

EXECUTIVE POWER AND ITS CONSTITUTIONAL LIMITATIONS

HEARING BEFORE THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES ONE HUNDRED TENTH CONGRESS SECOND SESSION

JULY 25, 2008

Serial No. 110-200

Printed for the use of the Committee on the Judiciary



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CONTENTS

JULY 25, 2008

Page

OPENING STATEMENTS

The Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Chairman, Committee on the Judiciary	1
The Honorable Lamar Smith, a Representative in Congress from the State of Texas, and Ranking Member, Committee on the Judiciary	3
The Honorable Robert Wexler, a Representative in Congress from the State of Florida, and Member, Committee on the Judiciary	4
The Honorable Robert C. "Bobby" Scott, a Representative in Congress from the State of Virginia, and Member, Committee on the Judiciary	5
The Honorable Steve King, a Representative in Congress from the State of Iowa, and Member, Committee on the Judiciary	5
The Honorable Zoe Lofgren, a Representative in Congress from the State of California, and Member, Committee on the Judiciary	10
The Honorable Daniel E. Lungren, a Representative in Congress from the State of California, and Member, Committee on the Judiciary	11
The Honorable Jerrold Nadler, a Representative in Congress from the State of New York, and Member, Committee on the Judiciary	12
The Honorable Mike Pence, a Representative in Congress from the State of Indiana, and Member, Committee on the Judiciary	13
The Honorable Sheila Jackson Lee, a Representative in Congress from the State of Texas, and Member, Committee on the Judiciary	15
The Honorable Trent Franks, a Representative in Congress from the State of Arizona, and Member, Committee on the Judiciary	18
The Honorable Steve Cohen, a Representative in Congress from the State of Tennessee, and Member, Committee on the Judiciary	19
The Honorable Hank Johnson, a Representative in Congress from the State of Georgia, and Member, Committee on the Judiciary	20
The Honorable Tammy Baldwin, a Representative in Congress from the State of Wisconsin, and Member, Committee on the Judiciary	21
The Honorable Keith Ellison, a Representative in Congress from the State of Minnesota, and Member, Committee on the Judiciary	26

WITNESSES

The Honorable Dennis J. Kucinich, a Representative in Congress from the State of Ohio	
Oral Testimony	26
Prepared Statement	28
The Honorable Maurice Hinchey, a Representative in Congress from the State of New York	
Oral Testimony	29
Prepared Statement	32
The Honorable Brad Miller, a Representative in Congress from the State of North Carolina	
Oral Testimony	33
Prepared Statement	35
The Honorable Walter Jones, a Representative in Congress from the State of North Carolina	
Oral Testimony	36
Prepared Statement	72

IV

	Page
The Honorable Elizabeth Holtzman, former U.S. Representative from New York	
Oral Testimony	73
Prepared Statement	75
The Honorable Bob Barr, former U.S. Representative from Georgia and 2008 Libertarian Nominee for President	
Oral Testimony	81
Prepared Statement	84
The Honorable Ross C. “Rocky” Anderson, Founder and President, High Roads for Human Rights	
Oral Testimony	98
Prepared Statement	100
Mr. Stephen Presser, Raoul Berger Professor of Legal History, Northwestern University School of Law	
Oral Testimony	129
Prepared Statement	131
Mr. Bruce Fein, Associate Deputy Attorney General, 1981–1982, and Chairman, American Freedom Agenda	
Oral Testimony	145
Prepared Statement	147
Mr. Vincent Bugliosi, Author and former Los Angeles County Prosecutor	
Oral Testimony	150
Prepared Statement	151
Mr. Jeremy A. Rabkin, Professor of Law, George Mason University School of Law	
Oral Testimony	152
Prepared Statement	155
Mr. Frederick A.O. Schwarz, Jr., Senior Counsel, Brennan Center for Justice at NYU School of Law	
Oral Testimony	160
Prepared Statement	162
Mr. Elliott Adams, President of the Board, Veterans for Peace	
Oral Testimony	171
Prepared Statement	172

LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING

Material submitted by the Honorable Steve King, a Representative in Congress from the State of Iowa, and Member, Committee on the Judiciary	7
Prepared Statement of the Honorable Sheila Jackson Lee, a Representative in Congress from the State of Texas, and Member, Committee on the Judiciary	16
Prepared Statement of the Honorable Tammy Baldwin, a Representative in Congress from the State of Wisconsin	23
Material submitted by the Honorable Walter Jones, a Representative in Congress from the State of North Carolina	38
Material submitted by the Honorable Bob Barr, former U.S. Representative from Georgia and 2008 Libertarian Nominee for President	175
Material submitted by the Honorable Steve King, a Representative in Congress from the State of Iowa, and Member, Committee on the Judiciary	191
Material submitted by the Honorable Steve King, a Representative in Congress from the State of Iowa, and Member, Committee on the Judiciary	194

APPENDIX

Material Submitted for the Hearing Record	239
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EXECUTIVE POWER AND ITS CONSTITUTIONAL LIMITATIONS

FRIDAY, JULY 25, 2008

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:19 a.m., in room 2141, Rayburn House Office Building, the Honorable John Conyers, Jr. (Chairman of the Committee) presiding.

Present: Representatives Conyers, Nadler, Scott, Watt, Lofgren, Jackson Lee, Waters, Wexler, Cohen, Johnson, Sherman, Baldwin, Schiff, Wasserman Schultz, Ellison, Smith, Lungren, Pence, King, Franks, and Gohmert.

Staff Present: Perry Apelbaum, Staff Director and Chief Counsel; Ted Kalo, Deputy Chief Counsel; Benjamin Staub, Majority Professional Staff Member; and Crystal Jezierski, Minority Counsel.

Mr. CONYERS. Good morning. The Committee will come to order.

We face few issues more difficult, complex or important than separation of powers in general and excesses of the executive branch in particular. As our first great civil libertarian, in my mind, Thomas Jefferson wrote, "The greatest calamity which would befall us would be submission to a government of unlimited powers."

So, it is for that reason that the Founders gave Congress the power to oversee the executive branch as well as the power of the purse, the power to decide when the country goes to war, and the power to remove through the constitutional process officers who may have violated their oath. And so it is for these same reasons that the Founders created independent courts to operate as a check on the two political branches and to serve as the final protector of our precious rights and liberties.

It is no secret that I have grave concerns about the excesses and the exercises of the executive branch authority as has been used in this present Administration. And at my direction, this Committee has spent a considerable portion of its time, energy and resources investigating allegations concerning the politicization of the Department of Justice; the misuse of signing statements; misuse of authority with regard to detention, interrogation and rendition of detainees and others; possible manipulation of intelligence regarding the Iraq war; improper retaliation against critics of the Administration, including the outing of Valerie Plame; and excessive secrecy by the Administration, including the misuse of various privileges and immunities.

I believe the evidence on these matters is both credible and substantial and warrants direct answers from the most senior members of the Administration, under oath if at all possible.

This Member, the second-longest serving in the Congress, has a 40-year track record of opposing governmental injustice by both Republican and Democratic Presidents. Regardless of who the next President is and who is in the congressional majority next year, Congress and the American people will be struggling with the legacy of these excesses.

By the same token, I have good friends on my own side of the aisle who say we have done too little and too late. I would remind all of us that in the prior Congress, when I wasn't Chairman, I held forums on the Presidential election in Ohio, what went wrong in that election; the Downing Street minutes hearings; hearings on warrantless wiretapping. And there have been at least two comprehensive reports made on these matters.

In this Congress, the Committee on Judiciary has held more than 45 separate public hearings on these matters, bringing in a range of witnesses, including the former Attorney General; a couple of past Attorneys General; also two heads of the Justice Department Office of Legal Counsel; two current and former Deputy Attorneys General; the special counsel, Patrick Fitzgerald; the Department of Justice White House liaison, Monica Goodling; the former Secretary of State of Ohio, Kenneth Blackwell; Douglas Feith; Scott McClellan; Ambassador Joseph Wilson, to name a few.

We have pursued criminal contempt against Harriet Miers, the President's former lawyer, and Josh Bolton, his chief of staff, in the Department of Justice and in Federal court. And we expect to take action against Karl Rove for his refusal to obey our Judiciary Committee-issued subpoena.

I have also been involved, as have other Members on the Committee, opposing the spying on Americans and wiretapping phones and warrantless surveillance, and have opposed many of the modifications in the wrong direction, in my view, of the FISA bill. We have helped initiate numerous Inspector General investigations and Office of Professional Responsibility investigations and have passed legislation into law limiting abusive United States Attorney appointments.

And we are not done yet. We do not intend to go away until we achieve the accountability that the Congress is entitled to and the American people deserve. I believe it is in all our interests to work together to rein in any excesses of the executive branch, regardless of whose hands it is in, Democratic, Republican, Libertarian, or independent.

Whether it was the suspension of habeas corpus during the Civil War, the Palmer raids during World War I, the internment of Japanese Americans during World War II, COINTELPRO that came out of the White House during Vietnam, we know the executive branch can and does overreach frequently during times of war. As one who was included on President Nixon's enemies list, I am all too familiar with the specter of an unchecked executive branch. And the risk to our citizens' rights are even graver today, as the war on terror has no specific end point.

And so I conclude, our great challenge as a Committee, as the Congress, as a people, is to find a way to work together to protect these rights and develop a record and a process for addressing and correcting the abuses, a process that will stand the test of time, in a manner that serves our Nation and our Constitution. I hope today's hearing will be a beginning to make progress in that direction.

And I am pleased now to recognize the Ranking Member of the Judiciary Committee from Texas, the distinguished Member, Lamar Smith.

Mr. SMITH. Thank you, Mr. Chairman.

Mr. Chairman, if last month it appeared we hosted a book-of-the-month club, this week it seems that we are hosting an anger management class. Nothing is going to come out of this hearing with regard to impeachment of the President. I know it, the media knows it, and the Speaker knows it. The Democratic leadership has said time and again they have no intention of bringing any impeachment resolution for the President or the Vice President to the House floor.

Why is that? It is because they know it won't pass. That is because there is no evidence to support impeachment. To quote a Democratic Member of this Committee during the Clinton impeachment, Congress, quote, "has no authority to forcibly remove the President simply because they dislike him or disapprove of his actions," end quote. And another Democratic Member of this Judiciary Committee said yesterday he did not think that the President had committed any crime.

After holding 32 hearings and listening to over 120 witnesses, the Members of the Judiciary Committee have found no evidence of any criminal wrongdoing by the President or the Vice President. Meanwhile, congressional approval ratings have sunk to a record low. Only 9 percent of those polled believe that Congress is doing a good job. That makes President Bush's approval rating of 32 percent look pretty good.

The American people have a low opinion of Congress because Congress wreaks of partisanship. This partisan hearing contributes to that view. Instead of partisan bickering and bitterness, we should consider bipartisan legislation to reduce the price of gas, reduce crime, and secure the borders.

Speaker Pelosi came into office promising to govern in a, quote, "respectful, bipartisan way." Yet there is nothing bipartisan about this hearing she suggested or the Speaker's recent comments about the President himself.

Americans are tired of bitter partisanship and want solutions that unite our country. They want lower gas prices. They want to keep their children safe from violent crime and sexual predators. And they want to live, work and raise their families in the United States free from terrorist attacks.

The relentless efforts of some individuals to malign the outgoing Administration only demeans and harms the institution of Congress. This hearing will not cause us to impeach the President. It will only serve to impeach Congress's own credibility.

Mr. Chairman, before I yield back, I want to read, with your permission, an excerpt from the House rules. And let me say at the

outset that I have confidence that our own Members, as well as our witnesses, will abide by these rules, as you always have yourself. And, in fact, you have always encouraged witnesses to do so.

But let me quote from the rules with regard to references to the President. This is a quote: The rules “do not permit the use of language that is personally offensive toward the President. Personal criticism, innuendo, ridicule or terms of opprobrium are not in order,” end quote.

Thank you, Mr. Chairman. I will yield back.

Mr. CONYERS. I thank the gentleman.

I am now pleased to recognize the distinguished Member of the Judiciary Committee, the Honorable Robert Wexler of Florida.

Mr. WEXLER. Thank you, Mr. Chairman. Is this for purposes of an opening statement?

Mr. CONYERS. Yes.

Mr. WEXLER. Thank you so much.

Thank you, Mr. Chairman. I applaud your tenacity and courage for calling for this hearing.

For the past few months, I have vigorously argued that this Committee should immediately begin impeachment hearings. The allegations made against the Bush White House documents serious abuses that, if proven, would certainly constitute high crimes.

The White House is charged with deliberately lying to Congress and the American people and manipulating intelligence regarding weapons of mass destruction in Iraq, ordering the illegal use of torture, firing U.S. attorneys for political purposes, denying the legitimate constitutional powers of congressional oversight by blatantly ignoring subpoenas, among countless other crimes.

Never before in the history of this Nation has an Administration so successfully diminished the constitutional powers of the legislative branch. It is unacceptable, and it must not stand. This is not how our Founders so carefully and delicately designed our democracy.

In a deliberate effort to reduce the power of this Congress and obstruct our ability to provide oversight over the executive branch, President Bush has ordered Karl Rove, Harriet Miers, Josh Bolton and other Administration officials to simply ignore Congress by refusing to testify. This failure of Administration witnesses to even appear is unprecedented in the history of our Nation. The Bush White House has distorted the concept of executive privilege beyond recognition in order to hide White House wrongdoings.

Faced with this litany of wrongful actions, I am convinced that the most appropriate response to this unprecedented behavior is to hold hearings for impeachment.

The power of impeachment, which our Founding Fathers provided to the House of Representatives, was designed precisely for this type of wrongdoing. I fully recognize the significance of holding impeachment hearings, and I have not come to this position lightly, not one bit. But when an Administration takes actions that amount to high crimes, we, the representatives of the people, are left with no option other than to seek impeachment and removal from office.

Our Government was founded by a delicate balance of powers, whereby one branch carefully checks the other branches to prevent

a dangerous consolidation of power. The actions of this White House have eviscerated this careful balance.

This is not a Democratic or Republican issue. This is an American issue. Without these checks and balances, a President can run roughshod over any law with impunity. Congress must end this disturbing pattern of behavior. And, in these circumstances, unfortunately the only option left is impeachment hearings.

We have been down this road before. Yes, we have. In 1973, articles of impeachment were introduced against President Nixon after he inappropriately tried to use executive privilege to bury evidence of his wrongdoings. I think it would be helpful to delve more deeply into what happened during the Nixon administration, particularly as it relates to the obstruction of the oversight powers of this Congress.

Mr. Chairman, I thank you so much for having this hearing and giving the American people an opportunity to hear about how we can begin to take our Government and our country back. Thank you.

Mr. CONYERS. You are welcome.

I have been reminded by a Member on the Committee that there are to be no reactions. As much as we want to applaud and cheer the statements that we totally approve of, let's restrain ourselves, please.

I am very pleased now to recognize the Chairman of the Crime Subcommittee, Bobby Scott, the distinguished gentleman from Virginia.

Mr. SCOTT. Thank you very much, Mr. Chairman.

Just very briefly, if government is to work with three branches of government, we have to understand the executive power and its constitutional limitations. So there are a number of issues that we have to address, such as the politicization of the Department of Justice, including hiring policy and the use of Department of Justice resources and powers in violation of the Constitution, we have to find out whether or not crimes were committed which resulted in us getting into Iraq, and who has authorized what virtually everyone in the world outside of this Administration considers torture. We have to figure out how we can do an investigation if the Department of Justice does not enforce subpoenas when witnesses refuse to cooperate with our investigations.

So this hearing on executive power and its constitutional limitations will not only help us define those limitations but also recommend ways to enforce those limitations.

I thank you, Mr. Chairman, for holding the hearing.

Mr. CONYERS. Thank you.

I am now pleased to recognize Steve King, the distinguished gentleman from Iowa, who is the Ranking Member on the Immigration Subcommittee.

Mr. KING. Thank you, Mr. Chairman.

I would notice, Mr. Chairman, in your opening remarks you used the phrase, "power to remove." And as I read that in my Constitution, that is actually impeachment. We are here having impeachment hearings before the Judiciary Committee.

It is an astonishing thing to me to think that I was sitting back there in 1998, in December 1998, watching what went on here. It

was one of the inspirations to me, the reason I am sitting here, bigger than anything else, is because I sat out there and I was influenced significantly by both sides of this in ways I won't go into.

But this is an impeachment hearing. And whether it is to be called the "power to remove," these are impeachment hearings before the United States Congress. I never imagined I would ever be sitting on this side when something like this happened.

And as I've watched the Bush administration in every day of these 7½ years, I didn't see anything along the way that would have indicated to me by an objective judgment that we would be sitting here with these impeachment hearings today.

But here is what I will tell you is going on. We have had this parade of 45 separate public hearings, as the Chairman said in his opening statement, 45 of them. Among them, the chief of staff for the Vice President of the United States, David Addington, the successor of Scooter Libby, I might add. And I would point out that it is pretty rare if you can find anybody out in the crowd that can actually say what it is that Scooter Libby actually did.

Along the list, Doug Feith, Attorney General John Ashcroft just last week, Scott McClellan. Forever the press secretary of the President of the United States will be looked at skeptically and probably be locked out of the inner sanctum of what goes on in the White House because Scott McClellan came here and testified. And even though there wasn't any new information there, he gave his view on what the President should have done 3 years after the fact.

And Joe Wilson, referenced by the gentleman from Florida, Ambassador Joe Wilson, whose integrity demonstrated before this witness was the least impressive of any witness that I have seen before this Committee in 6 years. And, in fact, Joe Wilson's report before the CIA, which is now a public document, says—and he testified, sitting right where Mr. Kucinich is right now—he testified before this Committee and before the world that he had been debriefed within 2 hours of his return from 2 weeks in Niger by two CIA agents, and those CIA then had debriefed him in his home. That report I think he thought was going to remain secret in perpetuity. But, in fact, that report is a public document. I will make that report available today.

And in that document, it says that he met with the former Prime Minister of Niger, Mayaki. Mayaki had met with Iraqi representatives, four of them, who were seeking expanded commercial relations in Niger. And the only thing that Niger has to sell is yellow cake uranium. And Mayaki said, "That is what the conversation was about. I downplayed it because I didn't want to get crossways with the United States." That will be in a public document today.

Mr. CONYERS. Does the gentleman wish to introduce it into the record?

Mr. KING. I do wish to introduce it into the record. My staff has it on the way. I thank the Chairman.

[The material referred to follows:]

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CENTRAL INTELLIGENCE AGENCY

18 MARCH 2002

NIGERIAN DENIAL OF PLUTONIUM YELLOWCAKE
SALES TO ROGUE STATESSOURCE: A CONTACT WITH EXCELLENT ACCESS WHO DOES NOT HAVE AN
ESTABLISHED REPORTING RECORD. (SENSITIVE CONTACT)

TEXT: 1. (HEADQUARTERS COMMENT: THE SUBSOURCES OF THE FOLLOWING INFORMATION KNEW THEIR REMARKS COULD REACH THE U.S. GOVERNMENT AND MAY HAVE INTENDED TO INFLUENCE AS WELL AS INFORM.) FORMER NIGERIAN GOVERNMENT OFFICIALS CLAIMED THAT SINCE 1987 THERE HAD BEEN NO CONTRACTS SIGNED BETWEEN NIGER AND ANY ROGUE STATES FOR THE SALE OF PLUTONIUM IN THE FORM OF YELLOWCAKE. THE FORMER OFFICIALS ALSO ASSERTED THERE HAD BEEN NO TRANSFERS OF YELLOWCAKE TO ROGUE STATES.

