in charge of the Investigative, Intelligence, Counter- Terrorism and International programs of the Bureau (1985-91). In September 1987, Mr. Revell was placed in charge of a joint FBI/CIA/U.S. military operation (Operation Goldenrod) which led to the first apprehension overseas of an international terrorist.

Prior to joining the FBI, Mr. Revell served as an officer and aviator in the U.S. Marine Corps, leaving active duty in 1964 as a Captain. He currently serves as the President of an international business and security consulting group based in Dallas.

Ken Robinson

Ken Robinson served a twenty-year career in a variety of tactical, operational, and strategic assignments including Ranger, Special Forces, and clandestine special operations units. His experience includes service with the National Security Agency, Defense Intelligence Agency and the Central Intelligence Agency. Ken has extensive experience in CIA and Israeli interrogation methods and is a member of the U.S. Military Intelligence Hall of Fame.

Roger Ruthberg

Roger Ruthberg served as an interrogator in the U.S. Army for 22 years. He conducted interrogation and counterintelligence operations during Operations Desert Storm, Joint Endeavor, and Iraq Freedom. He currently works as an instructor in debriefing operations on contract to the Department of Defense.

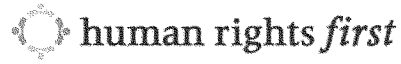
Haviland Smith

Haviland Smith is a retired CIA case officer and Station Chief who served for 26 years.

He served in East and West Europe and in the Middle East. He also served for three years as Chief of the Counterterrorism Staff at the Agency, as well as a tour as Executive Assistant to the DDCI.

Lieutenant General (Ret.) Harry E. Soyster, USA

Lieutenant General Soyster served as Director, Defense Intelligence Agency during DESERT SHIELD/STORM. He also served as Deputy Assistant Chief of Staff for Intelligence, Department of the Army, Commanding General, U.S. Army, Commanding General, U.S. Army Intelligence and Security Command and in the Joint Reconnaissance Center, Joint Chiefs of Staff. In Vietnam he was an operations officer in a field artillery battalion. Upon retirement he was VP for International Operations with Military Professional Resources Incorporated and returned to government as a Special Assistant to the SEC ARMY for WWII 60th Anniversary Commemorations completed in 2006.



How to Close Guantanamo

Blueprint for the Next Administration

August 2008

BLUEPRINT
FOR THE NEXT U.S. ADMINISTRATION

About Us

Human Rights First believes that building respect for human rights and the rule of law will help ensure the dignity to which every individual is entitled and will stem tyranny, extremism, and violence.

Human Rights First protects people at risk: refugees who flee persecution, victims of crimes against humanity or other mass human rights violations, victims of discrimination, those whose rights are eroded in the name of national security, and human rights advocates who are targeted for defending the rights of others. These groups are often the first victims of societal instability and breakdown; their treatment is a harbinger of wider-scale repression. Human Rights First works to prevent violations against these groups and to seek justice and accountability for violations against them.

Human Rights First is practical and effective. We advocate for change at the highest levels of national and international policymaking. We seek justice through the courts. We raise awareness and understanding through the media. We build coalitions among those with divergent views. And we mobilize people to act.

Human Rights First is a non-profit, nonpartisan international human rights organization based in New York and Washington D.C. To maintain our independence, we accept no government funding.

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How to Close Guantanamo A Three-stage Plan

"Guantanamo Bay has become an image throughout the world which has hurt our reputation. Whether we deserve it or not, the reality is Guantanamo Bay and Abu Ghraib have harmed our reputation in the world, thereby harming our ability to win the psychological part of the war against radical Islamic extremism."

Senator John McCain, April 8, 2007

"That the Hamdan trial—the first military commission trial with a guilty verdict since 9/11—took several years of legal challenges to secure a conviction for material support for terrorism underscores the dangerous flaws in the Administration's legal framework. It is time to better protect the American people and our values by bringing swift and sure justice to terrorists through our courts and our Uniform Code of Military Justice."

Senator Barack Obama, August 6, 2008

Introduction

The decision to send detainees to the Guantanamo Bay detention camp was driven in part by a desire to insulate the detention, interrogation and trial of terrorism suspects there from judicial scrutiny and the rule of law. That goal was illegitimate and unworthy of this nation, and any policy designed to implement it was destined for failure.

The policies of detention, interrogation and trial at Guantanamo have failed as both a practical and legal matter. The Supreme Court has rejected those policies each time it has examined them. In its third such decision in June 2008, the Court ruled that Guantanamo detainees have a right to habeas corpus, thereby invalidating the Administration's position that Guantanamo lies beyond the reach of the U.S. Constitution and the federal courts. Guantanamo policies also run counter to sound counterinsurgency doctrine. The attempt to create a "law free zone" where prisoners are subjected to detention, interrogation and trial practices that violate basic norms of human dignity and fundamental fairness has provided America's enemies with an easy recruiting tool, severely impaired counterterrorism cooperation with our allies, and failed to bring dangerous terrorists to justice.

Both Senator McCain and Senator Obama have acknowledged the damage to America's reputation for fairness and transparency done by Guantanamo, and each has vowed to close the detention facility as president as a first step towards repairing our reputation as a nation committed to human rights and the rule of law.

Making good on this pledge will require comprehensive policy changes and a major investment in domestic and political capital. After seven years of error upon error, the policies underlying the existence of Guantanamo are embedded in law and executive pronouncements. Reversing this will require bold action.

This Blueprint offers a strategy for closing Guantanamo that minimizes risk, recognizes the need for international cooperation, and encourages the support of the American public.

HUMAN RIGHTS FIRST BLUEPRINT—HOW TO CLOSE GUANTANAMO

How to Close Guantanamo

A Three-stage Plan

Summary

FIRST MONTH IN OFFICE

- Announce intention to empty the detention facility at Guantanamo within one year
- Direct the Attorney General to review cases for federal court prosecution
- Direct the Secretary of State to perform individualized risk assessments and review remaining cases for transfer to prosecution, repatriation, or resettlement
- Direct the Attorney General to identify secure U.S. detention facilities capable of housing detainees identified for federal court prosecution
- Improve access to family and counsel, and improve conditions of confinement at Guantanamo
- Suspend all pending military commission proceedings
- Terminate the Combatant Status Review Tribunals (CSRTs) and Administrative Review Boards (ARBs)
- Direct the Secretary of Defense to release convicted Guantanamo detainees upon completion of their sentences

FIRST SIX MONTHS IN OFFICE

- Bring those detainees who the Attorney General believes have committed crimes against the United States to U.S. soil for federal court prosecution
- Transfer for prosecution those detainees found eligible for transfer by the Secretary of State and who may be tried in their home countries or in third countries, even if they cannot properly be tried for crimes against the United States
- Negotiate repatriation agreements, and begin to repatriate a third group of detainees who have not committed crimes against the United States and who may be returned to their home countries in accordance with U.S. obligations under international human rights and humanitarian law
- Negotiate resettlement agreements, and begin to resettle a fourth group of detainees who cannot be returned home in accordance with international law
- Manage the risk posed by repatriation and resettlement by expanding risk assessment, monitoring, and other security programs
- Propose legislation to repeal the Military Commissions Act of 2006 (MCA)

FIRST YEAR IN OFFICE

- Initiate federal court prosecutions of detainees suspected of having committed crimes against the United States
- Complete transfers to prosecution, repatriation and resettlement of the remaining detainees
- Continue to manage the risk posed by repatriation and resettlement

How to Close Guantanamo

A Three-stage Plan

Details

FIRST MONTH IN OFFICE

During the first month in office, the next president should signal a clear intention to steer a new course with respect to detainee policy. Taking the following preliminary steps will send this important signal and will begin to establish a framework for later actions that will enable the transfer of prisoners out of Guantanamo.

We propose that the next president:

- **Announce intention to empty the Guantanamo detention facility within one year:** Setting a firm and definitive deadline for closing Guantanamo will inspire public confidence and encourage international cooperation over the coming year. It will also create incentives to think through the most challenging problems, while allowing time to address those problems in a meaningful way.
- **Direct the Attorney General to review cases for federal court prosecution:** The current administration has said it intends to prosecute approximately 80 Guantanamo detainees. In more than six years, however, only one trial has been conducted. While some say the answer to this problem lies in creating yet another substitute system for detaining and trying terrorist suspects, such a project is unnecessary and risks embroiling the next president in prolonged legal challenges that would obviate many of the advantages of closing Guantanamo and ending the military commissions. Most importantly, however, no new system has been proven necessary. Federal courts offer the possibility of finality, transparency, legitimacy and due process. *In Pursuit of Justice*, a recent Human Rights First report, studies more than 120 international terrorism cases prosecuted in U.S. courts and finds that the federal criminal justice system adequately balances the government's need to protect sensitive national security information with defendants' fair trial rights. Specially tailored federal anti-terrorism laws and other generally applicable federal criminal statutes provide an adequate basis to detain and monitor suspects and offer a broader spectrum of prosecutable conduct than the military commissions, which have jurisdiction only over war crimes. The next president should direct the Attorney General to thoroughly examine the cases slated for military commission trial, and all other cases where criminal charges may be appropriate, to assess the feasibility of federal court prosecution. While federal courts are capable of handling these cases, this assessment need not preclude the possibility of trying some cases in court martial proceedings under the Uniform Code of Military Justice.
 - **Examinations** should include briefings and recommendations from Department of Defense (DOD) prosecutors previously assigned to the cases; a review of all existing evidence for materiality, reliability, and admissibility; a thorough canvassing of the federal criminal code to identify offenses with which detainees could be charged; and consideration whether any additional investigation should be undertaken.
 - **Prosecutions** should begin on a rolling basis as individual case reviews are completed.
 - **While case reviews are being completed** the Attorney General should seek representation agreements from qualified federal defender offices and private defense attorneys and issue security clearances expeditiously so that the security clearance process does not cause future delays.
- **Direct the Secretary of State to perform risk assessments and review cases for transfer to prosecution, repatriation or resettlement:** Guantanamo has become more than a place. It is a symbol of injustice, of expediency over fundamental fairness. If the prison facility is closed, but the policies persist in another venue, the objectives prompting closure of Guantanamo will not be

achieved. Creating a state-side replica of the administrative detention regime at Guantanamo, as some have proposed, would raise serious practical and constitutional questions, and would likely perpetuate the same bureaucratic incentives that resulted in prolonged detention without trial at Guantanamo. Instead, the next president should direct the Secretary of State to perform individualized risk assessments in each of the remaining cases and review the cases for transfer to prosecution, repatriation or resettlement in third countries.

- **Transfer for prosecution:** Some detainees may be transferred for trial in their home countries or third countries, even if they cannot be tried for crimes against the United States. Such transfers should be made in accordance with international human rights and humanitarian law obligations.
- **Repatriation:** Detainees not suspected of criminal activity should be repatriated to their home countries whenever possible in accordance with international human rights and humanitarian law obligations.
- **Resettlement:** Some detainees, including Uighers, Tunisians, Algerians, and Libyans, may not be returned to their home countries because they face a substantial likelihood of torture there. Those detainees should be resettled in third countries.
- **Direct the Attorney General to identify secure U.S. detention facilities:** U.S. detention facilities are capable of housing Guantanamo detainees selected for federal court prosecution. During the past decade, the Federal Bureau of Prisons has developed a regime of Special Administrative Measures ("SAMs") to ensure security against highly dangerous defendants. Such measures include administrative segregation and the denial of telephone privileges and access to the media. Multiple terrorist suspects have been detained in federal detention facilities prior to trial. Ramzi Yousef was held for close to three years at the Metropolitan Correctional Center in New York City, and Zacarias Moussaoui was held for more than four years at the Alexandria Detention Center in Alexandria, Virginia. The Attorney General should be charged with identifying appropriate U.S. detention facilities for Guantanamo detainees. The facilities should be identified within 90 days so that any necessary modifications or renovations can be completed in a timely manner.
- **Improve access to family and counsel, and improve conditions of confinement at Guantanamo:** Until Guantanamo can be closed, increasing access to family members through video- and tele-conferencing, improving access to counsel, and reducing the use of solitary confinement will ease the burden of isolation experienced by Guantanamo detainees and bring U.S. policy more in line with international treatment obligations. In addition, providing detainees' families with access to regular health assessments and other appropriate data, as is done for the families of U.S. detainees in Iraq, will inspire domestic and international confidence that the United States is treating prisoners with appropriate care.
- **Suspend all pending military commission proceedings:** Continuing the military commission proceedings will likely result in additional legal challenges and delay and could create legal hurdles for eventual federal prosecutions. Placing a moratorium on these proceedings will allow time for the Attorney General to review case files and assess the feasibility of federal court prosecution. The sooner the illegitimate military commission proceedings come to a close, the sooner prosecutions may proceed with fairness and finality in the federal courts.
- **Terminate CSRTs and ARBs:** Approximately 265 men remain imprisoned at Guantanamo, only 21 of whom the government has criminally charged. The others are being held as "enemy combatants" pursuant to determinations made by Combatant Status Review Tribunals ("CSRTs") and reviewed annually by Administrative Review Boards ("ARBs") The CSRTs were a belated attempt, prompted by Supreme Court review, to remedy the deficiencies created by the decision to disregard the

requirements of the Geneva Conventions and U.S. Army regulations requiring battlefield status determinations. They have been a poor substitute for determining status. The *Boumediene* Court found serious deficiencies in the CSRT process, including that prisoners were not entitled to lawyers, had no access to the evidence against them, and no meaningful right to present exculpatory evidence. And they have backfired in terms of our counterterrorism strategy. Labeling Guantanamo detainees as "combatants" cedes an advantage to al Qaeda, allowing its members to project themselves and their followers as warriors engaged in a worldwide struggle against the United States and its allies. Withdrawing the orders establishing and implementing the CSRTs is an important step towards remedying these errors. The next president should direct the Secretary of Defense to:

- **Withdraw** the July 7, 2004, "Order Establishing Combatant Status Review Tribunals."
- **Withdraw** the July 16, 2004, Memorandum "Re: Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba."
- **Direct the Secretary of Defense to release detainees upon completion of their sentences:** On August 7, 2008, Salim Hamdan was sentenced to 66 months in prison. With credit for the 61 months he has already served, Mr. Hamdan will complete his sentence before the end of 2008. Nevertheless, DOD maintains it has the right to continue to detain Mr. Hamdan as an "enemy combatant" even after his sentence is complete. The law of war permits the continued detention of prisoners of war until the end of international armed conflict. But Mr. Hamdan was not properly detained as a prisoner of war, and his continued detention would only further diminish the legitimacy of the military commission proceedings. The next president should direct the Secretary of Defense to release Mr. Hamdan and any other Guantanamo detainees who are tried and convicted, upon completion of their sentences.

FIRST SIXTH MONTHS IN OFFICE

The initial announcement to close Guantanamo should be followed by swift action that demonstrates the next president's seriousness, both to the American public and the international community.

We propose that the next president:

- **Transfer detainees for criminal prosecution to U.S.-based detention facilities:** Transfers should be made to appropriate facilities once any necessary modifications or renovations are completed.
- **Transfer detainees for criminal prosecution in home or third countries:** Facilitating the transfer of some detainees for criminal prosecution is essential to closing Guantanamo, but those transfers must be conducted responsibly. *Arbitrary Justice*, a recent Human Rights First report, studied the transfer of detainees from Bagram and Guantanamo to the Afghan government for criminal prosecution and found that the criminal trials held in Afghanistan fail to meet international or Afghan fair trial standards. In the future, countries should be pressed to conduct prosecutions in accordance with international fair trial standards. The U.S. government should assist in this effort by providing these countries with information in its possession, including witness names and statements, interrogation reports and exculpatory evidence.
- **Negotiate repatriation agreements and repatriate detainees:** International pressure may be required to convince some countries to accept their own citizens and legal residents. The president's early announcement to close Guantanamo, and his efforts to improve conditions of confinement while the facility remains open, will increase the chances of cooperation from U.S. allies during this stage.
 - **Direct the Secretary of State to review the process for considering transfer to torture claims:** Article 3 of the Convention against Torture (CAT) prohibits the transfer of prisoners to countries where they are at risk of torture. The United States cannot rely on diplomatic assurances to prevent transfers to torture. Under current regulations, diplomatic

assurances from the receiving country are obtained in secret, there is no opportunity for the individual being transferred to challenge their reliability, and little is known about how they are obtained, what they consist of, and what happens to individuals transferred in reliance upon them. In at least some cases where the United States has relied upon diplomatic assurances, detainees have been abused upon return. To better protect against transfers to torture, the next president should direct the Secretary of State to review and modify as needed the agency's administrative process for considering individual CAT claims.

- **Negotiate resettlement agreements and resettle detainees:** In light of early pronouncements by then-Secretary of Defense Donald Rumsfeld that all detainees at Guantanamo were dangerous terrorists, the reluctance of other countries to accept resettlement of those now found not to pose a danger is unsurprising. Yet the next president is unlikely to succeed in closing Guantanamo without the assistance of third countries. The failure of the United States to resettle any such detainees here has only compounded the reluctance of other countries to accept third-party nationals themselves. The next president should consider resettling some detainees in the United States if their individual circumstances make them eligible for such relief. Doing so, even if the numbers are quite small, would send an important message and likely would increase the willingness of other countries to accept resettlement of the remaining detainees. The Uighers are one group of detainees that could be resettled in the United States. The United States has small Uigher communities in Los Angeles, San Francisco, New York and Washington D.C., and these communities have already agreed to provide assistance. If the United States takes some Uighers, other countries with Uigher communities, such as Canada and Germany, may be willing to negotiate resettlement agreements for those Uighers who remain. The next president should:
 - **Select senior officials from the Department of State** to negotiate resettlement agreements.
- **Approach UNHCR** or another international body to act as an intermediary, screening detainees for refugee status and helping to find placements.
- **Manage the risk posed by repatriation and resettlement:** Approximately 100 of the remaining detainees are Yemeni. State Department and Yemeni officials made little progress during recent negotiations to agree upon a plan for their release. The United States does not believe that Yemen is taking adequate steps to monitor and respond to acts of terrorism within its borders. Officials are also worried that prisons in Yemen are not secure. Releasing the Yemenis and some others will require an assumption of some risk, but those risks can be managed and are less than the risk posed by their continued detention. To manage the risk, the next president should:
 - **Direct the Secretary of State to perform individualized risk assessments** of detainees selected for repatriation and resettlement.
 - **Direct the Secretary of State to obtain appropriate security assurances** from receiving countries including assurances to lawfully monitor returned detainees' activities.
 - **Direct that transfers be made on a rolling basis** to ease the burden on home countries charged with monitoring detainees' activities.
 - **Propose legislation to invest in reintegration programs** modeled after the Saudi rehabilitation program, which led to the transfer of more than 100 Saudis out of Guantanamo. Yemen has already proposed instituting such a program.

- **Propose legislation to invest in law enforcement training** to assist other countries in monitoring detainees' activities and investigating suspected criminal activity.
- **Propose legislation to repeal the MCA:** From the beginning, with the Military Order of November 14, 2001, the military commissions devised by the Bush Administration were unnecessary and unwise. Originally intended as a mechanism for delivering swift justice in battlefield conditions, military commissions under the current administration have been neither swift nor just and have taken place far from the battlefield. These military commissions are a perversion of the military justice system. The next president should begin to erase this blot, which has given "military justice" a bad name, by working to dismantle the legal architecture on which the commissions are based. Doing so is consistent with counterinsurgency doctrine, which suggests that moving detained insurgents into a criminal justice system helps to de-legitimize them as criminals. Proposing legislation to repeal the Military Commissions Act of 2006 will help to achieve this goal and will encourage the Attorney General to move forward with the remaining prosecutions in the federal courts. In addition to proposing such legislation, the next president should:
 - **Rescind** President Bush's order of November 13, 2001, establishing military commissions.
 - **Direct the Secretary of Defense** to officially withdraw the March 21, 2002, "Military Commission Order No. 1," establishing procedures for trial by military commission
 - **Direct the Attorney General** to officially withdraw the August 12, 2005, "Proposed Amendments to Military Commission Order No. 1," proposing certain amendments to the Secretary of Defense's Military Commission Order No. 1.

FIRST YEAR IN OFFICE

By the end of the first year in office, each Guantanamo detainee should be designated for prosecution, transfer, repatriation or resettlement.

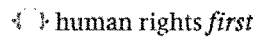
We propose that the next president:

- **Initiate prosecutions against Guantanamo detainees in federal courts:** Certain districts with experience handling terrorism cases, such as the Eastern District of Virginia and the Southern District of New York, should be assigned most cases. Other case assignments could be determined based on proximity to suitable detention facilities.
- **Complete transfers for prosecution, repatriation and resettlement:** By the end of the president's first year in office, all detainees who are not selected for federal court prosecution should be transferred for prosecution, repatriated to their home countries or resettled in third countries.
- **Continue to manage the risk posed by repatriation and resettlement:** Risk management will not end with the repatriation or resettlement of the final Guantanamo detainees. The United States should continue to assess the risks posed by detainees who have been resettled and repatriated and should continue to invest in reintegration programs and law enforcement training even after the Guantanamo detention facility is closed.

Conclusion

The misguided embrace of indefinite detention, torture and abuse has greatly damaged the reputation of the United States, fueled terrorist recruitment and undermined international cooperation in counterterrorism operations. The challenge of addressing these problems falls to the next president of the United States. Both Senator Obama and Senator McCain have recognized these realities. To restore integrity to the American justice system, and repair our reputation as a nation committed to the rule of law, Guantanamo must be closed.

Human Rights First's three-stage plan offers a strategy for closing Guantanamo that minimizes risk, recognizes the need for international cooperation, and encourages the support of the American public.



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HUMAN RIGHTS FIRST BLUEPRINT—HOW TO CLOSE GUANTANAMO

**Hearing Before the Subcommittee on the Constitution, Civil Rights,
and Property Rights**

United States Senate Committee on the Judiciary

Re: "Restoring the Rule of Law."

September 16, 2008

**Prepared Statement of Patrick F. Philbin, former Associate Deputy Attorney General,
U.S. Department of Justice.**

Chairman Feingold, Ranking Member Brownback, and Members of the Subcommittee, I appreciate the opportunity to address the topic before the Subcommittee today. As I understand it, the particular focus of today's hearing, and the stated concern in the title for "restoring the rule of law," relates to measures taken in connection with the ongoing conflict with al Qaeda and associated terrorist forces. I gained experience with many legal issues related to the conduct of the war on terrorism, including electronic surveillance and detention of enemy combatants, during my service at the Department of Justice from 2001 to 2005. My duties both as a Deputy Assistant Attorney General in the Office of Legal Counsel and, subsequently, as an Associate Deputy Attorney General involved providing advice on issues related to FISA and the use of electronic surveillance and the detention and trial of enemy combatants. Since my return to the private sector, I have attempted to keep up-to-date with many of the legal developments in these areas.

Because the topic of the hearing is broad, I will touch on only four points, and I hope that they will not be too disjointed for my testimony to be useful for the Subcommittee.

First, I respectfully take some issue with the title of today's hearing. A hearing on "Restoring the Rule of Law" might be understood to imply that it is taken as a given that there has been a widespread abandonment of the rule of law. I cannot accept that fundamental

premise. If the members of the Subcommittee were to adopt that assumption as a starting point, I think it would do a disservice to the dedicated men and women throughout the federal government who work tirelessly every day — and who have done so every day since 9/11 — to ensure that the actions the federal government takes to protect the Nation remain within the bounds of the law. In my time at the Department of Justice, I was privileged to work with dozens of dedicated individuals, both career employees and political appointees, who were committed to getting the right answer and ensuring that the rule of law prevailed.

That does not mean that mistakes have not been made or that there were not sharp disagreements about the law. I was involved in contentious debates at the Department of Justice, debates that required us to address novel and complex issues of law under enormous pressures. And in some instances I ultimately disagreed with reasoning others had endorsed. In the most acrimonious debate that occurred during my time in the government, when there were sharply divided views, the Department of Justice's statement of the law prevailed, and thus I believe that episode was ultimately a vindication of the rule of law. In one way, the very fact that so much energy and contention was focused on disputes about legal interpretations shows that the rule of law was considered vital. If it were not, debates about legal interpretations would not have mattered so much. And disagreements, mistakes, or errors in interpreting the law do not amount to an abandonment of the rule of law.

I think it is also important for me to sound a cautionary note about the tenor of the debate concerning the "rule of law." It is, of course, important for the committees of Congress to ensure, through hearings such as this, that respect for the rule of law is maintained. That is an important role of congressional oversight. But it is also important to bear in mind that if the tenor of the debate shifts too sharply, if the rhetoric goes too far in broadly casting aspersions on

the conduct of the War on Terror as if it has involved a wholesale rejection of the rule of law, that alteration in the tone of the debate could have a very real and negative impact on the morale of the people in the intelligence community who carry out some of the most sensitive and important programs in our struggle with al Qaeda. This factor was brought home to me when I was working at the Department of Justice. After a particularly contentious period of legal debates about a particular classified matter, an employee at an intelligence agency called me to say, in essence, thank you for all the work you did defending our program and for making sure the program was on a solid legal footing, because it really bothers us if people say that what we are doing is illegal. The men and women I met in the agencies of the intelligence community are staunchly dedicated to ensuring that they operate within the bounds of the law. Precisely because they are dedicated to that end, and because their morale matters, it is important that rhetoric should not overshadow responsible debate and we should ensure that hard-fought debates do not descend into broad-brush suggestions that the War on Terror has been lawless.

Second, I want to point out a danger that I believe comes along with many rhetorical uses of arguments related to the "rule of law." Of course, no one is against "the rule of law." It is a bedrock principle that must guide everyone in government service. But all too often in debates related to the War on Terror, many will attempt to pack into the concept of the "rule of law" the implicit assumption that any unilateral Executive Branch action or any argument for Executive power that is not subject to judicial review necessarily abandons the rule of law. In other words, the arguments proceed from the assumption that the rule of law exists only in the form of judicial review over Executive action. That is not the assumption of our Constitution. The Constitution assigns different roles to the three branches of government, and particularly in the conduct of warfare, the role of the Executive is paramount. Intelligence operations are typically conducted

without any form of judicial involvement, and a role for the judiciary such as that created in the Foreign Intelligence Surveillance Act in 1978 is clearly an innovation that is the exception rather than the rule.

One particular aspect of the judicial-centric rhetoric of the “rule of law” deserves emphasis. In many instances, the subtext packed into arguments about the “rule of law” is essentially that the conduct of the War on Terror is somehow “lawless” unless it is constrained more and more by the processes and “rights” for “suspects” that are familiar to us from our criminal justice system. In other words, the arguments are, at bottom, a challenge to the fundamental legal paradigm governing the conflict with al Qaeda and associated terrorist forces. In the wake of the attacks of September 11, the President determined that attacks on that scale by a transnational force were acts of war, that the United States was engaged in an armed conflict, and thus that the struggle against al Qaeda should be treated as an armed conflict, not as a mere matter of criminal law enforcement. Congress agreed with that assessment by passing the Authorization for Use of Military Force (AUMF), 115 Stat. 224. Significantly, moreover, the Supreme Court has also endorsed that paradigm for the conflict with al Qaeda. In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the Court accepted the judgment of the political branches that the Nation is engaged in an armed conflict and that, through the AUMF, the President is authorized to detain combatants in that conflict until the end of hostilities. As the Court put it, detention of combatants, “for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the ‘necessary and appropriate force’ Congress has authorized the President to use.” *Id.* at 518. The proper legal framework for our conflict with al Qaeda is thus provided by the laws of war, not what is most familiar to us from the processes of the criminal law.

The third point I would like to make simply involves an example of a situation where I believe that, unwisely, the assumption that “more involvement for the courts is necessarily better” has prevailed. This summer, Congress passed much needed amendments to the Foreign Intelligence Surveillance Act. *See* Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (July 10, 2008). In part, that legislation consisted of necessary amendments to provide the Executive the flexibility needed to acquire intelligence when targeting collection at aliens overseas. But the legislation also added a new provision to FISA that requires the government to obtain a warrant from the FISA Court in order to conduct surveillance of a U.S. citizen who is reasonably believed to be *outside the United States*. To obtain such a warrant the Attorney General must submit to the FISA Court an application setting forth facts demonstrating that there is probable cause that the target of the surveillance is an agent of a foreign power or terrorist organization. This is a new requirement that expands the jurisdiction of the FISA court into an area that had previously been the exclusive province of the Executive Branch.

As I explained in testimony before the full Committee when that legislation was under consideration in October 2007, I believe that this expansion of the FISA court’s jurisdiction was unnecessary and unwise. For decades, under Executive Order 12333, the Attorney General was permitted to authorize surveillance of U.S. citizens overseas upon a finding of probable cause to believe that that the person in question is an agent of a foreign power. Such determinations were handled outside of the FISA framework and without resort to the FISA Court. That system worked well in allowing the Executive to move flexibly and expeditiously to collect valuable intelligence on U.S. citizens who unfortunately choose to align themselves with foreign powers or terrorists. That system was consistent with the President’s independent authority to conduct

intelligence activities in the course of conducting United States foreign policy and acting to counter foreign threats. *See, e.g., In re Sealed Case*, 310 F.3d 717, 742 (Foreign Intel. Surveillance Ct. of Review 2002) (describing the inherent authority of the President to gather foreign intelligence information). It was also consistent with the Fourth Amendment. The touchstone of the Fourth Amendment is reasonableness, and it has long been held that in foreign intelligence investigations, the President may order warrantless searches even of citizens within the United States consistent with the Fourth Amendment. *See, e.g., United States v. Brown*, 484 F.2d 418, 425-26 (5th Cir. 1973). That result applies *a fortiori* to searches overseas.

Nor was there any record established before Congress to suggest that the power to conduct surveillance of U.S. citizens overseas had been abused. Attorneys General have exercised their powers under Executive Order 12333 with judgment and discretion. Instead, it seems that the only real reason for the amendment was the assumption that “more involvement for the courts is better.” In the field of foreign intelligence collection, particularly collection taking place overseas, I do not believe that assumption is correct. The Constitution assigns the Executive Branch the primary role in matters of foreign affairs and collecting foreign intelligence, and with good reason. The Executive, not the judiciary, is expert in such matters. *Cf. Chicago & S. Air Lines v. Waterman S.S. Co.*, 333 U.S. 103, 111 (1948) (“The President, both as Commander-in-Chief and as the Nation’s organ for foreign affairs, has available intelligence services whose reports neither are nor ought to be published to the world”; foreign affairs matters “are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility”). Requiring resort to the FISA court before collection can begin overseas adds an unnecessary layer of procedural complexity to a process that must be as swift and flexible as possible to ensure timely collection of intelligence. Particularly where there has been no record

of Executive Branch abuses suggesting the particular need for a new layer of judicial oversight, I do not think expanding the role of the FISA court was wise.

Fourth and finally, I would like to address one area where I believe Congress can and should take action to accomplish, not a restoration of the *rule* of law, but a needed restoration of *balance* in the law. I believe that, as Attorney General Mukasey has argued, legislation is warranted in response to the Supreme Court's decision in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

In *Boumediene*, the Court determined — in what it acknowledged was an unprecedented holding — that aliens detained by the military outside the sovereign territory of the United States during an ongoing armed conflict have a constitutional right to the writ of *habeas corpus*. My own views on the merits of that question were established some time ago. As Justice Scalia noted in his dissent, I co-authored the opinion of the Office of Legal counsel concluding that, under *Johnson v. Eisentrager*, 339 U.S. 763 (1950), aliens held at the U.S. Naval Station at Guantanamo Bay, Cuba, did not have such a constitutional right and that courts in the United States would not have jurisdiction to entertain *habeas corpus* petitions filed by them. See *Boumediene*, 128 S. Ct. at 2294 (Scalia, J., dissenting). And I have testified before the House Armed Services Committee that I believed the Court of Appeals for the D.C. Circuit ruled correctly in concluding that aliens detained at Guantanamo did not have a constitutional right to *habeas corpus*. In my view, *Boumediene* overruled the longstanding holding of *Johnson v. Eisentrager*.

At the same time that the *Boumediene* Court effected a seminal shift in the law concerning constitutional rights for aliens outside the United States, however, the Court declined to provide further concrete guidance concerning exactly what procedures would be required in

these particular *habeas* cases to satisfy an alien enemy combatant's right to the Great Writ. Under the Court's decision, that thorny matter would be left entirely for lower courts (and subsequently appellate courts, and eventually the Supreme Court itself) to sort out in litigation. At least as a practical matter, there thus may be some truth in what Chief Justice Roberts pointed out in dissent: what the decision is about most significantly is "control of federal policy concerning enemy combatants." 128 S. Ct. at 2279 (Roberts, C.J., dissenting). The Supreme Court's decision shifts a large measure of that control to the judiciary and away from the political branches, both Executive and Legislative, which had already jointly crafted a detailed system of review for the detainees at Guantanamo through the Detainee Treatment Act and the Military Commissions Act of 2006. Here again, simply increasing the role of courts is not necessarily better — it does not necessarily advance the "rule of law." The Constitution assigns responsibility over warfare to the Executive and Legislative Branches, and *Boumediene* marks an extraordinary extension of judicial control over an element of war policy. Chief Justice Roberts makes an interesting point in noting that, if one considers who has "won" as a result of *Boumediene*, it is "[n]ot the rule of law, unless by that is meant the rule of lawyers, who will now arguably have a greater role than military and intelligence officials in shaping policy for alien enemy combatants." 128 S. Ct. at 2293 (Roberts, C.J., dissenting).

The lack of concrete guidance provided by *Boumediene* will now spawn a flurry of litigation brought by detainees at Guantanamo in which the contours of these new *habeas* actions will be fleshed out. The common law process, however, is not well suited to providing swift and certain guidance. To the contrary, it will doubtless require multiple rounds of litigation, with trips to the court of appeals and perhaps even to the Supreme Court — a process that, as experience with *Boumediene* already shows, could take *years*. That approach thus threatens to

create exactly the *practical* problem that the *Eisentrager* Court pointed out over half a century ago — distracting the resources of both the military and the Department of Justice to handle burdensome litigation.

For that reason, although the Supreme Court has spoken definitively on the rights of the detainees at Guantanamo to have access to *habeas corpus*, I believe its decision still leaves an important role for the political branches to play. Congress can and should step in to shape those *habeas* actions by legislation to streamline the procedures rather than leaving the matter solely to the ad hoc process of multiple rounds of litigation. After all, the *Boumediene* Court itself acknowledged that in these new *habeas* actions “accommodations can be made to reduce the burden *habeas corpus* proceedings will place on the military without impermissibly diluting the protections of the writ,” 128 S. Ct. at 2276, and that, in these proceedings, “the Government has a legitimate interest in protecting sources and methods of intelligence gathering,” *id.* Such matters, however, are primarily within the competence of the political branches, not the courts. Thus, even though it will ultimately be up to the Supreme Court to determine what the constitutional right to *habeas* requires, it is entirely appropriate for Congress to streamline the process through legislation rather than leaving the entire matter to the trial-and-error process of months (or years) of litigation.

Legislation introduced by Senator Graham in the form of S. 3401 provides a step in the right direction. It addresses the concerns that Attorney General Mukasey has pointed out in terms of (i) limiting courts’ ability to order the transfer of enemy combatants detained *outside* the United States *into* the United States; (ii) ensuring the protection of classified information; and (iii) simplifying the procedures for these new *habeas* actions by permitting them to be conducted largely as paper hearings. I urge the Committee to give that bill, or similar legislation, serious

consideration rather than leaving the contours of the *habeas* actions required in the wake of *Boumediene* to be determined solely by litigation.

* * *

Thank you, Mr. Chairman, for the opportunity to address the Subcommittee. I would be happy to address any questions.

Testimony of John D. Podesta
President and CEO, Center for American Progress Action Fund
Before the Subcommittee on the Constitution
United States Senate
on
Secrecy and the Rule of Law
September 16, 2008

Executive Summary

Most Americans appreciate the need to keep secret national security information whose disclosure would pose a genuine risk of harm. But as the 9/11 Commission concluded, too much secrecy can put our nation at greater risk, hindering oversight, accountability, and information sharing.

Excessive secrecy conceals our vulnerabilities until it is too late to correct them. It slows the development of the scientific and technical knowledge we need to understand threats to our security and respond to them effectively. It short-circuits public debate, eroding confidence in the actions of the government. It undermines the credibility of the information security system itself, encouraging leaks and causing people to second guess legitimate restrictions.

The Commission on Protecting and Reducing Government Secrecy, chaired by Sen. Daniel Patrick Moynihan, and on which I served, concluded that “The best way to ensure that secrecy is respected, and that the most important secrets *remain* secret, is for secrecy to be returned to its limited but necessary role. Secrets can be protected more effectively if secrecy is reduced overall.”

Government secrecy serves its proper and necessary function when it is reserved for situations in which there is an identifiable risk to national security. In other words, it should be used to keep secret only that which genuinely needs to be kept secret.

One of Sen. Moynihan’s key insights was that secrecy is really “a mode of regulation.” But it differs from more familiar forms of regulation in that “the citizen does not even know that he or she is being regulated. Normal regulation concerns how citizens must behave, and so regulations are widely promulgated. Secrecy, by contrast, concerns what citizens may know; and the citizen is not told what may not be known.”

The result, said Moynihan, is “a parallel regulatory regime with a far greater potential for damage if it malfunctions.”

Over the past seven years, the American people have come to understand what he meant. During this period, the Bush administration has increased secrecy and curtailed access to information through a variety of means, including by:

- Issuing an executive order that encouraged the over-classification of government information by shifting the presumption in favor of classification;

- Slowing the pace of automatic and systematic declassification of government records, from a high-water mark of 204 million pages in 1997 during the Clinton administration to only 37 million in 2007;
- Presiding over an explosion in the use of “controlled unclassified” markings, most of which have never been authorized by statute, to restrict access to unclassified information;
- Withdrawing from public view thousands of pages of information that had previously been unclassified and available to the public through the Internet;
- Interpreting the Freedom of Information Act in a manner that has undermined the presumption favoring disclosure;
- Failing to preserve millions of White House communications as required by the Presidential Records Act and issuing an executive order that impedes the access of historians and the public to the records of past administrations;
- Invoking executive privilege, the state secrets privilege, and other common law privileges, to cover up administration misdeeds and deny plaintiffs their day in court;
- Threatening journalists, whistleblowers and other private citizens with criminal prosecution for the possession or publication of national security information; and perhaps most egregious of all, the issuance of secret orders and legal opinions to shield illegal actions from public scrutiny.

The obsessive secrecy of the Bush administration has damaged not only the security it was ostensibly meant to protect but also the rule of law that enables our society to maintain its internal stability and cohesion.

The rule of law can thrive only in an open society in which the laws are known and understood; government actions are taken, insofar as possible, in full view of the public and subject to scrutiny and debate; and government officials are held accountable for the arbitrary or unscrupulous exercise of power. The rule of law requires that Congress, the courts, the public and the press have access to the information they need to serve as effective checks on the executive branch. Without such information, there can be no checks and balances. Unless the people know what their government is doing, there can be no rule of law.

My written testimony proposes a series of steps by which Congress and the next president can address each of these problems, and I welcome the opportunity to discuss them with you.

The key recommendations include the following:

- *Over-classification.* The next president should rewrite Exec. Order 13292 to reinstate the provisions of Exec. Order No. 12958 that establish a presumption against classification in cases of significant doubt; permit senior agency officials to exercise discretion to declassify information in exceptional cases where the need to protect the information is outweighed by the public interest in disclosure; and prohibit reclassification of material that had been declassified and released to the public under proper authority.
- *Controlled unclassified information.* At a minimum, the next president should issue a new memorandum that creates a presumption against the designation of controlled unclassified information, and Congress should enact legislation to reduce the use of unclassified information control markings and establish an orderly process that would discourage their misuse and maximize public access to unclassified information. Better still, Congress should give serious consideration to getting rid of these designations altogether.
- *Freedom of Information Act.* The next president should direct the attorney general to revoke the Ashcroft memorandum and restore the presumption in favor of disclosure when there is no foreseeable harm to an interest protected by the exemption. If the president fails to take this step, Congress should amend FOIA to codify the presumption.
- *Presidential Records.* The next president should revoke Exec. Order 13233, removing the ability of heirs and children of former presidents to block access to presidential records and eliminating the new vice presidential privilege. If the president does not act, Congress should amend the Presidential Records Act to codify this change. Congress also should enact legislation to tighten the standards and procedures for preservation of electronic records and to include enforcement measures for noncompliance.
- *State Secrets Privilege.* Congress should consider statutory provisions to direct courts to weigh the costs and benefits of public disclosure in considering executive branch assertions of the State Secrets Privilege.
- *Secret Law.* The next president should direct the attorney general to issue a memorandum indicating that OLC opinions will not be withheld from Congress under any theory of privilege, and that there will be a presumption of public disclosure unless disclosure would pose a genuine risk of harm to national security. Congress should enact S. 3405, the Executive Order Integrity Act, to make it unlawful for the president to secretly modify or revoke a published executive order.
- *Whistleblower and press protections.* Congress should strengthen the Whistleblower Protection Act of 1989 to protect public employees from reprisal when they publicly disclose information regarding government wrongdoing or when they disclose classified information about government wrongdoing to members of Congress who are authorized to receive such information. Congress also should enact legislation to establish a qualified journalist-source privilege.