2. FORMER NIGERIAN PRIME MINISTER IBRAHIM (MAYAKI), WHO WAS NIGER'S FOREIGN MINISTER FROM 1986-1997 AND NIGER'S PRIME MINISTER FROM 1997-1999 AND WHO MAINTAINED CLOSE TIES TO THE CURRENT NIGERIAN GOVERNMENT, STATED HE WAS UNAWARE OF ANY CONTRACTS BEING SIGNED BETWEEN NIGER AND ROGUE STATES FOR THE SALE OF YELLOWCAKE DURING HIS TENURE AS BOTH FOREIGN MINISTER AND PRIME MINISTER. MAYAKI, HOWEVER, DID RELATE THAT IN JUNE 1999 BAKKA ((TEFRIDJI), A NIGERIAN/ALGERIAN BUSINESSMAN, APPROACHED HIM AND INSISTED THAT MAYAKI MEET WITH AN IRAQI DELEGATION TO DISCUSS "EXPANDING" COMMERCIAL RELATIONS" BETWEEN NIGER AND IRAQ. ALTHOUGH THE MEETING TOOK PLACE, MAYAKI LET THE MATTER DROP DUE TO THE UNITED NATIONS (UN) SANCTIONS AGAINST IRAQ AND THE FACT THAT HE OPPOSED DOING BUSINESS WITH IRAQ. MAYAKI SAID THAT HE INTERPRETED THE PHRASE "EXPANDING COMMERCIAL RELATIONS" TO MEAN THAT IRAQ WANTED TO DISCUSS PLUTONIUM YELLOWCAKE SALES. MAYAKI SAID HE UNDERSTOOD ROGUE STATES WOULD LIKE TO EXPLOIT NIGER'S RESOURCES, SPECIFICALLY PLUTONIUM, BUT HE BELIEVED THE NIGERIAN GOVERNMENT'S REGARD FOR THE UNITED STATES (U.S.) AS A CLOSE ALLY WOULD PREVENT

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SALES TO THESE STATES FROM TAKING PLACE DESPITE NIGER'S ECONOMIC NOES. MAYAKI CLAIMED THAT IF THERE HAD BEEN ANY CONTRACTS FOR YELLOWCAKE BETWEEN NIGER AND ANY ROGUE STATE DURING HIS TENURE, HE WOULD HAVE SEEN THE CONTRACT.

3. BOUCAR (MAI MANGA), NIGER'S FORMER MINISTER OF ENERGY AND MINES UNTIL 9 APRIL 1999, A FORMER DIRECTOR OF THE NIGERIESE COMENAC MINE AND CURRENTLY HONORARY PRESIDENT OF COMENAC, STATED THAT THERE WERE NO SALES OUTSIDE OF INTERNATIONAL ATOMIC ENERGY AGENCY (IAEA) CHANNELS SINCE THE MID-1980S. MAI MANGA SAID THAT HE KNEW OF NO CONTRACTS SIGNED BETWEEN NIGER AND ANY ROGUE STATE FOR THE SALE OF URANIUM. HE ADMITTED THAT YEARS AGO A PAKISTANI DELEGATION VISITED NIGER AND OFFERED TO PURCHASE URANIUM BUT THAT NO SALES RESULTED FROM THESE TALKS. MAI MANGA ALSO SAID THAT (FNU) ((BLASCHER)), THE FORMER DIRECTOR GENERAL OF SONAIR AND CURRENTLY A DIRECTOR AT COGEMA, CAME TO HIM IN 1998 WITH AN IRANIAN DELEGATION TO DISCUSS BUYING 400 TONS OF YELLOWCAKE FROM NIGER; HOWEVER, THE ONLY RESULT WAS A MEMORANDUM OF CONVERSATION, WITH NO CONTRACT BEING SIGNED AND NO YELLOWCAKE TRANSFERRED TO IRAN. MAI MANGA THEORIZED THAT NIGER'S MINES COULD HAVE INCREASED PRODUCTION TO SUPPLY IRAN WITH THIS AMOUNT OF YELLOWCAKE BUT THIS WOULD HAVE REQUIRED OPENING ADDITIONAL MINING FACILITIES THAT HAVE BEEN MOTHELBALLED FOR SEVERAL YEARS. MAI MANGA THEREFORE CONCLUDED THAT A SALE TO A ROGUE STATE SUCH AS IRAN WOULD HAVE BEEN DIFFICULT GIVEN THE NEED OF MORE FACILITIES. (SOURCE COMMENT: MAI MANGA APPEARED TO REGRET THAT NIGER EVEN DISCUSSED URANIUM SALES WITH IRAN IN LIGHT OF THE INTERNATIONAL PRESSURE THAT RESULTED.)

4. MAI MANGA STATED THAT URANIUM FROM NIGER'S MINES IS VERY TIGHTLY CONTROLLED AND ACCOUNTED FOR FROM THE TIME IT IS MINED UNTIL THE TIME IS LOADED ONTO SHIPS AT THE PORT OF COTONOU, BENIN. ACCORDING TO MAI MANGA, EVEN A KILOGRAM OF URANIUM WOULD BE NOTICED MISSING AT THE MINES. ON-SITE STORAGE IS LIMITED AND HE SAID THAT EACH SHIPMENT OF URANIUM IS UNDER NIGERIESE ARMED MILITARY ESCORT FROM THE TIME IT LEAVES ONE OF THE TWO NIGERIESE MINES UNTIL IT IS LOADED ON TO A SHIP IN COTONOU. AIR TRANSPORT IS TOO EXPENSIVE TO SHIP YELLOWCAKE AND TRUCKING BARRELS OF YELLOWCAKE NORTHWARD WOULD REQUIRE AN EXPERIENCED GUIDE AND MANY ARMED GUARDS, DUE TO THE SHIFTING DUNES AND BANDITS IN THAT REGION. MAI MANGA THEREFORE BELIEVED THAT IT WOULD BE DIFFICULT, IF NOT IMPOSSIBLE, TO ARRANGE A SPECIAL SHIPMENT OF URANIUM TO A PARIAN STATE GIVEN THESE STRICT CONTROLS AND THE CLOSE MONITORING BY THE NIGERIESE GOVERNMENT AND THE TWO MINING COMPANIES. MAI MANGA ALSO SAID THAT THE MINE AND YELLOWCAKE WORKERS ARE TOLD THAT URANIUM IS DANGEROUS SO THEY DON'T KNOW HOW TO HANDLE THE MATERIAL OUTSIDE OF THE STANDARD PROCEDURES.

5. MAI MANGA PROVIDED AN OVERVIEW OF THE TWO URANIUM MINES IN NIGER, SONAIR AND COMENAC. SONAIR IS AN OPEN PIT MINE THAT PRODUCES ROUGHLY 1000 TONS OF YELLOWCAKE PER YEAR. THIS HAS BEEN THE AMOUNT PRODUCED FOR YEARS AT THIS MINE WHICH IS JOINTLY OWNED BY FRANCE AND NIGER. COMENAC IS AN UNDERGROUND MINE THAT PRODUCES ROUGHLY 2000 TONS OF YELLOWCAKE PER YEAR. THIS MINE IS JOINTLY OWNED BY FRANCE, JAPAN, SPAIN AND NIGER. IN THE EARLY 1980S THE COMBINED OUTPUT WAS INCREASED FROM 3000 TONS TO NEARLY 4000 TONS OF YELLOWCAKE PER YEAR, BUT PRODUCTION WAS CUT IN THE 1980S WHEN THE URANIUM PRICE FELL AND SEVERAL YELLOWCAKE PRODUCTION LINES WERE MOTHELBALLED AND HAVE YET TO RESTART. NIGER DOES NOT TAKE ITS OWN PERCENTAGE OF THE PRODUCT; ALL THE YELLOWCAKE IS SHIPPED TO FRANCE, JAPAN OR SPAIN. FRANCE'S COGEMA OVERSEES THE PRODUCTION FROM BOTH MINES AND SETS THE PRODUCTION

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SCHEDULE ALONG WITH THE MINE MANAGEMENT, FIRST FOR THE YEAR AND THEN
BREAKING THE PRODUCTION INTO MONTHLY TARGETS. PRODUCTION IS ADJUSTED
DEPENDING ON THE URAMIUM YIELD FROM THE MINE ORE. ADDITIONALLY,
FRANCE CONTROLS THE FINANCIAL ASPECTS OF THE MINES BECAUSE URAMIUM IS
PRICED IN U.S. DOLLARS ON THE WORLD MARKET. BUT NIGER'S CONTRACTS
WITH COGEMA ARE IN CFA. WHEN THE CFA WAS DEVALUED, THIS EFFECTIVELY
CUT THE PRICE IN HALF--A CHRONIC SOURCE OF FRICTION BETWEEN FRANCE
AND NIGER.



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Mr. KING. And that is some of the framework that is not considered here by the majority side. And that is the value of this evidence that we are hearing come from, say, the gentleman of Florida and others.

And so I would point out that the 16 words, by the way, supported by the CIA report of Ambassador Wilson's, the President's 16 words in his State of the Union address on January 28, 2003, were supported by the CIA report from Ambassador Joe Wilson.

Weapons of mass destruction—every intelligence agency in the world that I know of, including the Israelis, including Western Europe, all agreed with the same thing. Those don't become lies. That is the best intelligence that we had.

So we are here, impeachment hearings before the United States Congress.

I am just going to quote quickly the Chair and the Chairman of the Constitution Subcommittee. I am not going to tell you which said what. Here is one from the impeachment hearings. You can figure it out on your own. I think you will know.

A 1998 impeachment hearings, quote: "We are using the most powerful institutional tool available to this body, impeachment, in a highly partisan manner. Impeachment was designed to rid this Nation of traitors and tyrants," closed quote, presumably and not something else.

And here is another quote from a different Chair: "It is an enormous responsibility and extraordinary power. It is not one that should be exercised lightly. It certainly is not one which should be exercised in a manner which is or would be perceived to be unfair or partisan," close quote.

I close my statement. And I look forward to hearing and watching this unfold.

Mr. Chairman, I yield back.

Mr. CONYERS. I thank the gentleman, and would remind him that we are gathered here today this morning on a hearing on the Executive Power and Its Constitutional Limitations. To the regret of many, this is not an impeachment hearing. To have an impeachment hearing, the House of Representatives has to vote to authorize that a Committee begin an inquiry. And that has not taken place yet.

I would now recognize the distinguished gentlelady from California, the Chair of the Immigration Subcommittee, Zoe Lofgren.

Ms. LOFGREN. Thank you, Mr. Chairman, for convening this important hearing.

In January of this year, I requested that this Committee hold a hearing to develop a common understanding of the role of impeachment in the history of the United States and a common understanding of the impeachment standards set forth in the Constitution. And I welcome this opportunity to explore the issues of executive power and its constitutional limitations.

I have a unique view of the history of impeachment. As you know, Mr. Chairman, I served on the staff of Congressman Don Edwards during the impeachment of Richard Nixon and, of course, also served as a Member of this Committee during the impeachment of President Clinton. The two efforts could not have been more different.

I would note that the impeachment of Richard Nixon consumed 14 months. And if you add in the Senate's action, because the information gathered there was material to the effort here; plus the evidence gathered by a very active prosecutor that was just voluminous, really going to the issue of whether high crimes and misdemeanors had been committed by President Nixon. And, really, the definition of high crimes and misdemeanors is rogue action that really undercuts the very core system of government. I won't belabor the Clinton impeachment but will simply say that his actions, though reprehensible, did not undercut the entire system of American Government.

Over the past 7 years, I have watched us go down roads I thought this country would never go down. I have watched the Administration take actions that I previously thought were unimaginable in our Nation that is governed by the Constitution. And, regrettably, for those years when the Republicans were in the majority in Congress, that broad push of executive power was too often ratified by the legislative branch of Government.

With just a few months left in this 110th Congress, I am particularly interested in hearing from witnesses about strategies to reverse the expansion of executive power that has jeopardized the careful balance between the three branches of Government that help preserve our freedom and our democracy.

It is my judgment that President Bush is the worst President our country has ever suffered, making judgments that have jeopardized our national security, impaired our economy, diminished the freedom and civil liberties of the American people. This hearing is an important step forward in examining how our free America can be restored.

I thank you, Mr. Chairman, and yield back.

Mr. CONYERS. Thank you.

I am pleased now to recognize the gentleman from California, Dan Lungren, who has not only been a Congressman, but was the chief law enforcement officer for California before he returned to the Congress.

Mr. LUNGREN. Thank you very much, Mr. Chairman.

I have deep respect for you, Mr. Chairman. We have worked together in the past on a nonpartisan basis. But I must express my disappointment in today's hearing.

When I was a kid growing up, the worst epithet that could be thrown at Republicans was "Herbert Hoover." Now it is "Richard Nixon," and I wondered how long it would be before we found that. I guess it was the second gentleman on the Democratic side to bring that up.

It is unusual, as anyone who has watched this Committee would know, that every Member is given a right to actually give an opening statement. We appreciate the fact that we were informed this morning that that would happen today, unusual though it is. One wonders what we are becoming here. When I was a kid growing up, we used to watch the Friday night fights, and now it looks like we have the Friday morning show trials.

I have great respect for many of the witnesses here that I know. It doesn't mean I don't have respect for the others, but I just know

a number of the witnesses, current Members, former Members with whom I served, others that I knew in previous Administration.

I am somewhat perplexed, Mr. Chairman, though, because in your opening statement you made reference to removal of the President. I believe those were your words. And yet you have assured us these are not impeachment hearings.

Mr. Jones told me that he was invited here to talk about his bill, which is not impeachment, so I hope we will keep that in mind as we go forward with other opening statements.

Maybe what we are here for is something called impeachment-lite. We won't go through the process of impeachment, but we will make every allegation against the President, some of which has already been said, and leave the press with the opportunity to print the fact that the President is accused of impeachable offenses but perhaps leaving not out the fact that we are not taking, as the Chairman told us, steps toward impeachment.

It is sort of in that Never-Never Land of accusing the President of impeachable offenses but not taking actions to impeach him, which I guess impugns him but does not impeach him. But maybe it has the same effect in the court of public opinion.

As I understand it, our notion of high crimes and misdemeanors contained in the Constitution comes from the English common law, and it refers to acts that are inconsistent with the obligations and duties of office that involve putting personal and partisan concerns ahead of the interests of the people and demonstrate the unfitness of the man to the office.

It has seldom been sought in the history of the United States, because that is a high bar. And I think, just as it is a tragedy that we have moved in the direction of criminalizing differences of political opinion to the detriment of this country and to the detriment of vigorous public debate, when we loosely throw around terms of "high crimes and misdemeanors" and loosely make references to disagreements we have with the chief executive, as deep as they may be, in the context of impeachment and high crimes and misdemeanors, in my judgment, we do violence to the Constitution and the seriousness of actions which would be impeachable. And for that, I am sorry.

This is occurring just months before the President will leave office. We know from the statements of the Speaker of the House there is no reasonable expectation that impeachment proceedings will proceed. So one has to wonder why.

Thank you very much, Mr. Chairman.

Mr. CONYERS. The Chair is pleased to recognize now the Chair of the Constitution Subcommittee in the Judiciary, the distinguished gentleman from New York, Jerry Nadler.

Mr. NADLER. Thank you, Mr. Chairman.

I won't take the full 5 minutes because I am eager to hear the testimony of the witnesses. But I must say, I have heard some of my colleagues on the other side of the aisle say that this hearing and many of the investigations of the full Committee and my Subcommittee have conducted are a waste of time or worse.

I had the misfortune to be here during the investigation and impeachment of President Clinton, who, at worst, lied about an affair.

It had to be one of the most demeaning and prurient circuses to which I have ever been subjected.

In this case, we are involved with far more serious allegations: allegations including violations of the anti-torture laws of this country, violations of the FISA laws, criminal prohibition against warrantless wiretapping, illegal detentions, political interference with prosecutions, and a host of other serious, illegal and possibly criminal acts which, by many definitions, would be classified as high crimes and misdemeanors.

I think it is vital that we look into these questions. So I thank the Chairman for holding these hearings, and I look forward to the testimony of the witnesses.

And I hope that anyone who thinks that inquiring into the excesses of the executive branch and into what appears to be a concerted effort in every different aspect of law to destroy the power of the Congress and the Judiciary and to limit our power to protect the liberties of the American people against encroachments by the executive are a waste of time, I hope they will rethink what they are doing here.

Thank you. I yield back the balance of my time.

Mr. CONYERS. The Chair is pleased now to recognize the distinguished gentleman from Indiana, Mike Pence, who serves on the Foreign Affairs Committee, as well as the Judiciary Committee.

Mr. PENCE. Thank you, Mr. Chairman.

I note this hearing is entitled "Executive Power and Its Constitutional Limitations." And I want to say, I accept the Chairman's assurance that it was not his intention to convene a hearing today on the subject of impeachment. But I know that many here today on both sides of the rostrum and many looking in are anxious to debate whether the 43rd President of the United States should be impeached. And I would like to address myself to that issue in my opening remarks.

We have already heard from the distinguished Ranking Member and other colleagues about arguments against having this hearing. I can't add to those arguments. These types of hearings, my concern is, do intentionally or unintentionally take us down the road of the criminalization of American politics. And I deeply regret that.

Now, putting those objections aside, let me say emphatically, I see absolutely no credible basis for the impeachment of President George W. Bush. The Constitution provides in article 2, section 4, that, "The President, the Vice President and all civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery and other high crimes and misdemeanors." Now, certainly the President has not been accused of treason or bribery, so that leaves high crimes and misdemeanors.

Now, let me direct my attention to my colleague on the left today and in every respect, Mr. Kucinich from Ohio. I think the gentleman knows of my respect and affection for him. I appreciate his passion and his focus, and I do not begrudge him his efforts in pursuing this cause. I just believe the gentleman from Ohio is dead-wrong on our history and on facts and on the Constitution.

In his testimony today, Professor Presser has provided us with an exhaustive overview of what the Framers of the Constitution in-

tended by the phrase, “high crimes and misdemeanors.” Taking cues from the Framers in “The Federalist Papers,” the English common law, and the text of the Constitution, Professor Presser sets forth the belief of the Framers that the President must have put his personal interests above the Constitution and the laws of the Nation, thereby violating his oath of office.

Of course, the Constitution provides the House of Representatives with the sole power of impeachment, article 1, section 2, clause 5. But that does not mean we should act without regard to the Framers’ intent or, frankly, without regard to our own good judgment and discretion.

I started looking at whether the President has violated his oath of office, specifically by putting his personal interests above those of the country or by committing other acts obviously criminal such as lying under oath.

Now, I want to say emphatically, I believe President Bush is a man of integrity. I believe he has led this Nation with distinction during some of her darkest hours.

Many in this room have not agreed with the President on every one of his policy decisions, and I am one of those people. As late as Wednesday of this week, my colleagues on this Committee will know that I vigorously debated a Member of this Administration on an issue upon which we disagreed.

But disagreements on policy with any President or Administration do not and must not, in and of themselves, give rise to impeachment. The Framers did not intend impeachment as a political device to be used whenever the majority party in Congress is unhappy with the President and wants to get rid of him. The bar is much higher than that, and ought to be.

President Bush has, in my view, conducted himself throughout his tenure in a manner that is not only consistent with his oath of office, but let me say emphatically here, from that dreadful day in September of 2001 to this, I believe President George W. Bush has consistently put the American people’s needs before his own.

Now, the issues up for discussion before resolutions in this body, I believe, include a range of accusations: improper politicization of the Justice Department, misuse of executive branch authority, alleged misuse of authority in denying Congress and the American people an opportunity to engage in oversight. These issues ought to be debated.

But let me say emphatically, there is no evidence in these allegations of the President putting his personal interest above those of the Nation. There is no evidence in these allegations of the President violating his oath of office. There is no evidence I have seen emerge from the multitude of hearings and investigations on the President and this Administration that have taken place throughout the 110th Congress which shows the existence of a high crime or a misdemeanor.

In short, let me say about the elephant in the room, about which this hearing apparently is not, let me say, I believe there has been no high crime or misdemeanor committed, and therefore there should be no serious consideration of the impeachment of President George W. Bush.

And I yield back.