Taken together, these measures will help that the government keeps secret only what needs to be secret. In so doing, they will enhance both openness and security while restoring respect for the rule of law. Thank you.

Secrecy and the Rule of Law

Thank you, Mr. Chairman, and members of the subcommittee. I am John Podesta, President and Chief Executive Officer of the Center for American Progress Action Fund. I am also a Visiting Professor of Law at the Georgetown University Law Center.

I served as Chief of Staff to President Bill Clinton from 1998 to 2001. I previously served in other roles in the White House, including Assistant to the President and Staff Secretary from 1993-1995, and Deputy Chief of Staff from 1997-1998.

I also have some experience in back of the dais, Mr. Chairman, having served as Counselor to former Senate Democratic Leader Tom Daschle, Chief Counsel for the Senate Agriculture Committee, and Chief Minority Counsel for the Senate Judiciary Subcommittees on Patents, Copyrights, and Trademarks; Security and Terrorism; and Regulatory Reform. It is an honor to be with you today.

* * *

Most Americans appreciate the need to keep secret national security information whose disclosure would pose a genuine risk of harm to our country and our people. This may include information on intelligence targets, sources and methods, military plans, troop movements and technology, and sensitive diplomatic negotiations.

But as the 9/11 Commission concluded, too much secrecy can put our nation at greater risk, hindering oversight, accountability, and information sharing.

Excessive secrecy conceals our vulnerabilities until it is too late to correct them. It slows the development of the scientific and technical knowledge we need to understand threats to our security and respond to them effectively. It short-circuits public debate, eroding confidence in the actions of the government. It undermines the credibility of the information security system itself, encouraging leaks and causing people to second guess legitimate restrictions. As Justice Stewart famously cautioned in the Pentagon Papers case:

I should suppose that moral, political, and practical considerations would dictate that a very first principle of that wisdom would be an insistence upon avoiding secrecy for its own sake. For when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion. I should suppose, in short, that the hallmark of a truly effective internal security system would be the maximum possible

disclosure, recognizing that secrecy can best be preserved only when credibility is truly maintained.¹

The Commission on Protecting and Reducing Government Secrecy, chaired by Sen. Daniel Patrick Moynihan, and on which I served, reached a similar conclusion in its 1997 report: "The best way to ensure that secrecy is respected, and that the most important secrets *remain* secret, is for secrecy to be returned to its limited but necessary role. Secrets can be protected more effectively if secrecy is reduced overall."²

Government secrecy serves its proper and necessary function when it is reserved for situations in which there is an identifiable risk to national security.

One of Sen. Moynihan's key insights was that secrecy is really "a mode of regulation." But it differs from more familiar forms of regulation in that "the citizen does not even know that he or she is being regulated. Normal regulation concerns how citizens must behave, and so regulations are widely promulgated. Secrecy, by contrast, concerns what citizens may know; and the citizen is not told what may not be known."

The result, said Moynihan, is "a parallel regulatory regime with a far greater potential for damage if it malfunctions."

Over the past seven years, the American people have come to understand what he meant. During this period, the Bush administration has increased secrecy and curtailed access to information through a variety of means, including by:

- Issuing an executive order that encouraged the over-classification of government information by shifting the presumption in favor of classification;
- Slowing the pace of automatic and systematic declassification of government records, from a high-water mark of 204 million pages in 1997 during the Clinton administration to only 37 million in 2007;
- Presiding over an explosion in the use of "controlled unclassified" markings, most of which have never been authorized by statute, to restrict access to unclassified information;
- Withdrawing from public view thousands of pages of information that had previously been unclassified and available to the public through the Internet;
- Interpreting the Freedom of Information Act in a manner that has undermined the presumption favoring disclosure;

¹ N.Y. Times Co. v. U.S., 403 U.S. 713, 729 (1971) (Stewart, J., concurring).

² REPORT OF THE COMMISSION ON PROTECTING & REDUCING GOV'T SECRECY (1997) at xxi.

- Failing to preserve millions of White House communications as required by the Presidential Records Act and issuing an executive order that impedes the access of historians and the public to the records of past administrations;
- Invoking executive privilege, the state secrets privilege, and other common law privileges, to cover up administration misdeeds and deny plaintiffs their day in court;
- Threatening journalists, whistleblowers and other private citizens with criminal prosecution for the possession or publication of national security information; and perhaps most egregious of all, the issuance of secret orders and legal opinions to shield illegal actions from public scrutiny.

The obsessive secrecy of the Bush administration has damaged not only the security it was ostensibly meant to protect but also the rule of law that enables our society to maintain its internal stability and cohesion.

The rule of law can thrive only in an open society in which the laws are known and understood; government actions are taken, insofar as possible, in full view of the public and subject to scrutiny and debate; and government officials are held accountable for the arbitrary or unscrupulous exercise of power. The rule of law requires that Congress, the courts, the public and the press have access to the information they need to serve as effective checks on the executive branch. Without such information, there can be no checks and balances. Unless the people know what their government is doing, there can be no rule of law.

Over-classification, declassification, and reclassification

The Moynihan Commission recommended a series of statutory reforms to the classification system that were widely praised but never implemented. But the spirit of the Moynihan recommendations can certainly be discerned in the contemporaneous amendments to the classification system that were instituted by President Clinton under Exec. Order No. 12958.

The Clinton order established a presumption of access, directing that "If there is significant doubt about the need to classify information, it shall not be classified." Similarly, the order provided that "If there is significant doubt about the appropriate level of classification, it shall be classified at the lower level." The order also:

- Limited the duration of classification, providing that where the classifier cannot establish a specific point at which declassification should occur, the material will be declassified after 10 years unless the classification is extended for successive 10-year periods under prescribed procedures.
- Provided for automatic declassification of government records that are more than twenty five years old and have been determined by the Archivist of the United States to have

permanent historical value, allowing for the continued classification of certain materials under specified procedures.

- Established a balancing test for declassification decisions in “exceptional cases,” permitting senior agency officials to exercise discretion to declassify information where “the need to protect such information may be outweighed by the public interest in disclosure of the information.”
- Prohibited reclassification of material that had been declassified and released to the public under proper authority.
- Authorized agency employees to bring challenges to the classification status of information they believe to be improperly classified.
- Created an Interagency Security Classification Appeals Panel (ISCAP) to adjudicate challenges to classification and requests for mandatory declassification, and to review decisions to exempt information from automatic declassification.

The changes instituted by President Clinton were largely erased by his successor, who issued a revised executive order in 2003. That order, Exec. Order No. 13292, eliminated the presumption of access, leaving officials free to classify information in cases of “significant doubt.” It also:

- Relaxed the limitations on the duration of classification, and made it easier for the period to be extended for unlimited periods.
- Postponed the automatic declassification of protected records 25 or more years old from April 2003 to December 2006, and permitted agencies to exempt certain categories of historical records from automatic declassification without a showing that the unauthorized disclosure would demonstrably damage the national security interests of the United States.
- Revived the ability of agency heads to reclassify previously declassified information if the information “may reasonably be recovered.”
- Allowed the Director of Central Intelligence to override decisions by ISCAP, subject only to presidential review.

The results of this shift in policy are reflected in the annual classification statistics published by the Information Security Oversight Office (ISOO) at the National Archives and Records Administration (NARA). According to ISOO’s 2007 report,³ executive branch agencies reported 23 million classification decisions in 2007, the overwhelming majority of which (22.8 million) were derivative classification decisions. This was nearly three times the number of classification actions (8.6 million) taken in 2001, the first year of the Bush administration, and four times the number (5.8 million) taken in 1996.

³ INFO. SEC. OVERSIGHT OFFICE, NAT’L ARCHIVES & RECORDS ADMIN., REPORT TO THE PRESIDENT 2007.

Estimates of the extent of over-classification vary, but the former director of ISOO, J. William Leonard, has cited an audit conducted by the Information Security Oversight Office which found that even trained classifiers, armed with the most up-to-date guidance, "got it clearly right only 64 percent of the time."⁴

Unfortunately, we also know of instances in which over-classification is the result, not of honest error, but of a desire to conceal. The executive order governing classification prohibits the use of the classification system to "conceal violations of law, inefficiency, or administrative error" or "prevent embarrassment to a person, organization, or agency." Yet at least some classification decisions by the Bush administration could have had little purpose other than to suppress information that might be embarrassing to the government.

A particularly egregious example is the infamous memo on interrogation of enemy combatants issued by the Office of Legal Counsel in 2003 and only declassified on March 31, 2008. According to Mr. Leonard, the memorandum should never have been classified in the first place: "The document in question is purely a legal analysis," and contains "nothing which would justify classification."⁵

Another notorious example is the decision by the Department of Defense to classify in its entirety the March 2004 report of the investigation by Maj. Gen. Antonio M. Taguba of alleged abuse of prisoners by members of the 800th Military Police Brigade at Baghdad's Abu Ghraib Prison. According to an investigation by the Minority Staff of the House Committee on Government Reform:

One reporter who had reviewed a widely disseminated copy of the report raised the issue in a Defense Department briefing with General Peter Pace, the Vice Chairman of the Joint Chiefs of Staff, and Secretary Rumsfeld. The reporter noted that 'there's clearly nothing in there that's inherently secret, such as intelligence sources and methods or troop movements' and asked: 'Was this kept secret because it would be embarrassing to the world, particularly the Arab world?' General Pace responded that he did not know why the document was marked secret. When asked whether he could say why the report was classified, Secretary Rumsfeld answered: 'No, you'd have to ask the classifier.'⁶

The desire to prevent embarrassment seems also to have played a role in the Bush administration's aggressive reclassification campaign. According to a February 2006 report by

⁴ *Overclassification and Pseudo-classification: The Impact on Information Sharing: Hearing Before the Subcomm on Intelligence, Information Sharing and Terrorism Risk Assessment of the House Comm on Homeland Sec., 110th Cong. (2007)* (statement of J. William Leonard).

⁵ Federation of American Scientists, *Secrecy News*, Apr. 3, 2008.

⁶ MINORITY STAFF OF HOUSE COMM. ON THE JUDICIARY, 10TH CONG., REPORT ON SECRECY IN THE BUSH ADMINISTRATION (2004) at 50.

the National Security Archive, the administration had reclassified and withdrawn from public access as of that date 9,500 documents totaling 55,500 pages, including some that are over 50 years old. For example:

- A complaint from the Director of Central Intelligence to the State Department about the bad publicity the CIA was receiving after its failure to predict anti-American riots in Colombia in 1948.
- A document regarding an unsanctioned CIA psychological warfare program to drop propaganda leaflets into Eastern Europe by hot air balloon that was canceled after the State Department objected to the program.
- A document from spring 1949, revealing that the U.S. intelligence community's knowledge of Soviet nuclear weapons research and development activities was so poor that America and Britain were completely surprised when the Russians exploded their first atomic bomb six months later.
- A 1950 intelligence estimate, written only 12 days before Chinese forces entered Korea, predicting that Chinese intervention in the conflict was "not probable."⁷

These reclassification actions call to mind the observations of the late Erwin N. Griswold, former Solicitor General of the United States and Dean of Harvard Law School, who argued the Pentagon Papers case before the Supreme Court in 1971. Presenting the case for the government, he had argued that the release of the Pentagon Papers would gravely damage the national security. Nearly two decades later, Griswold reflected on the lessons of that case:

It quickly becomes apparent to any person who has considerable experience with classified material that there is massive overclassification and that the principal concern of the classifiers is not with national security, but rather with governmental embarrassment of one sort or another. There may be some basis for short-term classification while plans are being made, or negotiations are going on, but apart from details of weapons systems, there is very rarely any real risk to current national security from the publication of facts relating to transactions in the past, even the fairly recent past. This is the lesson of the Pentagon Papers experience, and it may be relevant now.⁸

Some of the unclassified material removed from government web sites after 9/11 was at least more plausibly related to contemporary security concerns. But agencies have failed to provide a convincing rationale for how the withholding of these records serves the public interest.

⁷ MATTHEW M. AID, NAT'L SEC. ARCHIVE, DECLASSIFICATION IN REVERSE: THE U.S. INTELLIGENCE CMTY'S SECRET HISTORICAL DOCUMENT RECLASSIFICATION PROGRAM (2006).

⁸ Erwin N. Griswold, *Secrets Not Worth Keeping: The Courts and Classified Information*, WASH. POST, Feb. 15, 1989, at A25.

Consider, for example, the Risk Management Plans (RMPs) which are reported by chemical companies to the Environmental Protection Agency. These plans contain accident histories, measures adopted to prevent chemical releases, disaster plans, and worst-case scenario data, including the number of people in surrounding areas at risk of being killed or injured in the event of a catastrophic release.

More than two years *before* 9/11, the FBI was asked by the chemical industry to determine whether the disclosure of this information would increase our vulnerability to terrorism. At the Bureau's advice, Congress blocked EPA from disseminating the worst-case scenario assessments through the Internet (although these remain available at 50 reading rooms around the country). However, the FBI determined that the remaining information presented no increased risk and could remain on EPA's web site.

Ultimately, the FBI's determination mattered little. All RMP information came down in EPA's post-9/11 sweep, and it has yet to be restored. The public has been given no real explanation as to why.

In taking such actions, the administration has considered only the risks of public disclosure, not the benefits. Removing information does not remove risk, and may even increase it, lulling the public into a false sense of security and preventing citizens from bringing pressure to bear on officials responsible for chemical security.

The Bush administration has failed to act aggressively to address the problem.⁹ Secrecy is a poor substitute for policies that would make us more secure.

Recommendations regarding over-classification

It is, of course, too late to prevent the Bush administration from making classification decisions in violation of its own executive order. But the next president can swiftly rewrite the executive order to reinstate the provisions of Exec. Order No. 12958, specifically:

1. Establish a presumption against classification in cases of significant doubt;
2. Permit senior agency officials to exercise discretion to declassify information in exceptional cases where the need to protect the information is outweighed by the public interest in disclosure; and
3. Prohibit reclassification of material that had been declassified and released to the public under proper authority.

⁹ See, e.g., Paul Orum, *Toxic Trains and the Terrorist Threat*, Center for American Progress, Apr. 2, 2007, available at http://www.americanprogress.org/issues/2007/04/chemical_security_report.html; Preventing Toxic Terrorism, Center for American Progress, available at http://www.americanprogress.org/issues/2006/04/b681085_ct2556757.html; Linda Greer, *New Strategies to Protect America: Securing our Nation's Chemical Facilities*, Center for American Progress, available at <http://www.americanprogress.org/~/chemplantssecurity.pdf>.

In addition, the new order should require agencies to (a) consider the harm to the public interest (and to national security) of classifying information, (b) require that information be classified at the lowest level and the shortest duration appropriate, (c) confine classification to those portions of the document that are properly classified, and (d) establish systems for oversight, training and auditing of classification decisions, and remedies for improper classification decisions.

Controlled unclassified information (pseudo-classification)

For all its faults, the classification system has many virtues as well. Classification actions are subject to uniform legal standards pursuant to executive order. These actions can be taken by a limited number of officials who receive training in the standards to be applied; they are of limited duration and extent; they are monitored by a federal oversight office; they can be challenged; and they can be appealed.

The same cannot be said for the potpourri of unclassified control markings used by federal agencies to manage access to sensitive government information, most of which are defined by neither statute nor executive order, and which collectively have come to be known pejoratively as the “pseudo-classification” system.

Among the better known are Sensitive But Unclassified (SBU), Sensitive Security Information (SSI), Sensitive Homeland Security Information (SHSI), Critical Infrastructure Information (CII), Law Enforcement Sensitive (LES), and For Official Use Only (FOUO). While some of these control markings are authorized by statute,¹⁰ others have been conjured out of thin air. Some of these pseudo-classification regimes allow virtually any agency employee (and often private contractors) to withhold information without justification or review, without any time limit, and with few, if any, internal controls to ensure that the markings are not misapplied.

A March 2006 report by the Government Accountability Office (GAO) found that the 26 federal agencies surveyed use 56 different information control markings (16 of which belong to one agency) to protect sensitive unclassified national security information. The GAO also found that the agencies use widely divergent definitions of the same controls.¹¹

As in the case of classification and reclassification actions, these designations have at times been used not to protect legitimate national security secrets, but to spare the government from embarrassment. In a March 2005 letter to Rep. Christopher Shays, then the Chairman of the House Committee on Government Reform, Rep. Henry Waxman cited examples in which:

¹⁰ See, e.g., Aviation and Transp. Sec. Act, Pub. L. No. 107-71; Fed. Info. Sec. Act, Pub. L. No. 107-347; Homeland Sec. Act, Pub. L. No. 107-296; Critical Infrastructure Info. Act, Pub. L. No. 107-296.

¹¹ U.S. GOV'T ACCOUNTABILITY OFFICE, REP. NO. GAO-06-385, INFORMATION SHARING: THE FEDERAL GOVERNMENT NEEDS TO ESTABLISH POLICIES AND PROCESSES FOR SHARING TERRORISM-RELATED AND SENSITIVE BUT UNCLASSIFIED INFORMATION (2006).

- The State Department withheld unclassified conclusions by the agency's Inspector General that the CIA was involved in preparing a grossly inaccurate global terrorism report.
- The State Department concealed unclassified information about the role of John Bolton, Under Secretary of State for Arms Control, in the creation of a fact sheet that falsely claimed that Iraq sought uranium from Niger.
- The Department of Homeland Security concealed the unclassified identity and contact information of a newly appointed TSA ombudsman whose responsibility it was to interact daily with members of the public regarding airport security measures.
- The CIA intervened to block the chief U.S. weapons inspector Charles A. Duelfer, from revealing the unclassified identities of U.S. companies that conducted business with Saddam Hussein under the Oil for Food program.
- The Nuclear Regulatory Commission sought to prevent a nongovernmental watchdog group from making public criticisms of its nuclear power plant security efforts based on unclassified sources.¹²

In May 2008, President Bush issued an executive memorandum¹³ establishing a framework for the sharing of controlled unclassified information, which purported to standardize practices and thereby improve the sharing of information but in fact does nothing to limit the use (and misuse) of what are now collectively referred to as "controlled unclassified information" (CUI).

Recommendations regarding controlled unclassified information

At a minimum, the next president should issue a new memorandum that creates a presumption against the designation of controlled unclassified information. But Congress can and should go further. The House has passed two bills, H.R. 6193, introduced by Rep. Jane Harman (D-CA), and H.R. 6576, introduced by Rep. Henry Waxman (D-CA), which seek to reduce the use of unclassified information control markings and establish an orderly process that would discourage their misuse and maximize public access to unclassified information.

Enactment of this or similar legislation would be a positive step. Congress also might usefully resurrect the limitations on unclassified controls contained in H.R. 5112, the Executive Branch Reform Act, which was reported by the House Government Reform Committee during the 109th Congress. Those provisions would have prohibited agencies from adopting unclassified controls that are not expressly authorized by statute or executive order, except where the

¹² H.R. Rep. No. 109-18, at 16 (2005) (letter from Rep. Henry Waxman to Rep. Christopher Shays).

¹³ *Memorandum for the Heads of Executive Departments and Agencies re: Designation and Sharing of Controlled Unclassified Information (CUI)* (May 9, 2008), available at <http://www.whitehouse.gov/news/releases/2008/05/20080509-6.html>.

Archivist determines that there is a need for some agencies to use such designations “to safeguard information prior to review for disclosure.”

Legislation to eliminate non-statutory CUI markings would begin to ameliorate some of the worst features of what is today an unregulated wilderness of inconsistent standards and insufficient checks. But such proposals beg the question of whether Congress should be conferring such power on agency officials in the first place. Such measures are all too easy to enact, and once they are in place, it is virtually impossible to get rid of them.

I would therefore urge Congress to give serious consideration to getting rid of these designations altogether. If the information is sensitive enough to meet the test for classification, it should be classified. If it cannot meet that test and does not fall within a specific FOIA exemption, then it should be available to the public.

The Freedom of Information Act

In the decades since its enactment in 1966, the Freedom of Information Act (FOIA) has been one of the principal means by which the citizens of the United States can obtain access to unpublished government information. Under the statute, agencies are permitted to withhold information only if it is covered by one of the nine categories that are exempt from disclosure.

In 1993, Attorney General Janet Reno issued a memorandum which announced that in determining whether or not to defend a nondisclosure decision under FOIA, the Department of Justice would apply a “presumption of disclosure,” and would defend the assertion of an exemption “only in those cases where the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption.”¹⁴

In 2001, Attorney General Ashcroft issued a new memorandum, superseding the Reno memorandum and replacing the “foreseeable harm” standard with a much less stringent standard requiring only a “sound legal basis” for the assertion of a FOIA exemption.¹⁵ Not surprisingly, agencies have responded to the Ashcroft memo by making aggressive use of the exemptions to deny requests.

Equally troubling are the enormous backlogs in the handling of FOIA requests. While FOIA requires agencies to provide an initial response to a request within 20 days and to provide the documents in a timely manner, agencies often take months or years to respond. A 2007 survey of 87 agencies by the National Security Archive found that one requester has been awaiting a response for 20 years, and 16 have been waiting more than 15 years.¹⁶

¹⁴ *Memorandum for Heads of Departments and Agencies re: The Freedom of Information Act* (Oct. 4, 1993), available at <http://www.fas.org/sgp/clinton/reno.html>.

¹⁵ *Memorandum for Heads of All Departments and Agencies re: The Freedom of Information Act* (Oct. 12, 2001), available at <http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm>.

¹⁶ NATIONAL SECURITY ARCHIVE, *20 YEARS OF FOIA, 20 YEARS OF DELAY OLDEST PENDING FOIA REQUESTS DATE BACK TO THE 1980S*, July 2, 2007, available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB3224/index.htm>.

In December 2007, President Bush signed the OPEN Government Act, Public Law No: 110-175, which codified long-sought reforms to create incentives to improve agency response times and limit redactions, expand the definition of "news media" who are exempt from search fees, and require government contractors who maintain information "that would be an agency record" to respond to FOIA requests, and improve agency reporting requirements.

Recommendations on FOIA

One key provision of the OPEN Government Act that was dropped in the course of negotiations would have reversed the Ashcroft memo. The next president should direct the attorney general to issue a memorandum revoking the Ashcroft memorandum and restoring the presumption in favor of disclosure when there is no foreseeable harm to an interest protected by the exemption. If the president fails to take this step, Congress should amend FOIA to codify the presumption.

Presidential records

After resigning the presidency, Richard Nixon sought to retain personal control over his presidential records and to shield them from public view. Congress responded by enacting the Presidential Records Act of 1978 (PRA), which provides that presidential records are the property of the United States, and requires the president to "take all such steps as may be necessary to assure that the activities, deliberations, decisions, and policies that reflect the performance of his constitutional, statutory, or other official or ceremonial duties are adequately documented and that such records are maintained as Presidential records."

In 2001, President Bush issued E.O. 13233, which seriously undermined the intent of the PRA by granting the heirs and children of former presidents the right to block release of presidential records. It also created a new vice presidential privilege.

The Bush administration has also failed in its statutory duty to preserve many of the records of its own tenure. After the Clinton White House struggled to recover more than a million electronic files that had not been properly archived by its automated records management system, it left office with an effective electronic records management system in place. The new administration proceeded to replace that system with one that was both less reliable and less secure. The new system led to the loss of millions of emails over an 18-month period from January 2003 to July 2005. An internal analysis by the White House found approximately 700 days on which one or more components of the EOP reported an unusually low number of emails. For 473 of those days, one or more components reported no emails at all. There were 12 days for which no emails generated by the president's immediate office could be found, and 16 days without any emails generated by the office of the vice president.

In addition, it was learned that over 80 senior White House officials, including senior adviser Karl Rove, had routinely circumvented the archiving system altogether by conducting official business through their Republican National Committee email accounts. Most of these emails were not preserved, and congressional investigators found that little or no effort had been made to recover them.

The “loss” of millions of email messages leaves a major gap in the historical record, compromising the ability of historians to understand how and why crucial decisions were made. It presents a serious obstacle to historians and ordinary citizens seeking to understand the course of events and the actions and motivations of those who participated in them.

For this reason, the Center for American Progress asked 30 of the nation's most eminent historians to join us in urging Congress to enact legislation to strengthen the Presidential Records Act.¹⁷ In a letter to House¹⁸ and Senate¹⁹ leaders (attached), they argue that such reforms are essential to ensure that presidential records are preserved for posterity. Their call for reform has been endorsed by the three leading associations of U.S. historians: the American Historical Association, the Organization of American Historians, and the National Coalition for History.

Recommendations on Presidential Records

The next president should revoke Exec. Order 13233, removing the ability of heirs and children of former presidents to block access to presidential records and eliminating the new vice presidential privilege. Without the executive order, management and release of presidential records would once more be governed by existing NARA regulations (36 C.F.R. 1270). The regulations provide procedures for the incumbent president to dispose of records after obtaining the views of the Archivist. They offer an outgoing president the opportunity to restrict certain types of records from disclosure for 12 years, and provide former presidents with notice and an opportunity to assert claims that the records are privileged and should not be disclosed.

If the president fails to act to revoke E.O. 13233, Congress should act by approving legislation along the lines of S. 886/H.R. 1255, the Presidential Records Act Amendments of 2007, bipartisan legislation introduced by Sen. Jeff Bingaman (D-NM) and Rep. Henry Waxman (D-CA).

¹⁷ Mark D. Agrast, *Congress Must Act to Preserve Presidential Records for Future Generations*. Center for American Progress, Sept. 8, 2008, available at

http://www.americanprogressaction.org/issues/2008/presidential_records_act.html.

¹⁸ *Letter from U.S. Historians to House leaders* (Sept. 5, 2008), available at

http://www.americanprogressaction.org/issues/2008/pdf/presidential_records_act1.pdf.

¹⁹ *Letter from U.S. Historians to Senate leaders* (Sept. 5, 2008), available at

http://www.americanprogressaction.org/issues/2008/pdf/presidential_records_act2.pdf.

The House of Representatives has already passed one measure that would begin to address the problem of preservation of electronic records, although its prospects in the Senate are uncertain. H.R. 5811, The Electronic Communications Preservation Act, introduced by Rep. Henry Waxman (D-CA), would require the archivist to issue standards for preservation of electronic records and to report to Congress on whether agencies are complying with them. The bill also would require the archivist to establish electronic records management standards for presidential records, and to certify annually whether the controls established by the president meet the requirements.

H.R. 5811's congressionally mandated standards and reporting requirements would be a step in the right direction. But I would urge Congress to go further. The bill includes no real enforcement measures, and affords no remedy if the president fails to comply. At a minimum, Congress should provide a statutory role for the Archivist of the United States in ensuring White House compliance. Congress also should consider provisions which would empower the archivist and the public to challenge future presidents or vice presidents who fail to honor their obligation to preserve the nation's history for future generations.

More immediately, before the current administration leaves office, Congress should seek an acknowledgment from the vice president that, notwithstanding his prior assertions that he is not a member of the executive branch, he is bound by the record retention requirements of the Presidential Records Act, which require that vice presidential records be treated "in the same manner as Presidential records."²⁰

Executive branch privileges

The Bush administration has made aggressive use of executive privilege claims to withhold information from Congress and the courts. In addition, it has repeatedly asserted the common law state secrets privilege to curtail judicial review of government actions.

Executive privilege

The text of the Constitution says nothing about the right of Congress to demand information from the executive branch—or the right of the executive to withhold it. Yet the Supreme Court has long recognized that the power to investigate and the attendant use of compulsory process are inherent in the legislative function vested in the Congress by Article I of the Constitution.²¹

²⁰ 44 U.S.C. § 2207.

²¹ e.g. *McGrain v. Daugherty* 273 US 135 (1927); *Sinclair v. United States* 279 U.S. 263 (1929); *Watkins v. United States* 354 U.S. 178 (1957)

Our system of checks and balances requires that Congress have the ability to obtain the information it needs to make the laws and to oversee and investigate the activities of the executive branch. And it also requires that the president have the ability to resist demands for disclosures of information that could threaten important national interests, particularly disclosures that would harm the national security or foreign relations of the United States, and including those that would jeopardize ongoing criminal investigations or interfere with his ability to obtain frank and candid advice.

President Clinton from time to time invoked the privilege when he felt it was necessary to protect presidential communications and deliberations from overly broad and intrusive requests for information. But he also understood that the privilege is not unqualified: the public interests protected by the claim of privilege must be weighed against those that would be served by the disclosure. He appreciated that even where the privilege applies, it is not absolute. It can be overcome by a strong showing that the information request is focused, that Congress does not have other practical means of obtaining the information, and that the information is genuinely needed by the Committee and is "demonstrably critical to the responsible fulfillment of the Committee's functions."²²

Some in the present administration appear to believe that presidential advisers are immune from giving testimony on the theory that Congress does not have jurisdiction to oversee the Office of the President. No president in our country's history has attempted to make such an extraordinary claim and no precedent provides a legal justification to support that assertion.

That is what Judge Bates has thus far concluded in regard to the current controversy over the refusal of former White House Counsel Harriett Miers to testify before the House Judiciary Committee. And it is what I would expect the courts to continue to say, at least to the extent that the two branches are unable to resolve these matters for themselves through the normal process of accommodation.

State secrets privilege

The state secrets privilege was recognized by the Supreme Court in *Reynolds v. U.S.*, 345 U.S. 1 (1953), in which the executive branch sought dismissal of a suit brought under the Federal Tort Claims Act by the families of civilians killed in the crash of an B-29 Air Force plane. The families sought to gain access to the accident reports, but the government asserted in court that the national security would be harmed if the case were allowed to proceed. The Court accepted the government's claims but failed to inquire sufficiently to determine whether the claims were legitimate.

²¹ See *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C.Cir. 1974).

Decades later, when the documents were declassified, it was revealed that the plane had a history of mechanical failures and accidents, and the Air Force had failed to carry out preventive maintenance that might have prevented the disaster. The Court had been deceived: the government had asserted the state secrets privilege not to protect national security but to prevent its negligence from coming to light.

From the Reynolds case to the present day, the state secrets privilege has been repeatedly employed, not to protect genuine state secrets, but to shield the government from political and legal accountability for its misdeeds. Yet with few exceptions, the courts have continued to accord extraordinary deference to the mere assertion of the privilege, abandoning their proper role in reviewing the government's claims.

The nine presidents who served from 1953 to 2001 claimed the state secrets privilege just 55 times. Since 9/11, the Bush administration has invoked the privilege more than 20 times. These instances included:

- Challenges to the president's warrantless surveillance program brought by the American Civil Liberties Union, the Electronic Frontier Foundation, and the Center for Constitutional Rights.
- Lawsuits brought by Khaled El-Masri, a German citizen abducted by the CIA in Macedonia and rendered to Afghanistan, where he was tortured; and Maher Arar, a Canadian seized in a U.S. airport and rendered to Syria, where he too was subjected to torture. Both were victims of mistaken identity.
- A whistleblower suit brought by Sibel Edmonds, a former Turkish translator for the FBI, who was dismissed after attempting to alert her supervisors to problems in the division.

Recommendations on privilege claims

The next president and the next Congress undoubtedly will experience conflicts regarding requests for information. There will be times when each branch is compelled to assert its prerogatives. But the potential for such collisions can be considerably reduced, and those that occur can be more speedily resolved, if both branches avoid drawing lines in the sand. The next president would be wise to reject the radical doctrinal absolutism advanced by the outgoing administration, and both branches would do well to seek a resolution of these conflicts through the usual process of accommodation.

Given the tendency of many courts to defer to state secrets claims without examining them, it is important for Congress to adopt legislation to provide real judicial review. Congress should consider statutory provisions, such as those contained in S. 2533, the State Secrets Protection Act, reported by the Senate Judiciary Committee in August 2008, to provide real

judicial review of the government's assertion of the State Secrets Privilege by directing the courts to weigh the costs and benefits of public disclosure.

Secret law

There is surely nothing more repugnant to the rule of law in a democracy than the secret enactment or revocation of the laws themselves. If the laws are not knowable, then there is no way for the people to follow them, or to know whether their government is following them.

Executive orders

The leading case we know about was the president's secret order authorizing the National Security Agency to intercept the international electronic communications of American citizens without a court order. This action was a violation of the Foreign Intelligence Surveillance Act, and as an executive order cannot override a statute, was plainly illegal. But it also was inconsistent with Exec. Order 12333, first issued by President Reagan in 1981, and amended by later presidents, including President Bush, which establishes the framework of rules and institutional structures that govern the U.S. intelligence community.

The Office of Legal Counsel has taken the position—secretly, of course—that since the president may revoke or modify an executive order at any time, he may do so simply by departing from it, rather than by expressly waiving or revoking it. This at last puts into effect the famous remark of President Nixon—“If the President does it, that means that it is not illegal.”

Thus, while President Bush has formally amended E.O. 12333 on three occasions, under the theory of his administration, he also has amended it tacitly on at least one occasion we know about, and perhaps many others that have yet to come to light. This means that Exec. Order 12333 is not, in fact, a statement of current law at all.

It is one thing to say that the president may amend his own orders—a proposition on which there is no disagreement. It is another thing to say that he and his administration are not bound by those orders, and may simply suspend their operation for one day only while leaving them officially on the books. It is particularly revealing of this administration's overweening conception of executive power and its contempt for the rule of law that it sees nothing wrong with this.

As a practical matter, this practice makes oversight impossible and greatly complicates the task of legislating. How can Congress oversee the executive branch if it does not even know what orders and legal rulings are in effect? How can Congress enact new laws if it does not know how the existing laws are being interpreted and applied?

It is fundamentally inconsistent with the rule of law for the government, like any other business, to maintaining two sets of books, one public, the other for its eyes only. Nothing is more corrosive of public confidence in the rule of law.

OLC memoranda

The same must be said of opinions issued by the Office of Legal Counsel—authoritative interpretations of the Constitution and the laws on which the executive branch relies in making policy decisions. The president has fought to keep numerous OLC opinions secret under various theories of executive privilege. These include opinions long sought by this committee regarding the legality of the president's warrantless surveillance program, the interrogation of persons declared enemy combatants and many other matters.

It is one thing for the president to seek to maintain the confidentiality of documents that track the deliberations of his close advisers. It is another thing for him to withhold from congressional overseers the definitive legal interpretations which form the basis for the actions of the administration.

Recommendations on secret law

The next president should direct the attorney general to issue a memorandum indicating that OLC opinions, as binding authority on the executive branch, will not be withheld from Congress under any theory of executive privilege, deliberative process privilege or attorney-client privilege, and that there will be a presumption of public disclosure of such opinions unless their disclosure would pose a genuine risk of harm to national security.

Congress should enact S. 3405, the Executive Order Integrity Act, which was introduced by you, Mr. Chairman, and Senator Whitehouse, to make it unlawful for the president to secretly modify or revoke a published executive order. Under your legislation, the bill would require the president to provide notice in the Federal Register within 30 days after he "revokes, modifies, waives, or suspends a published Executive Order or similar directive." Such a notice would be required to specify the order affected by the president's action and the nature of the change, so that there would be no ambiguity about what precise provisions are in effect. The bill would not compel publication of any information that is classified, but would require that such information be provided to Congress.

I hope that Congress approves this important yet modest proposal, and that the next president signs it. I also hope the next president and his Justice Department will repudiate the obnoxious view that the president may modify a published executive order simply by acting inconsistently with it, rather than by formally revoking, amending or waiving it. The president must be bound by the law or it is not the law.

Protections for whistleblowers and the press

20

The rule of law requires that government be accountable to the people. And this in turn depends in large part on the vigor, courage and diligence of the media and private citizens, including nongovernmental watchdog organizations and conscientious actors within the government itself. While unauthorized disclosures can be exceedingly harmful to our national security, these are best handled through clear standards and administrative enforcement, not through threats and reprisals against the press or other nongovernmental actors.

Protections for whistleblowers

By revealing information about illegal activities by government officials and contractors, whistleblowers serve as an important check against official wrongdoing. It is in the public interest to ensure that they come forward, and that they do not face retaliation when they do so.

Protections for journalists

The U.S. does not have an Official Secrets Act. In 2001, President Clinton vetoed the 2001 Intelligence Authorization bill because it contained an official secrets provision that would have made any "unauthorized" disclosure of classified information a felony. Prior to 9-11, the Bush Administration took a public position consistent with the views expressed by President Clinton. But subsequently, the Bush administration has not been deterred. It has aggressively sought to transform the 1917 Espionage Act into the next best thing.

The Espionage Act prohibits the unauthorized disclosure of classified defense information to enemy powers with the intent to harm the United States. It does not apply to publication of classified information by the media. Yet Attorney General Alberto Gonzales darkly hinted that journalists who publish such information could be prosecuted under the Act. The Bush administration also attempted to use the Act to force the American Civil Liberties Union to turn over a leaked three-and-a-half-page document that apparently contained no classified information but may have been embarrassing to the government. Had this effort succeeded, it would have marked the first time in history that a criminal grand jury subpoena was used to force a private recipient of leaked material to turn it over to the government.

The Justice Department also has sought to bring pressure on journalists who refuse to disclose their confidential sources. It has had reporters jailed for refusing to cooperate with leak inquiries. Congress has under consideration legislation which would recognize a qualified journalist-source privilege that seeks to weigh the interest of the public, on one hand, in discouraging leaks that harm the national security, and on the other hand, in encouraging the media to tell the public things which the government may not wish them to know.

Recommendations on protections for whistleblowers and the press

Congress should enact S. 274, the Federal Employee Protection Act, which was introduced by Senator Daniel Akaka (D-HI) and passed by the Senate in December 2007. The bill would strengthen the Whistleblower Protection Act of 1989 to protect public employees from reprisal when they publicly disclose information regarding government wrongdoing. It also would protect employees who disclose classified information about government wrongdoing to members of Congress who are authorized to receive such information.

Congress also should enact S. 2035, the Free Flow of Information Act, introduced by Sens. Specter and Leahy and reported by the Senate Judiciary Committee on October 22, 2007. The bill would recognize a qualified journalist-source privilege, prohibiting compelled testimony by journalists unless the court determines that the testimony is essential to a criminal investigation or prosecution and cannot be obtained in any other way, that the matter concerns an unauthorized disclosure of properly classified information which will cause significant, clear and articulable harm to the national security, and that nondisclosure of the information would be contrary to the public interest.

Secrecy and e-government

Given the many threats and challenges we face as a nation, it is imperative that we enlist the full potential of new technologies to alert the public and enlist its cooperation and support in reducing risk and improving our quality of life. The culture of secrecy embraced by this administration is antithetical to that effort, and ultimately self-defeating.

New information technologies make it possible to gather, analyze, and disseminate large volumes of data. Sensor and satellite technology provide the ability to collect data remotely—in real-time, with no paper reporting necessary—on almost anything in the physical environment. Electronic reporting systems allow data to be delivered and aggregated instantaneously. Data-mining programs apply automated algorithms to extract patterns and correlations that might take years to uncover manually. And all of this information can be shared through the Internet in accessible, searchable formats that allow journalists, academics, nongovernmental organizations and concerned citizens to perform their own independent analyses.

The Center for American Progress has put forward recommendations to harness these technologies to build an open and accountable data-driven government.²³ The Bush administration, unfortunately, has been headed in the opposite direction.

EPA's Toxics Release Inventory, a publicly searchable Internet database, demonstrates the power of information to promote health and safety improvements. Since its launch 20 years ago, industrial releases of the original 299 toxic chemicals tracked by TRI have declined nearly

²³ Daniel C. Esty and Reece Rushing, *Governing by the Numbers*, Center for American Progress, April 23, 2007, available at http://www.americanprogress.org/issues/2007/04/data_driven_policy.html.

60 percent, due in large measure to public pressure and heightened awareness within government and industry itself.

Unfortunately, instead of building on this success, the administration has revoked disclosure requirements at the urging of industry lobbyists. In December 2006, EPA finalized a rule that exempts thousands of facilities from fully accounting for their toxic releases.²⁴ Specifically, facilities are now permitted to use the program's less informative "short form" for small quantities of persistent bioaccumulative toxins (PBTs)—which includes lead, mercury, and dioxin—as well as releases of other TRI chemicals up to 2,000 pounds (the previous threshold was 500 pounds).²⁵

Similarly, the National Highway Traffic Safety Administration (NHTSA) answered the wishes of the auto industry when it decided, in 2003, to withhold "early warning" data about automobile safety defects, which Congress required to be reported after the widespread failure of Firestone tires in 2000. NHTSA made the dubious claim that disclosure of this information—including warranty claim information, auto dealer reports, consumer complaints, and data on child restraint systems and tires—could result in "substantial competitive harm" to the auto industry.²⁶ On Sept. 10, NHTSA finally made some of this information available through SaferCar.gov following successful lawsuits by Public Citizen.²⁷

Such disclosure advances the rule of law by allowing the public to verify compliance and observe whether government and private-sector actors are serving the common good. With advances in information technologies, we now have the tools to greatly expand disclosure and accountability. It is to be hoped that the next administration, unlike the current one, views this as an opportunity rather than a threat.

Conclusion

Thank you again for convening this hearing and inviting me to participate in it. I hope that Congress and the next president will act to ensure that the government keeps secret only the information that needs to be secret. In so doing, they will enhance both openness and security while restoring respect for the rule of law. Thank you.

²⁴ 71 Fed. Reg. 76932 (Dec. 22, 2006)

²⁵ EPA went even further in its original proposal. In particular, the agency proposed to scrap annual reporting entirely in favor of biennial reporting, but backed off in the face of strong opposition from Sen. Lautenberg and others.

²⁶ 68 Fed. Reg. 44209 (July 28, 2003)

²⁷ NHTSA is still withholding the number of consumer complaints to the manufacturer, field reports taken, and claims involving death and injury.

September 5, 2008

The Honorable Harry Reid
Majority Leader
United States Senate
528 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Mitch McConnell
Minority Leader
United States Senate
461-A Russell Senate Office Building
Washington, D.C. 20510

Dear Majority Leader Reid and Republican Leader McConnell:

Last year, the National Archives located a July 7, 1863 letter written by President Abraham Lincoln concerning the Civil War, which was described by the Archives as a "significant find." The discovery of this short note, written over 150 years ago, occasioned extraordinary interest and excitement.

Modern presidents have generated millions upon millions of documents that are critical to an understanding of our nation's past. Yet unless Congress takes action to safeguard these materials, many of them may be lost to future generations.

In 1978, Congress reacted to the Watergate scandal by enacting the Presidential Records Act. The PRA requires the president to "take all such steps as may be necessary to assure that the activities, deliberations, decisions, and policies that reflect the performance of his constitutional, statutory, or other official or ceremonial duties are adequately documented and that such records are maintained as Presidential records."

Unfortunately, while the PRA requires the preservation of presidential records, it fails to provide an effective means of enforcing compliance with that requirement. The consequences of that failure have only recently become clear, with the revelation that millions of White House email messages generated between October 2003 and March 2005 are missing. Little to no effort has been made to recover the missing messages, and many, if not all, may now be permanently lost. That loss will leave an enormous gap in the documentary record of the period, compromising the ability of future historians to understand how and why the Bush administration made critical policy decisions, including the decision to go to war in Iraq.

As historians, we believe it is vital that the PRA be strengthened to ensure that such a devastating loss will never again take place. Effective enforcement measures, including appropriate penalties for noncompliance, are essential to establishing and maintaining sound record keeping practices. In addition, there must be greater oversight of compliance with the PRA, including such measures as annual reviews and inspections by the Archivist. Had such inspections been the norm, the fact that millions of records were missing would have been discovered much earlier and all or most of them might have been recovered.

New technologies have made possible the capture and retention of an enormous volume of executive branch communications. A reinvigorated Presidential Records Act is needed to ensure that this information is preserved and made available for historical study—so that future generations can one day greet the discovery of an email from President Bush with the same excitement that attended the Lincoln letter.

Sincerely,

Allida M. Black
George Washington University

David W. Blight
Yale University

Alan Brinkley
Columbia University

Douglas G. Brinkley
Rice University

Robert A. Caro New York, NY	Stanley I. Kutler University of Wisconsin
Clayborne Carson Stanford University	David Levering Lewis New York University
Lizabeth Cohen Harvard University	David McCullough West Tisbury, Massachusetts
Robert Dallek Washington, DC	James M. McPherson Princeton University
Joseph J. Ellis Mount Holyoke College	William Lee Miller University of Virginia
Eric Foner Columbia University	Anna Kasten Nelson American University
Lee W. Formwalt Executive Director Organization of American Historians	Jack N. Rakove Stanford University
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Stanley N. Katz Woodrow Wilson School, Princeton University	Lee White Executive Director National Coalition for History
Michael Kazin Georgetown University	Sean Wilentz Princeton University
David M. Kennedy Stanford University	Roger Wilkins George Mason University
Linda K. Kerber University of Iowa	Garry Wills Northwestern University

**United States Senate Committee on the Judiciary
Subcommittee on the Constitution
Hearing on “Restoring the Rule of Law”
September 16, 2008**

Joint Statement of

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Duke University School of Law

We are professors of law and former attorneys in the Justice Department's Office of Legal Counsel (OLC). We wish to commend the Subcommittee for holding this hearing on the rule of law. As former OLC attorneys we have seen firsthand the ways in which this principle has protected fundamental liberties and promoted the proper functioning of government. Adherence to rule of law principles, moreover, has ensured that a President's rightful assertion of constitutional authorities is not undermined by doubts about the Executive Branch's commitment to the separation of powers. We are deeply concerned by actions in the past few years that have eroded the force of this vital principle.

While no Administration has been perfect, for almost all of our history Presidents from all political parties have demonstrated a fundamental commitment to the principle of obedience to statutory and constitutional limits on executive power. That is, until now. Recent secret abuses of power and extravagant claims of unilateral authority have called seriously into question the Executive Branch's willingness to adhere to lawful limits on executive authority. The resulting crisis of legitimacy makes urgent the need for reforms to promote the rule of law throughout the federal government. In our testimony, we will focus upon ways to promote adherence to the law within the Justice Department, and particularly at OLC.

The fundamental precept that no one, not even the President, is above the law is enshrined in the Take Care Clause, which provides that "the President shall take Care that the Laws be faithfully executed."¹ Rarely has any President directly challenged the principle that the President must obey the law. President Nixon came close with his extraordinary assertion that, "when the President does it, that means it is not illegal."² The current Administration's challenge to the rule of law has been more subtle, and for that reason may prove more difficult to redress. That simply makes it even more imperative that we do all we can to understand and respond to this challenge

In our system, the Constitution, of course, is the supreme law of the land. Congress at times may enact statutes that violate the Constitution, and the courts possess the clear authority to declare such statutes invalid and unenforceable. In some rare circumstances, the President's duty to faithfully execute the laws counsels him to decline to enforce an unconstitutional statute even absent a judicial order. And under the system of separated powers, one way a statute can be unconstitutional is if it unduly impinges on powers that the Constitution assigns to the President. Whether it is appropriate in any given circumstances for the President to decline to enforce a statute he believes to be unconstitutional involves a complicated calculation, about which previous Administrations and past practice offer much guidance.³ At least one predicate is

¹ U.S. CONST. art. II, § 3.

² *Excerpts from Interview with Nixon about Domestic Effects of Indochina War*, N.Y. TIMES, May 20, 1977, at A16 (interview by David Frost).

³ See Walter E. Dellinger, *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. Off. Legal Counsel 199 (1994); Benjamin R. Civiletti, *The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation*, 4A Op. Off. Legal Counsel 55 (1980); David Barron, *Constitutionalism in the Shadow of Doctrine: The President's Non-Enforcement Power*, 63 L AW &

absolutely clear: to comply with the rule of law, in order to reach a sound conclusion that a statute unduly impinges on the President's powers, the scope of the President's powers must be correctly stated. Under this Administration, lawyers in the Executive Branch have wildly misinterpreted what the Constitution says about the extent of presidential authority, and as a result the President has erroneously claimed the authority to disregard laws that he is obligated to follow.

A second danger to the rule of law arises when, instead of directly challenging a statutory restriction on the President's powers as unconstitutional, the Executive Branch relies on constitutional concerns about the statute to justify a strained interpretation of the statute so that it no longer means what Congress said. The canon of constitutional avoidance instructs that when a statute can fairly be interpreted in two different ways, one of which would violate the Constitution (or would raise a serious constitutional concern) and one of which would not, the statute should be interpreted to avoid the constitutional problem. Courts often employ this sound rule of statutory interpretation. The Bush Administration, however, has repeatedly misused and abused the avoidance canon, twisting the meaning of statutes beyond recognition.⁴ This second danger to the rule of law is related to the first. Because the Bush Administration endorses such an expansive and erroneous interpretation of the President's exclusive powers, its lawyers have raised constitutional objections to statutes with unprecedented frequency. The result is that reasonable and permissible statutory regulations of the Executive Branch are misconstrued, contorted, or even eliminated, all in the name of avoiding constitutional concerns that actually flow from an implausible view of the Constitution.

When the secret Torture Memo of August 1, 2002⁵ became public, it provided a vivid – indeed, a shocking – example of the harm that could be done by the invocation of indefensibly sweeping constitutional claims of presidential authority to defy the law and by the perverse twisting of statutory language. A federal law makes it a crime for anyone acting under the color of law to engage in torture outside the United States. OLC nevertheless concluded that this federal law, which implements our treaty obligations under the Convention against Torture, could not operate to prohibit the President from ordering the use of torture in interrogating enemy combatants.⁶ First, the memo used the

CONTEMP. PROBS. 61 (2000); Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS. 7 (2000)...

⁴ See generally Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189 (2006).

⁵ Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, *Standards of Conduct for Interrogation under 18 U.S.C. 2340-2340A* (Aug. 1, 2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf>.

⁶ Although this memo was later rescinded, the Bush Administration has not repudiated this constitutional conclusion or the legal rationale on which it was based. Moreover, as we discuss below, the rationale found in the Torture Memo has been deployed in a number of memos that the Justice Department has not rescinded. And it also formed the basis for the ultimate conclusion of the Administration's most comprehensive war powers opinion, one that OLC has officially published. See Memorandum from John C. Yoo, Deputy Ass't Att'y Gen., Office of Legal Counsel, to Timothy Flanigan, Deputy Counsel to the President, *The President's Constitutional Authority to Conduct Military Operations against Terrorists and Nations Supporting Them* (Sept. 25, 2001), available at <http://www.usdoj.gov/olc/warpowers925.htm>.

canon of constitutional avoidance to suggest that the statute's unambiguous and unqualified prohibition on torture by all government personnel simply "does not apply to the President's detention and interrogation of enemy combatants pursuant to his Commander-in-Chief authority."⁷ Second, and alternatively, the memo concluded that if the statute cannot be read to exclude persons acting under Presidential orders -- a meaning that the words cannot support -- and instead must be understood to cover interrogations ordered by the President, then it is unconstitutional. On both points, the memo's reasoning is premised on such a broad conception of the President's authority as Commander in Chief that it would allow the President to ignore virtually any statute that regulates the military or the conduct of war. The memo also never even acknowledges that the Constitution explicitly assigns to Congress significant authority relevant to regulating the military, the conduct of war, or the nature of interrogations.⁸ The Administration's interpretation of the constitutional distribution of war powers has no support in judicial precedent. Former OLC head Jack Goldsmith observed that the Torture Memo, and other memoranda authored to support the Administration's counterterrorism activities, "were deeply flawed: sloppily reasoned, overbroad, and incautious in asserting extraordinary constitutional authorities on behalf of the President. I was astonished, and immensely worried, to discover that some of our most important counterterrorism policies rested on severely damaged legal foundations."⁹

Not only is the theory of presidential power found in the Torture Memo unjustified, but OLC also betrayed its proper role in arriving at its conclusions. Instead of enforcing valid legal constraints within the Executive Branch, OLC seems to have allowed its interpretation of applicable laws to be infected by its outsized view of the President's power to disregard limitations on his authority to do whatever he thought necessary. As a result, the memorandum reads more like a one-sided justification for conferring legal immunity than as a sober assessment of the actual state of the law.

The Torture Memo was by no means an isolated incident. Indeed, the highly inflated view of presidential power contained in the Torture Memo appears to have informed a vast array of the legal advice given during the Bush Administration. OLC, for example, issued a memo asserting that the President may initiate a full-scale, long-term war even if Congress has not declared or otherwise authorized it, and even if it is prohibited by the War Powers Resolution.¹⁰ Similarly, the Justice Department issued a memo -- which no official seems to have been willing to sign -- arguing implausibly that FISA does not apply to the President's Terrorist Surveillance Program and, further, that FISA would be unconstitutional if it did apply to limit this program.¹¹ In another memo dealing with

⁷ See Memorandum from Jay S. Bybee, *supra* note 5, at 34-35.

⁸ Congress has broad authority in this area. It is authorized, *inter alia*, to define and punish offenses against the laws of nations, U.S. CONST., art. I, § 8, cl. 10, and to make rules for the government and regulation of the land and naval forces, *id.*, cl. 14.

⁹ JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 10 (2007).

¹⁰ Memorandum from John C. Yoo, *supra* note 6.

¹¹ Memorandum from U.S. Department of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* 35 (Jan. 19, 2006) ("Indeed, if an interpretation of

torture and numerous other statutory limits on interrogation, issued in March 2003 but released just this past March, OLC repeated the extreme theories of presidential power it had voiced in the original Torture Memo.¹² The Administration only released each of these memos years after it began to disregard the statutes in question, in response to leaks about the memos or the underlying programs.

The Bush Administration's practice with respect to signing statements offers many additional examples of just how expansively it views presidential power. President Bush, like Presidents of both parties before him, has used signing statements to express his view that certain provisions of a new law are unconstitutional. In the first six years of the Bush Administration, the President issued 223 objections citing his commander-in-chief power or his authority over foreign affairs. These objections were raised against statutes addressing a wide variety of issues, from personnel matters¹³ to the use of torture.¹⁴ The common element shared by a great many of the statements is that the alleged constitutional concern was based on an unjustifiably far-reaching and preclusive view of the President's commander-in-chief authority. Moreover, this overreaching was not limited to the areas of foreign and military affairs. An erroneous, expansive view of presidential power was imported to domestic matters under the heading of the unitary executive theory. During his first six years in office, President Bush issued signing statements objecting to 363 new provisions of law on this ground alone. Yet in many instances, the statute in question raised no discernible constitutional problem and the President's objection was either unsupported or unsupportable.

Without regard to who wins the upcoming presidential election, we recommend that the next Administration make three commitments. First, the next President should promote a reasonable view of presidential power that is grounded in the Constitution's text and structure as well as settled judicial and political-branch precedents. Second, the next President should commit to greater openness and the accountability that goes with it. Third, the next President should commit to respecting important structural safeguards that

FISA that allows the President to conduct the NSA activities were not "fairly possible," FISA would be unconstitutional as applied in the context of this congressionally authorized armed conflict.").

¹² Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., to William J. Haynes, Gen. Counsel, department of Defense, *Military Interrogation of Alien Unlawful Combatants Held Outside the United States*, (Mar. 14, 2003), available at <http://www.fas.org/irp/agency/doj/olc-interrogation.pdf>.

¹³ Consider, for example, a provision limiting the number of government relations personnel employed in the Department of Defense. President Bush contended that this limitation would raise serious constitutional questions relating to his authority as commander in chief. Yet, the statement did not specify the nature of those objections and it is difficult to imagine what they might have been, other than the implausibly exaggerated view of the President's commander-in-chief power expressed in the Torture Memo. Statement on Signing The Department of Defense and Emergency Supplemental Appropriations for Recovery from and Response to Terrorist Attacks on the United States Act 2002, 38 WEEKLY COMP. PRES. DOCS. 46 (Jan. 10, 2002).

¹⁴ Consider, for example, the signing statement objecting to the McCain Amendment prohibiting military personnel from engaging in cruel, inhuman, or degrading treatment of detainees. President Bush asserted that this prohibition could violate his commander-in-chief power and strongly indicated that the judiciary had no authority to enforce it. Statement on Signing the Department of Defense, Emergency Supplemental Appropriation to Address Hurricanes in the Gulf of Mexico and Pandemic Influenza Act 2006, 41 WEEKLY COMP. PRES. DOCS. 1918 (Dec. 30, 2005).

check against presidential aggrandizement. Within each of these categories, we recommend a number of more specific steps.

1. A Well-Founded View of Presidential Power. To advance the first commitment, the next President should initiate a process to ensure that the new Administration withdraws and repudiates the reasoning of memoranda and opinions that overstate the President's constitutional powers and that minimize those of Congress and the courts. We have not conducted a comprehensive review of OLC opinions, nor could we as many are classified or otherwise inaccessible. Thus, we cannot offer an exhaustive list of the opinions that should be withdrawn. We do believe, however, that the list should include the Torture Memos,¹⁵ the DOJ Whitepaper on the Terrorist Surveillance Program,¹⁶ and the September 25, 2001 opinion on war powers.¹⁷

The next President should also affirmatively adopt a view of presidential power that recognizes the roles and authorities of all three co-equal branches and that takes account of settled judicial precedent. We believe that a model the next President should seriously consider adopting is "The Constitutional Separation of Powers between the President and Congress."¹⁸ Setting forth the principles that will govern the determination of questions of presidential power will provide a constraint against the sort of result-oriented advice-giving that proved so problematic in instances such as the Torture Memo.

2. Openness and Accountability. To advance the commitment to openness and accountability, we offer several recommendations. OLC should review its procedures for releasing opinions and publicly release guidelines that will govern publication decisions. The goal of the review should be to make sure that OLC's memoranda and opinions are made available to the public to the maximum extent possible consistent with the legitimate confidentiality interests of the Executive Branch.¹⁹

Congress, the Courts, and the public are unable to check against abuses of executive power if they do not know about them. In this regard, the experience of the past eight years is instructive. It was only years later and due to leaked information that we learned of highly consequential opinions advising that the Executive Branch was not bound to comply with statutory limits on its power, including opinions relating to the treatment of detainees, the President's domestic surveillance program, and the use of secret prisons overseas for detention and interrogation.

¹⁵ Jay S. Bybee, *supra* note 5; Memorandum from John C. Yoo, *supra* note 12.

¹⁶ U.S. Department of Justice, *supra* note 11.

¹⁷ Memorandum from John C. Yoo, *supra* note 6.

¹⁸ 20 Op. Off. Legal Counsel 124 (May 7, 1996).

¹⁹ This recommendation is discussed more fully in the document appended to this testimony, Principles to Guide the Office of Legal Counsel. Some of us have addressed this issue in previously submitted testimony. See *From the Department of Justice to Guantanamo Bay: Administration Lawyers and Administration Interrogation Rules, Part III Before Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 105th Cong. (forthcoming 2008) (statement of Christopher H. Schroeder), 2008 WL 2537928; *Secret Law and the Threat to Democratic and Accountable Government Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 105th Cong. (forthcoming 2008) (statement of Dawn E. Johnsen), 2008 WL 1923041.

The review of OLC disclosure procedures should place special emphasis on the importance of releasing legal memoranda and opinions that conclude that statutory constraints on the Executive Branch do not apply because they are unconstitutional or will be interpreted as inapplicable by means of the avoidance canon. The Bush Administration has frequently misused this canon to resist compliance with a wide array of statutory obligations. Congress can potentially remedy such misinterpretations by amending the relevant statute to make it expressly and absolutely clear that the statute applies where the Executive Branch has said it does not. But that cannot happen if Congress is not told of the executive's interpretation in the first place.²⁰ Federal law already requires the Justice Department to report any instance in which it declines to defend the constitutionality of a law or does not enforce the law because of a view that it is unconstitutional.²¹ The statute does not cover invocations of the avoidance canon, which has become a significant loophole over the past eight years. As a result, we do not know what laws the Administration is refusing to enforce and our ability to hold the government accountable is impaired. We strongly urge Congress to enact a law to require the Justice Department to report instances in which it employs the avoidance canon or other recently misused canons of statutory construction to yield a conclusion that a law does not apply to the Executive Branch or need not be executed. We would particularly commend to Congress's consideration "The OLC Reporting Act of 2008," to be introduced by Senator Feingold.²²

The next President should also commit to review the Executive Branch's practice in asserting privileges, including executive privilege. The presidential communications privilege is, according to the Supreme Court, a legitimate constitutional privilege rooted in the separation of powers.²³ Nevertheless, this privilege is not absolute and judicial precedent as well as long Executive Branch and congressional practice recognize that the President's constitutional interest must be balanced against Congress's legitimate interests in conducting investigations and oversight.²⁴ The next President should commit that, when disputes over privilege arise, the executive will seek to resolve them through good faith negotiation and meaningful accommodation. This negotiation and accommodation process must include recognition by the Executive Branch of the legitimate claims to information that the Congress does have in its legislative, oversight and investigatory functions. In a recent and highly relevant case, Judge Bates authored a helpful discussion of Congress' legitimate interests in information, which in our judgment is largely correct.²⁵

The next Administration should review the grounds and procedures for invoking the state secrets privilege. In recent years, the Executive Branch has increasingly used this

²⁰ See Morrison, *supra* note 4, at 1237-39.

²¹ 28 U.S.C. § 530D (2008).

²² We also recommend consideration of similar legislation that we understand Rep. Brad Miller plans to introduce in the House of Representatives.

²³ *United States v. Nixon*, 418 U.S. 683 (1974).

²⁴ See, e.g., *United States v. Am. Tel. & Telegraph Co.*, 567 F.2d 121 (D.C. Cir. 1977); *Senate Select Committee v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974).

²⁵ See *Committee on the Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008).

privilege as a categorical bar to litigation and as a shield to avoid scrutiny of legally questionable executive programs, such as the Terrorist Surveillance Program.²⁶ The next President should commit to invoking this privilege only where national security interests (rather than the interest in avoiding embarrassment or judicial scrutiny) truly require it.

In addition, the next Attorney General should reverse the presumption against disclosure of information in response to a Freedom of Information Act (FOIA) request. On October 12, 2001, Attorney General John Ashcroft issued a new Department of Justice Freedom of Information Act Policy Memorandum to the heads of all federal departments and agencies.²⁷ This memorandum reversed the existing presumption in favor of disclosure and instructed agencies that, in making discretionary FOIA decisions, they should consider the values behind the exemptions – emphasizing interests such as national security and privacy – that militate against disclosure.²⁸ This presumption against disclosure prevents accountability on a broad range of government decisions and actions. To maintain secrecy where there is not a clear reason or threat of harm to the national interest undermines both the reality and public perception that government decisionmaking comports with the rule of law.

3. Structural Safeguards against Abuse of Power. To advance the third commitment to enhance structural safeguards, we suggest that the President instruct the Attorney General to pay particular attention to the procedures of OLC. Together with a number of our former colleagues, we have written a set of guidelines that OLC should follow in order to best effectuate its role.²⁹ We have appended these guidelines to this testimony, and with one exception, we will not elaborate further on those guidelines here. We would like to highlight the first of the principles, which counsels that:

When providing legal advice to guide contemplated executive branch action, OLC should provide an accurate and honest appraisal of applicable law, even if that advice will constrain the administration's pursuit of desired policies. The advocacy model of lawyering, in which lawyers craft merely plausible legal arguments to support their clients' desired actions, inadequately promotes the President's constitutional obligation to ensure the legality of executive action.

We do not want to be misunderstood. Although we do not believe that OLC should act as an advocate as described above, we do believe that OLC can and should play the role of honest adjudicator of legal questions even while serving as close legal advisor to the Attorney General and the President. It is OLC's duty to give the President its best appraisal of what the law allows and forbids, even if this means informing the President

²⁶ See, e.g., *Al-Haramain Islamic Found. v. Bush*, 507 F.3d 1190 (9th Cir. 2007); *ACLU v. Nat'l Sec. Agency*, 498 F.3d 644 (6th Cir. 2007).

²⁷ Memorandum from U.S. Dep't. of Justice, Office of Info. and Privacy (Oct. 12, 2001), available at www.usdoj.gov/oip/foiapist/2001foiapist19.htm.

²⁸ See *The Ashcroft Memo*, COALITION OF JOURNALISTS FOR OPEN GOVERNMENT http://www.cjog.net/background_the_ashcroft_memo.html.

²⁹ Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 *UCLA L. REV.* 1559 app. at 1603-11 (2007).

that some proposed course of action would be illegal. In order for OLC to play this role effectively, however, the President must have confidence that OLC is willing to assist the President in advancing his or her policy objectives in a legally permissible manner. If this confidence is lacking, there is a real risk that on important matters the President will go elsewhere for legal counsel. The roles of presidential advisor and honest, neutral arbiter of legal questions, then, are not mutually exclusive, but mutually reinforcing.

It is also important to see the failure of OLC in the current Administration to live up to its proper role – including its willingness to operate as an advocate and to offer thinly plausible, or even implausible, legal justifications for the President’s policy goals – in the broader context of attempts to politicize the Department of Justice more generally. Congress has held hearings, and the Inspector General and Office of Professional Responsibility have issued a number of reports, with more forthcoming, on these activities. There have been troubling revelations that partisanship played a role in hiring decisions for career attorneys and for immigration law judges, and also indications that the decision to fire United States Attorneys was influenced, at least in part, by a design to encourage partisan-influenced prosecution decisions.³⁰ If our commitment to the rule of law has any meaning, these abuses cannot be tolerated. The next President should instruct the Attorney General to adopt measures to ensure that nothing similar ever happens again and that Justice Department decisions taken in the future are free of any lingering taint of partisanship.

Public confidence in the impartial administration of justice must be restored. It is not sufficient that the President and Attorney General themselves be satisfied that they have addressed the problem. Their efforts must be considered credible on bipartisan and interbranch bases.

* * * * *

Executive Branch lawyers play a critical role in ensuring that the government adheres to the rule of law. To address past abuses and restore the Department of Justice’s integrity and credibility, we urge the next President and Attorney General to undertake the various recommendations that we have laid out above. Our recommendations also reflect our appreciation of the important role that OLC plays in safeguarding those presidential powers that rest on secure constitutional foundations. Indeed, one of the reasons to correct the abuses of the current Administration is to ensure that the President and his lawyers do not operate under clouds of suspicion and skepticism when they do their duty and defend executive authority in appropriate circumstances. The next Administration, whoever heads it, will no doubt engage in controversial assertions of executive power.

³⁰ OFFICE OF THE INSPECTOR GEN. & OFFICE OF PROF’L RESPONSIBILITY, U.S. DEP’T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL (July 28, 2008); OFFICE OF THE INSPECTOR GEN. & OFFICE OF PROF’L RESPONSIBILITY, U.S. DEP’T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING IN THE DEPARTMENT OF JUSTICE HONORS PROGRAM AND SUMMER LAW INTERN PROGRAM (June 24, 2008). These reports are available at <http://www.usdoj.gov/opr/index.html>. For a discussion of the adverse effects of the politicized hiring of immigration law judges, see Charlie Savage, *Vetted Judges More Likely to Reject Asylum Bids*, N.Y. TIMES (Aug. 23, 2008).

These assertions should not be alarming from the standpoint of the rule of law if they are made openly and accountably, are based on well-supported constitutional interpretations, and emerge from a process that respects the structural checks against abuse of power.

APPENDIX
Principles to Guide the Office of Legal Counsel
December 21, 2004

The Office of Legal Counsel (OLC) is the Department of Justice component to which the Attorney General has delegated the function of providing legal advice to guide the actions of the President and the agencies of the executive branch. OLC's legal determinations are considered binding on the executive branch, subject to the supervision of the Attorney General and the ultimate authority of the President. From the outset of our constitutional system, Presidents have recognized that compliance with their constitutional obligation to act lawfully requires a reliable source of legal advice. In 1793, Secretary of State Thomas Jefferson, writing on behalf of President Washington, requested the Supreme Court's advice regarding the United States' treaty obligations with regard to the war between Great Britain and France. The Supreme Court declined the request, in important measure on the grounds that the Constitution vests responsibility for such legal determinations within the executive branch itself: "[T]he three departments of government ... being in certain respects checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extrajudicially deciding the questions alluded to, especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions seems to have been purposely as well as expressly united to the executive departments." Letter from John Jay to George Washington, August 8, 1793, *quoted in 4 The Founders' Constitution* 258 (Philip B. Kurland & Ralph Lerner, eds. 1987).

From the Washington Administration through the present, Attorneys General, and in recent decades the Office of Legal Counsel, have served as the source of legal determinations regarding the executive's legal obligations and authorities. The resulting body of law, much of which is published in volumes entitled *Opinions of the Attorney General* and *Opinions of the Office of Legal Counsel*, offers powerful testimony to the importance of the rule-of-law values that President Washington sought to secure and to the Department of Justice's profound tradition of respect for the rule of law. Administrations of both political parties have maintained this tradition, which reflects a dedication to the rule of law that is as significant and as important to the country as that shown by our courts. As a practical matter, the responsibility for preserving this tradition cannot rest with OLC alone. It is incumbent upon the Attorney General and the President to ensure that OLC's advice is sought on important and close legal questions and that the advice given reflects the best executive branch traditions. The principles set forth in this document are based in large part on the longstanding practices of the Attorney General and the Office of Legal Counsel, across time and administrations.

1. When providing legal advice to guide contemplated executive branch action, OLC should provide an accurate and honest appraisal of applicable law, even if that advice will constrain the administration's pursuit of desired policies. The advocacy model of lawyering, in which lawyers craft merely plausible legal arguments to support their clients' desired actions, inadequately promotes the President's constitutional obligation

to ensure the legality of executive action.

OLC's core function is to help the President fulfill his constitutional duty to uphold the Constitution and "take care that the laws be faithfully executed" in all of the varied work of the executive branch. OLC provides the legal expertise necessary to ensure the lawfulness of presidential and executive branch action, including contemplated action that raises close and difficult questions of law. To fulfill this function appropriately, OLC must provide advice based on its best understanding of what the law requires. OLC should not simply provide an advocate's best defense of contemplated action that OLC actually believes is best viewed as unlawful. To do so would deprive the President and other executive branch decisionmakers of critical information and, worse, mislead them regarding the legality of contemplated action. OLC's tradition of principled legal analysis and adherence to the rule of law thus is constitutionally grounded and also best serves the interests of both the public and the presidency, even though OLC at times will determine that the law precludes an action that a President strongly desires to take.

2. OLC's advice should be thorough and forthright, and it should reflect all legal constraints, including the constitutional authorities of the coordinate branches of the federal government—the courts and Congress—and constitutional limits on the exercise of governmental power.

The President is constitutionally obligated to "preserve, protect and defend" the Constitution in its entirety—not only executive power, but also judicial and congressional power and constitutional limits on governmental power—and to enforce federal statutes enacted in accordance with the Constitution. OLC's advice should reflect all relevant legal constraints. In addition, regardless of OLC's ultimate legal conclusions concerning whether proposed executive branch action lawfully may proceed, OLC's analysis should disclose, and candidly and fairly address, the relevant range of legal sources and substantial arguments on all sides of the question.

3. OLC's obligation to counsel compliance with the law, and the insufficiency of the advocacy model, pertain with special force in circumstances where OLC's advice is unlikely to be subject to review by the courts.

In formulating its best view of what the law requires, OLC always should be mindful that the President's legal obligations are not limited to those that are judicially enforceable. In some circumstances, OLC's advice will guide executive branch action that the courts are unlikely to review (for example, action unlikely to result in a justiciable case or controversy) or that the courts likely will review only under a standard of extreme deference (for example, some questions regarding war powers and national security). OLC's advice should reflect its best view of all applicable legal constraints, and not only legal constraints likely to lead to judicial invalidation of executive branch action. An OLC approach that instead would equate "lawful" with "likely to escape judicial condemnation" would ill serve the President's constitutional duty by failing to describe all legal constraints and by appearing to condone unlawful action as long as

the President could, in a sense, get away with it. Indeed, the absence of a litigation threat signals special need for vigilance: In circumstances in which judicial oversight of executive branch action is unlikely, the President—and by extension OLC—has a special obligation to ensure compliance with the law, including respect for the rights of affected individuals and the constitutional allocation of powers.

4. OLC's legal analyses, and its processes for reaching legal determinations, should not simply mirror those of the federal courts, but also should reflect the institutional traditions and competencies of the executive branch as well as the views of the President who currently holds office.

As discussed under principle 3, jurisdictional and prudential limitations do not constrain OLC as they do courts, and thus in some instances OLC appropriately identifies legal limits on executive branch action that a court would not require. Beyond this, OLC's work should reflect the fact that OLC is located in the executive branch and serves both the institution of the presidency and a particular incumbent, democratically elected President in whom the Constitution vests the executive power. What follows from this is addressed as well under principle 5. The most substantial effects include the following: OLC typically adheres to judicial precedent, but that precedent sometimes leaves room for executive interpretive influences, because doctrine at times genuinely is open to more than one interpretation and at times contemplates an executive branch interpretive role. Similarly, OLC routinely, and appropriately, considers sources and understandings of law and fact that the courts often ignore, such as previous Attorney General and OLC opinions that themselves reflect the traditions, knowledge and expertise of the executive branch. Finally, OLC differs from a court in that its responsibilities include facilitating the work of the executive branch and the objectives of the President, consistent with the requirements of the law. OLC therefore, where possible and appropriate, should recommend lawful alternatives to legally impermissible executive branch proposals. Notwithstanding these and other significant differences between the work of OLC and the courts, OLC's legal analyses always should be principled, thorough, forthright, and not merely instrumental to the President's policy preferences.

5. OLC advice should reflect due respect for the constitutional views of the courts and Congress (as well as the President). On the very rare occasion when the executive branch—usually on the advice of OLC—declines fully to follow a federal statutory requirement, it typically should publicly disclose its justification.

OLC's tradition of general adherence to judicial (especially Supreme Court) precedent and federal statutes reflects appropriate executive branch respect for the coordinate branches of the federal government. On very rare occasion, however, Presidents, often with the advice of OLC, appropriately act on their own understanding of constitutional meaning (just as Congress at times enacts laws based on its own constitutional views). To begin with relatively uncontroversial examples, Presidents at times veto bills they believe are unconstitutional and pardon individuals for violating what Presidents believe are unconstitutional statutes, even when the Court would uphold the statute or the conviction against constitutional challenge. Far more controversial are

rare cases in which Presidents decide to refuse to enforce or otherwise comply with laws they deem unconstitutional, either on their face or in some applications. The precise contours of presidential power in such contexts are the subject of some debate and beyond the scope of this document. The need for transparency regarding interbranch disagreements, however, should be beyond dispute. At a bare minimum, OLC advice should fully address applicable Supreme Court precedent, and, absent the most compelling need for secrecy, any time the executive branch disregards a federal statutory requirement on constitutional grounds, it should publicly release a clear statement explaining its deviation. Absent transparency and clarity, client agencies might experience difficulty understanding and applying such legal advice, and the public and Congress would be unable adequately to assess the lawfulness of executive branch action. Indeed, federal law currently requires the Attorney General to notify Congress if the Department of Justice determines either that it will not enforce a provision of law on the grounds that it is unconstitutional or that it will not defend a provision of law against constitutional challenge.

6. OLC should publicly disclose its written legal opinions in a timely manner, absent strong reasons for delay or nondisclosure.

OLC should follow a presumption in favor of timely publication of its written legal opinions. Such disclosure helps to ensure executive branch adherence to the rule of law and guard against excessive claims of executive authority. Transparency also promotes confidence in the lawfulness of governmental action. Making executive branch law available to the public also adds an important voice to the development of constitutional meaning—in the courts as well as among academics, other commentators, and the public more generally—and a particularly valuable perspective on legal issues regarding which the executive branch possesses relevant expertise. There nonetheless will exist some legal advice that properly should remain confidential, most notably, some advice regarding classified and some other national security matters. OLC should consider the views regarding disclosure of the client agency that requested the advice. Ordinarily, OLC should honor a requestor's desire to keep confidential any OLC advice that the proposed executive action would be unlawful, where the requestor then does not take the action. For OLC routinely to release the details of all contemplated action of dubious legality might deter executive branch actors from seeking OLC advice at sufficiently early stages in policy formation. In all events, OLC should in each administration consider the circumstances in which advice should be kept confidential, with a presumption in favor of publication, and publication policy and practice should not vary substantially from administration to administration. The values of transparency and accountability remain constant, as do any existing legitimate rationales for secret executive branch law. Finally, as discussed in principle 5, Presidents, and by extension OLC, bear a special responsibility to disclose publicly and explain any actions that conflict with federal statutory requirements.

7. OLC should maintain internal systems and practices to help ensure that OLC's legal advice is of the highest possible quality and represents the best possible view of the law.

OLC systems and processes can help maintain high legal standards, avoid errors, and safeguard against tendencies toward potentially excessive claims of executive authority. At the outset, OLC should be careful about the form of requests for advice. Whenever possible, agency requests should be in writing, should include the requesting agency's own best legal views as well as any relevant materials and information, and should be as specific as circumstances allow. Where OLC determines that advice of a more generally applicable nature would be helpful and appropriate, it should take special care to consider the implications for its advice in all foreseeable potential applications. Also, OLC typically should provide legal advice in advance of executive branch action, and not regarding executive branch action that already has occurred; legal "advice" after the fact is subject to strong pressures to follow an advocacy model, which is an appropriate activity for some components of the Department of Justice but not usually for OLC (though this tension may be unavoidable in some cases involving continuing or potentially recurring executive branch action). OLC should recruit and retain attorneys of the highest integrity and abilities. OLC should afford due respect for the precedential value of OLC opinions from administrations of both parties; although OLC's current best view of the law sometimes will require repudiation of OLC precedent, OLC should never disregard precedent without careful consideration and detailed explanation. Ordinarily OLC legal advice should be subject to multiple layers of scrutiny and approval; one such mechanism used effectively at times is a "two deputy rule" that requires at least two supervising deputies to review and clear all OLC advice. Finally, OLC can help promote public confidence and understanding by publicly announcing its general operating policies and procedures.

8. Whenever time and circumstances permit, OLC should seek the views of all affected agencies and components of the Department of Justice before rendering final advice.

The involvement of affected entities serves as an additional check against erroneous reasoning by ensuring that all views and relevant information are considered. Administrative coordination allows OLC to avail itself of the substantive expertise of the various components of the executive branch and to avoid overlooking potentially important consequences before rendering advice. It helps to ensure that legal pronouncements will have no broader effect than necessary to resolve the question at hand. Finally, it allows OLC to respond to all serious arguments and thus avoid the need for reconsideration.

9. OLC should strive to maintain good working relationships with its client agencies, and especially the White House Counsel's Office, to help ensure that OLC is consulted, before the fact, regarding any and all substantial executive branch action of questionable legality.

Although OLC's legal determinations should not seek simply to legitimate the policy preferences of the administration of which it is a part, OLC must take account of the administration's goals and assist their accomplishment within the law. To operate effectively, OLC must be attentive to the need for prompt, responsive legal advice that is not unnecessarily obstructionist. Thus, when OLC concludes that an administration

proposal is impermissible, it is appropriate for OLC to go on to suggest modifications that would cure the defect, and OLC should stand ready to work with the administration to craft lawful alternatives. Executive branch officials nonetheless may be tempted to avoid bringing to OLC's attention strongly desired policies of questionable legality. Structures, routines and expectations should ensure that OLC is consulted on all major executive branch initiatives and activities that raise significant legal questions. Public attention to when and how OLC generally functions within a particular administration also can help ensure appropriate OLC involvement.

10. OLC should be clear whenever it intends its advice to fall outside of OLC's typical role as the source of legal determinations that are binding within the executive branch.

OLC sometimes provides legal advice that is not intended to inform the formulation of executive branch policy or action, and in some such circumstances an advocacy model may be appropriate. One common example: OLC sometimes assists the Solicitor General and the litigating components of the Department of Justice in developing arguments for presentation to a court, including in the defense of congressional statutes. The Department of Justice typically follows a practice of defending an act of Congress against constitutional challenge as long as a reasonable argument can be made in its defense (even if that argument is not the best view of the law). In this context, OLC appropriately may employ advocacy-based modes of analysis. OLC should ensure, however, that all involved understand whenever OLC is acting outside of its typical stance, and that its views in such cases should not be taken as authoritative, binding advice as to the executive branch's legal obligations. Client agencies expect OLC to provide its best view of applicable legal constraints and if OLC acts otherwise without adequate warning, it risks prompting unlawful executive branch action.

The following former Office of Legal Counsel attorneys prepared and endorse this document:

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BEFORE THE UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND PROPERTY
RIGHTS
"RESTORING THE RULE OF LAW"

TESTIMONY OF KYNDRA K. ROTUNDA¹

VISITING ASSISTANT PROFESSOR OF LAW, CHAPMAN UNIVERSITY SCHOOL OF LAW &
MAJOR (JAG OFFICER) IN THE ARMY INDIVIDUAL READY RESERVES²

SEPTEMBER 16, 2008

¹ KYNDRA ROTUNDA, is the author of Honor Bound: Inside the Guantanamo Trials, which is published by Carolina Academic Press (June 2008) and is available on Amazon. Professor Rotunda formerly directed the Clinic for Legal Assistance to Service members at George Mason School of Law. She and her students successfully represented military families in various legal disputes, including Physical Evaluation Boards and Traumatic Service Group Life Insurance Appeals. Rotunda has recovered hundreds of thousands of dollars for disabled troops.

Professor Rotunda is regarded as a leading expert in military law, and was recruited by the National Veteran's Legal Services Program (NVLS) to produce a series of instructional DVDs about military law. She also authored a coordinating outline, and co-authored NVLS's forthcoming book regarding military administrative/disability proceedings, to be published by Lexis Nexis.