Mr. CONYERS. The Chair recognizes the distinguished gentlelady from Texas, who is a Subcommittee Chair on Homeland Security and a senior Member of the House Judiciary Committee, the Honorable Sheila Jackson Lee.

Ms. JACKSON LEE. Mr. Chairman, thank you very much for yielding.

And let me thank this Committee for accepting the institutional responsibility that the Congress and the House Judiciary retains. This is not a personal discussion. It is an institutional discussion and a very, very vital hearing.

Although Americans may be experiencing high prices at the gas pump, there may be concerns about tornadoes and hurricanes, certainly there are concerns regarding the economy, the Congress still cannot abdicate its responsibility for protecting the Constitution.

Mr. Chairman, I would like to just simply offer for the record the opening words of the Constitution: "We, the people of the United States, in order to form a more perfect union, establish justice, ensure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves, our posterity, do ordain and establish the Constitution for the United States of America."

It is unique; it is finite. It offers a distinctive role for this country and this Congress. And we must act.

We are being deliberative today. We are not being accusatory, but we are recognizing the responsibility of this particular Committee.

As I note, two former Members of Congress, Congresswoman Holtzman and Congressman Barr, both having experienced impeachment, I believe their presence today or their willingness to be here today connotes the seriousness of this hearing. We cannot dictate as to what the ultimate outcome will be, but we can take advantage of the responsibilities of this particular body and this particular Congress.

Now, let me cite the reasons why I believe that this is an appropriate process that we are going through and that we have every right to, again, be fact-finding so that we can make judgments as to how we protect the Constitution of the United States of America.

It is clear in this document that Congress has the right to declare war. In article 1, section 8, it is clear that there was a resolution of which I opposed in 2002. That was not a declaration of war. The question, even though it might be utilizing the War Powers Act, the question is whether or not this institution of the presidency, whether or not this Administration went forward on a war that was not declared under the rules of the Constitution and whether the presentation of the question of war violated the Constitution in how it was presented.

There are questions of torture and whether or not there was the direction of this particular Administration, institutional administration, to, in essence, contravene international law and thereby contravene the Constitution of the United States of America.

There is a question as to why an individual who admits to involvement in the exposing of a CIA agent, which I raise generically as to whether in times before that action could be treasonous, is whether or not that individual, Mr. Karl Rove, has refused repeat-

edly to appear before this body, and whether or not that is an institutional question or whether this Constitution is being protected.

Then, of course, we are well-familiar with the Saturday Night Massacres, when individuals resigned in the Nixon administration. But my question is whether or not the seeming question of the firing of U.S. attorneys, again, has to do with any institutional statement of the relationship between individuals who are supposed to be beyond politics. That is a question of protecting the Constitution.

Then, lastly, let me say that we have watched over a series of years, and I think my colleagues have watched this, the Congress passing laws and then the laws being contravened by signing statements. I introduced legislation H.R. 5684 to talk about the concept of signing statements which contravene the intent of this body. I suggest that we have the right to prohibit the funding for signing statements. But it is an institutional question of whether or not, in the checks and balances, the executive is overruling the constitutional right of this Congress.

So, Mr. Chairman, I adhere to this document. It is a beautiful document. It has given me, through the 13th and 14th amendment, as an African-American, the privilege of sitting here today and being viewed as a first-class citizen instead of a second-class citizen.

I, frankly, believe that this is a time that we hold this Constitution, endear it, and view this as an institutional question of whether or not we adhere to the concept that we have organized this Nation to form a more perfect union. I believe we have.

And I yield back, and look forward to the witnesses.

[The prepared statement of Ms. Jackson Lee follows:]

PREPARED STATEMENT OF THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, AND MEMBER, COMMITTEE ON THE JUDICIARY

Mr. Chairman, thank you for your leadership in convening today's very important hearing probing the reaches of Executive power and its Constitutional limitations. I would also like to thank the ranking member the Honorable Lamar S. Smith, and welcome our extremely distinguished witnesses.

In recent years the reputation of the Administration has been tarnished. This Committee has no greater challenge and obligation to the nation than to ensure that there are appropriate checks in balances between the power wielded by the Executive and Congress. Because ours is a system of checks and balances, we as members of Congress have a duty to make sure that one branch of government does not upset the balance of power between the three co-equal branches of government.

Congress has the power to ensure that the Executive does not overstep its bounds. There are a myriad of ways that Congress can exert its power. Among the ways that Congress can exercise its power is through appropriation, the appointment process, exercising oversight over the Executive, enactment legislation, or even establishing a select Committee to probe any abuse of power by the Administration.

In probing the limits of the power of any administration, we must consider the impact of signing statements. To some, the topic may seem abstract or esoteric or arcane. But you and I and most members of this Committee understand that what has been going on in the Administration regarding the misuse and abuse of signing statements poses, as the American Bar Association's Task Force on Signing Statements has observed, as a real threat to our system of checks and balances and the rule of law.

It is for this reason that in the last Congress I introduced H.R. 5684, the "Congressional Lawmaking Authority Protection Act" or CLAP Act of 2006, which (1) prohibited the expenditure of appropriated funds to distribute, disseminate, or publish presidential signing statements that contradict or are inconsistent with the legislative intent of the Congress in enacting the laws; and (2) bars consideration of

any signing statement by any court, administrative agency, or quasi-judicial body when construing or applying any law enacted by Congress. I am proud to say that the Chairman was one of the original co-sponsors of my bill.

I have reintroduced this legislation in substantially the same form in the 110th Congress, except that the new bill, H.R. 264, makes clear that the limitations of the law do not apply to presidential signing statements that are not inconsistent with the congressional intent. This is not a hard test to administer. Like the late Justice Potter Stewart said about obscenity: *"it may be hard to define, but you know it when you see it!"*

As an aside Mr. Chairman, might I say this to those who would question whether the Congress has the power to ban the use of appropriated funds to publish or distribute signing statements: regardless of whether it is wise to do so, if *no one seriously can question Congress' constitutional authority to terminate the Executive's use of appropriated funds to wage military operations, a fortiori, Congress has the constitutional authority to withhold from the president funds needed to distribute a signing statement that undermines the separation of powers!*

Let me state clearly and for the record my concern with the abuse and misuse of signing statements.

Presidential signing statements seek to alter Congress' primacy in the legislative process by giving a President's intention in signing the bill equal or greater standing to Congress' intention in enacting it. This would be a radical, indeed revolutionary, change to our system of separated powers and checks and balances.

Bill signing statements eliminate the need for a President ever to exercise the veto since he or she could just reinterpret the bill he signs so as to make it unobjectionable to him. Such actions deprive Congress of the chance to consider the president's objections, override his veto, and in the process make it clear that the president's position is rejected by an overwhelming majority of the people's representatives. Since few presidents wish to suffer a humiliation so complete and public they have strong incentive to work closely with the Congress and are amenable to negotiation and compromise. This is precisely the type of competitive cooperation the Constitution contemplates and which bill signing statements threaten!

Although presidents have used signing statements since the Monroe Administration, they really came to prominence during the administration of Ronald Reagan, who issued 276 signing statements, 71 of which (26%) questioned the constitutionality of a statutory provision. *The Reagan Administration's goal, as articulated by then-Office of Legal Counsel lawyer, now Associate Justice Samuel Alito, was to establish the signing statement as part of a statute's legislative history which courts would use in interpretation.* This met with limited success because while the Court referenced signing statements in two major cases, there is no indication that it accorded them any weight.

President George H.W. Bush issued 214 signing statements during his single 4-year term raising 146 constitutional objections. President Bill Clinton issued 391 but raised only 105 constitutional objections. Thus, out of a total of 881 signing statements, 322 constitutional objections were raised to the bills signed by Presidents Reagan, the first Bush, and Clinton during the twenty (20) year span from 1981–2001.

The record of the present Administration is dramatically different and confirms that such power has been more aggressively used and to an historically unprecedented degree. In less than six years, the current occupant of the White House issued more than 125 signing statements, *raising more than 800 constitutional objections by himself.* As the ABA Task Force put it:

From the inception of the Republic until 2000, Presidents produced signing statements containing fewer than 600 challenges to the bills they signed. According to the most recent update, in his one and a half terms so far, President George W. Bush (Bush II) has produced more than 800.

Mr. Chairman, according to Professor Christopher Kelley, an expert on presidential signing statements, as of January 12, 2007, the Executive has issued 150 signing statements challenging 1,149 provisions of law.

Not coincidentally, the Administration's signing statements have challenged the constitutionality of extremely high-profile laws such as the reporting provisions under the USA PATRIOT Act of 2005, and the McCain Amendment prohibiting torture. The president's statements have essentially asserted that the Executive does not believe that he is bound by key provisions of the legislation. They seek to further a broad view of executive power and the Administration's view of the "unitary executive," pursuant to which all the powers lodged in the Executive and administrative agencies by Congress is somehow automatically and constitutionally vested in the President himself.

In general, the Administration's signing statements do not contain specific refusals to enforce provisions or analysis of specific legal objections, but instead are broad and conclusory assertions that the president will enforce a particular law or provision consistent with his constitutional authority, making their true intentions and scope unclear and rendering them difficult to challenge.

What makes the Administration's use of presidential signing statements doubly problematic is his demonstrated and documented reluctance to raise his constitutional objections in a veto message to Congress, as contemplated by the Constitution. Indeed, the President has vetoed few bills (one was on the embryonic stem cell), notwithstanding the more than 1,000 constitutional objections he has raised during this same period of time.

It seems obvious to intelligent observers that the Administration is trying to game the system and frustrate the system of checks and balances so carefully crafted by the Framers. Rather than risk a showdown with the Congress over some claimed constitutional right he thinks he possesses but cannot articulate or defend in the light of day, the Administration simply signs the law as if he accepts its constitutional validity and then summarily issues a signing statement saying the Administration will comply with the law only to the extent it feels legally bound to do so, which of course, it doesn't.

This sort of shenanigan would embarrass and anger the Founding Fathers. Embarrass them because the action is cowardly, which was hardly to be expected of the Chief Executive of the United States. It would anger them because it makes a mockery of the system of checks and balances they so carefully crafted.

So thank you again, Mr. Chairman, for convening this timely and important hearing. I am looking forward to hearing from the witnesses and considering their responses to the committee's questions.

Mr. CONYERS. The Chair recognizes the distinguished gentleman from Arizona, Trent Franks, who is the Ranking Member on the Constitution Committee.

Mr. FRANKS. Well, thank you, Mr. Chairman.

Mr. Chairman, the title of this hearing is "Executive Power and Its Constitutional Limitations." And I want to take the Chairman at his word this morning that this hearing is not about impeachment, and therefore I hope we can expect that none of the witnesses will even mention the word "impeachment." But perhaps a more appropriate subject for our hearing today would be the congressional dereliction of its constitutional duty to protect the American people. Mr. Chairman, I say that based on this Committee's abysmal record on furthering legislation that would actually make the American people safer from terrorist attacks.

I am the Ranking Member on the Constitution, Civil Rights and Civil Liberties Subcommittee. And during this Congress, the Democratic majority of that Subcommittee has held no less than 11 hearings on the subject of providing more rights to known terrorists. Those hearings have included six hearings designed to impugn the integrity of public servants who have done nothing other than to work tirelessly within the limits of the Constitution to defend this country against murdering terrorists who plan day and night to kill as many Americans as possible.

Those hearings also included one designed to grant unprecedented litigation rights to terrorists so that they can use our lawyers and our own Federal courts to sue the very people who they try to kill and who are trying to bring them to justice.

And those hearings have also included one to provide greater restrictions to the Government's ability to seek business records in terrorist investigations, restrictions that would provide terrorists even greater rights than domestic criminals regarding business records that the Supreme Court has held are subject to absolutely no protections under the fourth amendment.

Amidst all of this, Mr. Chairman, the Subcommittee on the Constitution has not held one single hearing designed to make it easier for the Government to track down, detain and bring our terrorist enemies to justice.

Mr. Chairman, the coincidence of jihadist terrorism and nuclear proliferation I believe is one of the most dangerous circumstances facing the human family today. Osama bin Laden said, quote, "It is our religious duty to gain nuclear weapons." And every day Iran continues to enrich uranium to build a nuclear weapon. Terrorists bide their time.

Mr. Chairman, there may well be a day when we would all wish we could revisit this day again and when we could try to reorder our priorities and perhaps better appreciate a President who was willing to subordinate his popularity with the American people in order to protect them.

And, Mr. Chairman, I know that the full Committee does not address itself to any of these subjects today. Instead, it conducts a do-over hearing that amuses our terrorist friends greatly and that would make Alice in Wonderland roll her eyes.

And I yield back, Mr. Chair.

Mr. CONYERS. The Chair recognizes the gentleman from Tennessee, Steve Cohen, who serves with distinction on the Administrative and Commercial Law Subcommittee, as well as the Intellectual Property Committee.

Mr. COHEN. Thank you, Mr. Chairman.

Thank God we are not in Kansas any longer. I am very proud to be a Member of this Committee and appreciate your having these hearings on the executive powers.

I have only served here in this Congress now for a mere 19 months, but I have served 29 years as a legislator, both as a county commissioner and a State Senator. There were four Governors who I served as a State Senator at the time and four Governors I worked with. And I have great pride in the legislative branch of Government and the duty to be a check and balance on abuses of the executive. And I think that is what this hearing is about.

What I have seen in my 19 months with hearings here is a contemptuous conduct by this Administration toward this Congress and toward the whole idea of checks and balances. The idea that anybody can restrain this Administration is beyond them.

Last August I worked with one of the Members of the second panel, Mr. Fein, and we were working on impeachment articles for the former Attorney General of the United States, Alberto Gonzalez. Before we could bring those articles, General Gonzalez chose the wiser course, a little late, but he chose to resign.

Ms. Monica Goodling testified, but only after she was granted immunity. One does not seek immunity, generally, unless there has been some criminal conduct. The Attorney General's Office is part of the executive. Apparently there were, at least in Ms. Goodling's eyes, criminal conduct that was carried on by the executive, an agency of this particular Administration, that could have been uncovered by questioning by this Committee. That alone makes these hearings relevant.

But the fact is, these hearings will restore the faith of the American people and the idea that the executive cannot run roughshod

over the legislative process and that this Congress is standing up after 6 years of one-party rule and exercising its proper role of check and balance.

With that, I yield back the remainder of my time, Mr. Chairman, and proudly look forward to these hearings.

Mr. CONYERS. The Chair recognizes the gentleman from Georgia, Hank Johnson, a lawyer, magistrate and one who serves with great distinction on the Crime Committee, as well as the Intellectual Property Committee.

Mr. JOHNSON. Thank you, Mr. Chairman.

As a Member of the House Judiciary Committee, an attorney, and former magistrate judge, I understand the high standards that we must hold our public officials to. Every elected official, from dog catcher to the President, has one boss, and that is the American people. And once that bond is broken, once Administration officials feel they are no longer accountable to the American people, then action must be taken.

As the American people count down the final 6 months of this now infamous Bush administration, the prevailing political opinion has been that impeachment should be taken off the table. With only 6 months left, what would be the point, people ask? They argue that the American people would view impeachment as being overzealous partisanship which would harm our prospects for electing a Democratic President and adding to the Democratic Party's majority in November.

But I ask, would impeachment be a vehicle to restore life and vitality to the delicate system of checks and balances, which is the hallmark of our Constitution and which this Administration has shattered, aided and abetted by the do-nothing Republican-controlled rubber-stamp Congress which failed to exercise its constitutional responsibility to oversee the operations of the executive branch of our Government?

If lying about consensual sexual activity fits the bill for impeachment, then certainly lying to the American people about the reason for invading Iraq, a sovereign nation, which invasion resulted in the deaths of countless Iraqi citizens and 4,127 American service men and women, along with the maiming of over 30,000 Americans, certainly that qualifies as an impeachable offense.

There are other activities: warrantless wiretapping of Americans; torturing and kidnapping and detaining numerous prisoners, foreign enemy combatants, prisoners, whatever they could be classified as. The fact that we have become a severely surveilled population now, with the abuses of the PATRIOT Act, all done under the cloak of Government secrecy, political spying, the attacks on academic freedom, the politicization of the Justice Department, selective prosecutions—so many areas fertile for inquiry by this Congress.

And I am proud to have been a Member of the Judiciary Committee because this one has exercised vigorously its constitutional responsibility to oversee the operations of the executive branch.

And so while, Mr. Chairman, today's hearing is not an impeachment hearing, I fear that in the event that the current Administration continues with its secret actions, with motives and purposes that are not known or not revealed, if this Administration, during

the last 6 months, decides to attack the sovereign nation of Iran, then Americans will look back and think and rethink whether or not it would have been worth pursuing impeachment at this time to deter any further misdoing by this Administration.

And I will yield back.

Mr. CONYERS. I am inclined to remind everyone in the hearing room, there are guests today, and because of the importance of respecting our proceedings, please refrain from any actions of support or opposition to or for or against the views that are being expressed by the Members and the witnesses that will soon follow.

Tammy Baldwin is a distinguished Member of the Committee. She serves on the Crime Committee, and I recognize the gentlelady from Wisconsin.

Ms. BALDWIN. Thank you, Chairman Conyers. I ask unanimous consent to submit my full statement for the record.

Mr. CONYERS. Without objection, so ordered.

Ms. BALDWIN. On January 20, 2009, the next President and Vice President of the United States will stand before the American people and take an oath of office, swearing to preserve, protect and defend the Constitution of the United States. This commitment and obligation is so fundamental to our democracy that our Founders proscribed that oath in our Constitution. They also provided for the removal of the President and Vice President for, among other things, high crimes and misdemeanors.

Presidents and Vice Presidents do not take that oath in a vacuum. They are informed by the actions and inactions of past Presidents and Congresses, who establish these precedents for the future. What this Congress does or chooses not to do in furthering the investigation of the serious allegations against this Administration and if just cause is found to hold them accountable will impact the conduct of future Presidents perhaps for generations.

Mr. Chairman, there are those who would say that holding this hearing, examining whether or not the President and Vice President broke the law, is frivolous. I not only reject this, I believe there is no task more important for this Congress than to seriously consider whether our Nation's leaders have violated their oath of office. The American public expects no less. It is, after all, their Constitution. No President or Congress has the authority to override that document whereby We the People conferred upon the branches of government limited and defined power and provided for meaningful checks and balances.

Over the past several years, serious questions have been raised about the conduct of high-ranking Administration officials in relation to some of the most basic elements of our democracy: respect for the rule of law, the principle of checks and balances, and the fundamental freedoms enshrined in the Bill of Rights. In other words, the American people are in doubt as to whether Administration officials have fulfilled their oaths of office to preserve, protect, and defend our Constitution. And their concerns are not insignificant.

Americans want to know whether our Nation's highest-ranking officials broke the law to justify the invasion of Iraq. Many in our Nation and around the world wonder whether, today, the Bush White House is planning to illegally attack Iran. They wonder, too,

whether their private conversations are being listened to by government officials unconcerned about restraints placed upon them by the Constitution; whether our Nation is holding individuals in secret prisons, denying them even the right to appear before a judge or to be represented by an attorney, or to confront their accusers. They wonder who authorized torture and rendition. They wonder whether this Administration will forever change what it means to be an American.

Yet our efforts on behalf of the American people to hold the White House accountable for numerous credible allegations of abuse were blocked at each step. The list of congressional subpoenas with which Administration officials refuse to comply is long. Most recently, Karl Rove, the President's senior adviser, defied congressional subpoena to testify on allegations of politicization at the Department of Justice. This Administration has soundly rebuffed nearly every attempt to investigate and made true accountability impossible.

As we know, the Framers of our Constitution called for impeachment only in the case of high crimes and misdemeanors. The standard is purposely set high because we should not impeach for personal or political gain, only to uphold and safeguard our democracy. Sadly, in my judgment, at least two high-ranking Administration officials have met that standard. Although the call to impeach is one that I take neither easily nor lightly, I now firmly believe that impeachment hearings are the appropriate and necessary next step.