Rotunda began her career in the US Army JAG Corps. She remains in the Army Reserves and holds the rank of Major. Rotunda has served in several missions related to the Global War on Terror. She served in Guantanamo Bay; was the legal advisor to a team of investigators pursuing leads in the war on terror; served as a prosecutor at the Office of Military Commissions; and represented wounded troops at Walter Reed Army Medical Center. She was the lawyer assigned to Jessica Lynch after Lynch's rescue.

Professor Rotunda is an avid writer and soldier advocate. She has written op-eds for the *Christian Science Monitor*, *The Wall Street Journal*, *The Chicago Tribune*, *The Washington Times*, and *The New York Sun*. Rotunda is a regular television and radio commentator regarding military law, and the ongoing trials in Guantanamo Bay. She has appeared on over 20 nationally syndicated radio shows, including the Michael Reagan Show, the Dennis Miller Show and the Jim Bohannon Show. Rotunda has also appeared on national and international television news programs, including Hannity's America, the Brit Hume Report, and Al Jazeera.

² Professor Rotunda's opinions are based, in part, on her experiences serving three tours in the Global War on Terror, including a tour in Guantanamo Bay and one as a prosecutor at the Office of Military Commissions. She does not speak on behalf of the Department of Defense. Her views and opinions are her own.

Chairman Feingold, Senator Brownback, and Members of the Committee, thank you for the invitation to testify before you today. It is an honor to participate.

KYNDRA ROTUNDA BACKGROUND:

I am law professor at Chapman University School of Law in Orange, California. I am also a soldier — a Major in the Army JAG Corps, Individual Ready Reserves. I have served three tours in the Global War on Terror, including one in Guantanamo Bay as the legal advisor to the detention camp commander; one as a legal advisor for investigators pursuing world-wide leads in the War on Terror; and one as a prosecutor at the Office of Military Commissions. I have recently published a book entitled *Honor Bound, Inside the Guantanamo Trials* (Carolina Academic Press, June 2008), which is based on my first-hand experiences serving in this Global War on Terror.

STOP RISKING SOLDIER SAFETY IN GUANTANAMO BAY:

As we discuss the Rule of Law this morning, it is important to remember our military troops and our obligation to preserve and protect their rights, too. The United States should interpret the law to help, not hurt, our men and women in uniform who serve and sacrifice every day for this great nation. Unfortunately, that is not happening.

For instance, in Guantanamo Bay, the U.S. Military requires religious accommodation in a way that risks the safety of soldiers. It issues various religious items to each detainee, including a copy of the Qu'ran. But, incredibly, it forbids military prison guards in charge of the facility from even touching the Qu'rans under any circumstances.³ Not surprisingly, detainees have figured this out and use the Qu'ran to hide weapons, which they use to viciously attack military prison guards. Attacks against prison guards have risen to eight a day. In one year, detainees stabbed military troops with homemade

³ Army Command Sergeant Major confirmed this fact in June 2005, when he testified before Congress. He stated that certain items remain "off-limits" to guards in Guantanamo Bay. He stated, "The rule of thumb for the guards is that you will not touch the Qu'ran. . . that's the bottom line." Kyndra Rotunda, *HONOR BOUND INSIDE THE GUANTANAMO TRIALS* (Carolina Academic Press, 2008), citing Donna Miles, *Joint Task Force Respects Detainees Religious Practices*, DEPARTMENT OF DEFENSE, AMERICAN FORCES PRESS SERVICE, June 29, 2005.

knives 90 times, including cutting a doctor administering aid. (Incidentally, now doctors wear body armor when they treat detainees.)⁴

According to one military police officer who served in Guantanamo Bay, detainees brandish their home-made shanks to threaten U.S. troops, and then quickly shove them back into the Qu'ran, where they know are "off limits" to guards. Even in this situation, the guard may not touch the Qu'ran to confiscate the weapon.

When the military places certain items off-limits to soldiers running the detention camp, it puts soldiers at risk for serious harm, and it compromises security. An incident at Camp Bucca, Iraq (a U.S. operated detention camp in Southern Iraq, a few miles from the Kuwait border), is just one example. At Camp Bucca, the military erected a tent as a mosque for the detainees, and designated it off-limits to U.S. prison guards running Camp Bucca. The detainees used their makeshift mosque as a weapons cache, where they stashed concrete-shards that they had dug from the concrete around tent poles, and home-made bombs that they had made using human feces, hand-sanitizer and socks. The prisoners attacked Camp Bucca from the inside out. For four days they rioted and seriously injured several U.S. troops. One officer was hit in the eye with a chunk of cinderblock, which fractured his cheek in three places and broke his teeth. One soldier called the violence "absolutely incredible" due to the number of rocks and sheer accuracy.⁵

The attack from inside Camp Bucca continued for several days. The U.S. was forced to call for backup to restore order at its own prison camp. The U.S. foolishly excludes guards from certain areas of the prison camps, and designates items off-limits to U.S. prison guards.

What does the law say about religious accommodation in prisons? The Geneva Conventions say that POWs must follow the military disciplinary routine of their captors in order to preserve their right to religious latitude.⁶ This is similar

⁴ Kyndra Rotunda, HONOR BOUND: INSIDE THE GUANTANAMO TRIALS (Carolina Academic Press, June 2008), discussing and citing Richard Miniter, *Deadly Kindness*, NEW YORK POST, September 15, 2006.

⁵ Kyndra Rotunda, HONOR BOUND: INSIDE THE GUANTANAMO TRIALS (Carolina Academic Press, June 2008), discussing Steve Fairnau and Anthony Shadod, *In Iraq Jail, Resistance Goes Underground*, WASHINGTON POST FOREIGN SERVICE, WASHINGTON POST, August 24, 2005 at A 01.

⁶ Third Geneva Convention, Relative to the Treatment of Prisoners of War Chapter V, Article 34, August 12, 1949, stating, "Prisoners of war shall enjoy complete latitude in the exercise of their religious duties, including attendance at the service of their faith, on condition that they comply

to the standard applied in U.S. prisons. In *O'Lone v. Estate of Shabazz*,⁷ the Supreme Court said that prison officials could impinge on prisoners' right to exercise their religion for reasons related to legitimate prison management. The court upheld a regulation regarding prisoner work duties that precluded Muslim prisoners from attending religious services on Friday afternoons, as their faith required.⁸

The U.S. should restore the rule of law in Guantanamo Bay, and other U.S. operated detention camps by following the Geneva Conventions and allowing U.S. prison guards to search all items in detainee cells, including the Qu'ran. No place, or item, within our own prison camps should be off-limits to our guards. Doing so is extremely dangerous; neither International nor U.S. law require or authorize this unusual accommodation.

STOP DISCRIMINATING AGAINST FEMALE SOLDIERS IN GUANTANAMO BAY:

When I served in Guantanamo Bay, I was shocked and appalled to learn that the U.S. Military engages in unlawful discrimination against female military prison guards. Because it offends detainees, the U.S. forbids female soldiers from performing all aspects of their job within the detention camp. It forbids female soldiers from escorting detainees in some instances, or even walking beyond a designated point in a cellblock when detainees are in the recreation yard, lest she catch a glimpse of him – or he of she.

Some detainees refuse any interaction with female guards and interrogators. The military accommodates their prejudices and adheres to the cultural mores of detainees, instead of protecting the rights of female soldiers.

The U.S. should not engage in gender discrimination to appease the detainees. What will happen when a detainee refuses to accept a food tray, or receive a vaccine, from a Jewish soldier? Will we discriminate then, too? During WW II we did not discriminate against our Jewish soldiers to appease Nazis; we should not discriminate against our female soldiers to appease detainees who embrace similar discriminatory views.

with the disciplinary routine prescribed by the military authorities. Adequate premises shall be provided where religious services may be held."

⁷ *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 107 S.Ct. 2400, 96 L.Ed.2d 282 (1987), on remand 829 F.2d 32 (3d Cir. 1987).

⁸ Kyndra Rotunda, *HONOR BOUND: INSIDE THE GUANTANAMO TRIALS* (Carolina Academic Press, June 2008), citing ROTUNDA AND NOWAK, *TREATISE ON CONSTITUTIONAL LAW*, Vol. 5 sec. 21.6, fn. 25 (Thompson West, 3d ed. 1999).

The U.S. should uphold the rule of law by ensuring that all troops, regardless of their race, religion, or gender, will be allowed to perform all aspects of their job, without regard for the prejudices of our enemies.

HONOR U.S. POWs AND STOP WAIVING THEIR RIGHTS UNDER GENEVA

According to the Geneva Conventions, an enemy combatant is entitled to Prisoner of War Protections when she meets four basic requirements. She must wear a uniform, carry her weapon openly, follow the laws of war, and operate under a legitimate military structure with a chain of command.⁹ In short – she cannot hide that she is a soldier. She cannot pose as a civilian, and operate in the shadows to gain a strategic military advantage. She is a soldier and must hold herself out as a soldier. If she does these four basic things, she is entitled to POW protections if the enemy captures her. The U.S. follows the laws of war, and our soldiers are, without a doubt, entitled to POW protections when they are captured.

On April 9, 2004, terrorists in Iraq attacked a convoy and captured U.S. Private Matt Maupin, an army reservist. It led him away from the convoy, and away from his fellow soldiers. Later, his terrorist captors released footage of Matt sitting on the floor, wearing his uniform, surrounded by masked gunman who forced him to make a statement. Later, the terrorist claimed they murdered Private Maupin. But, it was not until four years later, in March, 2008, that the U.S. military discovered Private Maupin's body.

During the four long years that Private Maupin's family waited for word of their son, the military promoted Matt twice, to Staff Sergeant. But, it refused to acknowledge that Staff Sergeant Maupin was, in fact, a POW. Instead, it gave Staff Sergeant Maupin a title unknown under the Geneva Conventions. It considered Matt "missing" and called him "missing/captured" instead of referring to him correctly as a POW.¹⁰

Staff Sergeant Maupin should be a household name. All Americans should know his tragic story. When he was missing, the U.S. should have

⁹ Third Geneva Convention Relative to the Treatment of Prisoners of War, Article 4, August 12, 1949.

¹⁰ Kyndra Rotunda, HONOR BOUND: INSIDE THE GUANTANAMO TRIALS (Carolina Academic Press, June 2008). See also www.yellowribbonsupportcenter.com

reminded our enemies, and our critics, that we still waited for word from Iraqi terrorists about the fate of our beloved missing soldier.

Where was the International Committee of the Red Cross for Staff Sergeant Maupin? What happened to his rights under the Geneva Convention? We welcome the ICRC into GTMO. I was the liaison to the ICRC during one of my tours. We listened to their complaints and answered all of them while I was there. Should not the ICRC lobby to visit the prison camps where our soldiers are being held? Whether one is a privileged combatant (a POW) or nonprivileged combatant (a non-POW), the Geneva Conventions require that the holding authority treat the detainee humanely. The ICRC is supposed to issue complaints when it does not have the access necessary to determine if detainees are held humanely. But, the ICRC has been silent.

The U.S. should restore the Rule of Law and stop waiving POW protections for our own soldiers. U.S. Soldiers adhere to the Geneva Conventions and, if captured, are entitled to POW protections.

DO NOT TAR ALL SOLDIERS WITH THE BAD ACTS OF A FEW

The U.S. treats detainees in Guantanamo Bay humanely and affords them extensive privileges. Most detainees live in open bays with ten detainees to each bay. They receive twelve hours of recreation time a day, where they can do any number of activities including reading books from their library (which has over 5,000 titles), gardening, checking out movies or board-games, playing ping-pong, basketball, or volleyball, visiting the exercise facility, or even taking classes in English or in their native language. Conditions are so exemplary that when the U.S. offered release to one detainee, he declined and asked to stay. Another detainee asked if the military would consider moving his entire family to Guantanamo Bay. The U.S. released several detainees to Albania. After a few weeks in Albania, the detainees said they preferred *captivity* in Guantanamo Bay to *freedom* in Albania. One Guantanamo Bay detainee said, ". . . If people say that there is mistreatment in Cuba with the detainees, those type speaking are wrong; they treat us like a Muslim not a detainee."¹¹

These are all good stories. The United States seeks to win the hearts and minds of our enemies and demonstrate that we are a freedom-loving nation.

¹¹ Kyndra Rotunda, HONOR BOUND: INSIDE THE GUANTANAMO TRIALS (Carolina Academic Press, June 2008), citing JTF GTMO Information on Detainees, 4 March 2005, available at <http://www.jtfgtmo.southcom.mil/>.

That is what we are about. That is how we are trained. What happened at Abu Ghraib was a disgrace. But, the U.S. Military investigated, uncovered the crimes, and brought those soldiers to justice. The military has tried and sentenced over ten soldiers for mistreating detainees. One is serving a ten year prison sentence; another is serving a three year prison sentence. We cannot tar the entire military and every soldier with the bad acts of a few. They do not represent every soldier.¹² When the barrel is big enough, you are bound to find a few bad apples. And, the military is doing all that is possible to bring those bad apples to justice.¹³

Sometimes politicians have had ethics problems. But, we do not tar the entire Senate with the misdeeds of a few of their colleagues. Instead, we catch them and respond to each violation individually. The same principle applies to our troops and their work in the field. The fact that we catch people doing wrong is proof that the system works.

With respect to detainees in Guantanamo Bay, the rule of law is in full force – and it is working. Congress should not blame every soldier for the misdeeds of a few. It should not blame the military when the system is working. Instead, like what happened at Abu Ghraib, it should investigate any allegations of mistreatment, and bring those individual soldiers to justice.

In closing, I wish to thank the Committee for the opportunity to address this matter. It is important that we uphold the rule of law, and protect our men and women in uniform who are serving and sacrificing for this great nation every day. They are fighting for us – and we should fight for them, too.

¹² Kyndra Rotunda, *Honor Bound: Inside the Guantanamo Trials* (Carolina Academic Press, June 2008), discussing the sentence and trial of Charles Garner and Lynndie England.

¹³ It is important to note that the abuses at Abu Ghraib did not occur in the context of approved interrogation methods. See Kyndra Rotunda, *HONOR BOUND: INSIDE THE GUANTANAMO TRIALS* (Carolina Academic Press, June 2008), *citing and discussing*, *The Church Report*, Unclassified Executive Summary at 3, which concludes, "none of the pictured abuses at Abu Ghraib bear any resemblance to approved policies at any level, in any theater."

BRENNAN
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SENATE COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND PROPERTY RIGHTS

“RESTORING THE RULE OF LAW”

Tuesday, September 16, 2008

Written Testimony of

Frederick A.O. Schwarz, Jr.
Senior Counsel

Urging Congress to establish a bipartisan, independent investigatory Commission to determine what has gone wrong with our policies and practices in confronting terrorism since September 11, 2001, and to adopt a series of specific reforms aimed at restoring checks and balances and the rule of law in order to reduce risk of repetition of recent abuses.

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Testimony of Frederick A.O. Schwarz, Jr.
Before the Hearing on “Restoring the Rule of Law”
By the Constitution Subcommittee of the Senate Judiciary
Committee of the United States Senate

September 16, 2008¹

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I. Introduction.

The title of this hearing cuts to the heart of the matter. The current Administration has ignored, defied, and defiled the Rule of Law. In so doing, it has undermined America's greatest strength. And that has not only left Americans less free, it has also made us less safe. It is vital to our country's future that we do indeed restore the Rule of Law. In my testimony, I draw on my experience as Chief Counsel to the Church Committee to suggest how a new Congress and President in 2009 could start this immense and important task, especially in the context of counter-terrorism policy.

In the almost eight years that have passed under the current Administration, and especially in the seven years since the tragedy of 9/11, the White House arrogated to itself unprecedented powers of coercion, detention, and surveillance. All the while, it has tried to use a patina of legal and constitutional justifications to disguise the degree to which it has abandoned the core American values in whose defense these tactics have been deployed. The result has been a distortion of the Constitution, an evisceration of the rights and liberties of individuals, and a perversion of American values. All of this has done grave harm to our nation's reputation and has reduced our security here and abroad.

It is of the utmost importance to review our policies and practices, and to make changes where we find unseemly and illegal programs or inefficient and counterproductive policies. The time to act is at hand. The members of the 111th Congress will take their seats in early January, and a new administration will enter the White House on January 20, 2009. They, and the nation as a whole, have the opportunity to return to our values, check the overextension of the executive branch in recent years, and renew our national commitment to the constitutional framework under the rule of law.

The urgent need to restore checks and balances under the rule of law is far more important than the controversies that divide us. Instead, understanding the importance of righting the separation-of-powers imbalance and restoring respect for the rule of law should bring *all* Americans together. If today's President hails from one party and the congressional majority from another, in the future these affiliations will surely change. But the core principle—that the preservation of the Constitution's checks and balances, and respect for the rule of law, is essential to effective governance—endures regardless of what party controls either branch. If we turn a blind eye to this truth, the nation will feel the consequences far into the future.

Therefore, I am grateful to have the chance to share with you some thoughts on specific measures aimed at restoring the proper constitutional balance between the branches of government, reinvigorating the separation of powers, and restoring respect for American values.² Broadly speaking, I make two sorts of suggestions:

² Other thoughts are contained in *Unchecked and Unbalanced*, particularly in the addendum to the paperback revision (The New Press, 2008) and in the Brennan Center's publication, Aziz Huq, *Twelve Steps to Restore Checks and Balances*, available at http://www.brennancenter.org/content/resource/twelve_steps_to_restore_checks_and_balances.

(i) a bipartisan independent investigatory Commission should be established by the next Congress and President, first to determine what has gone wrong (and right) with our policies and practices in confronting terrorists since September 11, 2001, and then to recommend lasting solutions to address past mistakes (see pp 3 to 10 below); and

(ii) a series of specific reforms should be adopted aimed at reforming the executive branch and ensuring no repetition of recent abuses. Among the topics I touch on are the need for a clear rejection of the “monarchical” presidency theory; improved oversight and accountability mechanisms; responses to the pathological secrecy that today characterizes executive branch operations; and coercive interrogations (see pp 10 to 27 below).

We must resolve to confront our mistakes so that we do not repeat them. Throughout American history, in times of crisis, presidents have accumulated significant new powers, and the executive branch has often engaged in abusive conduct.³ Crisis always makes it tempting to ignore the wise restraints that both keep us free and reduce the likelihood of foolish mistakes. This nation has, at times, admirably set about correcting its course—realizing, as the dust settles, or as previously secret facts are revealed, that constitutional and legal norms have been breached, shaming and harming our nation.

One such moment, in which I was involved, came in 1975-1976, when an investigation conducted by a Senate Select Committee, known as the Church Committee for its Chair, Senator Frank Church of Idaho, revealed intelligence agencies’ excesses during the Cold War. The Church Committee’s investigation of the intelligence agencies, most importantly the FBI, the CIA, and the NSA and other components of the Defense Department, found that these agencies had exceeded their authority through abusive surveillance and disruption of political activity at home (*e.g.*, trying to provoke Martin Luther King, Jr. to commit suicide), and unwise overseas covert action (*e.g.*, hiring the Mafia to try to assassinate Cuba’s Fidel Castro, and supporting the overthrow of Chile’s democratically elected government). While men and women of the intelligence agencies directly committed abuses, the most serious breaches of duty were those of presidents and other senior executive branch officials who, the Church Committee determined, had the “responsibility” for controlling intelligence activities and generally failed to assure compliance with the law.”⁴

The Church Committee’s investigation illuminated what had been going wrong with our intelligence agencies. Exposing the truth strengthened both our democracy and our ability to defend the country without waste or abuse, confirming that America’s ability to self-correct is one of the great strengths of our democracy. It is time for such a searching assessment and self-correction again.

³ For an overview of past excesses, see *Unchecked and Unbalanced*, *supra* n. 1, at 3-5 (“Introduction”), chapter 2 21-49 (“Revelations of the Church Committee”). See also Geoffrey B. Stone, *Perilous Times: Free Speech in Wartime, From the Sedition Act of 1798 to the War on Terrorism* (2004).

⁴ *Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, Book II*. 1 S. REP. NO. 94-755, at 137 (1976).

II. Create an Investigatory Commission to Conduct a Thorough Accounting of National Security Policy and Its Systemic Flaws.

The new Congress and new President should by law create an independent, bipartisan Investigatory Commission charged with determining what has gone wrong (and right) with our policies in confronting terrorism, and to recommend solutions.

This is my first and most fundamental recommendation. Without full knowledge of all the facts, we cannot know why wrong steps were taken. We cannot take the necessary steps to repair the damage. Even with a new Administration in January 2009, if we fail to understand fully what went wrong or why we strayed so far, we risk repetition. We will instead proceed in ignorance, blindly trusting claims about what has made us safer without really knowing what has worked and what has rather harmed our country.

I know from my Church Committee experience that making the case for reform requires full knowledge and responsible exposure of the facts. I also know that accountability is not easy. Plenty of those who have made mistakes will push to ensure their errors are never revealed. But without accountability, it is the nation's security and its liberties that will suffer.

A. We Know Enough To Conclude There Is a Serious Problem.

Based on what we know now—about torture, about extraordinary rendition to torture, about permanent detention, about warrantless wiretapping, and about the Administration's "monarchical" theory of presidential power—it seems clear that the course we have charted over the last seven years has in fact made us less safe, as well as less free:

- We have squandered one of our greatest assets—respect for our values.
- By abandoning our values and choosing instead to adopt tactics of the enemy, we have given enemy recruiters powerful tools to stir up passions in the Muslim world.⁵
- After the rush of support and emotional bonding with America immediately after 9/11, we are met with disappointment, caution and resistance even from our closest allies. We have lost much crucial support from our allies, as admiration and respect for America has dropped substantially. This is not a hypothetical risk. It is already happening with many nations, including our closest ally. Thus, the British Parliament's Intelligence and Security Committee undertook an investigation of "extraordinary

⁵ See, e.g., PEW GLOBAL ATTITUDES PROJECT, AMERICA'S IMAGE SLIPS, BUT ALLIES SHARE U.S. CONCERNS OVER IRAN, HAMAS (June 13, 2006), available at <http://pewglobal.org/reports/display.php?ReportID=252>. The Brennan Center is presently conducting empirical research in the United Kingdom and the United States about the effect of adopting such tactics on the success of domestic policing efforts.

rendition.” Its July 2007 report frankly describes British intelligence agencies’ increasing reluctance to share information with their American counterparts, due in large part to concerns that the U.S. will utilize such information in “extraordinary rendition” operations notwithstanding Britain’s “caveats” prohibiting such use. Among the “serious implications” for the relationship between the two nations is a “greater caution in working with the U.S., including withdrawing from some planned operations, following these cases.”⁶

Things have indeed gone awry. On the matter of torture alone:

- Former Secretary of State Colin Powell warned that “The world is beginning to doubt the moral basis of our fight against terrorism.”⁷ And, as Marine General P.X. Kelley and my co-panelist today Robert F. Turner have explained, torture has “compromised our national honor and ... place[d] at risk the welfare of captured American military forces for generations to come.”⁸
- President George W. Bush correctly states that “the values of this country are such that torture is not part of our soul and our being,” while at the same time he contradicts himself by insisting that the CIA should be permitted to use “enhanced interrogation techniques” that go far beyond what the American military believes is proper and which conflict with any fair reading of the torture treaties and laws to which we are subject.
- Attorney General Michael Mukasey cannot bring himself to prohibit as torture the practice of waterboarding—a torture measure that dates back to the medieval Inquisition;⁹ and Vice President Dick Cheney positively embraces it, even though the United States prosecuted Japanese soldiers as war criminals for using waterboarding on American soldiers in World War II.
- Similarly, President Bush and Secretary of State Condoleezza Rice defend “extraordinary rendition” to send prisoners to Egypt and Syria for questioning despite the fact that our State Department repeatedly issues human rights reports that condemn Egypt and Syria for regularly using torture on prisoners. The excuse of the President and the Secretary: they promised not to torture “our

⁶ See Intelligence and Security Committee, *Rendition*, 2007, Cm. 7171 and p.27; *British Panel Doubts U.S. on Torture*, N.Y. TIMES, July 21, 2008, at A11.

⁷ Letter from Colin S. Powell, Secretary of Defense and General, to John McCain, Senator from Arizona (Sept. 13, 2006).

⁸ P.X. Kelley & Robert F. Turner, *War Crimes and the White House. The Dishonor in a Tortured New 'Interpretation' of the Geneva Conventions*, WASH. POST, July 26, 2007, at A21.

⁹ Darius Rejali, *Torture and Democracy* 280 (2007).

prisoners.” Not believable. Particularly not believable given that there is proof that “our prisoners” have been tortured.¹⁰

For America to adopt tactics of the enemy—such as torture—saps our moral and public strength.¹¹ It is all the worse when our leaders’ public positions are manifestly hypocritical.

The Administration’s legal justification for its conduct is almost as troubling as the conduct itself. Other moments in history have seen abuse that cannot be squared with our values or traditions. But the constitutional and legal theory under which this Administration has acted is unprecedented because it purports to justify breaking the law and neutering checks and balances. Thus, the Administration presents a remarkably troubling theory of presidential power that flies in the face of our own Revolution’s core values, that is inconsistent with the language and history of our Constitution, and that ignores crucial Supreme Court decisions.

The Administration’s post-9/11 position is simply that the President—like a seventeenth century British monarch—is above the law when it comes to security. Surprisingly, this theory is not a post-9/11 beast. It was first raised twenty years ago by then-Congressman Dick Cheney when he dissented in 1987 from Congress’s Iran-Contra Report by saying the President will “on occasion feel duty-bound to assert monarchical notions of prerogative that will permit him to exceed the laws.”¹² The attacks of 9/11 allowed the Vice President—supported by compliant lawyers in the Justice Department’s Office of Legal Counsel—to put into effect this dangerous, erroneous and unprecedented reading of America’s history and America’s Constitution.¹³

¹⁰ NYU Center for Human Rights and Global Justice, *Beyond Guantánamo: Transfers to Torture One Year After Rasul v. Bush* (2005) (“[E]xtraordinary renditions [by the CIA] have been carried out pursuant to a classified directive signed by President Bush a few days after September 11, 2001”); Scott Horton, *More on Maher Arar*, HARPER’S MAGAZINE, June 5, 2008.

¹¹ The law also has been perverted to justify the invasion of Americans’ constitutional privacy rights through warrantless surveillance, and possibly black bag searches or worse. Most importantly, the Constitution has been perverted by government lawyers so that they can advise the President that he need not comply with the law of the land.

¹² *Report of the Congressional Committees Investigating the Iran-Contra Affair, with Supplemental Minority, and Additional Views*, S. REP. NO. 100-216; H. REP. NO. 100-433, at 465 (1987) [hereinafter “ ”]. Of course, President Nixon also had claimed that “when the President does it, that means that it is not illegal.” But when he said this, he was no longer in office. Nixon and his cohort all knew that the illegal acts they did or ordered in seeking to stay in office were illegal, and never pretended otherwise.

¹³ Chapter 7 (“Kings and Presidents”) of *Unchecked and Unbalanced*, *supra* n.1, debunks this monarchical theory. Chapter 8 (“The King’s Counsel”) exposes the irresponsibility of the lawyers in the Justice Department’s Office of Legal Counsel—although some other government lawyers (particularly in the military) have been exemplary in, for example, attempting to resist torture.

B. Although A Lot is Known, This Country Still Needs An In-Depth Investigation To Learn the Whole Truth, and To Decide What Needs To Be Done To Remain True to Our Values and Better Protect Ourselves.

To avoid repeating history requires understanding history. As the Framers recognized, openness and transparency in government are prerequisites to democratic legitimacy and lawful government. As James Madison famously observed:

“[a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.”¹⁴

While some of our recent history has dribbled or leaked out, the Administration itself has denied a free people knowledge of many of the actions it has taken in their name. Excessive secrecy smothers the popular judgment that gives life to democracy.

Many details of the programs we know about have been suppressed, or glossed over with generalities, or misrepresented. What are described as successes often turn out to be nothing of the kind. Still other programs remain unknown. In addition, we do not know the extent to which the Administration was told (or understood) that a departure from America’s ideals actually risked undermining the battle against terrorists.¹⁵ The executive branch insists the truth about what it has done—and how it decided what to do—must remain secret. But without access to these facts, even for those with security clearance, the public can never know the full story and judge whether the United States conducted itself appropriately.

The fundamental message of this part of my testimony is this: The abuses that have taken place must be accounted for. We need to know what went wrong, how it is that mistakes and illegal actions were allowed to occur, and how they have harmed us. When there are allegations that ultimately are proven wrong, they should be aired and names cleared. When the United States has conducted its anti-terrorism policy forthrightly and wisely, it should be commended for doing so. But given the ample evidence that the Administration’s unchecked policy is out of balance, it is far more likely that the greatest need is institutional repair and restoration of the rule of law.

¹⁴Letter from James Madison to W.T. Barry (Aug. 4, 1822), *reprinted in 1 The Founders’ Constitution* 690 (Philip B. Kurland & Ralph Lerner eds., 1987).

¹⁵Based upon its extensive review of CIA covert actions—for example to overthrow governments—the Church Committee found that the “cumulative effects of covert actions” were “rarely noted” in CIA presentations or “taken into account” by the responsible National Security Council reviewing officials. See *Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, Book I*, 1 S. REP. NO. 94-755, at 156 (1976).

I should note that this is not about placing blame on those on the front lines. Too often, for example, illegal torture has been blamed on a “few bad apples” while those in political offices who directed and set conditions for the abuse have washed their hands of the matter. Accountability ultimately lies more with those elected officials and senior appointed officials than with the men and women on the front lines.

A Commission would serve several vital functions. It would reveal the many as-yet-unknown aspects of what our government has done and how it evaluated or rationalized its actions. And there is much we do not know. We still do not know, for example, the legal justifications advanced for the so-called “extraordinary rendition” or “terrorist surveillance” programs. We do not know with sufficient detail who was responsible for advocating and implementing the troubling policies based on these legal opinions. Nor do we know whether there are other secret programs that have not yet been revealed. But, as former Attorney General Nicholas deB. Katzenbach and I have argued elsewhere, in a country whose government is premised on the rule of law, there is never a justification for keeping binding legal decisions secret.¹⁶

Documenting violations of the public commitments that the United States has made also fulfills a moral imperative. Officially, our leaders have made statements that renounce the use of torture and degrading treatment.¹⁷ In practice, they have not lived up to this pledge. Indeed, they have recently sought new legal opinions from the OLC that allegedly would allow for new combinations and packages of torture.¹⁸ Renewing our commitment to the rule of law by confronting and acknowledging our recent failings gives substance to our national moral commitment, and thus can help begin to restore our international reputation.

The findings of a Commission also would play the important role of holding accountable those who are responsible for wrongdoing and for legal and constitutional violations. Justice is not served when our leaders piously wash their hands and blame those at the bottom. Democratic government demands that public officials—particularly those at the highest level—are held accountable for their actions. Aiming to avoid accountability, government officials who authorized and carried out improper or illegal actions attempt to ensure that their deeds remain forever secret. The public revelations made by a Commission would lodge accountability for those deeds where it belongs and serve as a warning to future government officials that they should take no action for which they would not like to be held publicly responsible.

¹⁶ Nicholas deB. Katzenbach & Frederick A.O. Schwarz Jr., *Release Justice's Secrets*, N.Y. TIMES, Nov. 20, 2007, at A23 (“Opinions that narrowly define what constitutes torture; or open the door to sending prisoners for questioning to Egypt and Syria, which regularly use torture; or rule the president has some ‘inherent power’ to ignore laws are all of concern to Congress and the public whether one agrees or disagrees with the legal analysis.”); see also Louis Fisher, *Why classify legal memos?*, NAT’L L.J., July 14, 2008.

¹⁷ *E.g.*, Convention Against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100.20, 1465 U.N.T.S. 85; 18 U.S.C. §§ 2340-2340A.

¹⁸ Scott Shane, David Johnston & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES, Oct. 4, 2007, at A1.

Finally, and indeed most importantly, the Commission's work would play an instrumental role in preventing future abuses. Its findings would form the factual basis for informed public debate on the role of governmental activities in a free society during an extended time of crisis. Charting a new course is impossible without knowing first how we found ourselves where we are now. Rather than dooming ourselves to the repetition of past mistakes, we must studiously commit ourselves to the avoidance of error and abuse. Determining what legislative and executive action is appropriate to prevent the recurrence of past abuses requires an understanding of how those abuses came about.

While the revelations of a new Commission charged with rooting out the truth of this most recent period of government failures might prove embarrassing to some individuals, and perhaps even to the country as a whole. That embarrassment is a price that must be paid. For, as the Church Committee concluded:

“We must remain a people who confront our mistakes and resolve not to repeat them. If we do not, we will decline; but if we do, our future will be worthy of the best of our past.”¹⁹

C. Essential Qualities of a Commission.²⁰

To accomplish this, I urge Congress and the next president to establish by law an Investigatory Commission that would document what went wrong—the abuses of power; the violations of law; the distortions of the constitutional structure, including the sweeping assertions of executive power and the undermining of checks and balances—as well as who was responsible, and how it has harmed us. The Commission should also make recommendations for reform within both the executive and legislative branches to prevent similar abuses in the future. An investigation should be as open as possible. And it must be comprehensive.

¹⁹ *Interim Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities*, S. REP. NO. 94-465, at 285 (1975). While this thought was in the Interim Report, it pervaded all the Church Committee's work.

²⁰ These thoughts are based on my experience as Chief Counsel of the Church Committee. The Committee conducted a comprehensive and non-partisan investigation into abuses carried out by the intelligence agencies during the Cold War era. It also covered the failures of presidential leadership in the six presidencies from Roosevelt through Nixon. (See also Loch Johnson, *A Season of Inquiry: The Senate Intelligence Investigation* (1985); Frank John Smist, *Congress Oversees the United States Intelligence Community, 1947-1994* 25-81 (1994); and LeRoy Ashby & Rod Gramer, *Fighting the Odds. The Life of Senator Frank Church* 453, 468-92 (1994); Schwarz & Huq, *supra* n.1, at Chapter 2 (“Revelations of the Church Committee”), at 21-49.

More recently, I have summarized some of the process lessons from the Church Committee in Chapter 3 (“The Church Committee Then and Now”) of *U.S. National Security, Intelligence and Democracy: From the Church Committee to the War on Terror* (Russell A. Miller, ed., 2008). (The relevant pages on how the Church Committee operated are pp. 27-31.)

I want to emphasize only three detailed points that are based on my experience with the Church Committee:

First, a successful Commission must be independent, bi-partisan in membership and non-partisan in approach. Its members should understand our Constitution and how our government works. They should know American history—including prior occasions when crisis made it tempting to ignore the wise restraints that keep us free.

Second, without detailed facts, oversight and investigation will necessarily be empty. Only with a record that is comprehensive and covers a wide range can one be sure that one understands patterns, be confident of conclusions, and make a powerful and convincing case for change. Without detailed facts, it is simply not possible to make a creditable case that something is wrong and needs fixing.

Testimony is important, often essential, and can be dramatic. Documents often provide the best key to the truth and to developing good testimony. A good investigatory commission involves much time and much hard work—to secure testimony and the necessary documents and to put a huge record together in a comprehensive and understandable fashion.

A Commission must therefore have the investigative tools—most importantly the power to subpoena—that are essential for an effective investigation. It must have access to all relevant information in all agencies and the White House—as well as that held by relevant private contractors. All of this information should be obtained by agreement if possible and by subpoena if necessary.

Third, investigating secret government programs requires access to secrets. It forces analysis of the overuse of secrecy stamps, and of the harm caused by excessive secrecy.²¹ All concerned within the intelligence community must understand and accept that those tasked with ensuring accountability are entitled to any and all secrets.

A Commission must handle secrecy issues responsibly. But ultimately, the investigation may require the describing and revealing of some secrets. Nonetheless, there are obviously also legitimate secrets. Oversight, or an investigation that is heedless of that, is doomed as well as irresponsible. But it is the responsibility of the investigators—and not the investigated—to decide (after a fair exchange of views) on what must remain hidden.

* * *

²¹ I know from my own experience with the Church Committee that secrecy stamps are often used to cover up and conceal embarrassment and illegality. As the experience of the recent 9/11 Commission and the Church Committee shows, responsible investigative committees or commissions handle secrecy issues appropriately.

Throughout the history of the nation, independent commissions have been used to serve these purposes. At the start, President Washington appointed a commission to investigate the causes of the Whiskey Rebellion in 1794.²² There have been many commissions since, some successful, some not so. The 9/11 Commission (which is largely reckoned to be a success) sought to determine how we found ourselves so unprepared for the events of that day and how to reduce the likelihood of recurrence.²³

The Church Committee's and the 9/11 Commission's investigations remain a model for how comprehensive investigations can clarify what has gone wrong and provide guidance going forward. One was a congressional committee, while the other was an independent entity created by statute. So long as an investigatory committee has the features I have listed above, I do not believe it is crucial whether Congress chooses to create an internal body (like the Church Committee), or an independent entity. In my view, however, an independent body such as the 9/11 Commission would be better suited at this moment in history.

Of course, if the newly elected president resists a commission, Congress should go ahead with its own investigation. In the past, in fact, I have suggested the value of such a congressional probe. Upon further reflection, I believe that an independent panel is preferable. Unlike the time when the Church Committee was established, we now have standing committees on intelligence (and longstanding committees such as Judiciary have been strengthened). Congress will have huge responsibilities in myriad policy areas, including relating to terrorism. There are many important subjects for legislation—including those I suggest below—that undoubtedly will take substantial time and thought. An independent commission would free up Congress from responsibility for an in-depth, time-consuming analysis of the past. An independent commission also may be more successful in navigating partisan divides. It is worth noting, too, that an independent panel would also be free to touch on Congress and its role in ways that might prove uncomfortable for a sitting committee.

III. Restoring Checks and Balances: Rectifying Recent Expansions of Executive Authority and Creating Laws to Prevent Repeated Abuse.

A. Renounce the Unprecedented "Monarchical Presidency" Theory.

The next president should reject the unprecedented "monarchical prerogative" asserted by the present Administration, thereby acknowledging once more the Framers' intended checks and balances. This Committee and the House Judiciary Committee should also continue to marshal expert testimony demonstrating that the theory flies in the face of the Constitution's origins, its text, subsequent history, and judicial interpretations.

²² Jonathan Simon, *Parrhesiastic Accountability. Investigatory Commissions and Executive Power in an Age of Terror*, 114 YALE L.J. 1419, 1428 (2005).

²³ Commission on Terrorist Attacks upon the United States, *The 9/11 Commission Report*, xv (2004).

The theory—first enunciated by Congressman Dick Cheney in his Iran-Contra dissent²⁴—has been used by the Administration to justify breaking the law—laws, for example, that forbid torture and warrantless wiretapping. The theory that has been repeatedly put forward by the Justice Department’s Office of Legal Counsel cannot withstand any scrutiny.²⁵

Revealingly, the Administration has refused to release key OLC opinions that defend in full its monarchical theory. (To be sure, several of the opinions that have been released *rely* on this theory, but they do not explain it, or defend it fully or professionally.)

The next president should make it unequivocally clear that he rejects the unprecedented claim of a monarchical right to break the law—that he will keep faith with the original constitutional compact and in particular its curbs on executive power. The Constitution of 1787 was designed in conscious reaction to the British monarchy’s concentrated power. As designed, it prevents the accumulation of power in any one branch of government. This is evident from the text of the Constitution, which not only split power between three branches of government, but also left all three branches subject to check by the others. In matters of national security, including not only the awesome question of when and how the nation should go to war, but also detailed issues covering the standards of conduct for our armed forces, the Constitution gave Congress authority. The importance of limits on executive authority was eloquently and exhaustively expressed in the 1787 Philadelphia Convention and in all subsequent debates about the Constitution’s ratification. And the most recent scholarship echoes and confirms the Founding Era’s rejection of the notion of an unbridled executive.²⁶

The Framers, well acquainted with the follies and excesses of (British) monarchical power, divided and shared martial power between the branches because they knew that concentrating such authority risks harm to the nation. Their wisdom remains just as valid today. The contemporary White House insistence on unilateralism harms the country in two ways. First, it leaves the country with no effective national security policy-making mechanism. Presidential unilateralism provides no forum for comprehensive debate to air pros, cons, and flaws in any policy. Instead, it deprives government of effective means of identifying and correcting errors, and increases the likelihood that we spend precious resources on tough-sounding policies that in fact do little to promote security.

²⁴ See *Iran-Contra Report*, *supra* n. 12.

²⁵ See Schwarz & Huq, *supra* n. 1, at Chapter 7 (“Kings and Presidents”), at 153-86.

²⁶ See David Barron & Martin Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008); Louis Fisher, *Presidential War Power* (2004); Morton Halperin, Op-Ed., *Listening to Comprohise*, N.Y. TIMES, July 8, 2008, at 21; Editorial, *Defeated in Court-Again*, WASH. POST, Aug. 1, 2008, at A16.