I yield back the remainder of my time, Mr. Chairman.
[The prepared statement of Ms. Baldwin follows:]

PREPARED STATEMENT OF THE HONORABLE TAMMY BALDWIN, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF WISCONSIN

**Opening Statement
Judiciary Committee Hearing on Executive Power
and Its Constitutional Limitations
Congresswoman Tammy Baldwin
July 25, 2008**

Thank you, Chairman Conyers.

On January 20, 2009, the next president and vice president of the United States will stand before the American people and take an oath of office, swearing to "...preserve, protect and defend the Constitution of the United States." This commitment and obligation is so fundamental to our democracy that our nation's founders proscribed that oath in our Constitution. They also provided for the removal of the president and vice president for, among other things, "high crimes and misdemeanors."

Presidents and vice presidents do not take that oath in a vacuum. They are informed by the actions or inactions of past presidents and congresses, who establish precedents for the future.

Recently, journalist John Nichols, a constituent of mine, laid out an appropriate metaphor to illustrate this principle. "Let's say that—when George Washington chopped down the cherry tree that he used the wood to make a little box. And in that box the president puts his powers. We've taken things out. We've put things in over the years. On January 20th, 2009... this administration will hand off a toolbox with more powers than any president has ever had, more power than the founders could have imagined....[W]ho ever gets it, one of the things we know about power is that people don't give away the tools. They don't give them up. The only way that we take tools out of that box is if we sanction....now and say the next president cannot govern as these men have."

What this Congress does, or chooses not to do in furthering the investigation of the serious allegations against this administration – and if just cause is found, to hold them accountable – will impact the conduct of future presidents, perhaps for generations.

Mr. Chairman, there are those who would say that holding this hearing – examining whether or not the president and vice president broke the law – is frivolous. I not only reject this, I believe there is no task more important for this Congress than to seriously consider whether our nation's leaders have violated their oath of office. The American public expects no less. It is, after all, their Constitution. No president or congress has the authority to override that document, whereby "We the People" conferred upon the branches of government limited and defined power, and provided for meaningful checks and balances.

Over the past several years, serious questions have been raised about the conduct of high ranking administration officials in relation to some of the most basic elements of our democracy: respect for the rule of law, the principle of checks and balances, and the fundamental freedoms enshrined in the Bill of Rights. In other words, the American people are in doubt as to whether administration officials have fulfilled their oaths of office to preserve, protect, and defend our Constitution.

And their concerns are not insignificant. Americans want to know whether our nation's highest ranking officials broke the law to justify the invasion of Iraq. Many in our nation and around the world wonder whether today the Bush White House is planning to illegally attack Iran. They wonder, too, whether their private conversations are being listened to by government officials unconcerned about the restraints placed upon them by the Constitution, whether our nation is holding individuals in secret prisons denying them even the right to appear before a judge, to be represented by an attorney, or to confront their accusers. They wonder whether this Administration will forever change what it means to be an American.

As Members of Congress, we, too, have Constitutional obligations. It was my hope that this session, Congress could begin to repair the damage that has been done to our democracy, our Constitution, and our standing in the world. Our nation's founders proscribed a system of checks and balances, providing for Congressional oversight as a fundamental part of ensuring co-equal branches of government. I believe this gives us no choice but to demand executive branch accountability in any and all forms possible.

I spent much of last year believing that impeachment could be averted if Congress – and particularly this Committee – exercised this Constitutional right to investigate this Administration's misdeeds, address their tragic consequences, and right the wrongs we uncovered. Mr. Chairman, under your leadership, we did hold a series of hearings and opened investigations on topics such as the U.S. Attorney firings, the war in Iraq, the Valerie Plame scandal, and other important subjects of Executive Branch accountability.

Yet our efforts on behalf of the American people to hold the White House accountable for the numerous, credible allegations of abuse were blocked at each step. The list of Congressional subpoenas that administration officials refused to comply with is long. Most recently, Karl Rove, the President's senior advisor, defied a Congressional subpoena to testify on allegations of politicization at the Department of Justice. This Administration has soundly rebuffed nearly every attempt to investigate and made true accountability impossible.

Accordingly, the American people have been forced to sit by while credible allegations of abuse of power mount:

- We have seen this Administration fabricate the threat of Iraqi weapons of mass destruction and allege, despite all evidence to the contrary, a relationship between Iraq and al Qaeda. These lies dragged our country into a preemptive and unjustified war that has taken the lives of more than 4,000 U.S. troops, injured 30,000 more, and will cost our nation more than a trillion dollars.
- We watched as this Administration again undermined national security by manipulating and exaggerating evidence of Iran's nuclear weapons capabilities and openly threatened aggression against Iran, despite no evidence that Iran has the intention or capability of attacking the U.S.
- We have looked on in horror as the Administration suspended habeas corpus by claiming the power to declare any person an "enemy combatant" – ignoring the Geneva Convention protections that the U.S. helped create.
- We have seen this Administration endorse torture and rendition of prisoners in violation of international law and stated American policy and values, and then destroy the videotaped evidence of such torture.
- We have seen this Administration spy on Americans without a court order in violation of the Fourth Amendment.
- We watched as the Administration ordered its U.S. Attorneys to pursue politically-motivated prosecutions in violation of the law and then oversaw the firing of eight U.S. Attorneys, while allowing others to retain their jobs because of partisan political considerations.
- We watched as Administration officials outed Valerie Plame Wilson as a covert agent of the CIA and then intentionally obstructed justice by disseminating false information through the White House press office.

As we know, the framers of our Constitution called for impeachment only in the case of high crimes and misdemeanors. The standard is purposely set high because we should not impeach for personal or political gain – only to uphold and safeguard our democracy. Sadly, in my judgment, at least two high ranking administration officials have met that standard. Although the call to impeach is one I take neither easily nor lightly, I now firmly believe that impeachment hearings are the appropriate and necessary next step.

Mr. CONYERS. Keith Ellison is not only a former State legislator from Minnesota, but he has been a trial lawyer for over 15 years and serves with distinction on the Immigration Committee and the Constitution Committee of Judiciary.

Mr. ELLISON. Mr. Chairman, thank you for these hearings.

I appreciate this opportunity very much. I have been waiting for it for quite a long time. Thank you very much.

Let me just be very direct and to the point, and I will submit my full statement for the record. It is important to get the facts on the record, to get people under oath, and to dig up the information that we need to form the basis of a decision as to how we should go forward. That alone is an important reason for these proceedings and for these hearings. The due process of getting the facts out on the table are critical. You simply can't jump to an outcome or a result. And so these hearings are critical and I think important simply because of the fact-gathering process that they require.

Also, second point, powers unused are lost. And our Constitution contemplated a three-part system of government, in which each one would hold the other accountable. The Constitution does not contemplate a branch of government acquiescing or deferring to another. If that happens, our constitutional system breaks down, and it does not work. We could end up with an imperial presidency, which is something the Framers never contemplated.

For those reasons, whether or not we are in the Democratic or Republican administration, it is critical for Congress as an institution to hang onto its powers. And yet, the Constitution doesn't give Congress an unlimited number of ways to hold the executive accountable. We all know about the power of the purse. That one works. We know that. We also know that there are other things we can do. We can try to wall off money restrictively. We can pass limited resolutions. But at the of the day, the most powerful tool for reining in the executive is that of impeachment. That is how you get the executive to pay attention and to balance the delicate constitutional framework. The system doesn't work if one branch acquiesces to another.

I am so happy to be here. My colleagues have laid out ample basis for inquiry: Iraq, signing statements, the denial of basic human rights, a surveillance society, many other factors. And I know we will have a good and fruitful hearing on those matters.

Thank you. I yield back.

Mr. CONYERS. Thank you. The Members of Congress that have asked to come before the Committee today are, of course, the gentleman from North Carolina, Mr. Jones; the gentleman from North Carolina, Brad Miller; the gentleman from New York, Maurice Hinchey; and the gentleman from Illinois—Ohio, Dennis Kucinich.

Dennis Kucinich chairs the Domestic Policy Subcommittee of Oversight and serves also on the Education and Labor Committee. He is a former mayor of the City of Cleveland and is a tireless advocate for peace and justice.

We welcome him here today.

**TESTIMONY OF THE HONORABLE DENNIS J. KUCINICH, A
REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO**

Mr. KUCINICH. May I proceed, Mr. Chairman?

I want to thank the Chair for this opportunity to testify.

And I want to recognize my colleagues on both sides of the aisle, Ranking Member Smith, and my colleagues from the House, who I work with, who are my friends, who I respect their integrity and their honor.

And I think it is important that we proceed among ourselves in that way so that we can be of service to our Nation in the highest manner.

Our country has been at war in Iraq, and has occupied the streets and villages of Iraq for 5 years, 4 months, and 6 days. The war has caused the deaths of 4,127 American soldiers and the deaths of as many as 1 million innocent Iraqis. The war will cost the American people upwards of \$3 trillion and is the main contributing factor to the destruction of our domestic economy.

Mr. Chairman, I would ask unanimous consent to enter S.J. Res. 45 and H.J. Res. 114 into the record.

Mr. CONYERS. Without objection, so ordered.

[See Appendix, pages 240 and 245.]

Mr. KUCINICH. The primary justifications for going to war, outlined in the legislation which the White House sent to Congress in October of 2002, have been determined conclusively to be untrue.

Iraq was not continuing to threaten the national security interests of the United States.

Iraq was not continuing to possess and develop a significant chemical and biological weapons capability.

Iraq was not actively seeking a nuclear weapons capability.

Iraq did not have the willingness to attack the United States.

Iraq had not demonstrated capability and willingness to use weapons of mass destruction.

Iraq could not launch a surprise attack against the United States or its Armed Forces.

Therefore, there was not an extreme magnitude of harm that would result in the United States—that would result to the United States and its citizens from such an attack. The aforementioned did not justify the use of force by the United States to defend itself.

Iraq had no connection with the attacks of 9/11 or with al-Qaeda's role in 9/11.

Iraq possessed no weapons of mass destruction to transfer to anyone.

Iraq had no weapons of mass destruction and, therefore, had no capability of launching a surprise attack against the United States or its Armed Forces, and no capability to provide them to international terrorists who would do so.

However, many Members of Congress relied on these representations from the White House to inform their decision to support the legislation that authorized the use of force against Iraq. We all know present and former colleagues who have said that if they knew then what they know now, they would not have voted to permit an attack upon Iraq.

The war was totally unnecessary, unprovoked, and unjustified. The question for Congress is this: What responsibility does the President and members of his Administration have for that unnecessary, unprovoked, and unjustified war? The Rules of the House prevent me or any witness from utilizing familiar terms. But we

can put two and two together in our minds. We can draw inferences about culpability.

Mr. Chairman, I ask unanimous consent to enter H. Res. 333, H. Res. 1258, and H. Res. 1345 into the record.

Mr. CONYERS. Without objection, so ordered.

[See Appendix, pages 255, 273 and 440.]

Mr. KUCINICH. I request that each Member read the three bills that I have authored, bills which are now awaiting consideration by the Judiciary Committee. I am confident that the reader will reach the same conclusions that I have about culpability.

What then should we do about it?

The decision before us is whether to honor our oath as Members of Congress to support and defend the Constitution that has been trampled time and again over the last 7 years.

The decision before us is whether to stand up for the checks and balances designed by our Founding Fathers to prevent excessive power grabs by either the judicial, legislative, or executive branch of government.

The decision before us is whether to restore faith in government, in justice, and in the rule of law.

The decision before us is whether Congress will endorse with its silence the methods used to take us into the Iraq war.

The decision before us is whether to demand accountability for one of the gravest injustices imaginable.

The decision before us is whether Congress will stand up to tell future Presidents that America has seen the last of these injustices, not the first.

I believe the choice is clear. I ask this Committee to think and then to act now in order to enable this Congress to right a very great wrong and to hold accountable those who misled this Nation.

I thank you.

[The prepared statement of Mr. Kucinich follows:]

PREPARED STATEMENT OF THE HONORABLE DENNIS J. KUCINICH, A REPRESENTATIVE
IN CONGRESS FROM THE STATE OF OHIO

Our country has been at war in Iraq, and has occupied the streets and villages of Iraq for five years, four months, and 6 days. The war has caused the deaths of 4,127 American soldiers and the deaths of as many as one million innocent Iraqis. The war will cost the American people upwards of \$3 trillion and is the main contributing factor to the destruction of our domestic economy.

We are borrowing money at high rates of interest to fight an illegal war for oil, so that the oil companies can make record profits while charging our constituents \$5 a gallon for gas. Food prices are increasing, the temperature of the planet is increasing, our dependence on fossil fuel is increasing, and poverty is increasing. How in the world could this have happened to our country?

Mr. Chairman, I would ask unanimous consent to enter S.J. Res. 45 into the record. The primary justifications for going to war, outlined in the legislation which the White House sent to Congress in October of 2002, have been determined conclusively to be untrue:

- Iraq did not pose “a continuing threat to national security”
- Iraq was not “continuing to possess and develop a significant chemical and biological weapons capability . . .”
- Iraq was not “actively seeking a nuclear weapons capability”
- Iraq was not “supporting and harboring terrorist organizations”
- Iraq had not “demonstrated its willingness to attack, the United States”
- Members of Al Qaeda were not “known to be in Iraq”

- Iraq had not “demonstrated capability and willingness to use weapons of mass destruction . . .”
- Iraq could not “launch a surprise attack against the United States or its Armed Forces”
- Therefore there was not an “extreme magnitude of harm that would result to the United States and its citizens from such an attack”
- The aforementioned did not “justify action by the United States to defend itself”
- Iraq had no “ongoing support for international terrorists”
- Iraq had not demonstrated “development of weapons of mass destruction.”

However, many Members of Congress relied on these representations from the White House to inform their decision to support the legislation that authorized the use of force against Iraq. We all know present and former colleagues who have said that if they knew then what they know now, they would not have voted to permit an attack upon Iraq.

The war was totally unnecessary, unprovoked and unjustified. The question for Congress is this: what responsibility do the President and members of his Administration have for that unnecessary, unprovoked and unjustified war? The rules of the House prevent me or any witness from utilizing familiar terms. But we can put two and two together in our minds. We can draw inferences about culpability.

Mr. Chairman, I would ask unanimous consent to enter H. Res. 333, H. Res. 1258, and H. Res. 1345 into the record. I request that each Member read the three bills I have authored, bills which are now awaiting consideration by the Judiciary Committee. I am confident the reader will reach the same conclusions that I have about culpability.

What, then, should we do about it?

The decision before us is whether to honor our oath as Members of Congress to support and defend the Constitution that has been trampled time and again over the last seven years.

The decision before us is whether to stand up for the checks and balances designed by our founding fathers to prevent excessive power grabs by either the judicial, legislative or executive branch of government.

The decision before us is whether to restore faith in government, in justice, and in the rule of law.

The decision before us is whether Congress will endorse with its silence the methods used to take us into the Iraq war.

The decision before us is whether to demand accountability for one of the gravest injustices imaginable.

The decision before us is whether Congress will stand up to tell future Presidents that America has seen the last of these injustices, not the first.

I believe the choice is clear.

I ask this committee to think, and then to act, in order to enable this Congress to right a very great wrong and to hold accountable those who have misled this Nation.

Mr. CONYERS. Our next Member of Congress to testify is our distinguished colleague, Maurice Hinchey, who serves as a Member of both the Committee on Appropriations, on the Natural Resources Committee, and also serves on the bicameral Joint Economic Committee, and a leader in the Progressive Caucus. He has been a longstanding opponent of the war in Iraq, an outspoken advocate for environmental reforms and economic justice.

Welcome.

TESTIMONY OF THE HONORABLE MAURICE HINCHEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. HINCHEY. Mr. Chairman, I thank you very much.

This has been a very, extraordinarily interesting experience just sitting here listening to you and to the other Members of this House Judiciary Committee, which is one of the most significant Committees in this Congress, with one of the greatest elements of

responsibility, particularly with regard to doing the job which is of such great importance for all of us, which is to defend and protect the Constitution of the United States.

So I deeply appreciate what you have done here, Mr. Chairman, and all the Members of this Committee as well, in being here for this particular purpose, to focus attention on this particular issue.

We have a main responsibility, as I said, to protect and defend that Constitution and maintain the separation of powers to ensure that we do not have one aspect of this government which dominates all the rest of it and particularly we do not have a President who attempts to dominate all of the lawful activities of our Nation and completely dominate all the significant decisions that are made. And we have seen that so clearly in the context of this Administration.

But I think we have seen it also in the context of corruption and incompetence. And I think that this Administration has been dominated throughout by those two words, corruption and incompetence. And that needs to be addressed. We need to be sure that, in the future, we have a President who understands his obligations and responsibilities, and who lives up to those obligations and responsibilities, and who works responsibly with the other two branches of government.

Now I think, with regard to the situation in Iraq and this terrorist operation which has dominated so much of what this Administration has done, the proper kind of attention has to be directed to the situation from the very beginning. And if you look at that situation from the very beginning, one of the things that you see is that 2 months before the election of November 2000, there was a meeting with the President and the intelligence operation, the director of intelligence to inform him about one of the major problems that we had to confront as a Nation, which was the fact that Osama bin Laden and al-Qaeda was determined to attack the United States. That was a message which was delivered down in Crawford, Texas, in September of 2000.

Following that, there were more than 40 intelligence briefings delivered to the top levels of this Administration, from January 2001 through September 10 of 2001, including references, all of those, all of those briefings included references to al-Qaeda, references to bin Laden, and the fact that they were determined to engage in various forms of attack. The most prominent one of those PDBs, for example, was the one that was made public, which was delivered on August 6, which was so obvious, particularly in its headline, about those facts.

The warnings to the White House about Osama bin Laden were extended and consistent, and should have promoted actions to prevent the attack of September 11, but they did not. And why they did not is a major question that we need to be confronting, I believe, as a Congress, particularly here in the House of Representatives.

Another example of that is how Richard Clarke sent consistent warnings to the National Security Adviser, Condoleezza Rice, throughout that same period of time in 2001, providing information that should have been adhered to.

After the attack of September 11, we engaged in a direct attack of course on the Taliban and al-Qaeda in Afghanistan. And that attack, of course, was very successful. It disrupted the Taliban. It put in a new government in that country.

But also it did something else, which is extraordinarily interesting. That military invasion of Afghanistan failed to follow up on bin Laden and allowed him to escape up into the Tora Bora Mountains. And that escape was provided by, most directly, by the Secretary of Defense in his direction to pull our military forces back and not follow up on that attack. And I think that that was clear that the reason for that was that they did not want to capture bin Laden, because if we had captured him, if our military had captured him, it would have been much more difficult for them to attempt to justify an attack against another country which had nothing to do with the attack of September 11 but which they were attempting to manipulate the intelligence, and did so initially with a certain amount of success, manipulating intelligence to try to show that there was a direct connection between Iraq and the attack of September 11, which of course there was not.

And then they went on to say that there were weapons of mass destruction in Iraq, and that those weapons of mass destruction were threatening the safety and security of the United States and other countries, and we should act against that in the form of an invasion. And of course, the information that was given over and over again was that there was no clear evidence. And that information was given by United Nations inspectors, inspectors from the United States, and from the intelligence of the United States.

Nevertheless, they chose to ignore all of that. Then the one that got a substantial amount of attention was the warnings that the Administration ignored, which included a memo that the National Intelligence Council sent to the White House in January of 2003 that stated that the uranium claim which this Administration was making, that that uranium claim was baseless and should be laid to rest.

We remember how just prior to that vote in October of 2002, there were those kinds of statements about that uranium claim. And then, just prior to the invasion in March of 2003, 2 months prior to that, how numerous statements were being made by members of the Administration talking about the potential for nuclear invasion and saying things, for example, over and over again on a number of occasions, we do not want a smoking gun to be a mushroom cloud. All of that was designed to manipulate the decision, which was unfortunately made by this Congress, to vote to give the President the authority to engage in some kind of military activity, which he carried out, against Iraq.