The result of presidential unilateralism has been policies that seriously undermine our credibility around the world, and provide terrorists with a powerful recruiting tool.²⁷ Today, America is often linked internationally to images of Guantánamo and Abu Ghraib more than to the ideals of liberty and equality. As even Bush Administration veterans acknowledge, these associations create an unacceptable “drag” on counterterrorism efforts.²⁸ As I have noted, even our closest allies in the United Kingdom now hesitate before cooperating with our intelligence services. In Germany, prosecutors investigating the rendition of its citizen Khalid El-Masri (who was ultimately released without charges, apparently after the CIA concluded that it had the wrong man), issued arrest warrants in 2007 for thirteen suspected CIA agents, and forwarded them to Interpol.²⁹ In Italy, a judge has issued indictments for twenty-six CIA officers and five members of the Italian secret service, all allegedly involved in the abduction and rendition to Egypt of Osama Moustafa Hassan Nasr, known as Abu Omar.³⁰ The judge called the case “a question of principle,” and declared, “Today, it’s Abu Omar. Tomorrow, it could be my daughter. These are fundamental human rights, and we have to respect them.”³¹

Restoring our flagging credibility depends on unambiguous renunciation of the monarchical prerogatives by those who will lead America starting on January 20, 2009. Repudiating the “monarchical prerogatives” that lie beneath the harmful policies of the current Administration is therefore the first and most important part of any course correction the next president can single-handedly take.

B. Renounce the Use of Signing Statements to Circumvent the Law.

The next president must commit to ending the way in which open-ended signing statements have been used to repudiate laws without justifying the law’s annulment or notifying the legislature. Congress can also do more to challenge signing statements.

Since the founding of the Republic, presidents have used signing statements. In and of themselves, signing statements are not harmful. The current Administration,

²⁷ According to a March 2007 Pew Global Attitudes Project poll, between 2002 and 2007, the proportion of people holding favorable views of the U.S. dropped from 75 percent to 56 percent in Great Britain and 63 percent to 39 percent in France. See Andrew Kohut, President, Pew Research Center, Testimony on America’s Image in the World: Findings from the Pew Global Attitudes Project before the Subcommittee on International Organizations, Human Rights, and Oversight of the Committee on Foreign Affairs (Mar. 14, 2007), available at <http://pewglobal.org/commentary/display.php?AnalysisID=1019>. The Pew Trust explicitly singled out Abu Ghraib and Guantánamo as drivers in this trend.

²⁸ See Matthew Waxman, Op-Ed., *The Smart Way to Shut Gitmo Down*, WASH. POST, Oct. 28, 2007, at B4; Colin Powell’s and P.X. Kelley’s and Robert F. Turner’s quotes at *supra* ns. 7 and 8.

²⁹ *Germany Issues Arrest Warrants for 13 CIA Agents in El-Masri Case*, SPIEGEL ONLINE, Jan. 31, 2007; Mark Lander, *German Court Confronts U.S. On Abduction*, N.Y. TIMES, Feb. 1, 2007; John Goetz, Marcel Rosenbach & Holger Stark, *CIA Arrest Warrants Strain US-German Ties*, SPIEGEL ONLINE, Jun. 25, 2007; Michael Isikoff & Mark Hosenball, *Hunting the Hunters*, NEWSWEEK, Mar. 29, 2007; *US Displeased over German Hunt for CIA Agents*, SPIEGEL ONLINE, Mar. 5, 2007.

³⁰ Georg Mascolo & Matthias Gebauer, *The CIA in the Dock*, SPIEGEL ONLINE, Jan. 10, 2007.

³¹ Ian Fisher & Elisabetta Povoledo, *Italy Braces for Legal Fight Over Secret C.I.A. Program*, N.Y. TIMES, June 7, 2007.

however, has employed the device in new, troubling ways, making them a tangible manifestation of its “monarchical” vision of the executive.³²

First, the Administration has used such statements to signal aggressive non-compliance with an unprecedented *range* of laws. In more than 200 years, presidents before George W. Bush challenged the constitutionality of 600 statutory provisions. By 2007, President Bush had used signing statements to challenge more than 1,100 provisions.³³ By signing an unprecedented number of signing statements, President Bush has bypassed congressional enactments that protect liberties, ban torture and “cruel, inhuman, and degrading treatment,” and that ensure disclosure and accountability.

Second, President Bush’s signing statements have been opaque about both the precise statutory provisions being repudiated and the exact constitutional theory being asserted to justify the signing statement.³⁴ This makes it impossible for Congress or the public to know exactly what is being complied with, and what is being defied. The result is the appearance of transparency without its substance.

Finally, the Administration has extended the use of signing statements by objecting to laws that require *reporting* executive noncompliance with the law.³⁵ That is, the President has declined to tell Congress and the people what laws he refuses to follow—and has used a signing statement to do so.

The next president must do better. He must abandon publicly the use of signing statements as a way to evade the law and to conceal such evasion from Congress and the people. Congress also must do better. It must challenge any improper use of signing statements. It must insist—by subpoena if necessary—that the president provide his reasons for each signing statement, as well as the specific statutory provisions to which it

³² See The Constitution Project, *Statement on Presidential Signing Statements By the Coalition to Defend Checks and Balances 1* (2006), available at http://www.constitutionproject.org/pdf/Statement_on_Presidential_Signing_Statement.pdf (noting that President Bush has “transformed” the use of signing statement); see also Schwarz & Huq, *supra* n. 1, at 91-92.

³³ Charlie Savage, *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy* 228 (2007).

³⁴ See Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 317 (2006) (noting the practice of simultaneously objecting to multiple provisions). For example, responding to an Amendment barring cruel, inhuman and degrading treatment, the President stated that “[t]he executive branch shall construe [the Amendment] in a manner consistent with the constitutional authority of the President ... as Commander in Chief.” President’s Statement on Signing H.R. 2683, the “Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006,” Dec. 30, 2006, available at <http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html>. This was a backhanded way of asserting monarchical powers without either saying what those powers were, or what precisely the scope of the objection was.

³⁵ See 28 U.S.C. § 530D (2006) (imposing reporting requirement in cases when the executive decides to contest affirmatively or to refrain from enforcing, applying, or administering any federal law).

applies. In short, the president must be required to justify publicly any determination that validly enacted legislation should not be enforced.

C. Enact a Law That Regulates the Invocation of Executive Privilege in Response to Congressional Requests for Information.

Congress should enact a statute to regulate and limit the use of executive privilege, particularly in cases involving potential wrongdoing within the executive branch.

Executive privilege is at the core of excessive governmental secrecy. It must be addressed and limited for there to be effective accountability in government.

Executive privilege is the president's claimed right to resist disclosure of documents and communications.³⁶ It can prevent the discovery of wrongdoing and error, preserve flawed and failing policies, and preclude accountability.³⁷ Excessive and inappropriate use of executive privilege is fundamentally destabilizing the constitutional architecture, and thus needs to be redressed.

Executive stonewalling of recent congressional efforts to secure crucial information in multiple ongoing oversight investigations—including investigations into allegations of politicization of prosecutorial decisions within the Justice Department, decisions regarding the hiring and firing of federal prosecutors, and EPA policy—illustrate this need for reform.³⁸ Currently, resolution of such disputes is abandoned to the give-and-take of the realm of power politics. Consequently, if the Executive chooses to block congressional access to information through a claim of executive privilege, there

³⁶ In fact, there are several kinds of privilege commonly referred to as executive privilege:

The [p]resident's constitutionally based privileges subsume privileges for records that reflect: military, diplomatic, or national security secrets (the state secrets privilege); communications of the [p]resident or his advisors (the presidential communications privilege); legal advice or legal work (the attorney-client or attorney work product privileges); and the deliberative processes of the [p]resident or his advisors (deliberative process privilege).

Exec. Order No. 13,233, reproduced at 44 U.S.C § 2204 note (2007); see also Gerald Wetlaufer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*, 65 IND. L.J. 845, 845 n.3 (1990). The focus of this section and the Brennan Center's forthcoming report is the "presidential communications" privilege and its application to congressional requests for information.

³⁷ After the November 2006 elections, the pace of congressional investigations picked up. See Thomas E. Mann, Molly Reynolds, & Peter Hoey, *A New Improved Congress?*, N.Y. TIMES, Aug. 26, 2007, at WK 11 ("During the first seven months of 1995, Congressional oversight of the executive branch increased modestly in the Senate but not at all in the House. But this year Congress, especially the House, has intensified its oversight, following years of inattention and deference by its Republican predecessor."). Many of these congressional efforts to exercise oversight powers have been thwarted, however, by claims of executive privilege. E.g., Carl Hulse, *House Vote on Contempt is Expected Soon*, N.Y. TIMES, Feb. 13, 2007, available at <http://www.nytimes.com/2008/02/13/us/13contempt.html>.

³⁸ Del Quentin Wilber, *Judge Orders Miers to Testify*, WASH POST, Aug. 1, 2008, at A2 ("The Bush administration has increasingly invoked executive privilege in its battles with Congress over documents and testimony related to issues as diverse as greenhouse gas emissions and FBI interviews of Vice President Cheney about the controversial leak of a CIA officer's identity.").

is very little Congress can now do to access that information. The House of Representatives' recent success in the Washington, D.C. district court in Congress's suit against Harriet Miers and Josh Bolton is an outlying exception.³⁹

Moreover, presidents' aggressiveness in withholding information—and Congress's willingness to acquiesce—historically has varied depending on the political strength of the particular president, the prevailing political environment, the presence or absence of scandal (or the suspicion of scandal), and the Executive's theory of the scope of his power. As a result, the rules of executive privilege have remained undefined and contingent.

Executive privilege claims should be recognized for what they are—legal arguments over entitlement to information. As such, they each have a “right” and a “wrong” resolution. And whatever means are used to resolve them should be designed to bring about the “right” resolution in as many instances as possible, rather than having the result based on what political actors can get away with. The current mechanism—pure politics, with legal arguments used merely as bargaining chips—is not so designed.

The Brennan Center is working on a comprehensive report and proposed legislation to reform executive privilege. The report concludes that the current system for resolving executive privilege disputes between Congress and the President is irremediably flawed: What is revealed depends not on what should be disclosed according to the law, but on the happenstance of the balance of political forces at a given moment. And the absence of clear legal benchmarks, let alone the means to enforce them, leads to overprotection of secrecy.

But law, and not politics, should govern this vital question. The Brennan Center report will propose new legislation to facilitate quicker and more principled resolution of inter-branch information disputes. It includes a draft of legislation that would enable fair and speedy resolution of executive privilege claims in line with the Constitution as interpreted by the Supreme Court. The proposed legislation includes a cause of action for a House of Congress to enforce compliance with a duly issued subpoena, even if the subject of the subpoena is an executive-branch official. In addition, the statute defines categories of information over which the executive may assert executive privilege, as well as what Congress must do to overcome the privilege. Significantly, the statute provides that when there is credible evidence of executive malfeasance, misconduct, or illegality, executive privilege may not prevail in response to a congressional attempt to investigate. This would ensure necessary and appropriate congressional oversight and

³⁹ While the case has not yet succeeded in securing the information Congress seeks, the court soundly rejected the executive's argument that presidential aides are absolutely immune from testifying before Congress. *Comm. on the Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 99 (D.D.C. 2008) (“[T]he asserted absolute immunity claim here is entirely unsupported by existing case law. In fact, there is Supreme Court authority that is all but conclusive on this question and that powerfully suggests that such advisors do not enjoy absolute immunity. The Court therefore rejects the Executive's claim of absolute immunity for senior presidential aides.”)

lawmaking, while not allowing frivolous congressional fishing expeditions. (The report and proposed statute will be available before the end of the year.)

D. Legislate To Limit the State Secrets Privilege.

Congress should confirm the federal courts' power and duty to adjudicate cases in which the executive branch is alleged to have used national security powers to impinge on constitutional liberties or human rights by enacting legislation to regulate the invocation of the state secrets privilege.

The state secrets privilege is an “evidentiary rule that protects information from discovery when disclosure would be inimical to the national security.”⁴⁰ The Court first articulated a “state secrets” privilege in 1953.⁴¹ Between 1953 and 1976, the government invoked the privilege in four law suits; between 1977 and 2001, the courts were asked to adjudicate claims of “state secrets” 51 times.⁴² Since 2001, however, the government has invoked the privilege vigorously in cases said to concern national security in order to block judicial scrutiny of wrongdoing, to seek “blanket dismissal of cases challenging the constitutionality of specific, ongoing government programs,”⁴³ and to prevent oversight of allegations of civil liberties violations.⁴⁴ In two cases concerning the extraordinary rendition and subsequent torture of clearly innocent individuals, for example, the executive invoked the privilege to prevent the involved individuals from obtaining justice.⁴⁵ In another unprecedented invocation of “state secrets,” the government argued that a detainee at the Guantánamo Bay Naval Base should not be permitted access to his lawyers because he would divulge state secrets—namely, information about the

⁴⁰ *In re United States*, 872 F.2d 472, 474 (D.C. Cir.) cert. denied sub nom. *United States v. Albertson*, 493 U.S. 960 (1989). While some courts have suggested casually that the privilege can be traced back to the 1807 trial of Aaron Burr, that early precedent in fact offers no support for an absolute refusal by the government to share information with the courts. See Louis Fisher, *In the Name of National Security: Unchecked Presidential Power And The Reynolds Case* 218 (2006); see also Amanda Frost, *The State Secrets Privilege and the Separation of Powers*, 75 *FORDHAM L. REV.* 1931, 1938-51 (2007) (surveying evolution and recent cases). The phrase “state secrets privilege” first took form in a 1953 Supreme Court case where the government used it to shield an accident report from discovery in a tort suit. Only later was it discovered (by relatives of those who died in the accident) that the report contained no classified evidence—only evidence of the government’s negligence. See *United States v. Reynolds*, 345 U.S. 1 (1953); Fisher, *In the Name of National Security*, *supra*, at xi, 113, 181-82.

⁴¹ *United States v. Reynolds*, 345 U.S. 1 (1953).

⁴² See William G. Weaver & Robert M. Pallito, *State Secrets and Executive Power*, 120 *POL. SCI. Q.* 85, 101 (2005).

⁴³ Frost, *supra* n. 40, at 1939.

⁴⁴ See generally *id.* at 1938-51 (surveying evolution and recent cases).

⁴⁵ See *El Masri v. United States*, 479 F.3d 296 (4th Cir. 2007); *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006). For other examples of the state secrets privilege at work, see e.g., *American Civil Liberties Union v. National Security Agency*, Nos. 06-2095/05-2140, appeal decided (6th Cir. July 6, 2007); *Hepting v. AT&T Corp.*, Nos. 17132/17137 (9th Cir. argued Aug. 13, 2007); *Center for Constitutional Rights v. Bush*, 06-CV-313 (GEL) (S.D.N.Y.); *American Civil Liberties Union v. National Security Agency*, No. 06-CV-10204, opinion at 438 F. Supp. 2d 754 (E.D. Mich. 2006), rev’d Nos. 06-2095/06-2140, 2007 U.S. App. LEXIS 16149 (6th Cir. July 6, 2007).

“alternative interrogation methods” used to torture him.⁴⁶ By blocking plaintiffs from seeking judicial relief in national security-related litigation, the “state secrets” privilege undermines the judicial branch’s constitutional checking function.⁴⁷

Legislation is now needed to preserve courts’ essential functions as protectors of individual rights and as watchdogs against executive branch aggrandizement.⁴⁸ The federal courts have their own independent authority to limit and control the state secrets privilege, but they have been unduly wary of exercising this power. Congressional intervention must strengthen the resolve of judges facing a recalcitrant executive branch.⁴⁹

⁴⁶ Carol D. Leonnig & Eric Rich, *U.S. Seeks Silence on CIA Prisons*, WASH. POST, Nov. 4, 2006, at A1. The detainee, Majid Khan, was allowed eventually to see a lawyer—who in turn was slapped with a gag order. See Gitanjali S. Gutierrez, *Going to See a Ghost*, WASH. POST, Oct. 15, 2007, at A15; see also Editorial, *Top Secret Torture*, WASH. POST, Nov. 21, 2006, at A26; Eric Rich & Dan Eggen, *From Baltimore Suburbs to a Secret CIA Prison*, WASH. POST, Sept. 10, 2006, at A8.

⁴⁷ Judicial oversight also provides an important supplement to Congress’s oversight function. This adjunct role is especially important in an era in which unilateral executive action is more common, and Congress finds it increasingly difficult to muster the supermajorities necessary to overcome the executive’s first-mover advantage. If the courts are taken out of the picture, the president will be able often to act unilaterally and then to block the majority will of both Houses with his veto power, or a signing statement. Without the courts to police strictly the executive’s compliance with legal limits, it becomes much more difficult for Congress to impose any effective check. Moreover, courts have a comparative advantage discerning violations of individual liberties because they are relatively insulated from political pressures and have more fine-grained tools for identifying specific rights violations. See Frost, *supra* n. 40, at 1952-53.

⁴⁸ The federal courts, as James Madison explained, are also “in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the [C]onstitution by the [D]eclaration of [R]ights.” 1 *Annals of Cong.* 457 (Joseph Gales ed., 1834); see also *Davis v. Passman*, 442 U.S. 228, 242 (1979) (“[W]e presume that justiciable constitutional rights are to be enforced through the courts. And, unless such rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights.”); *Bell v. Hood*, 327 U.S. 678, 684 (1946) (“[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.” (citations omitted)).

As the bipartisan Constitution Project has explained, “[u]nless claims about state secrets evidence are subjected to independent judicial scrutiny, the executive branch is at liberty to violate legal and constitutional rights with impunity and without the public scrutiny that ensures that the government is accountable for its actions.” The Constitution Project, *Reforming the State Secrets Privilege* i (2007) available at http://www.constitutionproject.org/pdf/Reforming_the_State_Secrets_Privilege_Statement1.pdf.

⁴⁹ Even when vested with clear statutory authority to review claims of executive secrecy, however, courts tend to shirk this responsibility. Consider the courts’ response to Congress’s amendment of the Freedom of Information Act in 1974 to repudiate the Supreme Court’s ruling in *EPA v. Mink*, 410 U.S. 73 (1973). See Freedom of Information Act, Pub. L. No. 93-502, 88 Stat. 1561-64 (1974). Since that date, courts “have been friendly to the executive,” consistently deferring to executive judgments; “apparently, the judiciary is not excited by the idea of developing national security expertise.” Adam M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA L. REV. 909, 939-40 (2006); see also Meredith Fuchs, *Judging Secrets. The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58

There are presently two bills pending in the House and Senate that would reform the state secrets privilege: (1) S. 2533, the “State Secrets Protection Act,” introduced by Senators Kennedy, Specter, and Leahy; and (2) H.R. 5607, the “State Secrets Protection Act of 2008,” introduced by Representatives Nadler, Petri, Conyers, and Delahunt. Both take important strides, but both could be strengthened so as to prevent the repetition of past abuses of the state secrets privilege. Both bills appropriately place in the hands of judges—not self-interested executive officials—the power to determine whether relevant evidence must be shielded from disclosure. Both also bar threshold dismissal on state secrets grounds, allowing parties an opportunity to make a preliminary case with non-classified evidence and requiring courts to let lawsuits proceed by directing the government to produce unclassified substitutes for secret evidence whenever possible.

These bills and other regulation of state secrets fall securely within Congress’s authority. Contrary to the assertion of Attorney General Michael Mukasey, they would neither represent an unconstitutional infringement on Article II powers nor compromise national security.⁵⁰ Congress regulates the Executive’s use and dissemination of information—including sensitive or even classified information—in numerous contexts. The Classified Information Procedures Act⁵¹ (“CIPA”), the Foreign Intelligence Surveillance Act⁵² (“FISA”), the Freedom of Information Act⁵³ (“FOIA”), and the Presidential Records Act⁵⁴ (“PRA”) all establish rules regarding information flow from and within the executive branch. Congress also has required the President to “establish procedures to govern access to classified information” and security clearances.⁵⁵ The National Security Act requires the Executive to disclose national-security-related information to the congressional intelligence committees.⁵⁶ No serious question has ever arisen as to the constitutionality of any of these statutes.

E. Strengthen Congressional Oversight of Intelligence Activities.

Congress should review and strengthen the present statutory disclosure and reporting requirements concerning intelligence and national security activities in order to enhance oversight.

The Constitution’s separation of powers assigns to Congress a necessary role conducting oversight of the activities of the executive branch. After all, when policies

ADMIN. L. REV. 162-67 (2006). For an example of excessive deference in the national security arena, see *Center for Nat’l Sec. Stud. v. Dep’t of Justice*, 331 F.3d 918, 927-28 (D.C. Cir. 2003).

⁵⁰ Letter from Michael Mukasey, Attorney General, U.S. Department of Justice, to Patrick J. Leahy, Senator and Chairman of the Judiciary Committee of the United States Senate 1 (Mar. 31, 2008).

⁵¹ 18 U.S.C. app. 3.

⁵² 50 U.S.C. § 1806(f).

⁵³ 5 U.S.C. § 552(a)(4)(B).

⁵⁴ 44 U.S.C. § 2201 et seq.

⁵⁵ *E.g.*, 50 U.S.C. § 435(a).

⁵⁶ 50 U.S.C. §§ 413(a), 413b(c).

are viewed by more than one person—or branch of government—erroneous facts, flawed reasoning, and accidental conclusions are more likely to be detected. Indeed, the Administration's decision to exclude key military officers and military lawyers from many pivotal discussions on detainee policy, including the use of torture, helped lead to errors that would have been avoided had more experienced voices been heard. Experience demonstrates this can be done even where there are issues of critical law enforcement or national security at stake. Indeed, it is precisely in those areas where mistakes in judgment owing to insufficient debate and discussion are most costly to the nation.

Experience also demonstrates that in the absence of congressional oversight, national security and law enforcement powers are often misused, either for partisan ends or in ways that harm U.S. residents and national security. As one longtime CIA general counsel explained at the time of the Church Committee, the absence of congressional oversight caused *problems* for that agency because “we became a little cocky about what we could do.”⁵⁷ On matters as diverse as political corruption and counterterrorism, Congress serves the nation best when it vigorously guarantees that federal law is applied in a fair, just, and effective manner. And that cannot be done if Congress is blinded.

Congress should strengthen reporting requirements for intelligence oversight.⁵⁸ Although the 1947 National Security Act regulates and mandates disclosures of intelligence activities to Congress,⁵⁹ its disclosure provisions contain loopholes and warrants legislative attention.⁶⁰

One area where Congress needs to focus is the work of its intelligence and related committees, which are supposed to facilitate accountability.⁶¹ Oversight by committee is

⁵⁷ Schwarz & Huq, *supra* n. 1, at 20. For source, see also Smist, *supra* n. 20, at 5, 9.

⁵⁸ Describing legislative oversight during the Cold War, former CIA director William Colby explained that “[t]he old tradition was that you don’t ask. It was a consensus that intelligence was apart from the rules.” Loch Johnson, *A Season of Inquiry: Congress and Intelligence* 7 (1976). In the Cold War a “few members of Congress ... protected the CIA from public scrutiny through informal armed services and appropriations subcommittees.” Tim Weiner, *Legacy of Ashes: The History of the CIA* 105 (2007). In the current presidency, there has been a larger collapse of oversight. See Thomas E. Mann & Norman J. Ornstein, *The Broken Branch: How Congress is Failing American and How to Get It Back on Track* 151-53 (2006).

⁵⁹ See, e.g., 50 U.S.C. §§ 413(a) & 413b.

⁶⁰ For example, the law states that all disclosure must be “consistent with due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters.” 50 U.S.C. § 413(a). Although this statement seems relatively anodyne, it may be/[is] used to deny Congress vital information or to deprive it of all information concerning specific programs.

⁶¹ As Gov. Thomas Kean and Lee Hamilton recently reemphasized, this remains a pressing problem: “Three years ago, the 9/11 commission noted that the Department of Homeland Security reported to 88 congressional committees and subcommittees—a major drain on senior management and a source of contradictory guidance. After halfhearted reform, the number is now 86.” Thomas Kean & Lee Hamilton, *Are We Safer Today?*, WASH. POST, Sept. 9, 2007, at B1. The 9/11 Commission, however had “no staff team or hearing on congressional oversight,” and it is possible that further investigation would yield a conclusion different from their recommendation of “unity of effort.” Commission on Terrorist Attacks upon the United States, *supra* n. 23, at 287-88.

especially vital because Congress' other tools, such as spending power and impeachment authority, are too unwieldy to be effective as an ongoing guarantee for a full flow of information. Big guns simply cannot be wheeled out on every occasion. Limiting excessive classification and reining in executive privilege alone will not ensure that Congress gets the information it needs to fulfill its constitutional role.⁶² There must be an affirmative obligation on the executive branch to disclose information. Statutory disclosure obligations are especially important in the national security arena because Congress, particularly in the absence of leaks from executive officials to the press, will not always be aware of the existence of the information it needs.

Statutory disclosure obligations fulfill their function only if the congressional committees that receive the resulting disclosures work properly.⁶³ Congress should in particular reconsider and limit the use of "gang of eight" briefings, which create the impression of accountability without its substance.⁶⁴

Congress should further consider whether the weaknesses of congressional oversight bodies during periods of unified government (i.e., when the same party holds power on Capitol Hill and in the White House) suggests the need for more radical change. Congress should consider giving equal control of the intelligence committees' information-forcing powers to the party not in the Oval Office, whether or not they are in the majority in Congress.⁶⁵ Although this idea is at odds with a tradition of majority control in Congress, it has received serious attention from major legal scholars.⁶⁶

In any event, oversight need not be a partisan matter—as the Church Committee demonstrated by bringing together both Republicans and Democrats to pursue inquiries into Administrations of both parties.⁶⁷ Neither Republicans nor Democrats, for example, should want a government where prosecutors are fired on partisan grounds. Neither

⁶² Congress's power to investigate is "perhaps the most necessary of all the powers underlying the legislative function.... [It] provides the legislature with eyes and ears and a thinking mechanism." J. William Fulbright, *Congressional Investigations: Significance for the Legislative Process*, 18 U. CHI. L. REV. 440, 441 (1951); see also *McGrain v. Daugherty*, 252 U.S. 135, 174 (1927); *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 509 (1975) ("The scope of [Congress'] power of inquiry ... is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.").

⁶³ The literature here is already exhaustive. See, e.g., Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CAL. L. REV. 1655 (2006); Robert F. Blomquist, *Congressional Oversight of Counterterrorism and Its Reform* ROGER WILLIAMS U.L. REV. 1, 69-74 (2005).

⁶⁴ For example, the White House misleadingly claimed that it had disclosed the NSA program "to Congress" without stating it had only disclosed to the "gang of eight." See Dan Eggen & Walter Pincus, *Varied Rationales Muddle Issue of NSA Eavesdropping*, WASH. POST, Jan. 27, 2006, at A5.

⁶⁵ Aziz Huq, *Spy Watch: After Years of Neglect, Congress Must Intensify Oversight of Intelligence Agencies*, LEGAL TIMES, May 15, 2006 (suggesting that control of intelligence oversight be vested in the party not in possession of the White House).

⁶⁶ Neal Katyal, *Internal Separation of Powers. Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2342, 2347 (2006) (suggesting that the minority party could hold hearings); see Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1050-53 (2004).

⁶⁷ See Smist, *supra* n. 20, at 77-78 (1990).

should want the “national security” or the “executive privilege” label to be applied to obscure partisan goals or to hide abusive exercises of power. Oversight should be a shared responsibility. And before facts are fully aired, nobody should prejudge the matter.

F. Strengthen the Inspector General System and Other Internal Checks and Balances.

Congress should review and strengthen by law the “internal checks and balances” of the executive branch, in particular the system of inspectors general for agencies and departments engaged in national security policy, and the protections for internal whistleblowers.

Congress alone cannot ensure that the law is followed all the time. The federal government, and in particular the national security apparatus, has swollen far beyond anything envisaged by the Framers, and far beyond the capacity of Congress and the courts to supervise. As the current Administration acknowledges, there is a consequent need for “strong measures to improve compliance [with the law] in ... national security mechanisms.”⁶⁸ Such internal checks and balances and protections would “help the Congress to hold the [e]xecutive [b]ranch accountable by rooting out waste, fraud, and abuse, and by shedding light on issues in need of attention.”⁶⁹

Many internal investigative and oversight mechanisms are familiar: a stronger system of inspectors general (or “IGs,” the statutory office responsible for internal auditing of executive branch activity); better protection for whistleblowers; separate and overlapping cabinet officers to ensure that the president hears competing opinions; agency “stovepipes” to ensure that there are internal channels to raise challenges to actions of questionable legality; mandatory review of government action by different agencies; civil-service protections for agency workers; reporting requirements to Congress; and an impartial decision-maker to resolve inter-agency conflicts to replace the now compromised Office of Legal Counsel. Many of these internal institutions exist in some form today but are too weak to be wholly effective. They should be strengthened.

G. Legislate To Reduce Excessive Secrecy and Over-Classification.

Congress should hold hearings on the abuse of secrecy and enact comprehensive rules to guard against the misuse of security-related classification and declassification. It should strengthen internal mechanisms that control oversight of classification.

Excessive secrecy affects the Constitution’s checks and balances in three ways. First, it prevents Congress and the public from knowing what problems exist or how best

⁶⁸ See Letter from Alberto R. Gonzales, Attorney General, U.S. Department of Justice, & Robert S. Mueller III, Director, Federal Bureau of Investigation, to Hon. Richard B. Cheney, Vice President (July 13, 2007) (on file with Brennan Center for Justice).

⁶⁹ Project on Government Oversight, *POGO’s 2007 “Baker’s Dozen” of Suggested Congressional Oversight Priorities*, Jan. 3, 2007, available at <http://www.pogo.org/p/government/go-070101-bakersdozen.html>.

to regulate them. Second, it shifts power to the executive branch, which can, and does, selectively release classified information in order to promote its political or policy agenda. Third, excessive secrecy limits the flow of information *within* the Executive—in some instances handicapping inter-agency processes of policy formation and yielding bad decisions.⁷⁰ For these reasons, Congress must promptly address excessive secrecy and over-classification, which has become an immense problem.⁷¹

Secrecy increased at the start of the Bush Administration and dramatically escalated after 9/11. Classification doubled from 2001 to 2004 alone.⁷² “The problem of over-classification is apparent to nearly everyone who reviews classified information,” wrote Governor Thomas H. Kean and Lee H. Hamilton after chairing the 9/11 Commission: “The core of the problem is the fact that people in government can get in trouble for revealing something that is secret, but they cannot get in trouble for stamping SECRET on a document.”⁷³ Furthermore, in the national security arena, excessive secrecy hampers Congress’s ability to gather information and formulate informed responses.⁷⁴

Congress should carefully review the regulations that now structure classification and declassification efforts. Such reviews might be done in the first instance by an expert, non-partisan panel. Based on this review, Congress should enact a comprehensive law limiting classification and installing checks to guard against the political manipulation of either classification or declassification. (The House of Representatives attempted to address this problem through legislation passed last week. I

⁷⁰ National Security Advisor Condoleezza Rice, for example, only learned of the Department of Justice’s infamous August 2002 opinion on torture in June 2004—and then only from the *Washington Post*. Barton Gellman & Jo Becker, *Pushing the Envelope on Presidential Power*, WASH. POST, June 25, 2007, at A1.

⁷¹ According to J. William Leonard, Director of the Information Security Oversight Office, more than two million of the 20.5 million classification decisions made in 2006 were incorrect. This error rate, Leonard told Congress, “calls into question the propriety” of the initial classification decisions. Charles Pope, *Government is Overzealous with Secrecy*, *Reichert says*, SEATTLE POST-INTELLIGENCER, July 26, 2007, at B1. Other executive branch officials are even more concerned about excessive classification than Leonard. One official has estimated that “beyond 50%” of currently classified documents have been improperly kept from the public. *Emerging Threats: Classification and Pseudo-Classification Before the S. Comm. On Government Reform*, 109th Cong. (2005) (statement of Thomas S. Blanton, National Security Archive, George Washington University) available at <http://www.gwu.edu/~nsarchiv/news/20050302/index.htm>.

⁷² Fuchs, *supra* n. 49, at 131, 133. On March 25, 2003, the White House ratcheted up government secrecy by imposing a presumption of non-disclosure on all federal agencies. Secrecy extends to the practices of individual policy-makers. Vice President Cheney, for example, “declines to disclose the names or even the size of his staff, generally releases no public calendar and ordered the Secret Service to destroy his visitor logs.” Barton Gellman & Jo Becker, *A Different Understanding With the President*. WASH. POST, June 24, 2007, at A1.

⁷³ Commission on Terrorist Attacks upon the United States, *supra* n. 23, at 69; *see also* Mann & Ornstein, *supra* n. 58, at 158-62 (describing the Congress’s “tolerance of executive secrecy” even before 9/11); *see generally* Daniel Patrick Moynihan, *Secrecy: The American Experience* (1999); *cf.* Sessile Bok, *Secrets: On the Ethics of Concealment and Revelation* 109-10 (1983) (“Long-term group practices of secrecy... are likely to breed corruption and to spread.”).

⁷⁴ Most importantly, this includes the Governmental Accounting Office. The Congressional Research Services has access to less information on security issues when it compiles information for Congress.

urge the Senate also to focus on such legislation.) Further, Congress should strengthen both inter-branch and intrabranched oversight mechanisms. The General Accounting Office should be given a clear mandate over security agencies. Internal bodies such as the Information Security Oversight Office and the Public Interest Declassification Board should be strengthened and vested with greater disclosure-forcing powers, e.g., subpoena authority.⁷⁵

H. Disclose the Office of Legal Counsel's Legal Opinions That Influence the Use of National Security Powers, and Consider Restructuring the Office.

The next Administration should release to Congress and the public all relevant internal legal opinions and presidential authorizations, especially those that rely on a "monarchical prerogatives" theory of presidential authority, or that otherwise negate or narrow the application of national security laws enacted by Congress. Congress should legislate to strengthen the independence of the Office of Legal Counsel (OLC) by insulating it from improper White House influence. It also should legislate to ensure maximum transparency for OLC opinions.

The Justice Department's OLC provides written and oral legal opinions to others in the executive branch, including the president, the attorney general, and heads of departments. It stands at the front line of executive branch legal interpretation.⁷⁶ But it has recently played a central role in sanctioning the dangerous theory of monarchical executive power that has corroded the checks and balances of constitutional government. Congress should curb with legislation this deviation in the OLC's role and promote OLC's transparency.

In legal opinions sanctioning torture, rendition, and warrantless surveillance, the OLC failed to check—and instead enabled—flagrant governmental disregard of the law. Rather than fulfilling its "special obligation to ensure compliance with the law, including respect for the rights of affected individuals and the constitutional allocation of powers," the OLC fell into an "advocacy model," i.e. simply signing off on what the White House wanted.⁷⁷ As a distinguished group of OLC alumni have explained: "The advocacy

⁷⁵ The Public Interest Declassification Board, established to reduce excessive classification, has been rendered ineffectual by White House control. Shaun Waterman, *Analysis: Secrecy board called 'toothless'*, UNITED PRESS INTER'L, Oct. 30, 2006.

⁷⁶ Schwarz & Huq, *supra*, n. 1, at Chapter 8 ("The King's Counsel"), at 187-199; Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 710-11 (2005); Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1309-10 (2000). The Office of Legal Counsel was created by statute in 1953; its head, an assistant attorney general, is subject to presidential appointment and Senate confirmation. See Reorganization Plan No. 2 of 1950, 64 Stat. 1261.

⁷⁷ Walter Dellinger et al., *Principles to Guide the Office of Legal Counsel 25*, (Dec. 21, 2004), available at http://www.acslaw.orefiles/2004%20programs_OLC%20inciples_white%20paper.pdf. It did so both by proffering the untenable theory of a "monarchical executive" to underwrite extraordinary new powers, and by interpreting statutes such as the September 2001 Authorization for the Use of Military Force, as a

model of lawyering, in which lawyers merely craft plausible legal arguments to support their clients' desired actions, inadequately promotes the President's constitutional obligation to ensure the legality of executive action."⁷⁸ Optimally, the OLC provides "thorough and forthright" advice that "reflect[s] all legal constraints, including the constitutional authorities of the coordinate branches of the federal government—the courts and Congress—and constitutional limits on the exercise of governmental power."⁷⁹

At the threshold, Congress should require transparency to promote integrity in OLC legal opinions. OLC opinions—past and future—should as much as feasible be disclosed to Congress and the public. These opinions have the force of law. In this country we should have no secret laws.

Since 9/11, OLC has issued legal memoranda—including the infamous "torture memo" of August 2002—that rely on a monarchical theory of presidential power to license torture, warrantless surveillance, and "extraordinary rendition."⁸⁰ Remarkably, the present Administration has refused to expose all its legal reasoning to the light of day—even as it continues to press its expansive vision of presidential power. To date, some legal opinions regarding compliance with international law, the detention of persons seized in Afghanistan in the course of Operation Enduring Freedom, and the use of coercive interrogation have been released or leaked. But others are known to exist and have been kept secret.⁸¹ The *current* Administration should release immediately all legal

wholesale repudiation of checks and balances in the national security field. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

⁷⁸ Dellinger et al., *supra* n. 77, at 1.

⁷⁹ *Id.* at 2; accord Jack Goldsmith, *The Terror Presidency: Law And Judgment Inside The Bush Administration* 35-37 (2007). In an age of increasing statutory and regulatory complexity, the OLC's role as an honest broker within the executive branch on legal issues is of paramount importance: Increasing numbers of legal questions never reach the courts, such that the executive functionally may have the last word on constitutional and statutory questions where vital human interests are at stake. See Pillard, *supra* n. 76, at 758.

⁸⁰ Many of these legal opinions provided internal legal justification, and hence "cover," for arguably illegal programs. In the absence of legal cover, illegal programs would not—and did not—continue. See, e.g., Dana Priest, *CIA Puts Harsh Tactics on Hold*, WASH. POST, June 27, 2004, at A1 (quoting one CIA official to the effect that the interrogation program "has been stopped until we sort out whether we are sure we're on legal ground").

⁸¹ These include—but are not limited to—the following:

- Memoranda dated October 4 and November 2, 2001, January 9, May 17, and October 11, 2002, February 25, 2003, March 15, May 6, and July 16, 2004, and February 4, 2005, concerning the so-called "Terrorist Surveillance Program" of the NSA. (Referenced in Letter to Patrick J. Leahy, Senator, from Shannon W. Coffin, Counsel to the Vice President, Aug. 20, 2007 (on file with Brennan Center for Justice).)
- Memorandum dated March 13, 2002, for William J. Haynes, II, General Counsel, Department of Defense, from Jay S. Bybee Assistant Attorney General, Office of Legal Counsel, entitled "The President's Power as Commander in Chief to Transfer Captured Terrorists to the Control and Custody of Foreign Nations," and undated memorandum concerning the President's authority to transfer terrorist suspects to other countries where they are likely to be tortured. (Although no record of this

opinions issued by the OLC that license policies of interrogation, detention, transfer, and surveillance. It seems likely that these opinions each rely in some measure on the presumption of monarchical prerogatives.⁸² If this Administration persists in its refusal to disclose these legal opinions, the next president should commit to doing so. If he refuses, Congress should subpoena them or legislate to require disclosure.

Congress should also address the OLCs institutional drift by strengthening its capacity to resist political pressures and to provide neutral and impartial advice that accounts for all relevant constitutional concerns.⁸³ Congress should also, among other things, require guidelines to ensure “appropriate executive branch respect for the coordinate branches of the federal government” and for individual constitutional and international human rights.⁸⁴ Congress should direct OLC to “seek the views of all affected agencies [as well as other] components of the Department of Justice before rendering final advice.”⁸⁵ To the maximum extent feasible, OLC opinions also should be made publicly available via an easily searchable public website.⁸⁶ Congress should also require that “absent the most compelling need for secrecy, any time the executive branch disregards a federal statutory requirement on constitutional grounds, [the OLC] should publicly release a clear statement explaining its deviation.”⁸⁷

memorandum has surfaced, a law review article by a former OLC lawyer reads remarkably like an OLC memo; the same lawyer has published other articles that cribbed from his work at OLC. See John Yoo, *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183 (2004); see also Schwarz & Huq, *supra* n. 1, at 163 (discussing article).

- Memorandum dated spring 2005, signed by Steven Bradbury, concerning the legality of CIA enhanced interrogation techniques used either alone or in combination, and concluding that these did not amount to “cruel, inhuman, or degrading” treatment. See Scott Shane, David Johnston & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES, Oct. 4, 2007, at A1.

These are the opinions we are fortunate enough to know about due to cross-references in other documents or press reports. There are likely others that we do not know exist, but that should be in the public domain.

⁸² Evidence for this derives from the fact that opinions that have been released do rely on extravagant theories of executive power. See, e.g., Memorandum from John Yoo, Deputy Assistant Attorney General, & Robert J. Delahunty, Special Counsel, for William J. Haynes II, “Application of Treaties and Laws to al Qaeda and Taliban Detainees,” Jan. 9, 2002; see also Robert Delahunty & John Yoo, *The President’s Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations that Harbor or Support Them*, 25 HARV. J.L. & PUB. POL’Y 487 (2002).