All of those circumstances need to be examined very, very carefully. And they need to be examined because of the terrible damage that all of that has done to the present set of circumstances that we are confronting as a Nation, both militarily, internationally, and economically right here at home. And the danger that it offers and really opens the door for in the future for other Presidents to engage in similar kinds of activities, which would put this Nation once again not only in physical danger but in the danger of eliminating the basic provisions of the Constitution of the United States

and undermine the democratic principles of our country, which need to be sustained.

I think that the situation that we are confronting now is one of the most difficult that we have had in the history of our country. And the word impeachment has been mentioned over and over again by Members of the Judiciary Committee on a number of occasions and again this morning. And I think, frankly, that, based upon all of the things that this Administration has done, it is probably the most impeachable Administration in the history of America because of the ways in which it has clearly violated the law.

One of the most clear examples of that is the State of the Union address in January of 2003. And in that State of the Union address, the President knew that what he was stating about the nuclear weapons program had been told to him that was false. It was not true. There was no documentation backing it up. And at the last minute of course, he switched and tried to put the responsibility onto the British. But all of that, of course, was very, very untrue. And the circumstances that we are confronting, I think, have to be dealt with. And I think the responsibility of this Committee needs to focus on all of those elements, to examine them carefully, and to see the way in which this Administration has behaved, the dangerous set of issues that we need to confront as a result of that behavior, and to engage in actions that are going to try to ensure that the basic democratic principles of our country are not going to be undermined, that they are going to be protected and strengthened with regard to future Presidents and future Congresses.

And so I thank you, Mr. Chairman, for everything that was said today by the Members of this Committee and for the opportunity to be here with you.

Thank you very much.

[The prepared statement of Mr. Hinchey follows:]

PREPARED STATEMENT OF THE HONORABLE MAURICE HINCHEY, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF NEW YORK

I would like to extend my appreciation to my dear friend Chairman Conyers and Ranking Member Lamar Smith, and members of the Committee, for giving me this opportunity to participate in this very important hearing on "Executive Power and its Constitutional Limitations."

This is a very important hearing, and I am honored to be a part of it. The Members who do not sit on the House Judiciary Committee, including myself, were invited to this hearing today because of certain actions we have taken as Members of Congress to highlight the behavior of this administration. While our actions varied, our purpose for acting can be linked to one common dominator—we do not believe that anyone is above the laws of these United States. I have no doubt that under the current administration, administrative officials have intentionally gone outside the bounds of the law and should be held accountable.

I think this is the most impeachable administration in the history of our country. This administration has successfully put its own interests above the interests of the American people, which is why in August of 2007, I introduced two companion bills to Senator Feingold's censure resolutions in the House. Both bills, H.Res. 625 and H.Res. 626, outline a very comprehensive argument in favor of censuring several administrative officials.

H.Res.625 would censure administration officials because of their role in stating the case for invading Iraq. The resolution would also condemn administrative officials for failing to plan for the inevitable civil conflict and humanitarian strife in Iraq. Finally, the resolution would also reprimand the administration for overstretching the military with prolonged deployments that have damaged U.S. efforts to be prepared for other conflicts.

H. Res. 625 would condemn administration officials for launching the warrantless surveillance program and for instituting and following extreme policies on torture, the Geneva Conventions, and detainees at Guantanamo Bay. The resolution would also condemn the politically—motivated firings of U.S. Attorneys.

I was unwilling to sit idly by and watch these abuses take place. Especially after evidence in how the administration responded to individuals that posed a dissenting view or a threat to its policies came to light—two obvious examples of this being the disclosure of the identity of CIA Operative Valerie Plame and the treatment of certain federal prosecutors.

The Founding Fathers of this great country set up a system of Checks and Balances to make certain that the three branches of government did not abuse their power. They did not set up the system of Checks and Balances as an option but rather an obligation which is why I consider it to be imperative to offer my voice on behalf of so many others who could not speak out of fear. Someday we will all be judged by what we did, or worse, what we did not do when confronted with these abuses. Inaction is simply not an option. I will leave you with this final thought, President Theodore Roosevelt once said, “No man is above the law and no man is below it; nor do we ask any man’s permission when we ask him to obey it.” Administration officials past, present and future should be no exception.

Mr. CONYERS. Congressman Brad Miller is known for his work on the Financial Services Committee to protect homeowners from predatory lending practices. In addition, he is on the Foreign Affairs Committee, as well as the Science and Technology Committee, where he Chairs the Investigations and Oversight Committee.

We welcome you here this morning.

TESTIMONY OF THE HONORABLE BRAD MILLER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NORTH CAROLINA

Mr. MILLER. Chairman Conyers, Ranking Member Smith, Members of the Committee, thank you for the invitation to testify this morning.

Our constitutional system of checks and balances assumes a certain jostling between the President and Congress. But the Bush administration’s refusal to provide information to Congress and to the American people; the Bush administration’s insistence on acting in secret is more dangerous and more sinister than just an extravagantly ambitious claim to executive branch powers.

Control of information stifles dissent. It insulates an Administration from challenge, either by Congress or by critics. Control of information is incompatible with democracy. Informed criticism, as annoying as it frequently is to people with power, is the stuff of democracy.

Democracy dies behind closed doors. It is Congress’s duty to throw the doors open and keep them open in future Administrations, Democratic and Republican alike. A great American political scientist, Woodrow Wilson, said that it is the proper duty of Congress to look into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, to embody the wisdom and will of its constituents.

The many disputes between Congress and the President, and it is not just Miers and Bolton and Rove, every Committee has been stiff-armed by the Bush administration in our exercise of our oversight powers. Those disputes will not be resolved before the election in November or by the inauguration in January, but those disputes will not be moot next year. We must continue our effort to learn how the Bush administration has used the powers of government,

and we must restore the balance of powers between Congress and the President, regardless of who is President and regardless of which party is in the majority in Congress.

I have introduced one bill just last week to restore Congress's checks on Presidential power, especially the power to act in impregnable secrecy. And I expect to introduce another shortly.

Ms. Lofgren asked for practical suggestions on how to right the balance between the branches of government, how to restore the separation of powers and the checks and balances that the Founders of this Republic intended. And that has been my aim.

Now, the first bill, H.R. 6508—Chairman Conyers is a cosponsor; Mr. Nadler is as well, as well as Ms. Sánchez, and obviously, I would welcome additional supporters—would allow the House to ask a court to appoint a special prosecutor for a criminal contempt of Congress charge where the United States Attorney refuses to present the case to the grand jury. In recent history, Congress has enforced our authority to take evidence by referring contempt charges to the U.S. Attorney under a 1857 criminal statute. There is not a lot of wiggle room in the language of the statute. The House, the Senate may submit contempt charges to the U.S. Attorney, whose duty it shall be to bring the matter before the grand jury for its action.

Now, despite that unequivocal statutory requirement, when Congress referred contempt charges, criminal contempt charges, against Josh Bolton and Harriet Miers, Attorney General Mukasey refused to allow the U.S. Attorney to present the charges to the grand jury. He argued that criminal prosecution is exclusively an executive branch power, and Congress cannot compel the executive branch to bring a criminal prosecution regardless of what the statute said.

In a 1987 decision, the Supreme Court held that a trial court could appoint a private prosecutor to bring a contempt of court proceeding where the appropriate prosecuting authority denied the Court's request to prosecute. The Supreme Court held that a trial court's power to appoint a private prosecutor was based on the trial court's inherent power of self-protection.

If the judiciary were completely dependent on the executive branch to redress direct affronts to its authority, the Supreme Court said, it would be powerless to protect itself if that branch declined prosecution. Congress cannot depend entirely on the executive branch to redress direct affronts to Congress, to Congress's authority any more than the courts can, especially when the affront is by the executive branch itself.

Second, the U.S. Justice Department's Office of Legal Counsel is little known to the general public, but it exercises remarkable power. The Bush administration has fully realized the potential for the abuse of the OLC's power. The Bush administration has, instead of seeking disinterested legal opinions from the OLC, the Bush administration has demanded and gotten exactly the opinions from the OLC that it wanted. And the Bush administration has received those opinions and acted on those opinions in secret, placing the opinions beyond any challenge. Even when the OLC obligingly advised the Bush administration that the Bush administration could just ignore the requirements of statute, the Bush administra-

tion asserts no exigent circumstances, no practical necessity for that breathtaking claim of power by the OLC. That they can exercise in secret that legal power, it is simply a calculated expansion of Presidential power at the expense of Congress and the courts.

I am now working with Senator Feingold and with others on legislation to require the OLC to report opinions to Congress, especially where the OLC decides that the executive branch can just ignore statutory requirements.

James Madison wrote, the Founders of our Republic provided against the usurpation of power by providing each branch of government the necessary constitutional means and personal motives to resist encroachment of the others. Madison wrote that the constant aim is to divide and arrange the several branches in such a manner as that each may be a check on the other, that the private interests of every individual may be a sentinel of public rights.

The Bush administration's claim that the President alone decides, in its own unreviewable discretion, what to tell Congress and the American people is an encroachment that we must resist. And by jealously asserting our rights under the Constitution, we defend the public rights. Thank you.

[The prepared statement of Mr. Miller follows:]

PREPARED STATEMENT OF THE HONORABLE BRAD MILLER, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF NORTH CAROLINA

Thank you for the invitation to testify this morning.

Our constitutional system of checks and balances assumes a certain jostling between the President and Congress, but the Bush Administration's refusal to provide information to Congress or to the American people is more dangerous and more sinister than just an extravagantly ambitious claim to executive branch powers. Control of information stifles dissent and insulates an administration from challenge, either by Congress or by critics. Control of information is incompatible with democracy. Informed criticism, as annoying as it is for many in power, is the stuff of democracy.

Democracy dies behind closed doors. It is Congress' duty to throw the doors open and keep them open in future administrations, Democratic and Republican alike. A great American political scientist, Woodrow Wilson, said that it is "the proper duty" of Congress "to look into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents."

The many disputes between the Bush Administration and Congress will not be moot if not resolved before the election in November or the inauguration in January. Congress must continue the effort next year to learn how the Bush Administration used the powers of government. And we must restore the balance of powers between Congress and the President, regardless of who is president and which party is in the majority in Congress.

I have introduced one bill to restore Congress' checks on presidential power, especially the power to act in impregnable secrecy, and I expect to introduce another shortly.

The first bill, HR 6508, would allow the House to ask a court to appoint a special prosecutor for a criminal contempt of congress charge where the United States Attorney refuses to present the case to the grand jury. In recent history, Congress has enforced our authority to take evidence by referring contempt charges to the U.S. Attorney under an 1857 criminal statute. There's not a lot of wriggle room in the statute: the House or Senate may submit contempt charges to the U.S. Attorney, "whose duty it shall be to bring the matter before the grand jury for its action." Despite that unequivocal statutory requirement, when Congress referred criminal contempt charges against Josh Bolton and Harriet Miers, Attorney General Mukasey refused to allow the U.S. Attorney to present the charges to the grand jury. He argued that criminal prosecution is exclusively an executive branch power, and Congress cannot compel the executive branch to bring a criminal prosecution regardless of what the statute said.

In a 1987 decision, the Supreme Court held that a trial court could appoint a private prosecutor to bring a contempt of court proceeding where “the appropriate prosecuting authority” denied the court’s request to prosecute. The Supreme Court held that the trial court’s power to appoint a private prosecutor was based on the trial court’s “inherent power of self-protection.” “If the Judiciary were completely dependent on the Executive Branch to redress direct affronts to its authority,” the Supreme Court said, “it would be powerless to protect itself if that Branch declined prosecution.”

Congress cannot depend entirely on the executive branch to redress affronts to Congress’ authority any more than the courts can, especially where the affront is by the executive branch itself.

Second, the U.S. Justice Department’s Office of Legal Counsel is little known to the public, but exercises remarkable power. The Bush Administration has fully realized the potential for the abuse of the OLC’s power. Instead of seeking disinterested legal opinions, the Bush Administration has demanded and gotten exactly the opinions it wanted from the OLC. And the Bush Administration has received and acted on the OLC’s opinions in secret, placing the opinions beyond challenge, even when the OLC obligingly advised that the Bush Administration could simply ignore statutory requirements. The Bush Administration asserts no exigent circumstances, no practical necessity for the breathtaking claim that the OLC can secretly excuse the administration from legal requirements. It is simply a calculated expansion of presidential power at the expense of Congress and the courts.

I am now working with Senator Feingold on legislation to require the OLC to report opinions to Congress, especially where the OLC decides that the executive branch can just ignore statutory requirements.

According to James Madison, the founders of our republic provided against the usurpation of power by providing each branch of government “the necessary constitutional means and personal motives to resist encroachments of the others.” Madison wrote that “the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel of the public rights.”

The Bush Administration’s claim that the president alone decides—in his own unreviewable discretion—what to tell Congress and the American people is an encroachment we must resist. And by jealously asserting our powers under the Constitution, we defend the public rights.

Mr. CONYERS. Walter Jones, long-serving Member of the House of Representatives from North Carolina, who serves on the Armed Services Committee, the Financial Services Committee and has been known for working across the aisle to craft bipartisan legislation; the War Crimes Act under President Clinton, the Constitutional War Powers Resolution, which he introduced with our Judiciary Committee colleague William Delahunt only last year.

We are pleased that you could be with us today.

TESTIMONY OF THE HONORABLE WALTER JONES, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NORTH CAROLINA

Mr. JONES. Mr. Chairman, thank you very much.

And I want to thank you and this Committee for holding this hearing, for giving me an opportunity to speak on the issue of Presidential signing statements. This hearing today is about trust. It is about the American people, and can they trust their government?

Just as the American people have access to the text of bills that are signed into law, they should have easy and prompt access to the content of Presidential signing statements that could affect how those laws will be executed.

To enable a more complete public understanding and trust of our Nation’s laws, the Congress should also be able to call for the executive’s explanation and justification for a Presidential signing statement.

The history of Presidential signing statements dates back to the 19th century. President James Monroe issued the first signing statement in 1821. However, a September 17th, 2007, Congressional Research Service report noted that U.S. Presidents, and I quote, have increasingly employed the statements to assert constitutional and legal objections to congressional enactments. In doing so, Presidents sometimes communicate their intent to disregard certain provisions of bills they have signed into law.

According to the CRS, President Clinton issued 381 signing statements while in office; 70 of these statements raised legal and constitutional objections. President George W. Bush has issued at least 152 signing statements; 118 of these statements have contained over 800 constitutional challenges or objections.

According to the American Bar Association, and I quote, “from the inception of the Republic until the year 2000, Presidents have produced signing statements containing fewer than 600 challenges to bills they signed.”

That tells a great deal.

I continue, because future Presidents are likely to continue this practice, Congress should act now to pass legislation to ensure proper understanding and disclosure of these signing statements.

To address this issue, I have introduced H.R. 5993, the Presidential Signing Statement Act, which would, first, require the President to provide copies of signing statements to congressional leadership within 3 days of being issued; second, require signing statements to be published in the Federal Register; third, require executive staff to testify on the meaning and justification for Presidential signing statements at the request of the House or the Senate Judiciary Committee; and fourth and last, provide that no moneys may be used to implement any law accompanied by a signing statement if any provision of the act is violated.

This bill directly addresses the recommendation of the American Bar Association Task Force on Presidential Signing Statements.

Mr. Chairman, I would like to submit a copy of the ABA report for the record.

[The material referred to follows:]

This resolution does not represent the policy of the American Bar Association until it shall have been approved by the House of Delegates. Informational reports, comments and supporting data are not approved by the House in its voting and represent only the views of the submitting entity.

AMERICAN BAR ASSOCIATION
TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS
AND THE SEPARATION OF POWERS DOCTRINE

RECOMMENDATION

RESOLVED, That the American Bar Association opposes, as contrary to the rule of law and our constitutional system of separation of powers, the issuance of presidential signing statements that claim the authority or state the intention to disregard or decline to enforce all or part of a law the President has signed, or to interpret such a law in a manner inconsistent with the clear intent of Congress;

FURTHER RESOLVED, That the American Bar Association urges the President, if he believes that any provision of a bill pending before Congress would be unconstitutional if enacted, to communicate such concerns to Congress prior to passage;

FURTHER RESOLVED, That the American Bar Association urges the President to confine any signing statements to his views regarding the meaning, purpose and significance of bills presented by Congress, and if he believes that all or part of a bill is unconstitutional, to veto the bill in accordance with Article I, § 7 of the Constitution of the United States, which directs him to approve or disapprove each bill in its entirety;

FURTHER RESOLVED, That the American Bar Association urges Congress to enact legislation requiring the President promptly to submit to Congress an official copy of all signing statements he issues, and in any instance in which he claims the authority, or states the intention, to disregard or decline to enforce all or part of a law he has signed, or to interpret such a law in a manner inconsistent with the clear intent of Congress, to submit to Congress a report setting forth in full the reasons and legal basis for the statement; and further requiring that all such submissions be available in a publicly accessible database; and

FURTHER RESOLVED, That the American Bar Association urges Congress to enact legislation enabling the President, Congress, or other entities or individuals, to seek judicial review, to the extent constitutionally permissible, in any instance in which the President claims the authority, or states the intention, to disregard or decline to enforce all or part of a law he has signed, or interprets such a law in a manner inconsistent with the clear intent of Congress, and urges Congress and the President to support a judicial resolution of the President's claim or interpretation.

REPORT

*The preservation of liberty requires that
the three great departments of power
should be separate and distinct.*

– James Madison, Federalist Papers, No. 47.

I. INTRODUCTION

On April 30, 2006, Charlie Savage, a respected veteran reporter for the Boston Globe, wrote a lengthy article on the use of presidential “signing statements” in which he reported that “President Bush has quietly claimed the authority to disobey more than 750 laws enacted since he took office, asserting that he has the power to set aside any statute passed by Congress when it conflicts with his interpretation of the Constitution.”¹ Savage wrote:

Legal scholars say the scope and aggression of Bush's assertions that he can bypass laws represent a concerted effort to expand his power at the expense of Congress, upsetting the balance between the branches of government. The Constitution is clear in assigning to Congress the power to write the laws and to the president a duty “to take care that the laws be faithfully executed.” Bush, however, has repeatedly declared that he does not need to “execute” a law he believes is unconstitutional.

Id. The Savage articles created a major national controversy, with the use – and, as some charged, the abuse – of signing statements drawing both severe critics and staunch defenders, with dozens of newspaper editorials² and op-ed pieces published.

Senator Arlen Specter (R-PA), the Chairman of the Senate Judiciary Committee, charged that congressional legislation “doesn't amount to anything if the president can say, ‘My constitutional authority supersedes the statute.’ And I think we've got to lay down the gauntlet

¹ See Charlie Savage, *Bush Challenges Hundreds of Laws*, BOSTON GLOBE, April 30, 2006, at http://www.boston.com/news/nation/Washington/articles/2006/04/30/bush_challenges_hundreds_of_laws/.

² See, e.g., *Veto? Who Needs a Veto?*, Editorial, NEW YORK TIMES, May 5, 2006 at <http://www.nytimes.com/2006/05/05/opinion/05fri1.html?th&emc=th>; *A White House power grab*, Editorial, SAN FRANCISCO CHRONICLE, June 12, 2006, at <http://sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2006/06/12/EDGMSJB0EJ1.DTL>; *Signing statements an abuse of power*, Editorial, ASBURY PARK PRESS, June 6, 2006, at <http://www.app.com/apps/pbcs.dll/article?AID=/20060606/OPINION/606060313/1032>.

and challenge him on it”³ He denounced the President’s use of signing statements as “a very blatant encroachment” on Congress’s power to legislate.⁴

At a June 27, 2006 Senate Judiciary Committee hearing on “Presidential Signing Statements,”⁵ Senator Patrick Leahy (D-VT), the Ranking Member, stated:

We are at a pivotal moment in our Nation’s history, where Americans are faced with a President who makes sweeping claims for almost unchecked Executive power. One of the most troubling aspects of such claims is the President’s unprecedented use of signing statements. Historically, these statements have served as public announcements containing comments from the President, on the enactment of laws. But this Administration has taken what was otherwise a press release and transformed it into a proclamation stating which parts of the law the President will follow and which parts he will simply ignore.

Senator Leahy called the broad use of signing statements “a grave threat to our constitutional system of checks and balances.”⁶

In light of the importance of these issues, ABA President Michael S. Greco appointed an ABA Task Force on Presidential Signing Statements and the Separation of Powers Doctrine to “examine the changing role of presidential signing statements, in which U.S. presidents articulate their views of provisions in newly enacted laws, attaching statements to the new legislation before forwarding it to the Federal Register” and to “consider whether such statements conflict with express statutory language or congressional intent.”⁷

³ See Andy Sullivan, *Specter to grill officials on Bush ignoring laws*,” REUTERS, June 21, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/21/AR2006062101594.html>

⁴ See Charlie Savage, *Senators Renew Call for Hearings on Signing Statements*, BOSTON GLOBE, June 16, 2006, at http://www.boston.com/news/nation/washington/articles/2006/06/16/senators_renew_call_for_hearings_on_signing_statements/.

⁵ The statements of all witnesses at the Senate Judiciary Committee hearing on “Presidential Signing Statements,” including Task Force members Bruce Fein and Professor Charles Ogletree, can be accessed at: <http://judiciary.senate.gov/hearing.cfm?id=1969>.

⁶ See Statement of Senator Patrick Leahy, Ranking Member, Judiciary Committee Hearing on Presidential Signing Statements, June 27, 2006, at http://judiciary.senate.gov/member_statement.cfm?id=1969&wit_id=2629

⁷ See ABA News Release, “ABA to Examine Constitutional, Legal Issues of Presidential Signing Statements” at: <http://www.abanews.org/releases/news060506.html>

In appointing the Task Force, President Greco stated:

The issue to be addressed by this distinguished task force is of great consequence to our constitutional system of government and its delicate system of checks and balances and separation of powers. The task force will provide an independent, non-partisan and scholarly analysis of the utility of presidential signing statements and how they comport with the Constitution and enacted law.

President Greco took special care to ensure that the membership of the Task Force represented a variety of diverse views and backgrounds. The Task Force members are both conservative and liberal, Republican and Democrat, and have had substantial experience in government, the judiciary, and constitutional law.⁸

While the Task Force was operating under intense time pressures, it benefitted from the fact that the use of presidential signing statements has been the subject of a variety of scholarly books and articles.⁹ In addition, the American Presidency Project, a collaboration between John Woolley and Gerhard Peters at the University of California, Santa Barbara, contains the signing statements of all United States Presidents since 1929,¹⁰ and Joyce A. Green, a concerned and public spirited Oklahoma City lawyer, created an annotated website of all of the signing statements since 2001 in order to “provide free convenient access -- for the entire world -- to the text of George W. Bush's presidential signing statements.”¹¹

The members of the Task Force reviewed a large number of reference materials and discussed and debated the issues in more than a half dozen lengthy conference calls and hundreds of emails. Every word of each recommendation was carefully considered and parsed until there

⁸ The Task Force is chaired by **Neal R. Sonnett**, and includes **Mark D. Agrast**, **Hon. Mickey Edwards**, **Bruce Fein**, **Dean Harold Hongju Koh**, **Professor Charles Ogletree**, **Professor Stephen A. Saltzburg**, **Hon. William S. Sessions**, **Professor Kathleen Sullivan**, **Tom Susman**, and **Hon. Patricia M. Wald**. **Alan J. Rothstein** serves as a Special Advisor. A short biography of each appears in an Appendix to this Report.

⁹ See, e.g., PHILLIP J. COOPER, *BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION* (2002); Christopher S. Kelley, “A Comparative Look at the Constitutional Signing Statement: The Case of Bush and Clinton,” Paper presented at the 61st Annual Meeting of the Midwest Political Science Association (April 2003), at <http://mpsa.indiana.edu/conf2003papers/1031858822.pdf>; Philip J. Cooper, *George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements*, 35 *PRESIDENTIAL STUD.* Q. 515 (2005).

¹⁰ See <http://www.presidency.ucsb.edu/signingstatements.php?year=2006&Submit=DISPLAY>.

¹¹ See <http://www.coherentbabble.com/signingstatements/about.htm>

was unanimous consensus by the members. Among those unanimous recommendations, the Task Force voted to:

- oppose, as contrary to the rule of law and our constitutional system of separation of powers, a President's issuance of signing statements to claim the authority or state the intention to disregard or decline to enforce all or part of a law he has signed, or to interpret such a law in a manner inconsistent with the clear intent of Congress;
- urge the President, if he believes that any provision of a bill pending before Congress would be unconstitutional if enacted, to communicate such concerns to Congress prior to passage;
- urge the President to confine any signing statements to his views regarding the meaning, purpose, and significance of bills, and to use his veto power if he believes that all or part of a bill is unconstitutional;
- urge Congress to enact legislation requiring the President promptly to submit to Congress an official copy of all signing statements, and to report to Congress the reasons and legal basis for any instance in which he claims the authority, or states the intention, to disregard or decline to enforce all or part of a law he has signed, or to interpret such a law in a manner inconsistent with the clear intent of Congress, and to make all such submissions be available in a publicly accessible database.
- urge Congress to enact legislation enabling the President, Congress, or other entities or individuals, to seek judicial review of such signing statements to the extent constitutionally permissible, and urge Congress and the President to support a judicial resolution of the President's claim or interpretation.

Our recommendations are not intended to be, and should not be viewed as, an attack on the current President. His term will come to an end and he will be replaced by another President, who will, in turn, be succeeded by yet another.

To be sure, it was the number and nature of the current President's signing statements which generated the formation of this Task Force and compelled our recommendations. However, those recommendations are directed not just to the sitting President, but to all Chief Executives who will follow him, and they are intended to underscore the importance of the doctrine of separation of powers. They therefore represent a call to this President and to all his successors to fully respect the rule of law and our constitutional system of separation of powers.

II. PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE

According to Professor Neil Kinkopf, signing statements have historically served “a largely innocuous and ceremonial function” to explain the President’s reasons for signing a bill into law and to serve to “promote public awareness and discourse in much the same way as a veto message”¹² And Professor Christopher Kelley, In his 2003 doctoral dissertation on this issue, noted that:

... it is what the president does with the signing statement that makes this an area of interest to those studying presidential power. The president can use the signing statement to reward constituents, mobilize public opinion toward his preferred policies or against his political opponents, decline to defend or enforce sections of the bill he finds to be constitutionally objectionable, reward political constituents by making political declarations regarding the supposed constitutional veracity of a section of a bill, and even move a section of law closer to his preferred policy.¹³

According to Kinkopf, “there is nothing inherently wrong with or controversial about signing statements.” However, the controversy arises when “a signing statement is used not to extol the virtues of the bill being signed into law, but to simultaneously condemn a provision of the new law as unconstitutional and announce the President’s refusal to enforce the unconstitutional provision.”¹⁴

Since several recent studies have concluded that the Bush Administration has used signing statements to claim the authority or state the intention to disregard or decline to enforce all or part of a law he signed more than all of his predecessors combined,¹⁵ we believe that a short history of the use of such statements will provide background, context, and perspective to this report.

¹² Neil Kinkopf, *Signing Statements and the President's Authority to Refuse to Enforce the Law* 2 (June 15, 2006), at <http://www.acslaw.org/node/2965>.

¹³ Christopher Kelley, *The Unitary Executive and the Presidential Signing Statement* (2003) (unpublished Ph.D. dissertation, Miami University), at <http://www.ohiolink.edu/etd/send-pdf.cgi?miami1057716977>.

¹⁴ *Id.*

¹⁵ *Id.* at 3; Savage, *supra*, note 1.

A. A History of the Use of Signing Statements

1. The First Two Centuries

The Constitution says nothing about the President issuing any statement when he signs a bill presented to him. If he vetoes the bill, Article 1, §7 requires him to tell Congress what his objections are, so that Congress can reconsider the bill and accommodate him or repass it by a two-thirds vote of both Houses in which case it becomes law without his signature.

Nonetheless Presidents have issued statements elaborating on their views of the laws they sign since the time of President James Monroe who, a month after he signed a bill into law which mandated reduction in the size of the army and prescribed the method by which the President should select military officers, issued a statement that the President, not Congress, bore the constitutional responsibility for appointing military officers.¹⁶

In 1830, President Andrew Jackson signed an appropriations bill providing for a road from Detroit to Chicago he objected to, but insisted in his signing statement that the road involved was not to extend beyond Michigan. The House of Representatives vigorously objected to his limitation but in fact acceded to it.¹⁷

In 1840, President John Tyler issued a signing statement disagreeing quite respectfully with certain provisions in a bill dealing with apportionment of congressional districts. As spokesman for the House, John Quincy Adams wondered why such an “extraneous document” was issued at all and advised that the signing statement should “be regarded in no other light than a defacement of the public records and archives.”¹⁸

No signing statements announcing a President’s intent not to comply with a law were issued until 70 years after the Constitution was ratified. Although after the Jackson and Tyler contretemps, Presidents seemed to shy away from statements denouncing provisions in bills they signed, the practice of identifying their differences with the Congress continued throughout the 19th century.¹⁹ There is, additionally, at least one example of a 19th century signing statement by

¹⁶ Kelley, *supra* note 9, at 5.

¹⁷ *Id.* at 5-6.

¹⁸ *Id.* at 5.

¹⁹ *Id.* The practice was recognized by the Supreme Court in *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 454 (1899). But the characterization in the 1994 Office of Legal Counsel memorandum authorized by Walter Dellinger on Presidential Authority to Decline to Execute Unconstitutional Statutes (hereafter Dellinger Declination Memorandum), at <http://www.usdoj.gov/olc/nonexecut.htm> (pagination according to the printed version), of a

President Ulysses S. Grant that “interpreted” a bill in a way that would overcome the Presidential constitutional concern, a technique that would frequently be employed by later 20th century Presidents to mold legislation to fit their own constitutional and statutory preferences. An appropriation bill had prescribed the closing of certain consular and diplomatic offices. President Grant thought it “an invasion of the constitutional prerogatives and duty of the Executive” and said he would accordingly construe it as intending merely “to fix a time at which the compensation of certain diplomatic and consular officers shall cease and not to invade the constitutional rights of the Executive.”²⁰

This pattern continued basically into the first 80 years of the 20th century. President Theodore Roosevelt proclaimed his intention in 1909 to ignore a restriction on his power to establish volunteer commissions in a signing statement; President Woodrow Wilson advised in a signing statement that executing a particular provision would result in violation of 32 treaties which he refused to do; and in 1943 President Franklin Roosevelt vehemently lashed back at a rider in an appropriation bill which barred compensation to three government employees deemed “subversive” by the Congress. Roosevelt “place[d] on record my view that this provision is not only unwise and discriminatory, but unconstitutional” and was thus not binding on the Executive or Judicial branches. This signing statement was later cited by the Supreme Court in *United States v. Lovett*,²¹ where it held the law unconstitutional. Roosevelt indicated he would enforce the law but that when the employees sued, he would instruct the Attorney General to side with them and attack the statute, which he did. Congress had to appoint a special counsel to defend it, unsuccessfully.²²

“consistent and substantial executive practice” of Presidential noncompliance with provisions in signed bills has been challenged by some commentators. See William C. Banks, *Still the Imperial Presidency*, 2 JURIST BOOKS-ON-LAW BOOK REVIEWS, No. 3 (March 1999), reviewing CHRISTOPHER N. MAY, PRESIDENTIAL DEFLANCE OF “UNCONSTITUTIONAL” LAWS: REVIVING THE ROYAL PREROGATIVE (1998), at <http://jurist.law.pitt.edu/lawbooks/revmar99.htm#Banks>. An earlier 1993 Dellinger memorandum on the Legal Significance of Presidential Signing Statements (hereafter Dellinger Signing Memorandum), at <http://www.usdoj.gov/olc/signing.htm> (pagination according to the printed version), lists Presidents Jackson, Tyler, Lincoln and Johnson as issuing signing statements dealing with constitutional objections to bills they signed. These statements in the main noted the Presidents’ objections and urged Congress to address them (which it often did). But some, however, such as Jackson’s road limitation, were read by Congress as signifying an intent not to follow the law and, in Jackson’s case, labeled an “item veto.”

²⁰ Dellinger Signing Memorandum, at 5.

²¹ 238 U.S. 303 (1946).

²² Kelley, *supra* note 9, at 7-8.

President Roosevelt also employed the “constitutional avoidance” technique pioneered by President Grant of interpreting a controversial provision so as not to raise constitutional concerns. When he issued a signing statement for the Emergency Price Control Act of 1942, he objected to certain “protectionist measures for farmers,” but continued that “nothing contained therein . . . can be construed as a limitation on existing powers of government agencies such as the Commodity Credit Corporation to make sales of agricultural commodities in the normal conduct of their operations.” Either Congress should remove the provision or he would treat it as a nullity. Congress removed it.²³ President Truman followed suit in a signing statement regarding a provision in a 1951 appropriations act, saying: “I do not regard this provision as a directive, which would be unconstitutional, but instead as an authorization . . .”²⁴ And in signing the Portal to Portal Act, President Truman took the then unusual step of defining the term “compensable labor” in a way so as to benefit the interests of organized labor, an interpretation later accepted by the courts.²⁵

Presaging the formulaic signing statements of the current era refusing to follow laws mandating intelligence disclosures, President Dwight Eisenhower in 1959 signed the Mutual Security Act, but stated, “I have signed this bill on the express promise that the three amendments relating to disclosure are not intended to alter and cannot alter the Constitutional duty and power of the Executive with respect to the disclosure of information, documents and other materials. Indeed any other construction of these amendments would raise grave constitutional questions under the historic Separation of Powers Doctrine.”²⁶

President Nixon in turn objected to a 1971 military authorization bill which set a date for withdrawal of U.S. forces from Indochina as being “without binding force or effect.”²⁷ And prior to the Supreme Court’s 1983 decision in *INS v. Chadha*,²⁸ invalidating the legislative veto, Presidents Eisenhower, Nixon, Ford and Carter objected to variations of those vetoes in signing statements and said they would not abide by them. Presidents John F. Kennedy and Lyndon Johnson construed such legislative vetoes as “request[s] for information.”²⁹

²³ Kelley, *supra* note 9, at 7; Dellinger Signing Memorandum, Appendix, at 6.

²⁴ Dellinger Signing Memorandum, Appendix, at 6.

²⁵ Kelley, *supra* note 9, at 4.

²⁶ Dellinger Signing Memorandum, Appendix at 6.

²⁷ *Id.*

²⁸ 462 U.S. 919 (1983). In its opinion the Supreme Court noted that eleven Presidents had indicated in signing statements and otherwise that the legislative veto was unconstitutional.

²⁹ Dellinger Signing Memorandum, Appendix, at 6; Dellinger Declination Memorandum,

As a general matter, President Jimmy Carter made greater use than his predecessors of signing statements, refusing, as President Grant had done before him, to follow the mandate of Congress to close certain consular posts and indicating his intent to construe the provision as only “precatory.”³⁰ He also issued a statement accompanying his signing of a 1978 appropriations act which contained a provision forbidding use of funds to implement his amnesty program for Vietnam draft resisters; he maintained that the provision was a bill of attainder, denied due process and interfered with the President’s constitutional pardoning power. He then proceeded in defiance of the law to use funds to process reentry visas for the Vietnam resisters and when critics sued the government to enforce the law his administration successfully defended his actions on the ground that the challengers had no standing to sue.³¹

2. The Reagan, Bush I and Clinton Years

The Administration of President Ronald Reagan is credited by many commentators as a period in which the use of signing statements escalated both quantitatively and qualitatively. The first observation is only moderately accurate; the second is quite true. For the first time, signing statements were viewed as a strategic weapon in a campaign to influence the way legislation was interpreted by the courts and Executive agencies as well as their more traditional use to preserve Presidential prerogatives.³² President Reagan’s Attorney General Edwin Meese secured an agreement from West Publishing Company to include signing statements along with traditional legislative history in the United States Code Congressional and Administrative News for easy availability by courts and implementing officials.³³

Appendix, at 6.

³⁰ Dellinger Signing Memorandum, Appendix, at 6.

³¹ Kelley, *supra* note 9, at 3. Professor May contends that of the 101 statutory provisions challenged by Presidents through 1981, the President actually “disregarded” only 12; of those 12, seven occurred between 1974 and 1981. President Carter accounted for five of those. *Banks, supra*.

³² Now Supreme Court Justice Samuel Alito wrote a memorandum while in the Office of Legal Counsel in 1986 counseling some modest experimentation with signing statements construing “ambiguous” statutory terms but recommended avoiding interpretive conflicts with Congress where the meaning of the law was clear. *See* Samuel A. Alito, Jr., Using Presidential Signing Statement to Make Fuller Use of the President’s Constitutionally Assigned Role in the Process of Enacting Law (Feb. 5, 1986) (Office of Legal Counsel memorandum), at <http://www.archives.gov/news/samuel-alito/accession-060-89-269/Acc060-89-269-box6-SG-LSWG-AlitotoLSWG-Feb1986.pdf>

³³ Kelley, *supra* note 9, at 8-9.

President Reagan succeeded in having his signing statements cited in several Supreme Court cases which upheld his Presidential powers against challenges by the Comptroller General in *Bowsher v. Synar*,³⁴ involving deficit spending limits and in the final denouement of the legislative veto in the *Chadha* case.³⁵ In his statement accompanying the signing of the Competition in Contracting Act in 1984, he had refused to abide by the provision which allowed the Comptroller General to sequester money in the event of a challenge to a government contract. His nonenforcement was challenged by a losing bidder, and the courts found the Act constitutional. His continued refusal to obey the court order resulted in a judicial tongue lashing and Congressional threats to eliminate funding, whereupon he changed course.³⁶

Two of the most aggressive uses of the signing statement by President Reagan to control statutory implementation occurred in the Immigration Reform and Control Act of 1986 in which Congress legislated that a “brief, casual and imminent absence” of a deportable alien from the United States would not terminate the required “continuous physical presence” required for an alien’s eligibility for legalized status. President Reagan announced in the signing statement, however, that an alien would be required to apply to the INS before any such brief or casual absence, a requirement totally absent from the bill. He also reinterpreted the Safe Drinking Water Act so as not to make several of its provisions mandatory.³⁷

President George Herbert Walker Bush (“President Bush I”) overtook President Reagan in the number of signing statement challenges to provisions in laws presented to him—232 in his four years in office compared to 71 in the two-term Reagan Administration.³⁸ A third of President Bush I’s constitutional challenges were in the foreign policy field. An Office of Legal Counsel opinion prepared for the President listed 10 types of legislative encroachments on Presidential prerogatives and urged they be countered in signing statements.³⁹

³⁴ Kelley, *supra* note 9, at 8; *Bowsher v. Synar*, 478 U.S. 717, 719 n.1 (1986).

³⁵ *INS v. Chadha*, 462 U.S. 919 (1983) n.13. Though not involving a signing statement the Reagan push to influence legislative interpretation received a boost from the Supreme Court’s decision in *Chevron U.S.A. Inc. v. NRDC*, 462 U.S. 919 (1983), which ruled that unless the text or Congressional intent was clear, any “permissible,” *aka* reasonable, interpretation by the agency of statutory language would prevail even if the court’s own interpretation might be different.

³⁶ Kelley, *supra* note 9, at 8-9.