⁸³ To implement this, Professor Neal Kumar Katyal has suggested splitting the OLC into distinct adjudicative and advisory divisions. Katyal, *supra* n. 66, at 2335-40. Judge Patricia Wald and Professor Neil Kinkopf argue that OLC should shift to a wholly “judicial model” that is distinct from the “advocacy model.” Patricia Wald & Neil Kinkopf, *Putting Separation of Powers into Practice. Reflections on Senator Schumer’s Essay*, 1 HARV. L. & POL’Y REV. 31, 57 (2007).

⁸⁴ Dellinger et al., *supra* n. 77, at 3. By authorizing internal guidelines aimed at a legislatively stipulated goal in lieu of regulating directly, Congress recognizes the leeway that the Department of Justice properly exercises in maintaining professional standards.

⁸⁵ *Id.* at 5.

⁸⁶ *Id.* at 4; see also Pillard, *supra* n. 76, at 750 (advocating for public database).

⁸⁷ Dellinger et al., *supra* n. 77, at 4.

I. Make It Clear: No More Torture, No More “Torture Lite.”

Recognizing the damage that abuse and rumors of abuse have done to America's reputation since 9/11, Congress should enact legislation closing loopholes that the executive branch believes allow or decriminalize the use of coercive interrogation measures including (but not limited to) waterboarding, prolonged sleep deprivation, and stress positions.

American law clearly prohibits all torture and all lesser forms of coercive interrogation, commonly known as cruel, inhuman, and degrading treatment.⁸⁸ But, since 9/11, the current Administration has secured from the Justice Department legal opinions that seed ambiguity about these unequivocal legal limits and devise ways to evade what should be clear and impenetrable barriers. Even though federal law and international law—clearly, and without reservation or caveat—prohibit all forms of torture and cruel, inhuman, and degrading treatment, the Administration has found ways to sanction interrogation tactics—including waterboarding and prolonged sleep deprivation⁸⁹—which clearly constitute torture.

Congress should not have to clarify again the law against torture. But given the executive's repeated evasions of that law, Congress must do so. In particular, Congress should specifically prohibit the “enhanced interrogation techniques” that the Administration reportedly uses, as well as the reported combinations of multiple

⁸⁸ See Schwarz & Huq, *supra* n. 1, at 67-69 (summarizing those laws).

⁸⁹ In confirmation hearings, Attorney General nominee Michael Mukasey was unable to state clearly that water-boarding constituted torture. See Attorney Transcript of Senate Judiciary Committee Hearing for Nomination of Judge Michael Mukasey as Attorney General, Day Two (Oct. 18, 2007), available at <http://www.washingtonpost.com>. But water-boarding has been considered torture since the Spanish Inquisition. There is no question of its tremendous pain-inducing power. See Rejali, *supra* n. 9, at 279-85.

Moreover, in July 2007, President Bush promulgated an executive order setting forth rules for CIA interrogations (the military being covered by a separate, and stringent, field manual on interrogation). The order listed a series of criminal statutes concerning torture and the McCain Amendment, and explained that these, along with religious and sexual abuses, defined the universe of the Geneva Conventions' Common Article 3 violations. The order also stated that detainees would receive “the basic necessities of life, including adequate food and water, shelter from the elements, necessary clothing, protection from extremes of heat and cold, and essential medical care.” See Executive Order Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency (July 20, 2007), available at <http://www.whitehouse.gov/news/releases/2007/07/print/20070720-4.html>.

Critically, the order did not specify which tactics the CIA would use. Further, it was carefully drafted to exclude several “enhanced” interrogation techniques allegedly already authorized for the CIA. Space remained, in short, for several of the harsher measures that had long been used against post-9/11 detainees. Certainly, that was how the order was read by the military's lawyers, who expressed concern to the White House that interrogations pursuant to the order would likely violate the 1949 Geneva Conventions. See Karen DeYoung, *Bush Approves New CIA Methods*, WASH. POST, July 21, 2007, at A1; Katherine Shrader, *Bush Alters Rules for CIA Interrogations*, ASSOC. PRESS, July 21, 2007, available at <http://abcnews.go.com/Politics/wireStory?id=3399803>; see also Charlie Savage, *Military cites risk of abuse by CIA*, BOSTON GLOBE, Aug. 25, 2007, at A1.

“enhanced” interrogation measures.⁹⁰ These restrictions should not be exclusive, but given as examples of the larger category of prohibited conduct. (In addition, all interrogations conducted by the CIA or the military should be videotaped. The involvement of doctors in interrogations should be carefully examined.) Absolute prohibitions should apply to all agents, employees, and contractors of the federal government (regardless of whether they are inside or outside the United States) and to individuals who work alongside the federal government. Finally, Congress should prohibit, without caveat, the transfer of suspected terrorists to other countries known to use torture.⁹¹ Reliance on another country’s assurance that it will not torture—in the face of State Department reports that they regularly *do* torture—is patently hypocritical and inadequate.⁹²

IV. Conclusion.

Checks and balances need to be restored to the Framers’ original vision. From the outset, our nation has been strongest when our government formulates policies by deliberative and open processes. Without the clarity that informed criticism brings, our national security policy is much more likely to be ineffective, uninformed, flawed and possibly harmful to our citizens and our standing in the world. Effective checks and balances are a prerequisite to informed criticism and open deliberation. In their absence, novel and erroneous constitutional theories have led to conduct that is contrary to American values. We will spend many years remedying the harms, both foreign and domestic, that these ill-advised policies have caused.

Consequences, not motive, are key. Make the assumption that the conduct which has undermined our values and sapped our strength arose in the context of seeking to protect the country from further attacks. But also remember—as Justice Louis Brandeis warned in a somewhat different context—that at times “the greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.”⁹³ After 9/11, the most important lack of “understanding” was that America’s greatest strength lies in our adherence to the rule of law.

Again, the Church Committee’s words are as true today as they were three decades ago:

⁹⁰ In a recent report, Human Rights First and Physicians for Human Rights have demonstrated that all of these techniques are torture. HUMAN RIGHTS FIRST & PHYSICIANS FOR HUMAN RIGHTS, LEAVE NO MARKS: ENHANCED INTERROGATION TECHNIQUES AND THE RISK OF CRIMINALITY (2007), available at <http://www.humanrightsfirst.info/pdf/07801-ctn-leave-no-marks.pdf>.

⁹¹ See generally Schwarz & Huq, *supra* n. 1, at 97-123. For an excellent overview of the international law issues, see Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333 (2007).

⁹² See HUMAN RIGHTS WATCH, STILL AT RISK: DIPLOMATIC ASSURANCES NO SAFEGUARD AGAINST TORTURE (2005) available at <http://hrw.org/reports/2005/eca0405/>.

⁹³ *Olmstead v. United States*, 277 U.S. 438, 479 (1928).

“The United States must not adopt the tactics of the enemy. Means are as important as ends. Crisis makes it tempting to ignore the wise restraints that make [us] free. But each time we do so, each time the means we use are wrong, our inner strength, the strength which makes [us] free, is lessened.”⁹⁴

The United States will (as it should) continue to have a massive and powerful executive branch. This makes it particularly pressing to find effective ways to ensure that the powers of the presidency are used wisely and fairly. During the past eight years—and indeed for years before that—oversight of the executive branch, in particular its formidable national security powers, has withered. Now, as the public catalog of flawed, harmful, and unwise policies grows, the case for comprehensive reform is undeniable and urgent.

Bringing the checks and balances of constitutional government to national security policy does *not* exchange liberty for security. To establish accountability is to ensure that security powers are targeted correctly and sensibly. It is to ensure that government officials do not hide their mistakes, claim victory when none is at hand, or turn security into a partisan game. The Framers knew well the temptation to ignore our own errors, to presume ourselves infallible, and to stifle evidence to the contrary. That is why they installed constitutional checks and balances to resist such natural and human tendencies. We have forgotten the Framers’ wisdom. But, if we are to prevail in the “war of ideas” at the heart of contemporary counterterrorism, if we are to convince others that America stands on solid moral ground, and that America remains committed to the “inalienable rights” of all, then we must find our way back to the original wisdom of the Constitution, and to a government that follows the rule of law and welcomes checks and balances.

September 16, 2008

⁹⁴ S. REP. NO. 94-465, *supra* n. 19, at 285. At the dawn of America, George Washington similarly rejected using tactics of the enemy: “Treat them with humanity, and Let them have no reason to Complain of our Copying the brutal example of the British army in their Treatment of our unfortunate brethren.” Washington to Samuel Blachley Webb, New Jersey, Jan. 8, 1777, reprinted in 8 *The Papers of George Washington: Revolutionary War Series* 16 (W.W. Abbot ed., 1985).

Similarly, the code that President Lincoln approved in the Civil War forbade soldiers using “torture to extort confessions.” Instructions for the Government of Armies of the United States in the Field art. 16, Apr. 24, 1863, General Orders No. 100, *available at* <http://www.yale.edu/lawweb/avalon/lieber.htm>.

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Hearing of the
United States Senate
Committee on the Judiciary
Subcommittee on the Constitution

Tuesday, September 16, 2008

“Restoring the Rule of Law”

Testimony of Suzanne E. Spaulding

Domestic Spying: Insights for a New Administration

"The essential principles of our Government form the bright constellation which has gone before us and guided our steps through an age of revolution and reformation....[S]hould we wander from them in moments of error or of alarm, let us hasten to retrace our steps and to regain the road which alone leads to peace, liberty and safety."

Thomas Jefferson, First Inaugural Address

Mr. Chairman, Members of the committee, I'd like to begin by commending you for holding this hearing, and for gathering additional testimony from a wide range of experts, focused not on re-litigating past disputes but on understanding the current and future imperative for upholding the rule of law.

Last week marked the seventh anniversary of the attacks of September 11, 2001. Those attacks quickly led to new laws, policies, and practices aimed at enhancing the nation's security against the terrorist threat. As we anticipate a new Administration, it is appropriate and necessary to assess these changes and endeavor to put in place a long-term, sustainable approach to security that reflects all that we've learned in the intervening years about the nature of the threat today and effective, appropriate strategies for countering it.

We are all familiar with the "soft-on-terror" charge of having a "September 10th" mindset." In truth, no American who experienced the horror of September 11 will ever again know the luxury of a September 10th mindset. The greater concern is being stuck in a September 12th mindset, unable or unwilling to understand the lessons we've learned since those terrible early days. This is the mindset that undermines America's long-term security.

On September 12, 2001, for example, we lived with a deep sense of fragility as we waited in fear for the next attack. Over the subsequent days and years, however, Americans returned to

their daily lives, just as the people of London went back down into the subways after their own attacks. We learned that resiliency is an essential and powerful weapon against terrorism. It means knowing that there may be another attack, but refusing to live in, or make decisions based upon, fear. When politicians and policymakers fall back on that September 12 mindset of fear to convey their message and promote their policies, they undermine that essential public resiliency.

On September 12, we thought we could defeat terrorism by going to war. Today, most of us understand that we are engaged in a battle for hearts and minds, competing against the terrorists' narrative of a glorious "global jihad" that attracts idealistic young people looking for answers. The image of an America committed to the rule of law and ensuring that even suspected terrorists get their day in court is a powerful antidote to that twisted allure of terrorism. Continuing to work towards the ideal of the shining city on the hill, contrary to the fears of some, is how this country will ultimately prevail against the terrorists.

We also sought, in those first days and months after September 11, to "balance" national security and civil liberties, as if they were competing objectives on opposite sides of the scale. We thought we could only get more of one by taking away from the other. Over the past seven years, however, we've been reminded that our values are an essential source of our strength as a nation.

For example, experts agree that the primary reason the U.S. does not face the level of homegrown terrorism threat Europe has experienced is that immigrants are better integrated into American society. Effectively working with Muslim communities in this country is one of the most promising avenues for deterring radicalization of young people. Policies that drive a wedge between those communities and the government or the rest of society frustrate those efforts and thereby threaten our national security.

Yet, on September 12, it seemed to some that our careful system of checks and balances was a luxury we could no longer afford. We've seen since that an avaricious arrogation of power by the executive leads to a dangerously weakened President. Our government is strongest when all three branches are fulfilling their constitutional roles. Still, there are those who would seek to

limit the role of the courts and seem unwilling to insist that the President follow the laws passed by Congress.

We all awoke to a changed world on September 12. But the world has continued to change, and so must our understanding of the threat we now face and how to combat it. The battle for hearts and minds is of tremendous consequence. The enemy is deadly, determined, and adaptive. We cannot defeat it if we are stuck in the past. It is essential, as this committee clearly understands, to move beyond our fears and fully understand what makes us strong.

Brian Jenkins, a hard-nosed national security expert who has been helping us understand and battle the terrorist threat for over 35 years, noted in his recently released book, *Unconquerable Nation*, that “there has been too much fear-mongering since 9/11. We are not a nation of victims cowering under the kitchen table. We cannot expect protection against all risk. Too many Americans have died defending liberty for us to easily surrender it now to terror....Instead of surrendering our liberties in the name of security, we must embrace liberty as the source and sustenance of our security.”

We have to demonstrate that we still believe what our founders understood; that this system of checks and balances and respect for civil liberties is not a luxury of peace and tranquility but was created in a time of great peril as the best hope for keeping this nation strong and resilient. It was a system developed not by fuzzy-headed idealists but by individuals who had just fought a war and who knew that they faced an uncertain and dangerous time. They saw first-hand the how the whims of a single, unchecked ruler could lead a country astray. They knew that in times of fear and crisis, the instinct is to reach for power--and they determined that balancing power between all three branches would protect against that frailty of human nature and ultimately make for wiser, better decisions and a more unified and strong nation.

A New Administration Should Conduct a Comprehensive Review of Domestic Spying

With this understanding of the national security imperative to respect the rule of law, a new Administration should undertake a comprehensive review of domestic intelligence

activities, including the policies and laws put in place after 9/11 in the rush to fill perceived gaps in authorities and capabilities to detect terrorists inside the US. The threat of further attacks inside the United States presents unique challenges, both to effective intelligence and to appropriate protections against unwarranted government intrusion. The new Administration should assess the effectiveness of our domestic intelligence efforts in meeting these challenges. My testimony today will focus on a key aspect of that review: ensuring that these intelligence activities, policies, and laws support, rather than undermine, the rule of law.

Senator Obama has already said he will ask his Attorney General to conduct a comprehensive review of domestic surveillance. Senator McCain should do the same. In addition, while today's hearing is focused on advice to a new President, in past appearances before this Committee and before the House Judiciary Committee I have urged Congress to undertake a similar review.

The timing is right for such a review. There has been a flurry of activity on domestic surveillance law and policy in recent weeks and months, in the Executive branch, Congress, and the courts. A new Administration should assess these changes, as well as existing policies and laws, to promptly ensure careful implementation of those it deems appropriate and revisions to those that raise concerns.

An Executive branch review can also help to inform legislative action. The deeply flawed legislation to amend FISA passed the Congress this summer with a commitment by the leadership in the House and Senate to re-visit it in the next session. By early next year, we will have the results of the Inspector General (IG) report required in that law. A fuller understanding of all of the electronic surveillance activities that were initiated in the immediate aftermath of the 9/11 attacks and how those activities and programs were modified over time will provide key insights into the pressures that should be anticipated in the future and how to better handle them in law and in practice. Next year's sunset of three provisions of the PATRIOT Act also provides a good context for this kind of comprehensive review.

In addition, the review should be informed by some excellent IG reports already completed, including reports on the use of National Security Letters; by state and local investigations, such as those looking into allegations that local police engaged in surveillance of

antiwar protesters; and by activity in the courts, such as challenges to the application of the third-party record doctrine in light of advances in technology.

Why we need a comprehensive review

The legal framework for domestic intelligence has come to resemble a Rube Goldberg contraption rather than the coherent foundation we expect and need from our laws. The rules that govern domestic intelligence collection are scattered throughout the US Code and a multitude of internal agency policies, guidelines, and directives, developed piecemeal over time, often adopted quickly in response to scandal or crisis and sometimes in secret. They do not always reflect a firm understanding of why intelligence collection needs to be treated differently than law enforcement investigations, the unique intelligence requirements for homeland security, and the degree to which respect for civil liberties, fundamental fairness, and the rule of law is essential to winning the battle for hearts and minds--and, therefore, essential to our homeland security.

The various authorities for gathering information inside the United States, including the authorities in FISA, need to be considered and understood in relation to each other, not in isolation. For example, Congress needs to understand how broader FISA authority relates to current authorities for obtaining or reviewing records, such as national security letters, section 215 of FISA, the physical search pen register/trap and trace authorities in FISA, and the counterparts to these in the criminal context, as well as other law enforcement tools such as grand juries and material witness statutes.

Executive Order 12333, echoed in FISA, calls for using the "least intrusive collection techniques feasible." The appropriateness of using electronic surveillance or other intrusive techniques to gather the communications of Americans should be considered in light of other, less intrusive techniques that might be available to establish, for example, whether a phone number belongs to a suspected terrorist or the pizza delivery shop. Electronic surveillance is not the "all or nothing" proposition often portrayed in some of the debates.

How a comprehensive review should be conducted

A new Administration should initiate a review of all current domestic spying activities, including those that are international but involve collection and dissemination of information about people inside the US. This should include activities not only at FBI and NSA, but also the Department of Defense, the Central Intelligence Agency, the National Geo-spatial Intelligence Agency, entities at DHS, and elsewhere in the federal government, as well as state and local police and other entities. In addition, it should review all current laws, regulations, guidelines, policies, OLC memos, etc., related to domestic spying activities.

At the same time, the Administration should direct the Director of National Intelligence to oversee a thorough assessment of the nature, scale, and scope of the national security threat inside the United States. This is particularly important with respect to the terrorist threat. It seems likely that different detection strategies -- and different tools-- might apply depending upon whether, for example, you are attempting to detect thousands of terrorists inside the US, hundreds, dozens, or even fewer. The harm they could inflict might be similar, but the tools you would use to detect them, and the scale of privacy intrusions that would be justified, may vary.

In addition, a better understanding of the nature of the threat will also inform the assessment of which strategies are most likely to deter those threats. For example, understanding that we are engaged with terrorists in a competition for heart and minds helps us to understand the national security costs of activities, policies, and even terminology that reinforce the terrorists' message or undermine our own message. Similarly, understanding the value of community policing in detecting and deterring terrorist activity may lead to more careful policies about when and how we involve those local police in federal activities.

Key Issues for Review

Some of the key issues that any comprehensive review should address include:

- A review of the Foreign Intelligence Surveillance Act, including changes enacted as part of the PATRIOT Act and in the amendments this summer, assessing both the statutory language and its implementation.

- The recent amendments focused on meeting a particular need asserted by the current Administration and, as noted earlier, many Member of Congress stated their view that it was a deeply flawed bill and should be re-visited in the coming session of Congress. Beyond that, however, what seemed lost in the debate is the need to reassess FISA more generally in light of the vastly higher level of international communications engaged in by Americans today, via the Internet as well as by phone, than was the case in 1978. Does it still adequately protect innocent Americans from unwarranted government intrusion into their private communications?
- In addition, the electronic and physical search provisions of FISA, complex from their inception, have become virtually impenetrable to nearly all but those who work with it on a daily basis—and perhaps even to those unfortunate souls! Is there a way to simplify this regime to ensure compliance, enhance the prospects for effective oversight, and improve public trust?
- This review should include careful consideration of the important role of judges. As Supreme Court Justice Powell wrote for the majority in the *Keith* case, “The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility are to enforce the laws, to investigate, and to prosecute. ...But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech.”
- A review of the legal regime for national security letters (NSLs) and its implementation.
 - The legal authorities for issuing NSLs are scattered throughout the US Code, with different triggers, targets, scope, and safeguards. Recent IG reports document widespread misuse of this broad authority by the FBI. However, FBI is not the only federal agency with authority to issue NSLs; any agency engaged in intelligence analysis can also issue NSLs. That includes CIA and intelligence

components in the Department of Defense. A comprehensive review should consider whether the authority to issue national security letters should be brought within a single provision of law, which government entities should have this authority, and what safeguards are needed to protect against abuse, including a possible role for the judiciary. Legislation introduced by the Chairman of this Subcommittee, Senator Feingold, offers thoughtful suggestions on each of these issues.

- The First Amendment implications of domestic spying activities, including safeguards to protect against political spying and other investigations of First Amendment protected activities, as well as the chilling effect of current and proposed policies and activities.
 - Most of the debate about domestic surveillance has centered on the application of the Fourth Amendment. However, it is equally important to ensure that domestic spying activities do not infringe upon or unnecessarily chill activities protected by the First Amendment. For example, most laws and policies in this area include a prohibition on engaging spying “based solely upon activities protected by the First Amendment.” Presumably, this means the spying could be based almost entirely on First Amendment activities, so long as there is some other basis, too, no matter how insignificant. A careful review should include an assessment of how this language is interpreted in guidance, such as the new Attorney General guidelines, and in practice.

- The need for a legal framework for government data-collection and data-mining practices that addresses government access to both private information, such as financial and communications records, and “public” information collected by private data-brokers, which is then collected or collated in various databases, such as millions of records in the FBI’s Investigative Data Warehouse;
 - This should include an assessment of whether collection of massive amounts of data from third parties for purposes of data-mining still falls within the “third-party record doctrine” as envisioned by the Supreme Court (in cases holding that there is no Fourth Amendment privacy interest in records such as phone

logs or bank account information held by a third party), or whether a difference in quantity—given the ability of technology to turn massive amounts of those records into a detailed picture of an individual’s daily life-- becomes a difference in kind.

- It should also include an assessment of rules prescribing what can/should be done with information once it’s collected, (e.g., Who in USG should get to see/use it? For what purposes? Under what retention rules?), and whether there are there adequate safeguards to protect against unwarranted and discriminatory uses of such information to interfere with the right to travel and work, including the denial of security clearances.
- Whether there are adequate safeguards against inappropriate and discriminatory profiling, targeting, and selective enforcement, by law enforcement and intelligence personnel in the name of counterterrorism;
 - In addition to concerns about fundamental fairness and appropriate use of scarce enforcement resources, activities and policies that appear discriminatory against certain communities or demographics should be carefully assessed in light of their potentially negative impact on our overall counterterrorism strategy.
- The appropriate role, if any, for the various federal, state, and local entities currently engaged in domestic intelligence activities.
 - The first step is to identify all players engaged in domestic intelligence activities. This includes collection and analysis—particularly since technology increasingly blurs the line between these two categories. As noted, the focus is generally on FBI, but many other agencies and elements are also involved. Moreover, proposed changes to the Code of Federal Regulations would further expand the intelligence role of state and local police. Do all of these entities have a unique and essential role, or can fewer entities be called upon to collect and/or analyze domestic intelligence in a way that meets the needs of others? Does each entity adequately understand its role and limitations? Are necessary safeguards in place

to prevent abuse? Are there appropriate oversight mechanisms for all of this activity?

- The need to enhance transparency and oversight--in both the Executive Branch and the Congress-- with regard to domestic intelligence in order to sustain public support, improve the quality of intelligence, and ensure respect for the rule of law.

This last bullet may be the most important aspect of any comprehensive review. Today's hearing is evidence that this Committee fully understands the importance of transparency and oversight, particularly with regard to intelligence activities operating within a democracy.

Mr. Chairman, let me close by again commending you for all of your efforts to ensure that a new Administration places an appropriately high priority on restoring America's commitment to the rule of law. I very much appreciate the opportunity to participate in this important endeavor.

RESTORING THE RULE OF LAW:

The First Step is to

Stop Congressional Lawbreaking



Prepared statement of

Professor Robert F. Turner, SJD

Co-Founder and Associate Director
Center for National Security Law
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before the

Subcommittee on the Constitution

of the

U.S. Senate Committee on the Judiciary

Room 216 • Hart Senate Office Building

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About the Witness

Professor Robert F. Turner holds both professional and academic doctorates from the University of Virginia School of Law, where in 1981 he co-founded the Center for National Security Law. He has also served as the Charles H. Stockton Professor of International Law at the Naval War College and a Distinguished Lecturer at the U.S. Military Academy at West Point. In addition to teaching seminars on Advanced National Security Law at the law school, for several years he taught International Law, U.S. Foreign Policy, and seminars on the Vietnam War and Foreign Policy and the Law in what is now the Woodrow Wilson Department of Politics at Virginia.



His academic expertise is supplemented by many years of governmental service, including five years during the mid-1970s as national security adviser to Senator Robert P. Griffin with the Senate Foreign Relations Committee and subsequent Executive Branch service as Special Assistant to the Under Secretary of Defense for Policy, Counsel to the President's Intelligence Oversight Board at the White House, and Acting Assistant Secretary of State for Legislative and Intergovernmental Affairs in 1984-85. His last government service was as the first President of the U.S. Institute of Peace, which he left in 1987 to return to the University of Virginia.

A veteran of two voluntary tours of duty as an Army officer in Vietnam, Dr. Turner has spent much of his professional life studying the separation of national security powers under the Constitution. Senator John Tower wrote the foreword to his 1983 book *The War Powers Resolution: Its Implementation in Theory and Practice*; and former President Gerald Ford wrote the foreword to *Repealing the War Powers Resolution: Restoring the Rule of Law in U.S. Foreign Policy* (1991). Dr. Turner authored the separation-of-powers and war powers chapters of the 1400-page law school casebook, *National Security Law*, which he co-edits with Professor John Norton Moore. Turner's most comprehensive examination of these issues, *National Security and the Constitution*, has been accepted for publication as a trilogy by Carolina Academic Press and is based upon his 1700-page, 3000-footnote doctoral dissertation by the same name.

Professor Turner served for three terms as chairman of the prestigious ABA Standing Committee on Law and National Security in the late 1980s and early 1990s and for many years was editor of the ABA *National Security Law Report*. He has also chaired the Committee on Executive-Congressional Relations of the ABA Section of International Law and Practice and the National Security Law Subcommittee of the Federalist Society.

The views expressed herein are personal and should not be attributed to the Center or any other entity with which the witness is or has in the past been affiliated.

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EXECUTIVE SUMMARY

MR. CHAIRMAN, Senator Brownback, and Members of the Subcommittee. I am deeply honored to appear once again before this subcommittee – particularly because the topic is one of such great importance to the Nation: “Restoring the Rule of Law.” Ironically, that was the subtitle to one of my books on the War Powers Resolution.

I have a lengthy prepared statement (with more than 100 citations) that I would ask be included in the record. Although I worked on it all weekend, I did not have time to proofread it carefully and there remain some incomplete citations. I ask the Subcommittee’s permission to make corrections prior to publication.

My central premise is that we have a hierarchy of “laws” in this country, with the *Constitution* at the very top. Sadly, over the past three or four decades, Congress has been flagrantly violating the Constitution in a variety of ways.

As a Senate staff member in 1976, I drafted a lengthy memorandum explaining why “legislative vetoes” were unconstitutional. Seven years later, in the *Chadha* case, the Supreme Court reached the same conclusion on multiple grounds. Sadly, rather than eliminating the hundreds of existing legislative vetoes already on the books, Congress

has responded by enacting more than 500 *new* patently unconstitutional legislative vetoes – thumbing its nose at the Supreme Court and our Constitution in the process. This is the single most common reason presidents have found it necessary to issue signing statements.

The greatest congressional lawbreaking has occurred in the area of foreign affairs. Using quotations from Founding Fathers like Washington, Jefferson, Madison, Hamilton, Jay, and Marshall, I demonstrate that the Constitution gave *exclusive* control over our foreign policy to the president – subject only to narrowly-construed “exceptions” vested in the Senate and Congress – when it vested in that office the nation’s “executive power” in Article II, Section 1. And I demonstrate a long history of agreement on this point by all three branches of government.

The *Federalist Papers* explained that, because Congress could not be trusted to keep secrets, the new Constitution had left the President “able to manage the business of intelligence as prudence might suggest.” Throughout our history that was the common understanding until 35 years ago, when Congress began usurping power in this area.

As for “presidential signing statements,” I show that the principle behind them dates back to the Administration of Thomas Jefferson, who refused to enforce the unconstitutional Alien and Sedition Laws. I quote John Marshall in *Marbury v. Madison* declaring that ““a legislative act contrary to the constitution is not law,” and explaining

that, in the area of foreign affairs, the Constitution grants to the president a great deal of unchecked discretionary powers. In that landmark case, Chief Justice Marshall wrote: “whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion.” As recently as 1969, Senate Foreign Relations Chairman J. William Fulbright acknowledged: “The pre-eminent *responsibility* of the President for the formulation and conduct of American foreign policy is clear and unalterable.” Soon thereafter, in the anger and heat of the Vietnam War, Congress began a rampage of lawbreaking.

Finally, Mr. Chairman, I show how this congressional lawbreaking has done extraordinary harm to our national security and the cause of world peace. I explain how an unconstitutional 1973 statute snatched defeat from the jaws of victory in Indochina and led directly to the slaughter of millions of lives we had solemnly pledged to defend in Cambodia and South Vietnam. I show how the horribly partisan congressional subversion of our peacekeeping deployment in Beirut a decade later led directly to the terrorist attack that killed 241 Marines – and I document the role of that incident in persuading Osama bin Laden to attack American in 2001. I also show how unconstitutional legislative constraints on our Intelligence Community prevented it from protecting us from those attacks.

My time is up, Mr. Chairman, but I look forward to taking your questions.

Prepared Statement

Mr. Chairman, Senator Brownback, and Members of the Subcommittee. I am deeply honored to appear once again before this subcommittee, and all the more so to address a constitutional issue that has been of great concern to me for many decades.

Two Caveats

Before turning to the details of my presentation, it is important to make two important caveats. First of all, like all of my writing and public statements in recent years, the views I express this morning are *personal* and should not be attributed to the Center for National Security Law, the University of Virginia, the American Bar Association, or any other organization or entity with which I am or in the past have been associated. Secondly, I want to emphasize that my scholarship in this area has been focused on *national security* aspects of separation of powers issues. That is not to say that I am unwilling to address broader rule of law issues, but I can probably be of most use to you by focusing on the national security questions.

I.

INTRODUCTION

More than seventeen years ago I published a book that I had initially entitled “Restoring the Rule of Law in U.S. Foreign Policy.” Ironically, it was based largely upon several statements that I had delivered about war powers to this and several other Senate and House committees over a number of years. My publisher decided to reverse the title and subtitle¹ – but that didn’t change the message of the volume.

My central point was that, beginning in the later years of the Vietnam War, Congress had time and again usurped constitutional power vested by the American people *exclusively* in the President. My presentation this morning will focus upon some of the more harmful ways Congress has been breaking the law, and my bottom line is a simple one: “Physician, heal thyself.”² This is not to deny that the executive branch has also on occasion veered from respect for the rule of law – it certainly has. But in my judgment, those violations – as serious as some of them have been – pale by comparison to the lawbreaking of the legislative branch. It is my hope that the next president will have the courage to continue defending the Constitution against further legislative encroachment.

¹ See ROBERT F. TURNER, REPEALING THE WAR POWERS RESOLUTION: RESTORING THE RULE OF LAW IN U.S. FOREIGN POLICY (1991).

² Luke 4:23.

I mentioned that in my view the current Administration has on occasion failed to meet the standards we properly expect from our president *vis-à-vis* the rule of law. As some of you may recall, on July 26 of last year I co-authored a hard-hitting op-ed in the *Washington Post* entitled “War Crimes and the White House”³ that was sharply critical of the current Administration’s position on the treatment of detainees. But while there is no doubt in my mind but that this Administration has on several matters been insensitive to the rule of law, I would say the same thing about the administrations of Abraham Lincoln, Woodrow Wilson, and Franklin Roosevelt during the wars that occurred on their watches. One of the things that distinguishes the current Administration from most of its wartime predecessors is that, immediately after the 9/11 attacks, it came to Congress and obtained statutory authorization for a number of measures it felt appropriate in the struggle against international terrorism. Nevertheless, its record is far from a perfect one.⁴

The Founding Fathers Fear of Legislative Tyranny Is Being Realized

However, in terms of governmental misconduct, by *far* the greatest threat to the rule of law in this Nation in recent decades has been “lawbreaking” by the *Legislative* Branch in the form of usurpation of executive power. Ironically, this

³ P.X. Kelley & Robert F. Turner, *War Crimes and the White House*, WASH. POST, July 26, 2007 at A21, available on line at: <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/25/AR2007072501881.html?hpid=opinionsbox1>.

⁴ For my critique of John Yoo’s *War By Other Means*, see Robert F. Turner, *An Insider’s Look at the War on Terrorism*, 93 CORNELL L. REV. 471 (2008), available on line at: <http://www.virginia.edu/cnsl/pdf/turner-review-of-yoo-book.pdf>.

was one of the great fears of our Founding Fathers. The Supreme Court has repeatedly observed “the debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches.”⁵ Typical of the prevailing view was Representative James Madison’s remark in 1789 that: “[I]f the federal Government should lose its proper equilibrium within itself, I am persuaded that the effect will proceed from the encroachments of the Legislative department.”⁶ Later in my presentation⁷ I shall discuss this broad concern about legislative abuse further.

**A Blatant Example of Legislative Lawbreaking:
More Than 500 New Unconstitutional Legislative Vetoes**

To mention just one example of blatant legislative lawbreaking, consider the infamous “legislative veto,” by which Congress asserts a right to micromanage the execution of laws without following the proper constitutional legislative process. This is an issue that has been of concern to me for more than three decades. Indeed, on June 11, 1976, my then-boss, Senator Bob Griffin of Michigan, inserted in the *Congressional Record* a lengthy analysis I had drafted – complete with extensive footnotes – explaining why legislative vetoes are unconstitutional.⁸ Seven years and twelve days later, the Supreme Court reached

⁵ *Buckley v. Valeo*, 424 U.S. 1, 129 (1976); *Bowsher v. Synar*, 478 U.S. 714, 727 (1986).

⁶ *Madison to Edmund Pendleton*, 21 June 1789, 5 WRITINGS OF JAMES MADISON 405-06 n.

⁷ See *infra*, text accompanying notes ___ & ___. XXXX [search TJ Notes]]xxx

⁸ 122 CONG. REC. 17643 (June 11, 1976), available on line at <http://www.virginia.edu/cnsl/bio/turner.html>.

the same conclusion in the case of *INS v. Chadha*,⁹ using many of the same arguments I had used and striking down legislative vetoes as unconstitutional on *multiple* grounds. Yet, as my good friend Dr. Louis Fisher of the Library of Congress will confirm, since *Chadha* was handed down more than twenty-five years ago, Congress has not only failed to remove the hundreds of *preexisting* legislative vetoes from the statute books – it has enacted more than 500 *new* legislative vetoes, thumbing its nose at the Supreme Court and the United States Constitution each time in the process.

Public Approval of Congress Is at “Record Low”

One month ago today, the Gallup organization issued a report entitled: “congressional approval hits record low 14%” – the lowest approval level since Gallup began monitoring public attitudes towards Congress.¹⁰ A full seventy-five percent of the American people contacted in the poll – three out of every four – declared they “disapproved” of the behavior of Congress. And this despite the fact that most Americans *don't know* that, for a quarter of a century, Congress has been flagrantly violating the Constitution on a regular basis even after the issue was resolved by the Supreme Court, and then blaming the *president* when he seeks to defend the Constitution by refusing to execute such laws. Sadly, because

⁹ 462 U.S. 919 (1983).

¹⁰ Lydia Saad, *Congressional Approval Hits Record-Low 14%*, GALLUP.COM, July 16, 2008, available on line at: <http://www.gallup.com/poll/108856/Congressional-Approval-Hits-RecordLow-14.aspx> .

of tragic failures in our educational system even at the law school level,¹¹ this tactic is clearly working to deceive many Americans – although in last month’s Gallup poll the President’s approval rating was more than twice that of Congress.¹²

B.
**UNDERSTANDING THE CONSTITUTIONAL SEPARATION
OF FOREIGN AFFAIRS POWERS**

Our topic this morning is “Restoring the Rule of Law.” In addressing this subject, I submit it is important to begin by asking: “What *law* do you wish to restore?” Because in the United States we have a hierarchy of laws, and much of the debate I hear on this issue appears to ignore that fact. Under our system of government, the *Constitution* is supreme. It is supreme to the UN Charter and other international treaties and agreements. It is equally supreme to acts of the legislature. And much of the public debate I hear about broad presidential (and *vice* presidential) claims of “executive power” over foreign affairs seem to focus almost entirely upon *statutes* enacted by Congress. The assumption seems to be

¹¹ Throughout most of our history, it was well understood that the president has considerable constitutional discretion that could not be usurped either by Congress or the courts. Until World War II, the number of laws regulating diplomacy, intelligence, and the like could be counted on one hand and had been requested by presidents. All of this changed dramatically during the later years of the Vietnam War, but – with the exception of a single class taught by my Center for National Security Law co-founder Professor John Norton Moore, who began teaching Law and National Security in 1972 – most American law schools did not start addressing these issues until the end of the twentieth century. Since 9/11, National Security Law has become a popular offering at most American law schools, but many of the instructors still remain clueless that the Constitution treated foreign and domestic affairs differently.

¹² The poll measured 31% approval for President Bush. Saad, *Congressional Approval Hits Record-Low 14%*. *supra* note 7. [[CHECK IN FINAL xxxx.]]

that the president's duty to "take Care that the Laws be faithfully executed"¹³ means that he (or she) must carry out instructions from Congress across the board of governmental activities. I respectfully submit that this view of the Constitution is profoundly mistaken.

I think it is imperative, if you are *serious* about wishing to restore the "rule of law," for you to focus upon the distinction between domestic and foreign affairs recognized by our Founding Fathers, academic commentators throughout the centuries, and the Supreme Court. I've written a 1700-page doctoral dissertation on this issue with more than 3000 footnotes, and I know you will be pleased to know that I don't intend to subject you to the full version this morning. But a little background and a few examples will illustrate my point.

Quincy Wright's Classic *The Control of American Foreign Relations*

My own scholarly interest in these issues began more than four decades ago, when I had the pleasure of hearing a presentation by the legendary Professor Quincy Wright – who during his distinguished career served as president of both the American and International Political Science Associations, the American Society of International Law, and the American Association of University Professors. He was a truly remarkable scholar and human being. For the record, since not everyone may recall this legendary scholar, no one would describe Quincy Wright as a "conservative" or a "hawk" in any sense. He spent much of

¹³ U.S. CONST., Art. II, Sec. 3.

his life studying and championing the cause of peace and was from its start a vocal critic of the Vietnam War.¹⁴ A great believer in the rule of law in international affairs, he was also among the first champions of an international criminal court.¹⁵

Among his many other achievements, Dr. Wright's 1922 treatise, *The Control of American Foreign Relations*, remains a classic in the field. In it, Professor Wright explained: "In foreign affairs, therefore, the controlling force is the reverse of that in domestic legislation. The initiation and development of details is with the president, checked only by the veto of the Senate or Congress upon completed proposals."¹⁶

Beyond these "vetoes" (or "negatives" as Jefferson and Hamilton often described them) – and, of course, other provisions of the Constitution – the President's authority over the nation's external relations was *exclusive*. Neither the Senate nor Congress itself had constitutional authority to usurp presidential authority in this area. Professor Wright explained:

Declarations of foreign policy may be made by Congress in the form of joint resolutions, but *such resolutions are not binding on the President*. They merely indicate a sentiment which he is free to follow or ignore. Yet they are often couched in mandatory

¹⁴ See, e.g., the short tribute to Professor Wright on the University of Denver web server at: <https://portfolio.du.edu/portfolio/getportfoliofile?uid=111966>. ("He was from the outset an active opponent of the United States war in Vietnam, challenging its supposed legal basis as well as its asserted morality, justice, or political rationality.")

¹⁵ See, e.g., Quincy Wright, *Proposal for an International Criminal Court*, 46 AM.J. INT'L L. 60 (1952); and Quincy Wright, *The Scope of International Criminal Law*, 15 VA. J. INT'L L. 562 (1975).

¹⁶ QUINCY WRIGHT, *THE CONTROL OF AMERICAN FOREIGN RELATIONS* 151-52 (1922).

terms and in defense of his independence the President has frequently vetoed them.¹⁷

Now, as everyone here knows, a joint resolution is a type of statute. And, today, the idea that the President might be free to ignore a statute enacted by the Congress would shock people. It might even lead to hearings about “restoring the rule of law.” But throughout most of our history, this was the majority view of the Constitution.¹⁸ But before turning to a discussion of congressional deference to the president in foreign affairs, it may be useful to briefly summarize the actual constitutional basis for the president’s largely unchecked authority over foreign affairs.