³⁷ Marc V. Garber and Kurt A. Williams, *Presidential Signing Statement as Interpretation of Legislative Intent: An Executive Aggrandizement of Power*, 24 Harv. J. on Legis. 363 (1987), at 2 and n.14.

³⁸ Kelley, *supra* note 9, at 10.

³⁹ *Id.*

He responded forcefully to his perception of such threats in laws, both great and small. The Dayton Aviation Heritage and Preservation Act of 1992, for example, directed the Secretary of the Interior to make appointments to a commission which would exercise Executive power though the appointees were not confirmed as Executive branch officers. Appraising this as an affront to Presidential power under the Appointments Clause, President Bush I refused to appoint anyone until Congress changed the law. He acted similarly with respect to nominations under the National and Community Services Act which had designated the Speaker and Senate Majority Leader to make appointments.⁴⁰

President Bush I advanced the Reagan interpretive agenda further in two instances in which his administration first arranged to have colloquies inserted into the congressional debates and then in signing statements relied on those colloquies to interpret statutory provisions despite stronger legislative evidence in favor of contrary interpretation. The first case involved a foreign affairs appropriations bill in which the Congress had forbidden sale of arms to a foreign government to further a foreign policy objective of the United States which the United States could not advance directly. Stating first that he intended to construe “any constitutionally doubtful provisions in accordance with the requirements of the Constitution,” President Bush I said he would restrict the scope of the ban to the kind of “*quid pro quo*” exchange discussed in a specific colloquy his administration had arranged with Congressional allies rather than credit the broader range of transactions clearly contemplated by the textual definition which included deals for arms “in exchange for” furthering of a U.S. objective. “My decision to sign this bill,” he said in the statement, “is predicated on these understandings” of the relevant section, referring to the colloquy.⁴¹

In the 1991 Civil Rights Act, a piece of legislation President Bush I could not afford politically to veto, Congress said quite clearly that it wished to return to an interpretation of what constituted “disparate impact” for Title VII discrimination purposes that existed prior to the Supreme Court’s cutback in the *Ward’s Cove* case.⁴² The President’s signing statement, however, labeled by one commentator as the most controversial signing statement of his term, again relied on a colloquy inserted in the record of the congressional debate and concluded that the Act “codifies” rather than “overrules” *Ward’s Cove*.⁴³

A look at the Clinton record of the use of the presidential signing statement shows that President Clinton used the constitutional signing statement less in his two terms than did his

⁴⁰ Kelley, *supra* note 9, at 11-12.

⁴¹ Kelley, *supra* note 9, at 12-14.

⁴² *Ward’s Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989).

⁴³ Kelley, *supra* note 9, at 14-16.

predecessor in one (105 to 146), but still more than the Reagan administration (105 to 71).⁴⁴ For the Clinton Administration, “the signing statement was an important cornerstone of presidential power, as outlined by Walter Dellinger in his 1993 OLC memo. It would become particularly important after the 1994 mid-term elections when the Congress became Republican and more polarized.”⁴⁵

In a 1993 memorandum, the then head of OLC, later acting Solicitor General Walter Dellinger, justified on historical and constitutional bases, a President’s refusal to follow a law that is “unconstitutional” on its face. In a second memorandum in 1994 to White House Counsel Abner Mikva, he said the President had an “enhanced responsibility to resist unconstitutional provisions that encroach upon the constitutional power of the Presidency.” But he cautioned:

As a general matter, if the President believes that the Court would sustain a particular provision as constitutional, the President should execute the statute, notwithstanding his own beliefs about the constitutional issue. If, however, the President, exercising his independent judgment, determines both that a provision would violate the Constitution and that it is probable that the Court would agree with him, the President has the authority to decline to execute the statute.

[I]n deciding whether to enforce a statute the President should be guided by a careful weighing of the effect of compliance with the provision on the constitutional rights of affected individuals and on the executive branch’s constitutional authority. Also relevant is the likelihood that compliance or noncompliance will permit judicial resolution of the issue.⁴⁶

Over half of President Clinton’s constitutionally related signing statements were in the realm of foreign policy. In the 1996 National Defense Authorization Act, which followed his prior veto of a provision requiring discharge of HIV positive service members, the same provision resurfaced. This time Clinton declared in the signing statement that the provision was unconstitutional and instructed his Attorney General not to defend the law if it were challenged.

However, President Clinton’s advisors made it clear that, if the law were not struck down, the President would have no choice but to enforce it. At a White House briefing on February 9, 1996,⁴⁷ White House Counsel Jack Quinn explained that “in circumstances where you don’t have

⁴⁴ *Id.* at 19.

⁴⁵ *Id.* at 23.

⁴⁶ Dellinger Declination Memorandum.

⁴⁷ See *Special White House Briefing on Provision in the FY1996 Defense Authorization Bill Relating to HIV-positive Armed Services Members*, February 9, 1996, Federal News Service,

the benefit of such a prior judicial holding, it's appropriate and necessary to enforce it. . .” Assistant Attorney General Walter Dellinger added:

When the president's obligation to execute laws enacted by Congress is in tension with his responsibility to act in accordance to the Constitution, questions arise that really go to the very heart of the system, and the president can decline to comply with the law, in our view, only where there is a judgment that the Supreme Court has resolved the issue.

Id. Congress subsequently repealed the provision before any court challenge was mounted.⁴⁸

In another 1995 appropriations act, the President took aim at the Government Printing Office's attempts to control Executive branch printing through a provision that “no funds appropriated may be expended for procurement of any printing of government publications unless through the GPO.” Clinton instructed his subordinates to disregard the provision and his defiant stance was never put to the test.⁴⁹ Clinton followed his predecessors in repudiating and refusing to enforce the series of legislative vetoes declared illegal in 1984 by the Supreme Court that Congress nevertheless continued to attach to legislation.⁵⁰ Clinton issued signing statements objecting to 140 constitutional incursions on his Presidential authority.⁵¹

3. The Bush II Era

From the inception of the Republic until 2000, Presidents produced signing statements containing fewer than 600 challenges to the bills they signed. According to the most recent update, in his one-and-a-half terms so far, President George W. Bush (Bush II) has produced more than 800.⁵²

available on Lexis-Nexis. *See also*, Alison Mitchell, *President Finds a Way to Fight Mandate to Oust H.I.V. Troops*, NEW YORK TIMES, February 10, 1996 (Clinton “once signing the overall legislation, would have no choice but to enforce the law, in the absence of a court ruling against it”).

⁴⁸ Kelley, *supra* note 9, at 19.

⁴⁹ *Id.* at 20-21.

⁵⁰ Neil Kinkopf, *Signing Statements and the President's Authority to Refuse to Enforce the Law* (2006), 3-4, at <http://www.acslaw.org/files/kinkopf-Signing%20statements%20and%20President's%20Authority.pdf>.

⁵¹ Savage, *supra*, note 1.

⁵² It is important to understand that these numbers refer to the number of **challenges** to provisions

He asserted constitutional objections to over 500 in his first term: 82 of these related to his theory of the “unitary executive,” 77 to the President’s exclusive power over foreign affairs, 48 to his power to withhold information required by Congress to protect national security, 37 to his Commander in Chief powers.⁵³

Whereas President Clinton on occasion asked for memoranda from the Office of Legal Counsel on his authority to challenge or reject controversial provisions in bills presented to him, it is reported that in the Bush II Administration all bills are routed through Vice President Cheney’s office to be searched for perceived threats to the “unitary executive”—the theory that the President has the sole power to control the execution of powers delegated to him in the Constitution and encapsulated in his Commander in Chief powers and in his constitutional mandate to see that “the laws are faithfully executed.”⁵⁴

Some examples of signing statements in which President Bush has indicated he will not follow the law are: bills banning the use of U.S. troops in combat against rebels in Colombia; bills requiring reports to Congress when money from regular appropriations is diverted to secret operations; two bills forbidding the use in military intelligence of materials “not lawfully collected” in violation of the Fourth Amendment; a post-Abu Ghraib bill mandating new regulations for military prisons in which military lawyers were permitted to advise commanders on the legality of certain kinds of treatment even if the Department of Justice lawyers did not agree; bills requiring the retraining of prison guards in humane treatment under the Geneva Conventions, requiring background checks for civilian contractors in Iraq and banning contractors from performing security, law enforcement, intelligence and criminal justice functions.⁵⁵

Perhaps the most prominent signing statements which conveyed refusals to carry out laws involved:

of laws rather than to the number of signing statements; a single signing statement may contain multiple such challenges. See Kelley, *A Signing Statement Update*, Media Watch Blog, July 11, 2006 at <http://www.users.muohio.edu/kelleycs/2006/07/signing-statement-update.html>. As of July 11, 2006, the total was 807. See <http://www.users.muohio.edu/kelleycs/mediablog.html>.

⁵³ Philip J. Cooper, *George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statement*, 35 *Presidential Studies Quarterly* (2005), at 515, 522.

⁵⁴ Charlie Savage, “Cheney Aide is Screening Legislation,” *BOSTON GLOBE*, May 28, 2006 at http://www.boston.com/news/nation/articles/2006/05/28/cheney_aide_is_screening_legislation/.

⁵⁵ Savage, *supra* note 1.

- Congressional requirements to report back to Congress on the use of Patriot Act authority to secretly search homes and seize private papers;⁵⁶
- The McCain amendment forbidding any U.S. officials to use torture or cruel, inhuman, or degrading treatment on prisoners (the President said in his statement that as Commander in Chief he could waive any such requirement if necessary to prevent terrorist attacks);
- A requirement that government scientists transmit their findings to Congress uncensored, along with a guarantee that whistleblower employees at the Department of Energy and the Nuclear Regulatory Commission will not be punished for providing information to Congress about safety issues in the planned nuclear waste repository at Yucca Mountain in⁵⁷

President Bush has been particularly adamant about preventing any of his subordinates from reporting directly to Congress even though there is Supreme Court precedent to the effect that Congress may authorize a subordinate official to act directly or to report directly to Congress. When Congress set up an educational research institute to generate independent statistics about student performance, and to publish reports “without the approval” of the Secretary of Education, President Bush asserted in his signing statement that “the Institute director would be subject to the supervision and direction of the Secretary.”

In another bill, Congress said no U.S. official shall prevent the Inspector General for the Coalition Provisional Authority in Iraq from carrying out his investigations and he should report any attempt directly to Congress. President Bush insisted in his signing statement that the Inspector General “refrain” from any investigation involving national security or intelligence already being investigated by the Pentagon and the Inspector General himself could not tell Congress anything without going through the President.⁵⁸

The Intelligence Authorization Act of 2002 required that the Congress be given regular reports on special matters. The signing statement treated this requirement as “advisory” or “precatory” only stating that the requirement “would be construed in a manner consistent with the President’s constitutional authority to withhold information, the disclosure of which could impair foreign relations, the national security, the deliberative processes of the Executive or the

⁵⁶ See Senator Patrick Leahy’s Opening Statement on U.S. Patriot Improvement and Reauthorization Act of 2005, Executive Business Meeting, March 15, 2006 at http://judiciary.senate.gov/member_statement.cfm?id=1811&wit_id=2629.

⁵⁷ Savage, *supra* note 1.

⁵⁸ *Id.*

performance of the Executive's constitutional duties."⁵⁹

This exact phraseology has been repeated in Bush signing statements innumerable times. Scholars have noted that it is a hallmark of the Bush II signing statements that the objections are ritualistic, mechanical and generally carry no citation of authority or detailed explanation.⁶⁰ "These boilerplate objections [are] placed over and over again in signing statements."⁶¹

A frustrated Congress finally enacted a law requiring the Attorney General to submit to Congress a report of any instance in which that official or any officer of the Department of Justice established or pursued a policy of refraining from enforcing any provision of any federal statute, but this too was subjected to a ritual signing statement insisting on the President's authority to withhold information whenever he deemed it necessary.⁶²

Even action deadlines set in the National Homeland Security Act were rejected as contravening the unitary executive function.⁶³ The Intelligence Authorization Act of 2003 setting up the 9/11 Commission provoked the same signing statement retaining the President's power to withhold information — a claim which later became a major bone of contention between the White House and the Commission. A December 2004 intelligence bill required reports on the use of national security wiretaps on U.S. soil as well as reports on civil liberties, security clearances, border security and counter narcotics efforts. All were subjected to the same treatment by signing statement.⁶⁴ Even the Homeland Security Act requirements for reports to Congress about airport screening chemical plant vulnerabilities and visa services suffered a similar fate.⁶⁵

⁵⁹ Cooper, *supra* note 53, at 523-24.

⁶⁰ Kinkopf, *supra* note 49, at 6. The language used in the signing statement accompanying the McCain amendment, that the President would construe it "in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as commander in chief consistent with the constitutional limitations on the judicial power" was used 82 times in the first Bush term; Cooper, *supra* note 52, at 521.

⁶¹ Cooper, *supra* note 53, at 522-23, 526.

⁶² Pub. L. 107-273, § 202(a), codified at 28 USC § 530D.

⁶³ Savage, *supra* note 1.

⁶⁴ Savage, *supra* note 1.

⁶⁵ Cooper, *supra* note 53, at 524-25; Savage, *supra* note 1.

President Bush's signing statements have consistently refused to honor Congressional attempts to impose affirmative action or diversity requirements on federal hiring. Fifteen times the Bush signing statements have objected to such provisions, proclaiming that they would be construed "in a manner consistent with the Constitution's guarantee of equal protection." This included directions by Congress to recruit and train women and minorities in the intelligence agencies and promote diversity in the Export-Import bank operations.⁶⁶

One learned commentator sums up the Bush II use of signing statements as follows: "When in doubt challenge the legislative process whether there is a serious issue or not." He labels the Bush record on signing statements as "an audacious claim to constitutional authority; the scope of the claims and the sweeping formulae used to present them are little short of breathtaking." They are "dramatic declaratory judgments holding acts of Congress unconstitutional and purporting to interpret not only Article II Presidential powers but those of the legislators under Article I."⁶⁷

B. Separation of Powers and the Intent Of The Framers

The original intent of the framers was to require the President to either sign or veto a bill presented by Congress in its entirety. A line-item veto is not a constitutionally permissible alternative even when the President believes that some provisions of a bill are unconstitutional.

The plain language of Article I, §7, clause 2 (Presentment Clause) compels this conclusion. It speaks of the signing or vetoing of a "Bill," and a veto override vote in Congress by two-thirds majorities to enact a "Bill." There is not even a hint that the President could sign or veto part of a bill and elect to enforce a law that differed from the one passed by Congress. But for a vagrant remark by James Wilson, not a syllable uttered during the constitutional convention or state ratification debates questions the plain meaning of the Presentment Clause. Our first President George Washington confirmed the clear understanding of the Clause when he declared that a bill must be either approved in all of its parts or rejected in toto. Writings of George Washington 96 (J. Fitzgerald ed., 1940).

Accordingly, the United States Supreme Court in *Clinton v. New York*, 524 U.S. 417 (1998), held the line item veto unconstitutional, even if approved in a statute enacted by Congress. Writing for the Court, Justice John Paul Stevens elaborated: "Familiar historical materials provide abundant support for the conclusion that the power to enact statutes may only 'be exercised in accord with a single finely wrought and exhaustively considered procedure.' Our first President understood the text of the Presentment Clause as requiring that he either 'approve all the parts of a Bill, or reject it in toto.'" 524 U.S. 439-440 (quoting *INS v. Chadha*, *supra* at 951).

⁶⁶ Savage, *supra* note 1.

⁶⁷ Cooper, *supra* note 53, at 530.

The presidential oath enshrined in Article II, § 1, clause 7 requires a President to the best of his ability to “defend the Constitution of the United States.” There are many ways in which a President can defend the Constitution. One is to veto a bill that he believes violates the Constitution in whole or in part. The President must defend the entire Constitution, and that includes the Presentment Clause and Article II, § 3, which stipulates that the President “shall take Care that the Laws be faithfully executed....”

Article II, §3 has important historical roots in the complaint about non-enforcement of laws made against King James II by the British Parliament, which ultimately occasioned his dethronement. Thus, the English Bill of Rights of 1688 indicted the King for “assuming and exercising a power of dispensing with and suspending of laws and the execution of laws without consent of Parliament.” It declared “That the pretended power of suspending of laws or the execution of laws by regal authority without consent of Parliament is illegal.” Because the “take care” obligation of the President requires him to faithfully execute all laws, his obligation is to veto bills he believes are unconstitutional. He may not sign them into law and then emulate King James II by refusing to enforce them.

In *United States v. Smith*, 27 F. Cas. 1192 (C.C.D.N.Y. 1806), defendants claimed a right to violate the Neutrality Act because of a presidential authorization. The government countered: “Among the powers and duties of the president...he is expressly required to ‘take care that the laws be faithfully executed.’ They will not venture to contend that this clause gives the president the right of dispensing with the law...He has a qualified veto, before the law passes...When it has become law...it is his duty to take care that it be faithfully executed. He cannot suspend its operation, dispense with its application, or prevent its effect, otherwise than by the exercise of [his] constitutional power of pardoning, after conviction. If he could do so, he could repeal the law, and would thus invade the province assigned to the legislature, and become paramount to the other branches of the government.”

Supreme Court Justice William Patterson, sitting on the court, agreed: “[The Neutrality Act] imparts no dispensing power to the president. Does the constitution give it? Far from it, for it explicitly directs that he shall ‘take care that the laws be faithfully executed’... True, a *nolle prosequi* may be entered, a pardon may be granted; but these presume criminality, presume guilt, presume amenability to judicial investigation and punishment, which are very different from a power to dispense with the law.”

Article II, § 1, vests the “Executive Power” in the President. But at least since 1688, the executive power as conceived in Great Britain and America excluded a power to dispense with or suspend execution of the laws for any reason.

III. THE ABA TASK FORCE RECOMMENDATIONS

If our constitutional system of separation of powers is to operate as the framers intended, the President must accept the limitations imposed on his office by the Constitution itself. The use of presidential signing statements to have the last word as to which laws will be enforced and which will not is inconsistent with those limitations and poses a serious threat to the rule of law. It is this threat which the Task Force recommendations seek to address.

A. Signing Statements Must Respect the Rule of Law and Our Constitutional System of Separation of Powers

As noted above, the first Recommendation urges that the President and those who succeed him cease the practice of using presidential signing statements to state his intention to disregard or decline to enforce a law or to interpret it in a manner inconsistent with the will of Congress. One of the most fundamental innovations of the American Constitution was to separate the executive from the legislative power. The Framers regarded this separation of powers as “essential to the preservation of liberty.” James Madison, *The Federalist* No. 51.

In particular, the Framers sought to prevent in our new government the abuses that had arisen from the exercise of prerogative power by the Crown. Their device for doing so was to vest lawmaking power in the Congress and enforcement power in the President, and to provide in Article II § 3 that the President “shall take Care that the Laws be faithfully executed.” As the Supreme Court stated in holding that President Truman could not seize the nation’s steel mills during the Korean war without congressional authorization, “In the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

The Constitution accordingly embodies “the Framers’ decision that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.” *INS v. Chadha*, 462 U.S. 919 (1983). Under Article I, §7, every law requires a majority of each house of Congress and presentment to the President for approval or disapproval. The Constitution thus limits the President’s role in the lawmaking process to the recommendation of laws he thinks wise and the vetoing of laws he thinks unwise.

It may well seem burdensome or frustrating to a President to be so confined in his response to the legislative enactments of the Congress. The Supreme Court has acknowledged that “[t]he choices . . . made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable.” But the Court has reminded us that “those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked,” and often restated that there is no “better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.” *INS v. Chadha*, *supra*.

The Supreme Court has struck down both one-House vetoes, which sought to enlarge the power of Congress, and presidential line-item vetoes, which sought to diminish it, as inconsistent with those restraints. Presidential signing statements that express an intent to disregard or effectively rewrite enacted legislation are similarly inconsistent with the “single, finely wrought and exhaustively considered, procedure” provided for by the Framers.