The Constitutional Meaning of “Executive” Power

Mr. Chairman, at the core of much of the debate over broad claims of “executive power” by the incumbent President, Vice President Cheney, and scholars like John Yoo is a profound misunderstanding of the constitutional meaning of that term. Today, it is perfectly reasonable to assume that the vesting in the president of “the executive Power” of the nation conveyed merely a duty and authority to see the laws enacted by Congress “faithfully executed.” But that is *not* the meaning of “executive Power” as it is used in the Constitution, and the proof of this observation is overwhelming.

¹⁷ WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 278 (emphasis added).

¹⁸ I will discuss several examples of legislative deference to the president in this area below. *See*, especially, the statement by Senator John Coit Spooner, *infra*, text accompanying note __. XXX UPDATE XXX

When I was researching my doctoral dissertation many years ago I spent months poring over historic documents concerning the origins of our Constitution. And I recall finding a letter from a signer of the Constitution who described it to an acquaintance as being “awful.” Knowing that he was a great admirer of the document, my first inclination was to assume that the letter must be from a different individual sharing the same name. But further research disclosed that in 1788 the word *awful* had an entirely different meaning than it does today. Indeed, a quick Google search of “definition of ‘awful’” reveals this original but now arcane usage as “amazing, awe-inspiring, awesome, awful, awing (inspiring awe or admiration or wonder).”¹⁹

I respectfully submit that were we trying to understand the meaning of a 1788 letter describing the new Constitution as “awful,” it would be imperative that we determine the meaning ascribed to that word by its author. And for the same reasons, if we wish to understand what powers the Founding Fathers conveyed by granting “the executive Power” to the President, we must try to grasp their understanding of that term as it was used in 1787 as well. While I do not deny there were some differences (particularly in the very early days of the Constitutional Convention) about which powers “executive” in their nature should be given to the new American executive, there is an amazing consensus clearly

¹⁹ WORDNET (Princeton University), available on line at: <http://wordnet.princeton.edu/perl/webwn?s=awful>.

and contemporaneously recorded for posterity that establishes the meaning beyond any reasonable doubt.

The Influence of Locke, Montesquieu, and Blackstone

To properly understand the separation of foreign affairs constitutional powers, it is important to be familiar with the literature that most influenced the Founding Fathers in this area. Often called the “political bibles of the constitutional fathers,”²⁰ John Locke, Montesquieu, and William Blackstone (along with numerous others of the era) argued that the control of foreign affairs – what Locke described as the business of “war, peace, leagues, and alliances” – was inherently part of the power belonging to the executive.

Locke explained that, although “in the well or ill management of it be of great moment to the commonwealth,” this power over “the management of the security and interest of the publick without” (outside the Nation’s boundaries) was of tremendous importance to the safety of the Nation, it had to be entrusted to the discretion of the executive because:

[I]t is much less capable to be directed by antecedent, standing, positive Laws, than [by] the Executive; and so must necessarily be left to the Prudence and Wisdom of those whose hands it is in, to be managed for the publick [*sic*] good. . . . [W]hat is to be done in reference to Foreigners, depending much upon their actions, and the variation of designs and interest, must be left in great part to the Prudence of those who have this Power committed to them, to

²⁰ See, e.g., WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 363.

be managed by the best of their Skill, for the advantage of the Commonwealth.²¹

Professor William Goldsmith, in his three-volume, 2300-page compilation on presidential power, notes that:

Blackstone's chapter entitled "Of the King's Prerogative" was the most informative discussion of executive power available in the period, and much of the language and many of the provisions that found their way into Article II of the American Constitution traced their source to this book. . . .

Some of the language and substantive provisions which are found in the *Commentaries* can be recognized in our Constitution. Such phrases as "*ex post facto* law," "due process," etc., appear throughout the document, and there are a number of provisions of Article II which appear to be heavily influenced by Blackstone's chapter on the King's prerogative. The *Commentaries* present a Monarch who possesses close to absolute power in the realm of foreign policy as well as Commander in Chief of the Armed Forces Despite the Founding Fathers' denunciation of the unchecked power of the King, and their undisguised contempt for most of the trappings of royalty, they were obviously greatly influenced by Blackstone's definition of executive powers, and gave their democratic monarch many of the same responsibilities.²²

As already noted, when we appeared before the full Senate Judiciary Committee early last year my old friend Lou Fisher quoted James Wilson as remarking in the early days of the Philadelphia Convention that he "did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers."²³ That's correct. But that was not the view that carried the day in Philadelphia. The final Constitution *did* invest the executive with certain prerogatives that were not subject to control by Congress. As Madison noted in

²¹ JOHN LOCKE, SECOND TREATIES ON CIVIL GOVERNMENT § 147.

²² I WILLIAM M. GOLDSMITH, THE GROWTH OF PRESIDENTIAL POWER 55-57 (1974).

²³ See *supra*, text accompanying note 40. XXX CK IN FINAL XX

Federalist No. 47: “The entire legislature, again, can exercise no executive prerogative”²⁴

The Founding Fathers’ Understanding of “Executive Power”

That those “executive prerogatives” included exclusive discretion over diplomacy, intelligence, and military operations – subject only to narrowly-construed “negatives” expressly vested in the Senate or Congress – was a point of *unanimity* among a diverse range of our Founding Fathers who quarreled extensively about other aspects of the new Constitution.

One of the first discussions occurred in the early days of the First Session of the First Congress, during the House debate on Madison’s bill to establish a Department of Foreign Affairs. Since the Constitution was apparently silent on the issue, the question arose as to where the power to *remove* a secretary of foreign affairs resided. Some argued that, in the absence of a clear grant of such power in the Constitution, the appointment must be for life-tenure unless removed for cause by impeachment. Others suggested that, since the Constitution had required the “advice and consent” of the Senate for appointment of such officers, the power of removal logically belonged to the president subject, again, to the advice and consent of the Senate. But Madison carried the day by arguing that removal was by its nature an “executive” function, and the Senate had only been given a negative over the *appointment* phase. Thus, the officer served at the

²⁴ FEDERALIST No. 47 at 326.

pleasure of the president. Explaining the decision, Madison wrote: “[T]he Executive power being in general terms vested in the President, all powers of an Executive nature, not particularly taken away must belong to that department.”²⁵

This is fine, you may say – no one questions the President’s power to fire the secretary of state. But what about this broader claim of, as it is sometimes put, the president being the Nation’s “sole organ” of foreign affairs? Here, too, the record is clear.

Consider, for example, a memorandum written at the request of President George Washington by our first Secretary of Foreign Affairs, Thomas Jefferson. Asked to examine where the Constitution had vested all of the unspecified aspects of foreign intercourse – like who decides where to send a diplomat and who decides whether he is to be designated “ambassador,” or “minister,” or by some other term, Jefferson replied:

The Constitution . . . has declared that “the Executive power shall be vested in the President,” submitting only special articles of it to a negative by the Senate

The transaction of business with foreign nations is executive altogether; it belongs, then to the head of that department, except as to such portions of it as are specially submitted to the Senate. Exceptions are to be construed strictly.²⁶

²⁵ *Madison to Edmund Pendleton*, June 21, 1789, 5 WRITINGS OF JAMES MADISON 405 n.

²⁶ *Jefferson’s Opinion on the powers of the Senate Respecting Diplomatic Appointments*. April 24, 1790, in 3 THE WRITINGS OF THOMAS JEFFERSON 16, 17 (Mem. ed. 1903) (italics added).

Three days later, President Washington made this entry in his diary:

“Tuesday, 27th [April 1790]. Had some conversation with Mr. Madison on the propriety of consulting the Senate on the places to which it would be necessary to send persons in the Diplomatic line, and Consuls; and with respect to the grade of the first—His opinion coincides with Mr. Jay’s and Mr. Jefferson’s—to wit—that *they have no Constitutional right to interfere* with either, and that it might be impolitic to draw it into a precedent, their powers extending no farther than to an approbation or disapprobation of the person nominated by the President, all the rest being *Executive* and vested in the President by the Constitution.²⁷

Read that language again – the Senate has “no constitutional right to interfere” in this business. So here we have Thomas Jefferson, George Washington, America’s first Chief Justice John Jay, and two of the three authors of the *Federalist Papers* clearly on record as believing that the business of foreign affairs was vested *exclusively* in the President as part of the “executive Power” contained in Article II, Section 1, save for those narrowly construed “exceptions” clearly vested in Congress or the Senate.

On most matters of controversy concerning the new government, if Thomas Jefferson and James Madison were on one side, Alexander Hamilton was probably on the other. But on this one, there was agreement. In his first *Pacificus* essay, Hamilton explained in 1793:

The general doctrine of our Constitution . . . is that the executive power of the nation is vested in the President; subject only to the exceptions and qualifications which are expressed in the instrument. . . .

²⁷ 4 DIARIES OF GEORGE WASHINGTON 122 (Regents’ Ed. 1925) (emphasis added).

It deserves to be remarked, that as the participation of the Senate in the making of treaties, and *the power of the Legislature to declare war, are exceptions out of the general "executive power" vested in the President, they are to be construed strictly*, and ought to be extended no further than is essential to their execution.

While, therefore, the Legislature can alone declare war, can alone actually transfer the nation from a state of peace to a state of hostility, it belongs to the "executive power" to do whatever else the law of nations . . . enjoin in the intercourse of the United States with foreign Powers.²⁸

I have not yet mentioned another Jefferson rival, John Marshall – said by some to have been the greatest chief justice of the United States in our history. As a Federalist member of the House of Representatives in 1800, Marshall swayed even many Republicans in arguing that President Adams had not violated the Constitution by ordering the seizure of a British deserter and his surrender to the commander of a British warship in Charleston Harbor pursuant to an extradition clause in the Jay Treaty without involving the judiciary. In remarks later quoted with approval by the Supreme Court in *Curtiss-Wright*, Marshall reasoned that the President was "the sole organ of the nation in its external relations" because "[h]e possesses the whole Executive power."²⁹ Virtually paraphrasing the statement by Sir William Blackstone that "What is done by the royal authority, with regard to foreign powers, is the act of the whole nation,"³⁰ Marshall argued "the President expresses constitutionally the will of the nation" in foreign affairs.³¹

²⁸ 15 THE PAPERS OF ALEXANDER HAMILTON 39 (Harold C. Syrett ed., 1969) (emphasis added).

²⁹ 1 ANNALS OF CONG. 613 (Gales ed., 1851).

³⁰ 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 245 (1765).

³¹ 1 ANNALS OF CONG. 615.

Even more importantly, as our third Chief Justice – in perhaps the most famous case in the history of the Supreme Court – Marshall reaffirmed the exclusive nature of presidential power over foreign affairs. Writing for the Court in *Marbury v. Madison*, Marshall explained:

By the constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. . . . [A]nd whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and *being entrusted to the executive, the decision of the executive is conclusive*.³²

As though to emphasize that he was talking about the president's exclusive powers in the realm of foreign affairs, Marshall continued:

The application of this remark will be perceived by adverting to the act of congress for establishing the department of *foreign affairs*. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the president. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.³³

Thus, in support of the theory that Article II, Section 1, of the Constitution vested in the president the control of American foreign relations save for narrowly-constructed “exceptions” expressly vested in the Senate or Congress, we have:

³² *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 165-66 (1803).

³³ *Id.* (emphasis added).

- (1) The first President of the United States (who also served as president of the Constitutional Convention;
- (2) The first and third Chief Justice of the United States; and
- (3) All three authors of the *Federalist Papers* (by far the most important documents for explaining the new Constitution to the American people prior to ratification).

And yet, today, when “executive power” is discussed in Congress (or in American law schools, for that matter), it is usually in the context of denouncing our “law-breaking” President for failing to carry out the orders he has received from the legislature. That was not always the case.

Historic Legislative Deference to the President

Mr. Chairman, I promised I would not impose my entire dissertation on you, but let me give you a few examples from the history of the United States Congress. One of the first statutes approved by the First Session of the First Congress in 1790 was an act to establish what we today know as the Department of State. It was a very simple act (it could have been printed on a single page) and was introduced by James Madison:

Be it enacted . . . That there shall be an Executive department, to be denominated the Department of Foreign Affairs, and that there shall be a principal officer therein, to be called the Secretary . . . , who shall perform and execute such duties as shall from time to

time be enjoined on or intrusted to him by the President of the United States, agreeable to the Constitution . . .; and furthermore, that the said principal officer shall conduct the business of the said department in such manner as the President . . . shall from time to time order or instruct.³⁴

Dr. Thach explains that – in strong contrast to the Department of the Treasury, whose secretary was required by statute to appear before Congress on demand and to submit his annual report not to the president or “the people” but to Congress – the “presidential departments” of foreign affairs and war were treated very deferentially:

The sole purpose of that organization [the Department of Foreign Affairs] was to carry out, not legislative orders, as expressed in appropriation acts, but the will of the executive. In all cases the President could direct and control, but in the ‘presidential’ departments he could determine what should be done, as well as to how it should be done. . . . Congress was extremely careful to see to it that their power of organizing the department did not take the form of ordering the secretary what he should or should not do.³⁵

Consider as well the first appropriations bill for foreign intercourse, which was equally deferential to the president’s exclusive constitutional responsibility for the business of intelligence and diplomacy. In language carried forward year after year, the statute provided:

[T]he President shall account specifically for all such expenditures of the said money as in his judgment may be made public, and also for the amount of such expenditures as he may think it advisable

³⁴ 1 Stat. 28 (1789).

³⁵ CHARLES C. THACH, THE CREATION OF THE PRESIDENCY 1775-1789 at 160.

not to specify, and cause a regular statement and account thereof to be laid before Congress annually”³⁶

Indeed, the consistent congressional deference to the president while appropriating funds for foreign affairs during the first three administrations in our history was acknowledged by President Jefferson in an 1804 letter to Treasury Secretary Albert Gallatin:

The Constitution has made the Executive the organ for managing our intercourse with foreign nations. . . . The executive being thus charged with the foreign intercourse, no law has undertaken to prescribe its specific duties. . . . Under . . . two standing provisions there is annually a sum appropriated for the expenses of intercourse with foreign nations. The purposes of the appropriation being expressed by the law, in terms as general as the duties are by the Constitution, the application of the money is left as much to the discretion of the Executive, as the performance of the duties. . . .

From the origin of the present government to this day . . . it has been the uniform opinion and practice that the whole foreign fund was placed by the Legislature on the footing of a contingent fund, in which they undertake no specifications, but leave the whole to the discretion of the President.³⁷

When the Senate first established a permanent Committee on Foreign Relations in 1816, one of its first reports declared:

The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns

³⁶ 1 Stat. 129 (1790).

³⁷ *Jefferson to Gallatin*, Feb. 19, 1804, 11 WRITINGS OF THOMAS JEFFERSON 5, 9, 10 (Mem. ed. 1903).

with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiations may be urged with the greatest prospect of success. For his conduct he is responsible to the Constitution. The committee considers this responsibility the surest pledge for the faithful discharge of his duty. They think the interference of the Senate in the direction of foreign negotiations calculated to diminish that responsibility and thereby to impair the best security for the national safety. The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch.³⁸

In a similar vein, an 1897 Senate report on the constitutional power to recognize foreign governments explained:

Intervention, like other matters of diplomacy, sometimes calls for secret preparation, careful choice of the opportune moment, and swift action. It was because of these facts that the superintendence of foreign affairs was intrusted to the executive and not to the legislative branch of the Government. . . .

[O]ur Constitution gave the President power to send and receive ministers...[etc.]. These grants confirm the *executive* character of the proceedings, and indicate an intent to give all the power to the President, which the Federal Government itself was to possess—the general control of foreign relations. . . . That this is a great power is true; but it is a power which all great governments should have; and, being *executive* in the conception of the founders, and even from its very nature incapable of practical exercise by deliberative assemblies, was given to the President.³⁹

Or consider one of the great debates on the Senate's power to demand negotiating documents. In 1906, Senator Augustus Bacon introduced a motion to instruct the president to provide the Senate with negotiating records concerning a treaty

³⁸ Quoted in CORWIN, THE PRESIDENT: OFFICE AND POWERS 441 (emphasis added). See also *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936).

³⁹ U.S. SENATE, MEMORANDUM UPON THE POWER TO RECOGNIZE THE INDEPENDENCE OF A NEW FOREIGN STATE 6-7. Sen. Doc. 54-56, 54th Cong., 2d. Sess. (1897) (emphasis added).

pending before that body. In response, Senator John Coit Spooner delivered a detailed and obviously well-researched floor speech that reaffirmed the traditional view of presidential power. He remarked:

The Senate has nothing to do with the negotiation of treaties or the conduct of our foreign intercourse and relations save the exercise of the one constitutional function of advice and consent which the Constitution requires as a precedent condition to the making of a treaty. ...

From the foundation of the Government it has been conceded in practice and in theory that the Constitution vests the power of negotiation and the various phases—and they are multifarious—of the conduct of our foreign relations *exclusively* in the President. And, Mr. President, he does not exercise that constitutional power, *nor can he be made to do it*, under the tutelage or guardianship of the Senate or of the House or of the Senate and House combined.⁴⁰

I noted earlier Professor Quincy Wright's contention that statutes enacted by Congress concerning foreign affairs were not in any way binding upon the president.⁴¹ Consider Senator Spooner's comment on that same issue, uttered well before publication of the Wright book:

I do not deny the power of the Senate either in legislative session or in executive session—that is a question of propriety—to pass a resolution expressive of its opinion as to matters of foreign policy. But if it is passed by the Senate or by the House or by both Houses it is beyond any possible question purely *advisory*, and *not in the slightest degree binding in law or conscience upon the President*. ...[S]o far as the conduct of our foreign relations is concerned, excluding only the Senate's participation in the making of treaties, the President has the *absolute and uncontrolled and uncontrollable* authority.⁴²

⁴⁰ 40 CONG. REC. 1417 (1906) (emphasis added).

⁴¹ See *supra*, text accompanying note ___, xxxx

⁴² 40 CONG. REC. 1417 (1906) (emphasis added).

You may be thinking that this was a radical view that was not taken seriously by Spooner's colleagues at the time. But Professor Corwin tells us that was not the case. Not only did Senator Bacon respond to the Spooner address by acknowledging that the Senate's claim to the information was based not upon "legal right" but upon "courtesy" between the President and the Senate, but the great Henry Cabot Lodge – a Harvard Ph.D. who chaired the Senate Foreign Relations Committee and was perhaps most famous for his role in leading the fight to block Senate consent to the ratification of the Versailles Treaty following World War I that created the League of Nations – remarked: "Mr. President, I do not think that it is possible for anybody to make any addition to the masterly statement in regard to the powers of the President in treaty making . . . we have heard from the Senator from Wisconsin [Sen. Spooner]."⁴³

If this sounds shocking, let me leave you with but one more quotation. During my early years as a Senate staff member working with the Foreign Relations Committee,⁴⁴ it was chaired by Senator J. William Fulbright, of Arkansas. Today, he is perhaps best remembered for his strong opposition to the Vietnam War. But in 1959, before events in Vietnam⁴⁵ had captured the attention of many

⁴³ Edward S. Corwin, *The President: Office and Powers 1787-1957* at 182 (4th rev ed. 1957).

⁴⁴ I was not a member of the Committee staff, but rather what was referred to as an "S. Res. 60" staff member – paid out of a fund intended to provide each member of the Committee with a full-time personal staff member to assist him (or her) with Committee business.

⁴⁵ There was fighting in South Vietnam and the first two Americans were killed in hostilities on July 8, 1959. But I tend to view the actual "war" as beginning with the AUMF in August 1964 and ending with our final evacuation and the Communist conquest of the country we had repeatedly pledged to defend on April 30, 1975. But one might as reasonably date the origins of the war to

Americans, Chairman Fulbright delivered a scholarly lecture at Cornell Law School in which he declared:

The pre-eminent *responsibility* of the President for the formulation and conduct of American foreign policy is clear and unalterable. He has, as Alexander Hamilton defined it, all powers in international affairs “which the Constitution does not vest elsewhere in clear terms.” He possesses sole authority to communicate and negotiate with foreign powers. He controls the external aspects of the Nation’s power, which can be moved by his will alone—the armed forces, the diplomatic corps, the Central Intelligence Agency, and all of the vast executive apparatus.⁴⁶

This, as I have said, was the conventional wisdom between the drafting of our Constitution and roughly a decade after Senator Fulbright’s Cornell speech. And I would draw your attention to the fact that the president’s “unalterable” power involved not merely the “conduct” of U.S. foreign policy, but its “formulation” as well.

If you have read this far, you are most likely confused. Why would members of the Legislative Branch recognize exclusive powers in the foreign affairs realm in the president? Where do such ideas originate? Let’s go back in history and try to find out.

Hanoi’s May 19, 1959, decision to open the Ho Chi Minh Trail and launch an effort to “liberate” South Vietnam by armed force.

⁴⁶ J. William Fulbright, *American Foreign Policy in the 20th Century Under an 18th-Century Constitution*, 47 CORNELL L. Q. 1, 3, (1961) (bold emphasis added).

The Constitutional Convention

My good friend Dr. Louis Fisher – certainly one of the preeminent scholars in the nation in this area – is fond of quoting from Madison's *Notes* and Max Farrand's four-volume *Records of the Federal Convention* to support his views. Thus, when we both appeared before the full Judiciary Committee on January 30 of last year, Lou testified:

Review what the framers said in Philadelphia. On June 1, 1787, Charles Pinckney offered his support for "a vigorous Executive but was afraid the Executive powers of Congress might extend to peace & war &c which would render the Executive a Monarchy, of the worst kind, towit an elective one." 1 Farrand 64-65. John Rutledge wanted the executive power placed in a single person, "tho' he was not for giving him the power of war and peace." James Wilson, who also preferred a single executive, "did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature. Among others that of war & peace &c." Id. at 65-66. Edmund Randolph worried about executive power, calling it "the foetus of monarchy." The delegates to the Philadelphia Convention, he said, had "no motive to be governed by the British Governmt. as our prototype." Alexander Hamilton, in a lengthy speech on June 18, strongly supported a vigorous and independent President, but plainly jettisoned the British model of executive prerogatives in foreign affairs and the war power. In discarding the Lockean and Blackstonian doctrines of executive power, he proposed giving the Senate the "sole power of declaring war." The President would be authorized to have "the direction of war when authorized or begun." Id. at 292.⁴⁷

⁴⁷ Statement by Louis Fisher Specialist in Constitutional Law appearing before the Senate Committee on the Judiciary "Exercising Congress's Constitutional Power to End a War" January 30, 2007, available on line at: http://judiciary.senate.gov/hearings/testimony.cfm?id=2504&wit_id=432 .

With all due respect to my friend Lou, Edmund Randolph is hardly a reliable source for the meaning of the Constitution – his “foetus of monarchy”⁴⁸ comment was directed against “unity in the Executive magistracy” while arguing that instead of a single executive the new Constitution should create three.⁴⁹ Randolph failed time and again to get his way in Philadelphia, and ultimately refused to sign the final document. And, as Lou acknowledges, all of these quotes occurred on June 1, 1787, at the end of only the first full week of substantive deliberations. James Madison’s *Notes* remind us that, on that same day:

[Roger Sherman] was for the appointment [of the president] by the Legislature, and for making him absolutely dependent on that body, as it was the will of that which was to be executed. An independence of the Executive on the supreme Legislative, was in his opinion the very essence of tyranny if there was any such thing.⁵⁰

While this is apparently the fantasy of many in Congress today, to say the least – opinions changed *dramatically* over the course of the Convention.

Indeed, these misleading excerpts proffered by Dr. Fisher were *never* the prevailing sentiment in Philadelphia. As Professor Charles Thach observed in his classic 1922 Johns Hopkins study, *The Creation of the Presidency*:

State experience thus contributed, nothing more strongly, to discredit the whole idea of the sovereign legislature, to bring home the real meaning of limited government and coordinate powers.

⁴⁸ I MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787 at 66.

⁴⁹ *Id.*

⁵⁰ *Id.* at 68.

The idea, more than once utilized as the basis of the explanation of Article II of the Constitution, that the jealousy of kingship was a controlling force in the Federal Convention, is far, very far, from the truth. . . .

Madison expressed the general conservative view when he declared on the Convention floor:

Experience had proved a tendency in our governments to throw all power into the legislative vortex. The Executives of the States are in general little more than cyphers; the legislatures omnipotent. If no effective check be devised for restraining the instability and encroachment of the latter, a revolution of some kind or the other would be inevitable.⁵¹

This problem of “omnipotent” state legislatures – and the tyranny they begat – was decried by Thomas Jefferson in his 1782 *Notes on the State of Virginia*:

All the powers of government, legislative, executive, and judiciary, result to the legislative body. The concentrating these in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. 173 despots would surely be as oppressive as one. . . . An *elective despotism* was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others. For this reason that convention, which passed the ordinance of government, laid its foundation on this basis, that the legislative, executive and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time. But no barrier was provided between these several powers. The judiciary and executive members were left dependant on the legislative, for their subsistence in office, and some of them for their continuance in it. If therefore the legislature

⁵¹ CHARLES THACH, *THE CREATION OF THE PRESIDENCY 1775-1789* at 52 (1922).

assumes executive and judiciary powers, no opposition is likely to be made; nor, if made, can it be effectual

The time to guard against corruption and tyranny, is before they shall have gotten hold on us. It is better to keep the wolf out of the fold, than to trust to drawing his teeth and talons after he shall have entered.⁵²

Our Constitution was carefully drafted to prevent the reoccurrence of this legislative tyranny, and throughout most of our history both branches have generally – with notable exceptions – sought to remain within their proper boundaries. But starting in the late 1960s and continuing until this day, the federal legislature has forgotten its proper place and begun seizing the constitutional powers of the executive – especially in the field of foreign relations and its subcomponents of diplomacy, intelligence, and the control of military operations.

I have watched this development with great sadness, first in my position as a Senate staff member advising a member of the Senate Foreign Relations Committee for five years during the 1970s, later as the Acting Assistant Secretary of State for Legislative Affairs in the mid-1980s, and for the past two-decades or so as a scholar.

⁵² THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 245-46 (1782), available on line at: <http://etext.virginia.edu/etcbin/toccer-new2?id=JefVirg.sgm&images=images/modeng&data=/texts/english/modeng/parsed&tag=public&part=all>.

**The Pernicious Influence of Vietnam Mythology
and the Evils of Political Partisanship in Wartime**

During the height of the Vietnam War, our nation went through a very intense and painful conflagration that often produced more heat than light. And it sometimes seems that portions of our collective memory – our “hard drive,” so to speak – were melted in the process. For by the time it was over, neither political branch seemed to understand the meaning of our Constitution in this area.

Members of Congress read the Constitution and observed it did not even use words like “foreign affairs” or “national security,” and they questioned why their predecessors had been so deferential to the executive. It became politically expedient to tell constituents that Vietnam was a consequence of presidential “lawbreaking” – LBJ (for Republicans) or Nixon (for Democrats) had taken the Nation into an unpopular, unnecessary, unwinnable foreign conflict in violation of the Constitution. Congress was going to pass the War Powers Resolution to regain its proper authority and the problem would be solved. When it was revealed that the Intelligence Community had made mistakes (and it had made mistakes, although much of the criticism was grossly overstated⁵³), Congress

⁵³ A full discussion of this issue is beyond the scope of this short presentation, but I would note that when the Church Committee completed its massive inquiry into alleged “CIA assassinations” it concluded that the CIA had never “assassinated” anyone and that the two most recent Directors of Central Intelligence had each issued internal CIA regulations prohibiting any direct or indirect involvement in “assassination” long before Congress began its inquiry. (It did find that the CIA had repeatedly attempted to kill Fidel Castro – in my view a lawful target given his efforts to subvert numerous governments in Latin America by armed force – and had plotted to kill Patrice Lumumba but he had been killed by a rival Marxist organization before the CIA could act. *See generally*, Robert F. Turner, *It's Not Really "Assassination" Legal and Moral Implications of Intentionally Targeting Terrorists and Aggressor-State Regime Elites*, 37 UNIV. RICH. L. REV. 791-98 (2003).

promised to take control of that field as well. By the early 1970s Richard Nixon was the primary villain, and by demonizing him congressional Democrats won decisive victories at the polls and ultimately forced Nixon to resign.

Ironically, this was exactly the same tactic conservative Republicans had used against President Harry Truman in 1950.⁵⁴ And just as with Truman, the charge against Nixon was unfounded. Congress had for years pressured presidents to do more to stop Communist aggression in Indochina, and when a reluctant LBJ finally decided to act he went immediately to Congress and received a very clear AUMF by a combined vote of 504-2 – a margin of support of 99.6 percent. His public approval in the Gallup Polls shot up 58%, and the two senators who had opposed the authorization were defeated in their next election attempts. And given all of the silliness we heard about Nixon's "illegal" incursion into Cambodia in 1970, I might note that the AUMF applied equally to Cambodia as well as South Vietnam (both being "protocol states" of the 1955 SEATO Treaty).

I want to talk briefly about "Vietnam" – or, perhaps more correctly, the war Congress authorized to defend South Vietnam, Laos, *and Cambodia* – because incredible harm has resulted from legislators attempting to "prevent another

⁵⁴ In reality, as once top-secret State Department records reveal, immediately upon returning to Washington following the North Korean invasion Truman told his senior advisers that he wanted to address a joint session of Congress as soon as possible and asked the State Department to draft what today we would call an "AUMF" (Authorization for the Use of Force). He repeatedly met with the joint congressional leadership, but everywhere he turned he was advised by congressional leaders that he did not need statutory authorization and he should "stay away" from Congress. Truman ultimately deferred to that advice, and Republicans who had initially supported him strongly denounced him as a liar and crook who had violated the Constitution as soon as the war started to become unpopular. See Robert F. Turner, *Truman, Korea, and the Constitution: Debunking the "Imperial President" Myth*. 19 HARV. J. L. & PUB. POL. 533 (1996).

Vietnam” without a serious understanding of what really happened during the Vietnam War.

Understanding “Vietnam” and Its Tragic Legacy

I think it may be worth noting as well that history has largely reputed the arguments of the anti-war movement. I well recall sitting on a couch in the back of the Senate chamber in 1974 and listening to senators denounce the State Department as “lying” for asserting that the “National Liberation Front” (NLF) was a creature of North Vietnam. In my undergraduate honors thesis written in 1966, I noted that three months before the NLF was allegedly founded at a “conference of resistance fighters” in South Vietnam, the Third Party Congress of Hanoi’s *Dang Lao Dong* (Communist party) passed a resolution declaring that “[t]o ensure the complete success of the revolutionary struggle in south Vietnam, our people there must strive to . . . bring into being a broad National United Front.”⁵⁵ This was classic Leninism. I would add that – as I noted in my 1975 book, *Vietnamese Communism*⁵⁶ – entire paragraphs of the NLF program were lifted *verbatim* from the program of the “Fatherland Front” in Hanoi. It did not take a rocket scientist to see through this mythology. All you really had to do was do a little research and pay attention.

⁵⁵ 1 DEMOCRATIC REPUBLIC OF VIETNAM, THIRD NATIONAL CONGRESS OF THE VIET NAM WORKERS’ PARTY 225 (c. 1961).

⁵⁶ ROBERT F. TURNER, VIETNAMESE COMMUNISM: ITS ORIGINS AND DEVELOPMENT 234 and appendices I and K (1975).

After the war was over, Communist Vietnam published an official military history that was translated into English and republished in 2002 by the University Press of Kansas under the title *Victory in Vietnam*. In his forward to this volume, University of Pennsylvania Professor William Duiker notes: “one of the most pernicious myths about the Vietnam War—that the insurgent movement in South Vietnam was essentially an autonomous one that possessed only limited ties to the regime in the North—has been definitively dispelled.”⁵⁷

I have no doubt that many in Congress during the early 1970s honestly believed that Congress had played no part in committing us to war in Indochina and it was perfectly appropriate for the legislative branch to seize control of military decisions on the conduct of the war and intelligence activities. Some clearly knew better.⁵⁸ But, I’m far more interested in seeing the system fixed than in placing blame – and certainly most of the members of the current Congress played no role in the early usurpations. But I must admit to a little frustration, having appeared before more than a dozen congressional committees over the past twenty-five or so years, documenting these facts time after time, when no one seems concerned about trying to restore Congress to its proper constitutional role.

⁵⁷ William Duiker, “Foreword: The History of the People’s Army,” in *Victory in Vietnam: The Official History of the People’s Army of Vietnam, 1954-1975* (Lawrence, Kansas: University Press of Kansas, 2002), p. xvi.

⁵⁸ See, e.g., my discussion of the conduct of Senator Jacob Javits and Representative Paul Findley in TURNER, REPEALING THE WAR POWERS RESOLUTION 15-16, 20, 34-35, 87.

**What about Dean Harold Koh's Contention that Justice Jackson's
Concurrence in *Youngstown* Has Superseded *Curtiss-Wright*
as the Constitutional Foreign Policy Paradigm?**

Judging from academic writing on the subject, if there is a modern "conventional wisdom" on the separation of foreign affairs powers under the Constitution it is the "shared powers" view embraced by my friends Dr. Lou Fisher and Professor Harold Koh – currently Dean of Yale Law School. Dean Koh's highly acclaimed 1990 volume, *The National Security Constitution*, is cited time and again as gospel. But when the Koh book first came out, two of the nation's preeminent authorities in this area – former Yale Dean Eugene Rostow and the legendary Yale Professor Myres McDougal wrote me separately expressing their shock that the book was receiving so much praise.

The explanation, I believe, is that in recent decades our law schools and universities have stopped teaching this important part of our constitutional history. Few law professors focus heavily in this realm, and by the early 1970s – when Harold was entering college – even the State Department largely stopped referring to the grant of "executive Power" as the president's primary authority over foreign affairs. So, like probably the majority of scholars today who were unaware of this history, Harold set out to explain his "national security constitution" from the assumption that Congress was supposed to be the senior partner – making policy by laws the president was charged with faithfully executing.

Let's consider an excerpt from *The National Security Constitution* setting forth the *Curtiss-Wright vs. Youngstown* Koh paradigm:

[T]hroughout our constitutional history, what I call the *Youngstown* vision has done battle with a radically different constitutional paradigm. This counter image of *unchecked executive discretion* has claimed virtually the entire field of foreign affairs as falling under the president's inherent authority. Although this image has surfaced from time to time since the early Republic, it did not fully and officially crystallize until Justice George Sutherland's controversial, oft-cited 1936 opinion for the Court in *United States v. Curtiss-Wright Export Corp.* As construed by proponents of executive power, the *Curtiss-Wright* vision rejects two of *Youngstown's* central tenets, that the National Security Constitution requires congressional concurrence in most decision on foreign affairs and that the courts must play an important role in examining and constraining executive branch judgments in foreign affairs.⁵⁹

When I first read this, I could not help but wonder if Dean Koh had even carefully read Justice Jackson's *Youngstown* concurrence, or the majority opinion in the case by Justice Black. For in *Youngstown*, both Black and Jackson went to

⁵⁹ HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION* 72 (1990).

considerable lengths to emphasize that they were not endeavoring to constrain the powers of the President in dealing with the external world. At issue in *Youngstown* was whether the President’s “war powers” authorized him to instruct the Secretary of the Interior to seize domestic steel mills – the *private property* of Americans – to prevent a labor strike that might affect the availability of steel for the Korean War. This was in my view at its core a Fifth Amendment case involving the guarantee that “[n]o person shall . . . be deprived of . . . property, without due process of law . . .”

That the Supreme Court in *Youngstown* perceived it was dealing with a domestic rather than a foreign affairs case is abundantly clear from this excerpt from Justice Hugo Black’s majority opinion:

The order [to seize steel mills] cannot properly be sustained as an exercise of the President’s military power as Commander-in-Chief of the Armed Forces. The Government attempts to do so by citing a number of cases upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war. Such cases need not concern us here. Even though “theater of war” be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces had the ultimate power as such to take possession of *private property* in order to keep *labor disputes* from stopping production. This is a job for the Nation’s lawmakers, not for its military authorities.⁶⁰

But Dean Koh focuses primarily on the Jackson concurring opinion, so let’s consider that. First of all, there is no reason to believe that Justice Jackson was in the slightest degree hostile to *Curtiss-Wright* as the appropriate foreign policy

⁶⁰ 343 U.S. 579, 587 (1952) (emphasis added).

paradigm. Just two years before *Youngstown*, he wrote for the Court majority in

Eisentrager:

Certainly it is not the function of the Judiciary to entertain private litigation - even by a citizen - which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region. . . . The issue . . . involves a challenge to conduct of diplomatic and foreign affairs, for which the President is *exclusively* responsible. *United States v. Curtiss-Wright Corp* . . .⁶¹

Even in *Youngstown*, Justice Jackson was appropriately deferential to presidential power with respect to the *external* world:

[N]o doctrine that the Court could promulgate would seem to be more sinister and alarming than that a President whose conduct of *foreign* affairs is so largely uncontrolled, and often is even unknown, can vastly enlarge his mastery over the *internal* affairs of the country by his own commitment of the Nation's armed forces to some foreign adventure. . . .

That military powers of the Commander in Chief were not to supersede representative government of *internal* affairs seems obvious from the Constitution and from elementary American history. . . . Such a limitation [the Third Amendment] on the command power, written at a time when the militia rather than a standing army was contemplated as a military weapon of the Republic, underscores the Constitution's policy that Congress, not the Executive, should control utilization of the war power as an instrument of *domestic* policy

We should not use this occasion to circumscribe, much less to contract, the lawful role of the President as Commander in Chief. I should indulge the widest latitude of interpretation to sustain his *exclusive* function to command the instruments of national force, at least *when turned against the outside world for the security of our*

⁶¹ *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (emphasis added).

society. But, when it is turned *inward*, not because of rebellion but because of a lawful economic struggle between industry and labor, it should have no such indulgence. . . . What the power of command may include I do not try to envision, but I think it is not a military prerogative, without support of law, *to seize person or property* because they are important or even essential for the military or naval establishment.⁶²

Even more fundamentally, in *Youngstown* Justice Jackson actually cited *Curtiss-Wright* early in his concurring opinion, explaining in a footnote: “That case does not solve the present controversy. It recognized *internal* and *external* affairs as being in separate categories”⁶³ And, as both Justice Black and Jackson repeatedly emphasized, *Youngstown* was an “internal affairs” case.

I would add that is also the consensus of scholars like Columbia Law School Professor Louis Henkin, who in *Foreign Affairs and the Constitution* noted:

Youngstown has not been considered a “foreign affairs case.” The President claimed to be acting within “the aggregate of his constitutional powers,” but the majority of the Supreme Court did not treat the case as involving the reach of his foreign affairs power, and even the dissenting justices invoked only incidentally that power or the fact that the steel strike threatened important American foreign policy interests.⁶⁴

Consider further the reaction of Justice Rehnquist, joined by Chief Justice Burger and two other members of the Court, in the 1979 dispute over President Carter’s constitutional power to terminate the U.S. mutual security treaty with the

⁶² *Id.* at 642, 644, 645 (emphasis added).

⁶³ *Id.* at 637 n.2 (bold emphasis added).

⁶⁴ HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 341 n.11 (1972).

Republic of China on Taiwan. Senator Goldwater had urged the Court to decide the case on *Youngstown*, but Rehnquist wrote:

The present case differs in several important respects from *Youngstown* . . . cited by petitioners as authority both for reaching the merits of this dispute and for reversing the Court of Appeals. In *Youngstown*, private litigants brought a suit contesting the President's authority under his war powers to seize the Nation's steel industry, an action of profound and demonstrable *domestic* impact. . . . Moreover, as in *Curtiss-Wright*, the effect of this action, as far as we can tell, is "entirely external to the United States, and [falls] within the category of *foreign* affairs."⁶⁵

Dean Koh's Reliance on *Little v. Barreme*

Dean Koh's paradigm is not premised entirely upon the *Youngstown* concurrence, but that is its mainstay. *Inter alia*, he also cites the 1804 case of *Little v. Barreme*⁶⁶ to demonstrate the Supreme Court has sometimes decided against the president in a war powers context. In *Barreme*, President Adams had directed American warships to seize American-owned vessels bound to or from French ports – acting pursuant to an act of Congress that had only authorized the seizing of American ships headed *to* French ports. The litigation resulted when the U.S. frigate *Boston*, commander by Captain Little, seized *The Flying Fish* (ultimately shown to have been owned by a Dutch national) on the high seas shortly after it *departed from* a French port.

⁶⁵ *Goldwater v. Carter* 444 U.S. 996 (1979) (emphasis added).

⁶⁶ 6 U.S. 170 (1804).

The key to understanding *Barreme* is not merely that, like *Youngstown*, the case involved a seizure of property believed at the time to belong to an American owner; but that one of the “exceptions” to the general grant of executive power to the president that was expressly vested in Congress is the power to “make Rules concerning Captures on . . . Water”⁶⁷ The primary focus of the decision was on whether damages for the wrongful seizure of foreign property should be paid by the government or by Captain Little, and Chief Justice Marshall acknowledged that his own initial thinking had been for the former – but he had been “convinced that I was mistaken”⁶⁸ by his colleagues on the Court. In the end, Congress enacted a private bill indemnifying Captain Little for the cost of the judgment.

There are other cases Professor Koh (or others) might cite in which the Supreme Court decided against the executive, but I would urge you to examine them carefully to see if they perhaps involve seizures of person or property without due process of law or other clear “excptions” to the president’s general grant of executive power.

⁶⁷ U.S. CONST., Art. I, Sec. 8, Cl. 11.

⁶⁸ *Id.* at 179.

C.
**A QUICK LOOK AT SOME SPECIFIC ISSUES
IN THIS CONTROVERSY**

Mr. Chairman, having discussed some of the more theoretical issues, let me turn and quickly address some of the specific issues that are often raised by legislators when they accuse modern presidents of violating the “rule of law.” In particular, I will talk about “presidential signing statements,” conditional appropriations, and congressional involvement in diplomacy, foreign intelligence, and war powers.

Presidential Signing Statements

Let me start by considering those controversial “presidential signing statements” – one of the issues that will certainly be addressed by others during this hearing as an example of presidential disregard for the rule of law. The incumbent President has often announced while signing legislation that he will not be bound by certain provisions he believes to be unconstitutional; or, alternatively, that he will interpret ambiguous provisions in a new statute in such a manner as to avoid unconstitutional ends. As you know, in August 2006 the American Bar Association House of Delegates approved a resolution declaring that presidential signing statements are “contrary to the rule of law and our constitutional system of separation of powers”⁶⁹ This is absolutely *absurd*.

⁶⁹ The full text of the resolution may be found on line at: http://www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendation-

For the record, I believe that the current Administration has at times issued signing statements in inappropriate settings.⁷⁰ But I strongly *commend* the President for having the courage to stand firm against congressional usurpations of constitutional authority. As the legendary Professor Charles Warren of Harvard Law School observed in 1930:

Under our Constitution, each branch of the Government is designed to be a coordinate representative of the will of the people . . . Defense by the Executive of his constitutional powers becomes in very truth, therefore, defense of popular rights - defense of power which the people granted him In maintaining his rights against a trespassing Congress, the President defends not himself, but popular government; he represents not himself, but the people.⁷¹

By far the most frequent basis for presidential signing statements – in this administration, and in every administration at least since Ronald Reagan was president – has been flagrantly unconstitutional⁷² legislative vetoes. And when a

report_7-24-06.pdf. In preparing for this morning's hearing, I found an ABA news release that suggests that this resolution was edited to read "The American Bar Association opposes, as contrary to the rule of law and our constitutional system of separation of powers, the *misuse* of presidential signing statements [emphasis added]" before it was approved by voice vote. The news release is available on line at: http://www.abanet.org/media/releases/news080806_1.html. I was unaware of this change. If it was added to make it clear that some signing statements are constitutional, I apologize to the ABA for my prior criticism of the resolution. However, other explanations for the change are possible.

⁷⁰ For example, one of the "exceptions" to the general grant of "executive Power" to the president was the power given to Congress in Article I, Section 8, Clause 10, "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nation" That clearly, in my view, empowers Congress to enact statutes punishing violations of the 1949 Geneva Conventions, the Convention Against Torture, and other instruments of international law to which the United States is a party.

⁷¹ Charles Warren, *Presidential Declarations of Independence*, 10 B. U. L. REV. 1, 35 (1930).

⁷² See the discussion of the *Chadha* case, *supra*, text accompanying notes __ - __. XXX CK XXX

President in such cases declares that he is going to uphold the Constitution over an inconsistent and flagrantly unconstitutional statute enacted by Congress, he is being faithful to his oath of office to “take Care that the Laws be faithfully executed”⁷³ For as Chief Justice John Marshall observed in *Marbury v. Madison*, “a legislative act contrary to the constitution is not law.”⁷⁴

Although the Alien and Sedition Acts were signed into law by John Adams, his successor Thomas Jefferson refused to enforce them on constitutional grounds and pardoned all of those they had victimized. He later explained: “[T]he sedition law was contrary to the constitution and therefore void. On this ground, I considered it as a nullity wherever I met it in the course of my duties ; and on this ground I directed *nolle prosequis* in all the prosecutions which had been instituted under it”⁷⁵ Had this act been passed over his veto, there is no question that Thomas Jefferson rather than James Monroe would have issued our first “signing statement.”

Signing statements have been used to uphold the rights of the people against a lawbreaking Congress time and again throughout our history. In 1942, a powerful subcommittee chairman on the House Appropriations Committee inserted a rider in the Urgency Deficiency Appropriation Act of 1943 prohibiting the use of treasury funds to pay the salaries of three named individuals – men many House

⁷³ U.S. CONST., Art. II, Sec. 3.

⁷⁴ *Marbury v. Madison*, 5 U.S. 137, 177 (1803). See also *Fairbank v United States*, 181 U.S. 283, 285-86 (1901).

⁷⁵ *Jefferson to Gideon Granger*, Mar. 9, 1814, in 9 THE WRITINGS OF THOMAS JEFFERSON 454, 456-57 (Paul Leicester Ford, ed. 1898).

members no doubt sincerely believed were “Communists.” (After all, they had been identified by name as “subversives” in a floor speech by Rep. Martin Dies, Chairman of the House Committee on Un-American Activities – and for all I know they all *were* Communists.) Some House members objected – the provision was termed a “legislative lynching” and compared to the “star chamber” during the House floor debate – and the Senate unanimously rejected the initial conference report because of this provision. But the House would not yield, the money was urgently needed to feed and supply our military forces fighting World War II in Europe and the Pacific, and the fifth conference report was ultimately approved by both houses with Section 304 intact. Because the money was needed for the war effort, President Roosevelt did not have the option of vetoing the bill. So he issued a statement upon signing the act into law declaring that Section 304 was unconstitutional and would bind neither the executive branch nor the judiciary. How shocking!

The issue was finally resolved four years later when the Supreme Court struck down Section 304 as an unconstitutional Bill of Attainder in the 1946 *Lovett* case.⁷⁶ Presumably, the American Bar Association and current Members of Congress who find such signing statements inherently objectionable share the view – argued by Counsel for the House before the Court at the time – that riders to appropriations measures are nonjusticiable political questions that cannot be

⁷⁶ *United States v. Lovett*, 328 U.S. 303 (1946). For a more detailed discussion of this issue, see ⁷⁶ Robert F. Turner, *Presidential Signing Statements and the ABA*, WASH. TIMES, August 6, 2006, and my prepared statement before the full Senate Judiciary Committee on January 30, 2007, at 37, available on line at: <http://www.virginia.edu/cnsj/pdf/Turner-SJC-testimony30Jan2007.pdf>.

challenged in the courts. But, as the *Lovett* case established, that view is profoundly *wrong*.

There is no doubt that the Constitution gives Congress complete control over appropriations⁷⁷ – just as the president’s general control over foreign policy is clear.⁷⁸ The president may veto an appropriations bill, and the Senate may block a completed treaty or refuse to provide funds for foreign aid or other international activities. Otherwise, the powers are exclusive. But as the Supreme Court noted in *Curtiss-Wright* (a seminal case that will be discussed further below⁷⁹), *every* governmental power “must be exercised in subordination to the applicable provisions of the Constitution.”⁸⁰

The Power of the Purse and “Conditional Appropriations”

In domestic settings, it is commonplace for legislators to place conditions in appropriations acts restricting the way money can be used. Unless such “riders” conflict with constitutional constraints, such measures are usually unobjectionable. But the practice that became popular during the Vietnam War of conditioning money for the presidential departments of Defense and State – or for

⁷⁷ U.S. CONST., Art. I, Sec. 9, Cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law”)

⁷⁸ See *infra*, text accompanying notes ___ - ___, XXXXX CK FINAL XXX

⁷⁹ See *infra*, text accompanying notes ___ XXXX CK FINAL XXX

⁸⁰ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). See also, *Gravel v. United States*, 408 U.S. 606,644 (1972) (“The Court said [in *Curtiss-Wright*] that the power of the President in the field of international relations does not require as a basis an Act of Congress; but it added that his power ‘like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.’”).

the Intelligence Community – raises very serious constitutional problems unless confided strictly to one of the narrow exceptions to executive power expressly vested in Congress or the Senate.

Few serious scholars would suggest that Congress could tell the President he could not use appropriate funds unless he agreed to appoint a particular individual as Secretary of Defense, not to negotiate a particular international agreement with a specified foreign country, or where to deploy combat units in time of authorized war. Put simply, Congress may not constitutionally use appropriations riders to accomplish ends that it is otherwise prohibited from doing by the Constitution.

I've written about this issue at length elsewhere⁸¹ and will not elaborate further here, beyond expressing the view that the 1973 statute that prohibited the president from spending appropriated funds for combat activities in Indochina was in my view unconstitutional, and had Congress actually enacted legislation early last year prohibiting the President from implementing the so-called "surge" in Iraq it would have been unconstitutional. Calling up existing reserve forces during a congressionally-authorized armed conflict is at the core of the Commander-in-Chief power. Congress clearly has the discretion to refuse additional forces and appropriations – and thus can compel an American military defeat if it so wishes – but it has no general authority to legislate an end to an

⁸¹ Robert F. Turner, *The Power of the Purse*, IN THE CONSTITUTION AND NATIONAL SECURITY (Howard E. Shuman & Walter R. Thomas, eds., 1990), available on line at: <http://www.virginia.edu/cnsl/pdf/PowerofthePurse-RFT1990.pdf>.

armed conflict. Indeed, a proposal at the Philadelphia Convention to give Congress some role in ending a war was following debate *unanimously* defeated.⁸² The parallels with the 1789 decision over the power to remove the Secretary of Foreign Affairs are obvious.⁸³

This practice of abusing conditional appropriations is a threat to our system of separation of powers. For if Congress may properly usurp the Commander-in-Chief power in this way, what is to prevent it from enacting legislation providing that no funds shall be available to the judiciary unless the Supreme Court agrees to take directions from Congress. Whether the “condition” is to “overturn *Roe v. Wade*” (or “not override a particular case), or a prohibition against overturning any statute enacted by Congress, the very principle would mean the end of meaningful separation of powers.

Diplomacy and the Conduct of Foreign Relations

I have already noted that in April 1790 Thomas Jefferson, George Washington, James Madison, and John Jay agreed that the Senate had “no constitutional right to interfere” with the business of diplomacy.⁸⁴ If there was any doubt about this issue, it should have been resolved in 1936 when the Supreme Court in *Curtiss-Wright* declared:

⁸² 2 FARRAND, RECORDS OF THE FEDERAL CONVENTION 319.

⁸³ See *supra*, text accompanying note ____ . XXXX

⁸⁴ See *supra*, text accompanying note ____ . XXXX

Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. *Into the field of negotiation the Senate cannot intrude, and Congress itself is powerless to invade it.* As Marshall said in his great argument of March 7, 1800, in the House of Representatives, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."⁸⁵

The Court explained:

It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and *exclusive* power of the President as the sole organ of the federal government in the field of international relations -- a power which does not require as a basis for its exercise an act of Congress but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.⁸⁶

There was a time when the Senate Foreign Relations Committee had a firm rule that it would not permit formal testimony by a foreign official. This was seen as an infringement of the diplomatic prerogatives of the executive. Perhaps the last stake was driven through the heart of that constitutionally-premised rule when Chairman Jesse Helms demanded that foreign diplomats at the United Nations formally testify before the Committee. Committee members in the old days would willingly meet informally with foreign representatives over cocktails, and

⁸⁵ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936) (bold emphasis added).

⁸⁶ *Id.*

international travel (particularly trips that involved visits with American military forces abroad) became fairly common after World War II.

But Congress itself, as early as 1798, made it a felony for any American to “usurp executive authority” (as the debate was entitled in the *Annals of Congress*⁸⁷) by communicating with a foreign government about a matter in controversy or dispute between the two governments without the approval of the Executive Branch. As if to emphasize that this applied especially to Members of Congress, Republican Albert Gallatin declared during the floor debate that (making reference to the diplomatic and quasi-military conflict with France):

In our situation, for instance, said he, it would be extremely improper for a member of this House to enter into any correspondence with the French Republic. . . . It might, therefore, be declared, that though a crime of this kind cannot be considered as treason, it should nevertheless be considered as a high crime.⁸⁸

Some of you will no doubt recall the trip the Speaker of the House took to Syria last March over the objections of the White House. More important than her flagrant violation of a felony statute was the usurpation by a leader of one political branch of constitutional powers the Supreme Court has affirmed belong *exclusively* to the executive.⁸⁹

⁸⁷ 9 ANNALS OF CONG 2 489 (1798).

⁸⁸ *Id.* 2498.

⁸⁹ See Robert F. Turner, *Illegal Diplomacy*, WALL STREET JOURNAL, April 6, 2007, available on line at: <http://www.opinionjournal.com/extra/?id=110009908>.

**Usurping Presidential Control Over “the Business of Intelligence”:
Warrantless Foreign Intelligence Surveillance and FISA**

I worked in the Senate when FISA was first enacted in 1978, and it was my strong view at the time that it was flagrantly unconstitutional. Nothing in the Constitution empowers Congress to interfere in the business of collecting foreign intelligence, and John Jay in *Federalist* No. 64 explained to the American people before the Constitution was ratified that – because Congress and the Senate could not be trusted to keep secrets⁹⁰ – the new Constitution had left the *President* “able to manage the business of intelligence as prudence might suggest.”⁹¹ As discussed, early foreign affairs appropriations bills required the president to account “specifically” only for those expenditures “as in his judgment may be made public,” and to account “for the *amount* of such expenditures as he may think it advisable not to specify”⁹² As I have documented in previous testimony before the Senate and House Judiciary Committees,⁹³ until 1973 the

⁹⁰ FEDERALIST No. 64 at 434-35 (Jacob E. Cooke, ed. 1961) (“There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. . . . and there doubtless are many . . . [potential sources] who would rely on the secrecy of the president, but who would not confide in that of the senate, and still less in that of a large popular assembly.”). As early as 1776, Benjamin Franklin and a unanimous Committee of Secret Correspondence of the Continental Congress decided that a sensitive covert operation involving French support for the American Revolution could not be shared with others in Congress, for “We find by fatal experience that Congress consists of too many members to keep secrets.” *Verbal statement of Thomas Story to the Committee*, 2 P. FORCE, AMERICAN ARCHIVES: A DOCUMENTARY HISTORY OF THE NORTH AMERICAN COLONIES, Fifth Series, 819 (1837-53). For a detailed discussion of the Founding Fathers’ recognition that Congress could not be trusted with keeping secrets, see my prepared testimony before the House Permanent Select Committee on Intelligence on February 23, 1994, “Secret Funding and the ‘Statement and Account’ Clause: Constitutional and Policy Implications of Public Disclosure of an Aggregate Budget for Intelligence and Intelligence-Related Activities,” available on line at: http://www.fas.org/irp/congress/1994_hr/turner.htm .

⁹¹ FEDERALIST No. 64 at 435.

⁹² 1 STAT. 129 (1790) (emphasis added).

⁹³ “Congress, Too, Must ‘Obey the Law’: Why FISA Must Yield to the President’s Independent

prevailing view – as expressed by the great Henry Clay during a 1918 debate in the House of Representatives – was that it would be *improper* for Congress to inquire into expenditures for foreign intelligence purposes.⁹⁴

When Congress enacted the first wiretap statute in 1968, it expressly declared “Nothing contained in this chapter . . . shall limit *the constitutional power of the President* to take such measures as he deems necessary . . . to obtain foreign intelligence information . . . or to protect national security information against foreign intelligence activities.”⁹⁵ After Vietnam, an angry Congress enacted FISA, flagrantly usurping the President’s constitutional control over “the business of intelligence.” That statute created an appellate FISA Court of Review, which in 2002 noted that every court to consider the issue held that the president has independent constitutional power to authorize warrantless foreign intelligence surveillance, adding that “FISA could not encroach on the President’s constitutional power.”⁹⁶

Over the years, the Supreme Court has had no less than seven opportunities to declare that the lower courts were wrong about there being a foreign intelligence

Constitutional Power to Authorize the Collection of Foreign Intelligence.” Testimony before the U.S. Senate Committee on the Judiciary, February 28, 2006 http://www.virginia.edu/cnsl/pdf/TURNER-SJC-28Feb06_FINAL.pdf; and “Is Congress the Real ‘Lawbreaker?’: *Reconciling FISA with the Constitution*.” Testimony before the House Judiciary Committee hearing on Warrantless Surveillance and the Foreign Intelligence Surveillance Act: The Role of Checks and Balances in Protecting Americans’ Privacy Rights, September 5, 2007, available on line at: [http://www.virginia.edu/cnsl/pdf/Turner-IJC-5Sept07-\(final\).pdf](http://www.virginia.edu/cnsl/pdf/Turner-IJC-5Sept07-(final).pdf).

⁹⁴ 32 ANNALS OF CONG. 1466 (1818).

⁹⁵ 18 USC § 2511(3) (1970) (emphasis added).

⁹⁶ *In re Sealed Case*, 310 F.3d 717, 742 Foreign Int. Surv. Ct. Rev., November 18, 2002 (NO. 02-002, 02-001).

exception to the Fourth Amendment's warrant requirement, yet that principle was so well established by the time of the 1980 *Truong* case⁹⁷ that not a single Justice voted to grant *certiorari*.⁹⁸

Usurping Presidential War Powers

I worked in the Senate during the first five years following enactment of the 1973 War Powers Resolution, and its flagrant unconstitutionality has been the subject of two of my books, numerous articles, and countless lectures and debates. In December 1984 I had the honor of debating former Senator Jacob Javits, the chief Senate sponsor of that legislation, who to my surprise acknowledged that portions were unconstitutional. Four years later, Senator George Mitchell observed in a Senate floor speech “the War Powers Resolution does not work, because it *oversteps the constitutional bounds* on Congress’ power to control the Armed Forces in situations short of war”⁹⁹ And just two months ago, the very distinguished bipartisan National War Powers Commission – co-chaired by former Representative Lee Hamilton – unanimously concluded that the War Powers Resolution is unconstitutional and should be repealed.¹⁰⁰ Sadly, I see little interest in doing so on the Hill today.

⁹⁷ *United States v. Truong*, 629 F.2d 908, 912 (1980).

⁹⁸ *Humphrey v. United States*, 454 U.S. 1144, (1982)

⁹⁹ CONG. REC. 6177, May 19, 1988. For a more extended excerpt from this statement see TURNER, REPEALING THE WAR POWERS RESOLUTION 162.

¹⁰⁰ “One topic on which a broad consensus does exist is that the War Powers Resolution of 1973 does not provide a solution because it is at least in part unconstitutional and in any event has not worked as intended.” NATIONAL WAR POWERS COMMISSION REPORT 6, available on line at: <http://millercenter.org/dev/ci/system/application/views/newwebsite/policy/commissions/warpow>

D.
**CONGRESSIONAL USURPATION OF EXECUTIVE
CONSTITUTIONAL DISCRETION HAS DONE
TREMENDOUS DAMAGE TO AMERICA AND THE WORLD**

Mr. Chairman, from my years as a Senate staff member and working in the Department of State I realize that it is common for legislators and even cabinet members to conclude that these technical constitutional issues are too complex and confusing – especially for non-lawyers – and thus to try to set them aside and focus on more “important” problems between the political branches.

Indeed, I remember when Senators John Tower and Arlen Specter approached the Department of State perhaps two-dozen years ago with the idea that Congress and the Executive Branch might cooperate to create a “case or controversy” so that the Supreme Court could address and clarify the roles of each branch – or at minimum rule on the constitutionality of the 1973 War Powers Resolution. Ultimately, Senator Tower was not able to attend the meeting between Secretary of State Shultz and Senator Specter, but I was asked to sit in both because I was at the time Acting Assistant Secretary of State for Legislative and Intergovernmental Affairs¹⁰¹ and (I suspect) because I had published a book a year or two earlier on the War Powers Resolution and thus might be able to provide useful background. I personally favored the idea, but – I think in part because he felt we already had

[eis/report.pdf](#).

¹⁰¹ I don't recall the date of the meeting, and thus am not certain whether at the time I had taken over as Acting Assistant Secretary following the retirement of Tapley Bennett or perhaps I was still serving as Principal Deputy Assistant Secretary. The point is not material to this discussion.

enough quarrels with Congress that we didn't need to be manufacturing new ones, and also perhaps because he was not an expert on the constitutional issues and was uncertain how such a move might play out – Secretary Shultz did not elect to pursue the issue.

Lest my presentation this morning come across as a lot of esoteric theorizing with no real-world significance, I want to make it clear that I am talking about legislative lawbreaking that has repeatedly had catastrophic consequences for our nation and the world.

The Human Consequences of Our Indochina Debacle

More than thirty-five years have passed since the last American combat unit withdrew from South Vietnam, and most Americans have tried to put that tragedy behind us. Perhaps it is because I continue to teach a seminar on the conflict, or perhaps because it was such an important part of my life for more than a decade, but I can't do that.

I wrote my undergraduate honors thesis on the conflict before volunteering for military service, volunteering for the infantry (becoming an Expert Infantryman), and repeatedly volunteering for service in Vietnam. I grew up in a military family, and my sense of "Citizenship in the Nation" was no doubt enhanced by my Eagle Scout training. But, as it turned out, the government was far more

interested in my knowledge of Ho Chi Minh and his colleagues than it was in my talents as a warrior – and I would up spending both of my Vietnam assignments on detail from MACV to the American Embassy working on North Vietnamese Affairs.

When I left the Army as a Captain in 1971 I took a job and then became a Fellow at Stanford's Hoover Institution on War, Revolution, and Peace, where I wrote the first major English-language history of the Vietnamese Communist movement. The fellowship brought me to Capitol Hill, where I made regular trips back to Indochina – ending in April 1975 when I was the last Hill staff member in South Vietnam during the final evacuation. Between 1968 and 1975 I had traveled through 42 of South Vietnam's 44 provinces plus Laos and Cambodia, and in the process I developed a great affection for the land and people I met.

One of my tasks in the Embassy (where I filled a newly-created position as "Assistant Special Projects Director") was to investigate enemy terrorism, and a lot of my travel was tied to specific terrorist incidents. I spoke with defectors and cooperative POWs, followed the North Vietnamese media, and read countless captured documents. And it became obvious that if America abandoned our commitment to defend the non-Communist people of Indochina there would quickly be a bloodbath.

Ironically, although the American press seldom reported it, by 1972 the United States was winning the war in South and North Vietnam militarily. When Congress in 1973 enacted a statute making it unlawful for the President to spend treasury funds on combat operations anywhere in Indochina – quite literally snatching defeat from the jaws of victory – it accomplished two ends.

First of all, it betrayed a solemn commitment our Nation had first made through the UN Charter¹⁰² in 1945 and more specifically by the SEATO Treaty – which was ratified in 1955 with the advice and consent of all but a single Senator present and voting. In his Inaugural Address, a young President John F. Kennedy inspired friends of liberty around the globe when he promised America would “oppose any foe” for the cause of human freedom. Then, in August 1964, by a collective margin of 99.6 percent, the U.S. Congress enacted what today would be called an Authorization for the Use of Force (AUMF) empowering the president to use military force to assist any “protocol states” (i.e., South Vietnam, Laos, and Cambodia) of the SEATO Treaty requesting assistance in defense of its freedom.

To be sure, many legislators who voted to betray those solemn commitments – and the sacrifice of the more than 58,000 American forces who had lost their lives in that struggle – were honestly taken in by the Communist propaganda line that the National Liberation Front was independent of Hanoi and only wanted peace, human rights, and an end to “foreign occupation” of their country. But as I’ve

¹⁰² See Article 1, Section 1, which committed us to take effective collective measures in response to threats to the peace.

already observed, Hanoi has since the war admitted that it made a decision in May 1959 to “liberate” South Vietnam by armed force. Our defense of South Vietnam was very much part of the Containment Doctrine that had led us to resist Communist aggression in Korea in 1950 and send tens of thousands of American forces to Europe to protect our NATO allies from possible aggression.

The other consequence of the congressional decision to betray our commitments was perhaps even more tragic. When Congress passed what I continue to believe was an unconstitutional statute intended to prevent the president from fulfilling our longstanding commitments, we had just compelled Hanoi to sign the Paris Agreements and both Moscow and Beijing were pressuring Hanoi to curtail its activities in South Vietnam. There was a serious chance for peace. But when Congress threw in the towel, North Vietnamese Premier Pham Van Dong declared that “the Americans won’t come back now even if we offer them candy,” and Hanoi soon sent virtually its entire Army to seize control of its neighbors to the south and west by classic international armed aggression. Hanoi’s Soviet-made tanks would have been sitting ducks to American airpower – but Congress had made that illegal.

The worst immediate consequences were in Cambodia, where the Yale Cambodia Genocide Program estimates 1.7 million people – more than 20 percent of the population – were slaughtered. Ironically, the reason I had returned to Saigon in April 1975 was to try to rescue orphans, and I had focused especially on a plan to

bring Cambodian orphans out through Saigon on the empty C-130 cargo planes that were delivering rice day after day. I was too late, Phnom Penh fell, and those orphans likely suffered the fate of so many “undesirables” under Pol Pot’s Genocide. Not wanting to waste bullets, the Khmer Rouge often dispatched small children by simply picking them up by their tiny legs and bashing them against trees until they stopped quivering.¹⁰³ Had it not been for a lawbreaking Congress, that didn’t have to happen.

The loss of life in South Vietnam was less. Including those who starved in “reeducation camps” or died at sea as “boat people” trying to escape the Stalinist tyranny we imposed on that country, and those actually executed, the death toll certainly was in seven figures. And despite all of the rhetoric from congressional war critics that abandoning our commitments would bring both peace and human rights, in the two decades following their conquest of South Vietnam the Hanoi regime consistent ranked among the “dirty dozen” and “worst of the worst” human rights violators by Freedom House.

Heady over their glorious victory over the hated Richard Nixon in Indochina, congressional liberals soon turned their attentions to Angola, where the Soviet Union was transporting thousands of Cuban forces to help the Marxist MPLA achieve a military victory rather than take its chances through free elections. With shouts of “No More Vietnams,” Congress enacted yet another

¹⁰³ See, e.g., “Killing Fields” Lure Tourists to Cambodia, NATIONAL GEOGRAPHIC TODAY, Jan. 10, 2003, available on line at: http://news.nationalgeographic.com/news/2003/01/0110_030110_tvCambodia.html.

unconstitutional statute – the Clark Amendment – that made it unlawful for us to resist the Soviet/Cuban aggression. It took a decade for Congress to realize how stupid that move had been, and in the process an estimated half-million people had died in Angola.

The decision to abandon our long-standing commitments in Indochina was not missed by the world's major tyrants, who realized that America had largely lost its will to defend other victims of aggression. American hostages were seized in Iran, and the Soviet Union invaded Afghanistan (resulting in another million deaths and the birth of the Taliban). For the first time in more than half-a-century, Moscow instructed its client Communist parties in Central America that it was acceptable to commence armed struggle. And when first President Carter and then President Reagan tried to assist victims of Communist aggression in El Salvador, once again congressional liberals stepped in with cries of “No More Vietnams.”

Congress, 9/11, and “Intelligence Failures”

As national security adviser to Senator Griffin during the Church Committee hearings in 1975-76, I attended several hearings and tried to follow the investigation closely. It was like a feeding frenzy, with legislators rushing to expose the sexiest secrets they could find – and to assure front-page coverage,

they would embellish much of the real “dirt” they found. The CIA was a “rogue elephant,” and Congress was going to bring it down.

Nevermind that the overwhelming majority of disclosures had already been made public by the Attorney General before the hearings started. Nevermind that Directors of Central Intelligence Helms and Colby had each issued internal regulations prohibiting any direct or indirect CIA involvement with “assassination” – or, for that matter, the fact that when their investigation was over they could not identify a single person the CIA had ever “assassinated.” To be sure, Presidents Eisenhower and Kennedy had directed that the CIA try to assassinate Fidel Castro and several attempts had been made. And there was evidence as well of a plot to kill Patrice Lumumba of the Congo – but he was killed by a rival Marxist guerrilla group before the CIA could act.

I’m not suggesting that there were no serious problems exposed during the Church-Pike hearings. But steps had already been taken within the Executive Branch to correct them quietly, and the damage done to the Intelligence Community by the Church and Pike hearings did tremendous harm to our nation. Those problems were exacerbated by the subsequent Iran-Contra hearings.

Immediately following the 9/11 tragedies, author Tom Clancy wrote an op-ed that was published in the *Wall Street Journal* a week thereafter. It was a very thoughtful piece and I commend it to you. He wrote:

It is a lamentably common practice in Washington and elsewhere to shoot people in the back and then complain when they fail to win the race. The loss of so many lives in New York and Washington is now called an "intelligence failure," mostly by those who crippled the CIA in the first place, and by those who celebrated the loss of its invaluable capabilities.

What a pity that they cannot stand up like adults now and say: "See, we gutted our intelligence agencies because we don't much like them, and now we can bury thousands of American citizens as an indirect result." This, of course, will not happen, because those who inflict their aesthetic on the rest of us are never around to clean up the resulting mess, though they seem to enjoy further assaulting those whom they crippled to begin with.

Call it the law of unintended consequences. The intelligence community was successfully assaulted for actions taken under constitutionally mandated orders, and with nothing left to replace what was smashed, warnings we might have had to prevent this horrid event never came. Of course, neither I nor anyone else can prove that the warnings would have come, and I will not invoke the rhetoric of the political left on so sad an occasion as this.

But the next time America is in a fight, it is well to remember that tying one's own arm is unlikely to assist in preserving, protecting and defending what is ours.¹⁰⁴

Congressional Culpability for the Tragedy in Beirut Twenty-Five Years Ago

Thirteen days from today will mark the twenty-fifth anniversary of an incredibly partisan Senate debate about the War Powers Resolution that signaled our adversaries that America was divided and, to quote Syrian Foreign Minister Abdel

¹⁰⁴ Tom Clancy, *How We Got Here: First we crippled the CIA. Then we blamed it.*, *Wall Street Journal*, Sept. 18, 2001, available on line at: <http://www.opinionjournal.com/extra/?id=95001164>.

Halim Khaddam, “short of breath” over our deployment of peacekeepers in Beirut, Lebanon.¹⁰⁵ Shortly after the highly-partisan Senate vote, during which only two Democrats supported President Reagan, we intercepted a message between two fundamentalist Muslim terrorist groups that said: “If we kill 15 Marines, the rest will leave.”¹⁰⁶ Why did they believe that? Because the world’s media reported the highly partisan and narrow Senate vote and speculated that, if there were further American casualties, many Senators and Representatives would “reconsider their support.”¹⁰⁷

Certainly no one in Congress intended to be placing a “bounty” on the lives of our Marines, but that’s what they did. And on October 23, 1983, a terrorist truck bomb murdered 241 sleeping Marines, and congressional pressure forced President Reagan to withdraw those who had survived the attack.

This incredibly partisan debate – the *Washington Post* explained that “the Democrats are doing push-ups for 1984” (referring to the upcoming elections), and the minority report of the Senate Foreign Relations Committee was entitled “Minority Views of All Democratic Committee Members” – was totally unnecessary. Sending a contingent of U.S. Marines to join peacekeepers from Great Britain, Italy, and France and with the consent of every significant military

¹⁰⁵ See TURNER, REPEALING THE WAR POWERS RESOLUTION 143-44.

¹⁰⁶ *Marines Draw a Bead on Snipers*, U.S. NEWS & WORLD REPORT, Oct. 31, 1983 at 13.

¹⁰⁷ See, e.g., John Knickerbocker & Dan Southerland, *Congress: A Wary “Aye” on Marines*, CHRISTIAN SCIENCE MONITOR, Sept 22, 1983 at A1 (“Congressional hesitation, reservations, and fears are such, however, that should American troops suffer casualties in Beirut, many senators and congressmen would immediately reconsider their support.”).

force in the region did not even *arguable* infringe the power of Congress “to declare War.”¹⁰⁸ (Only four Marines had died during the year prior to the start of the debate.)

Once again, those Marine deaths were a direct cause of unconstitutional efforts by Congress to turn voters against the incumbent president with cries of “No More Vietnams.” Historically, even our enemies were reticent about attacking U.S. Marines. The likely consequence was that – assume the attacked Marines didn’t end the conflict by killing the attackers – by morning the area would be crawling with a new group of Marines with a very bad attitude. But things change when a partisan American Congress assures our enemies that an attack on our Marines will lead to a legislative vote to abandon the mission.

The Role of the Debacle in Beirut on Bin Laden’s Decision to Attack America on September 11, 2001

In a 1998 interview in Afghanistan, Osama bin Laden told an ABC News correspondent that America’s retreat following the Beirut bombing proved we were “paper tigers.” A 2003 Knight Ridder account observed: “The retreat of U.S. forces inspired Osama bin Laden and sent an unintended message to the Arab world that enough body bags would prompt Western withdrawal, not retaliation.”¹⁰⁹ I don’t think it is an overstatement to conclude that the highly-

¹⁰⁸ U.S. CONST., Art. I, Sec. 8, cl. 11 (“Congress shall have the power . . . to declare War”)

¹⁰⁹ Scott Dodd & Peter Smolowitz, *1983 Beirut Bomb Began Era of Terror*, DESERET NEWS, Oct. 19, 2003, available on line at: <http://deseretnews.com/dn/view/0,1249,515039782,00.html> . See also, Brad Smith, *1983 Bombing Marked Turning Point In Terror: The U.S. reaction to the Beirut*

partisan war powers debate of September 1983 contributed significantly to bin Laden's decision to attack the United States on September 11, 2001.

Of course, we still might have prevented those attacks had Congress not flagrantly usurped the constitutional power of the president "to manage the business of intelligence as prudence might suggest."¹¹⁰ Although Congress itself had as late as 1968 recognized by statute the President's independent constitutional power to authorize warrantless foreign intelligence surveillance (wiretaps),¹¹¹ when the Supreme Court in the 1972 *Keith* case drew a distinction between wiretaps involving agents of foreign powers, and those involving purely domestic national security targets (requiring a warrant for the later) – and suggested that Congress might want to consider enacting new legislation to provide rules for wiretaps of purely *domestic* national security targets – the Congress elected instead to seize control of the president's power over *foreign* intelligence collection.

In so doing, Congress didn't consider the possibility that we might face a foreign terrorist threat from an individual who was not technically an "agent" of a foreign power, like Zacharias Moussaoui, so made no provisions for obtaining a FISA warrant for such an individual and made it a felony for NSA or FBI employees to engage in electronic surveillance inside the United States other than as permitted by FISA. Thus, the reason FBI lawyer Colleen Rowley could not get permission to seek a FISA warrant to examine Moussaoui's laptop was because a careless

attack set off a chain of events, some say, TAMPA TRIB., October 23, 2003.

¹¹⁰ See *supra*, note ___ and accompanying text. [JAY FED 64 XXX]

¹¹¹ See *supra*, note ___ and accompanying text. [[Omnibus Crime Bill]]

Congress had unconstitutionally seized control of foreign intelligence collection and had neglected to foresee the possible existence of such a threat. (Remind anyone of John Locke's warnings?)

. General Michael V. Hayden, currently Director of the Central Intelligence Agency and former Director of the National Security Agency, has publicly expressed the view that, had the controversial NSA Terrorist Surveillance Program been in effect prior to 9/11, "it is my professional judgment that we would have detected some of the 9/11 *al Qaeda* operatives in the United States, and we would have identified them as such."¹¹² Put differently, had Congress not unconstitutionally usurped the President's exclusive control over the collection of foreign intelligence in 1978, the Intelligence Community might well have prevented the 9/11 attacks.

So the record strongly supports the conclusion that congressional lawbreaking – that is, the usurpation of constitutional authority expressly vested exclusively in the president – persuaded our terrorist enemies in Beirut to slaughter 241 sleeping Marines on October 23, 1983. According to Osama bin Laden himself, our withdrawal from Lebanon following that tragic and unnecessary attack convinced him that Americans were unwilling to accept casualties. It does not require great analytical skills to realize that this was likely a key factor in his decision to launch the September 11, 2001, terrorist attacks that killed approximately 3,000 of our

¹¹² Remarks by Lt. Gen. Michael V. Hayden, National Press Club, January 23, 2006, available online at http://www.dni.gov/release_letter_012306.html.

countrymen. But, had it not been for yet another act of congressional lawbreaking – enactment of the FISA statute – it is the professional judgment of one of our most senior Intelligence Community leaders that those attacks still might have been prevented.

So, Mr. Chairman, I am delighted to learn that the Subcommittee on the Constitution is focusing its attention on the important business of restoring the rule of law as we approach a national election that will bring a new occupant to the White House. I wish you well, and I hope that my presentation will motivate you to give some attention to the very serious problem of congressional violations of the rule of law.

**The Importance of Restoring
Non-Partisanship to U.S. Foreign Relations**

Mr. Chairman, I will close with a plea for nonpartisanship in foreign affairs. I am neither a Republican nor a Democrat. I've never given a penny to either party or to any candidate for federal office, and I tend to cast my votes for the individual based more on perceptions of character and talents than on party affiliation. Quoting Thomas Jefferson, I have often remarked: "If I could not go to heaven but with a party, I would not go there at all."¹¹³ My desire to avoid party politics

¹¹³ In a 1789 letter from Paris to Francis Hopkinson, who had asked whether Jefferson was a Federalist or an Anti-Federalist, Jefferson replied:

is no doubt influenced by a strong commitment to bipartisanship when it comes to foreign policy and national security matters. Indeed, I have framed on my office wall a memorandum¹¹⁴ I wrote to my boss – Foreign Relations Committee member Senator Bob Griffin – more than three decades ago, urging that as the probable Senate Minority Leader under the incoming Carter Administration he should reach out to the new President in the great tradition of another Michigan Republican, Senator Arthur Vandenberg.

I am not a Federalist, because I never submitted the whole system of my opinions to the creed of any party of men whatever in religion, in philosophy, in politics, or in any thing else where I was capable of thinking for myself. Such an addiction is the last degradation of a free and moral agent. If I could not go to heaven but with a party, I would not go there at all. Therefore I protest to you I am not of the party of federalists. But I am much farther from that of the Antifederalists.

Jefferson to Francis Hopkinson, Mar. 13, 1789, in 14 THE PAPERS OF THOMAS JEFFERSON 649, 650 (Julian P. Boyd, ed. 1958).

¹¹⁴ Election day was November 2, and the following morning I wrote the Senator a memo with the Subject “Possible ‘Vandenberg’ Speech for Next Year.” It read:

The voters have selected jimmy Carter. He was neither your choice nor mine, but he is all we are going to have for the next four years.

You have often praised Senator Arthur Vandenberg for his spirit of bipartisan cooperation in foreign policy. As Vandenberg once noted, “in the final analysis the Congressional ‘opposition’ decides whether there shall be cooperation.”

Since you are the probable choice for Minority Leader and a member of the Foreign Relations Committee, you are obviously going to have alot [sic] to say about the Republican party’s policy vis a vis Carter’s foreign relations.

So long as Carter’s policies are reasonable - - even though they might not conform to our own views on how best to get the job done -- I think you should try hard to restore the Vandenberg tradition. (The fact that the Democrats didn’t is no excuse for our not trying.)

If you want to try to restore bipartisan cooperation, would you like for me to draft some remarks along those lines for possible delivery early in the new session?

As it turned out, Senator Griffin lost the race for party leader early the next year by one vote to Senator Howard Baker, and soon thereafter decided not to run for re-election in 1978. The speech I had hoped for became a casualty of those events.

In the years since then, I've published articles criticizing Republican conservatives for misrepresenting the facts in attacking Harry Truman over the Korean War,¹¹⁵ and I've criticized congressional liberals for misrepresenting the facts in attacking LBJ and Nixon in Vietnam. During the 1996 election I strongly criticized Senator Bob Dole for trying to usurp President Clinton's discretion over whether to move our embassy from Tel Aviv to Jerusalem.¹¹⁶ One may disagree with my conclusions and interpretations, but I don't believe my scholarship has ever been tainted by political partisanship.

And, in closing, I would commend to each of you this excerpt from the February 10, 1949, remarks of the late Senator Arthur Vandenberg, who said during a "Lincoln Day" address in Detroit:

It will be a sad hour for the Republic if we ever desert the fundamental concept that politics shall stop at the water's edge. It will be a triumphant day for those who would divide and conquer us if we abandon the quest for a united voice when America demands peace with honor in the world. In my view nothing has happened to absolve either Democrats or Republicans from continuing to put their country first. Those who don't will serve neither their party nor themselves.¹¹⁷

Mr. Chairman, this concludes my prepared remarks.

¹¹⁵ See, e.g., Robert F. Turner, *Truman, Korea, and the Constitution. Debunking the "Imperial President" Myth*. 19 HARV. J. L. & PUB. POL. 533 (1996).

¹¹⁶ Robert F. Turner, *Only President Can Move Embassy*, LEGAL TIMES, Jan. 22, 1996 at 46.

¹¹⁷ Quoted in TURNER, THE WAR POWERS RESOLUTION 118.