B. Presidential Concerns Regarding Constitutionality of Pending Bills Should Be Communicated To Congress Prior To Passage

The White House and each of the 15 major executive departments maintain large and sophisticated legislative or congressional affairs offices and routinely and closely track the progress of bills introduced in the Congress. Moreover, much legislation considered by Congress each session emanates initially from the Executive Branch. For that reason, it is unlikely that important legislation would be considered and passed without the opportunity for full and fair input by the Administration.

Therefore, our second recommendation urges the President, if he believes that any provision of a bill pending before Congress would be unconstitutional if enacted, to communicate such concerns to Congress prior to passage. It is reasonable to expect the President to work cooperatively with Congress to identify and ameliorate any constitutional infirmities during the legislative process, rather than waiting until after passage of legislation to express such concerns in a signing statement.

C. Signing Statements Should Not Be A Substitute For A Presidential Veto

The third Recommendation urges the President to confine signing statements to the meaning, purpose, or significance of bills he has signed into law, which he then must faithfully execute. For example, it is entirely appropriate for the President to praise a bill as a landmark in civil rights or environmental law and applaud its legislative sponsors, or to provide his views as to how the enactment of the law will affect the welfare of the nation.

When Congress enacted the Sarbanes Oxley Act,⁶⁸ President Bush wrote in his signing statement that it contained “the most far-reaching reforms of American business practices since the time of Franklin Delano Roosevelt.”⁶⁹ And when President Carter signed the Foreign

⁶⁸15 U.S.C. §7201 *et seq.*

⁶⁹ See Signing Statement of George W. Bush, July 30, 2002, available at <http://www.whitehouse.gov/news/releases/2002/07/20020730.html>.

Intelligence Surveillance Act of 1978,⁷⁰ he wrote in his signing statement:⁷¹

The bill requires, for the first time, a prior judicial warrant for *all* electronic surveillance for foreign intelligence or counterintelligence purposes in the in the United States in which communications of U.S. persons might be intercepted. It clarifies the Executive's authority to gather foreign intelligence by electronic surveillance in the United States. It will remove any doubt about the legality of those surveillances which are conducted to protect our country against espionage and international terrorism. It will assure FBI field agents and others involved in intelligence collection that their acts are authorized by statute and, if a U.S. person's communications are concerned, by a court order. And it will protect the privacy of the American people.

In short, the act helps to solidify the relationship of trust between the American people and their Government. It provides a basis for the trust of the American people in the fact that the activities of their intelligence agencies are both effective and lawful. It provides enough secrecy to ensure that intelligence relating to national security can be securely required, while permitting review by the courts and Congress to safeguard the rights of Americans and others.

Id. Such statements contribute to public dialogue and accountability.

However, the Recommendation urges the President not to use signing statements in lieu of compliance with his constitutional obligation to veto any bill that he believes violates the Constitution in whole or in part. That obligation follows from the original intent and practice of the Founding Fathers, including President George Washington.

To sign a bill and refuse to enforce some of its provisions because of constitutional qualms is tantamount to exercising the line-item veto power held unconstitutional by the Supreme Court in *Clinton v. New York*, *supra*. By honoring his obligation to veto any bill he believes would violate the Constitution in any respect the President honors his oath to defend the Constitution. That obligation ensures that both Congress and the President will be politically accountable for their actions and that the law the President enforces will not be different from the one Congress enacted.

In 1969, future Chief Justice William H. Rehnquist, then the Then Assistant Attorney General for the Office of Legal Counsel, wrote: "It is our view extremely difficult to formulate a constitutional theory to justify a refusal by the President to comply with a Congressional directive

⁷⁰ See 50 U.S.C. §1801 *et seq.*

⁷¹ Statement on Signing S.1566 Into Law, October 25, 1978, at: <http://www.cnss.org/Carter.pdf>.

to spend[T]he execution of any law is, by definition, an executive function, and it seems an anomalous proposition that because the Executive Branch is bound to execute the laws, it is free to decline to execute them." *See* Hearings on the Executive Impoundment of Appropriated Funds Before the Subcommittee on Separation of Powers of the Senate Judiciary Committee, 92nd Cong., 1st Sess. 279, 283 (1971).

The Task Force did not ignore the rare possibility that a President could think it unavoidable to sign legislation containing what he believed to be an unconstitutional provision. As illustrated by the many bills enacted by Congress that contain one-House or committee veto directives that had been specifically declared unconstitutional by the Supreme Court in *Chadha*, it is not far-fetched to suppose that Members of Congress could persist in enacting unquestionably unconstitutional provisions. There may also be situations where, on first look, insignificant provisions in omnibus emergency-relief or military-funding measures, enacted as Congress recesses or adjourns, would seem not to merit a veto.

In acknowledging this possibility, the Task Force does not wish to suggest that it finds acceptable the use of signing statements to signal executive branch noncompliance with a provision enacted by Congress. The Founding Fathers contemplated bills with both attractive and unattractive features packaged together with unrelated provisions, including appropriations riders. The President nonetheless was expected to veto even "urgent" bills that he believed were unconstitutional in part and, if the urgency were genuine, Congress could either delete the offending provisions or override the President. Only once or twice in the nation's history has Congress overridden a veto occasioned by the President's belief in the unconstitutionality of the bill presented.⁷²

If the President and Congress are unable to resolve their differences regarding the constitutionality of proposed legislation, and practical exigencies militate against a veto, and if the President therefore signs the bill and issues a signing statement, he should clearly and publicly state in his signing statement his views on the legislation and his intentions with respect to enforcement or implementation, and should then seek or cooperate with others in obtaining timely judicial review regarding the provision in dispute (see section E, below).

Such situations notwithstanding, the Task Force opposes the use of presidential signing statements to effect a line-item veto or to usurp judicial authority as the final arbiter of the constitutionality of congressional acts. Definitive constitutional interpretations are entrusted to an independent and impartial Supreme Court, not a partisan and interested President. That is the meaning of *Marbury v. Madison*. A President could easily contrive a constitutional excuse to decline enforcement of any law he deplored, and transform his qualified veto into a monarch-like absolute veto. The President's constitutional duty is to enforce laws he has signed into being

⁷² *See generally*, Dawn E. Johnsen, *Presidential Non-enforcement of Constitutionally Objectionable Statutes*, 63 Law & Contemp. Probs. 7 (Winter/Spring 2000), available at <http://www.law.duke.edu/journals/63LCPJohnsen>.

unless and until they are held unconstitutional by the Supreme Court or a subordinate tribunal. The Constitution is not what the President says it is.

D. Legislation Is Needed To Ensure That Congress And The Public Are Fully Informed About The Use Of Presidential Signing Statements

Today, when the President issues a signing statement, it is published in the Weekly Compilation of Presidential Documents. In addition, since the Reagan administration, signing statements have been included with the legislative history reprinted in the volumes of the U.S. Code Congressional & Administrative News.

However, there is no requirement that these statements be submitted to Congress or made readily available to the public. There is also no requirement that the President explain the reasons and legal basis for a statement in which he claims the authority, or states the intention, to disregard or decline to enforce all or part of a law he has signed, or to interpret such a law in a manner inconsistent with the clear intent of Congress.

The result, until quite recently, was that few members of Congress, and even fewer members of the public, were aware that the President had taken these actions, and that they might seriously undercut the legislation he had signed.

The recommendation seeks to remedy this situation by urging Congress to enact legislation requiring the President promptly to submit to Congress an official copy of all signing statements he issues, and in any instance in which he claims the authority, or states the intention, to disregard or decline to enforce all or part of a law he has signed, or to interpret such a law in a manner inconsistent with the clear intent of Congress, to submit to Congress a report setting forth in full the reasons and legal basis for the statement. The proposed legislation would further require that the materials submitted by the President be made available in a publicly accessible database.

Could a President, in a signing statement, disregard even this legislation? That is precisely what occurred in 2002 when President Bush II signed a bill which required the Attorney General to submit a detailed report of any instance in which he or any Justice Department official "establishes or implements a formal or informal policy to refrain . . . from enforcing, applying, or administering any provision of any Federal statute . . . on the grounds that such provision is unconstitutional." Pub. L. 107-273, § 202(a), codified at 28 USC § 530D. The President issued a signing statement which read, in pertinent part:

The executive branch shall construe § 530D of title 28, and related provisions in § 202 of the Act, in a manner consistent with the constitutional authorities of the President to supervise the unitary executive branch and to withhold information the disclosure of which could impair foreign relations, the national security, the deliberative processes of the Executive, or the performance of the Executive's

constitutional duties.⁷³

The statement went on to say that the President had instructed executive agencies accordingly. In effect, the statement said that the President may order executive agencies not to comply with a congressional directive requiring them to report instances in which they have been ordered not to comply.

This absurd result highlights the purpose of our first clause, and underscores the reason we so strongly oppose such use of signing statements as “contrary to the rule of law and our constitutional system of separation of powers.”

**E. Legislation Is Needed To Provide For Judicial Review
Of Presidential Signing Statements In Appropriate Cases**

The final Recommendation of the Task Force addresses the question of how Congress should respond if a President insists on signing statements that declare his intent to refuse to enforce provisions of a bill he has signed into law because of his belief that they are unconstitutional.

At present, the standing element of the “case or controversy” requirement of Article III of the Constitution frequently frustrates any attempt to obtain judicial review of such presidential claims of line-item veto authority that trespass on the lawmaking powers of Congress. Congress cannot lessen the case or controversy threshold, but it can dismantle barriers above the constitutional floor.

Currently a plaintiff must allege an individualized concrete injury caused by the defendant as opposed to a generalized grievance about unconstitutional government. Further, the requested judicial relief must be reasonably calculated to redress the injury. For individual plaintiffs, a signing statement might well elude the case or controversy requirement because the immediate injury is to the lawmaking powers of Congress. The President thus becomes the final judge of his own constitutional powers, and he invariably rules in favor of himself.

Therefore, this Recommendation urges Congress to enact legislation that would enable the President, Congress, or other entities to seek judicial review, and contemplates that such legislation would confer on Congress as an institution or its agents (either its own Members or interested private parties as in *qui tam* actions) standing in any instance in which the President uses a signing statement to claim the authority, or state the intention, to disregard or decline to enforce all or part of a law, or interpret such a law in a manner inconsistent with the clear intent of Congress.

⁷³ See President Signs Justice Approps Authorization Act - Statement by the President, November 2, 2002, at <http://www.whitehouse.gov/news/releases/2002/11/20021104-3.html>.

If such review were initiated by the Congress or other entities, it could be argued that the concrete injury was the usurpation of the lawmaking powers of Congress by virtue of the provisions of the signing statement, and the denial of the opportunity to override a veto if the President believes a law is unconstitutional. As noted above, however, our recommendation also contemplates that the President could initiate such judicial review.

The remedy fashioned could be an order directing that the enacted law be fully enforced, since the President would have foregone the opportunity for a veto by signing of the bill, or it could be a more general declaratory judgment that the President may not use signing statements in such a manner, but must either enforce a bill which he signs into law or exercise his veto on any bill he believes is unconstitutional in whole or in part. It is to be hoped that the President would obey any constitutional declaration of the Supreme Court.

This Recommendation also urges Congress and the President to support judicial resolution of the President's claim or interpretation through the use of signing statements, for example, by avoiding non-constitutional arguments like the political question doctrine or prudential standing. It would be expected that one case before the Supreme Court would put to rest the constitutionality of a signing statement that announces the President's intent not to enforce a provision of a law or to do so in a manner contradictory to clear congressional intent.

As noted above, the Task Force recognizes that legislation providing for judicial review of signing statements would have to overcome constitutional and legal hurdles, and the ABA stands ready to work with Congress on these issues. We also recognize that such legislation could be rejected by the Supreme Court. However, it would still have been worth the undertaking, since it would demonstrate an eagerness to play by constitutional rules short of impeachment, and the use of signing statements in the manner opposed by our recommendations presents a critically important separation of powers issue.⁷⁴

F. Additional Issues Not Considered by the Task Force

The Task Force considered developing a recommendation to address the issue of what weight the courts should give to presidential signing statements in determining the meaning and purpose of legislation, but decided that this topic, while important, is beyond our immediate charge. Although most courts accord little or no weight to presidential signing statements, some appear to have taken them into account in determining the intent of legislation.

⁷⁴ The Task Force determined that it was not within its mandate to make recommendations as to what remedies Congress should employ in the event that the President continues on his present course and judicial review proves impracticable. We note, however, that Congress is not without constitutional recourse, including the "power of the purse" to withhold appropriations, should it choose to exercise it.

For example, signing statements have received attention in *United States v. Story*, 891 F.2d 988 (2d Cir. 1989), a President Reagan signing statement, though the court concluded that deference to such statements should occur only in exceptional circumstances, and in two cases declaring the Pledge of Allegiance unconstitutional. *Newdow v. United States Cong.*, 292 F.3d 597 (9th Cir. 2002); *Newdow v. United States Cong.*, 328 F.3d 466 (9th Cir. 2002). Most recently, in his dissent in *Hamdan v. Rumsfeld*, 548 U.S. ____ (June 29, 2006), Associate Justice Antonin Scalia cited the President's statement on signing H.R. 2863,⁷⁵ which addressed, in part, the Detainee Treatment Act of 2005, and quoted from the signing statement in a footnote.⁷⁶

The Task Force also declined to expand its mission to address such questions as what effect signing statements should be given within the Executive Branch; how the President should respond if Congress overrides a veto motivated by his constitutional concerns; or what should be done if the President, in the absence of a signing statement, nevertheless fails to enforce a law enacted under his or an earlier administration.

While these are undoubtedly important issues, the Task Force believed them to be subsidiary to the issue of the President's duty to enforce or veto the bills presented to him, and the constraints of time did not permit us to delve into them. Although outside the precise scope of our mission, they clearly merit further exploration and analysis, either by our Task Force or by another appropriate ABA entity.

IV. CONCLUSION

Professor Kinkopf concludes that the use, frequency, and nature of the President's signing statements demonstrates a "radically expansive view" of executive power which "amounts to a claim that he is impervious to the laws that Congress enacts" and represents a serious assault on the constitutional system of checks and balances.⁷⁷

⁷⁵ See President's Statement on Signing of H. R. 2863, the "Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006" (Dec. 30, 2005), at http://www.whitehouse.gov/news/releases/2005/12/print/20051230_8.html.

⁷⁶ See *Hamdan v. Rumsfeld*, *supra*, Scalia, J., *dissenting*, Slip. Op. at 13, n. 5: [T]he executive branch shall construe section 1005 to preclude the Federal courts from exercising subject matter jurisdiction over any existing or future action, including applications for writs of habeas corpus, described in section 1005."

⁷⁷ Kinkopf, *supra*, at 7. "If the President may dispense with application of laws by concocting a constitutional objection, we will quickly cease to live under the rule of law." *Id.*

We emphasize once again that our concerns are not addressed solely to the current President, and we do not question his good faith belief in his use of signing statements. However, the importance of respect for the doctrine of separation of powers cannot be overstated.

The Supreme Court has reminded us that it was the “the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty.”⁷⁸ And Justice Kennedy has observed that “[l]iberty is always at stake when one or more of the branches seek to transgress the separation of powers.”

Separation of powers was designed to implement a fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty. The Federalist states the axiom in these explicit terms: “The accumulation of all powers, legislative, executive, and judiciary, in the same hands ... may justly be pronounced the very definition of tyranny.” The Federalist No. 47. So convinced were the Framers that liberty of the person inheres in structure that at first they did not consider a Bill of Rights necessary. It was at Madison's insistence that the First Congress enacted the Bill of Rights. It would be a grave mistake, however, to think a Bill of Rights in Madison's scheme then or in sound constitutional theory now renders separation of powers of lesser importance.

Clinton v. City of New York, 524 U.S. 417, 450 (1998) (Kennedy, J. concurring) (internal citations omitted).

The Recommendations of the ABA Task Force on Presidential Signing Statements and the Separation of Powers Doctrine recognize and honor those cherished principles. The American Bar Association has always been in the forefront of efforts to protect the rule of law and our constitution, and it is now incumbent upon this great organization to speak out forcefully against actions which would weaken our cherished system of checks and balances and separation of powers. We urge the House of Delegates to adopt the proposed Recommendations.

Respectfully submitted,

NEAL R. SONNETT,
Chair
ABA Task Force on Presidential Signing Statements
and the Separation of Powers Doctrine

August 2006

⁷⁸ *Mistretta v. United States*, 488 U.S. 361, 380 (1989).

APPENDIX
ABA Task Force on Presidential Signing Statements
and the Separation of Powers Doctrine
Biographies

Chair

Neal R. Sonnett

Mr. Sonnett is a former Assistant United States Attorney and Chief of the Criminal Division for the Southern District of Florida. He heads his own Miami law firm concentrating on the defense of corporate, white collar and complex criminal cases throughout the United States. He has been profiled by the National Law Journal as one of the "Nation's Top White Collar Criminal Defense Lawyers," was selected three times by that publication as one of the "100 Most Influential Lawyers In America," and has been included in all 20 editions of The Best Lawyers in America.

Mr. Sonnett is a former Chair of the ABA Criminal Justice Section, which he now represents in the ABA House of Delegates, and a former President of the National Association of Criminal Defense Lawyers. He is the incoming President of the American Judicature Society and Vice-Chair of the ABA Section of Individual Rights and Responsibilities. He serves as Chair of the ABA Task Force on Treatment of Enemy Combatants, Chair of the ABA Task Force on Domestic Surveillance in the Fight Against Terrorism, and serves as the ABA's official Observer for the Guantanamo military commission trials. He is also a member of the ABA Task Force on the Attorney-Client Privilege, the Task Force on Gatekeeper Regulation and the Profession, and he served on the ABA Justice Kennedy Commission. He is a Life Fellow of the American Bar Foundation and serves on the ALI-ABA Advisory Panel on Criminal Law and on the Editorial Advisory Boards of The National Law Journal and Money Laundering Alert.

Mr. Sonnett has received the ADL Jurisprudence Award and the Florida Bar Foundation Medal Of Honor for his "dedicated service in improving the administration of the criminal justice system and in protecting individual rights precious to our American Constitutional form of government." He has also received the highest awards of the ABA Criminal Justice Section, the National Association of Criminal Defense Lawyers, The Florida Bar Criminal Law Section, the Florida Association of Criminal Defense Lawyers (Miami), and the ACLU of Miami.

Members

Mark D. Agrast

Mark Agrast is a Senior Fellow at the Center for American Progress in Washington, D.C., where he oversees programs related to the Constitution, the rule of law, and the history of American progressive thought.

Before joining the Center for American Progress, Mr. Agrast was Counsel and Legislative Director to Congressman William D. Delahunt of Massachusetts (1997-2003). He previously served as a top aide to Massachusetts Congressman Gerry E. Studds (1992-97) and practiced international law with the Washington office of Jones, Day, Reavis & Pogue (1985-91). During his years on Capitol Hill, Mr. Agrast

played a prominent role in shaping laws on civil and constitutional rights, terrorism and civil liberties, criminal justice, patent and copyright law, antitrust, and other matters within the jurisdiction of the House Committee on the Judiciary. He was also responsible for legal issues within the jurisdiction of the House International Relations Committee, including the implementation of international agreements on human rights, intercountry adoption, and the protection of intellectual property rights.

Mr. Agrast is a member of the Board of Governors of the American Bar Association and a Fellow of the American Bar Foundation. A past Chair of the ABA Section of Individual Rights and Responsibilities, he currently chairs the ABA's Commission on the Renaissance of Idealism in the Legal Profession.

Hon. Mickey Edwards

Mickey Edwards is a lecturer at Princeton University's Woodrow Wilson School of Public and International Affairs and the Executive Director of the Aspen Institute-Rodel Fellowships in Public Leadership. He was a Republican member of Congress from Oklahoma for 16 years (1977-92), during which time he was a member of the House Republican leadership and served on the House Budget and Appropriations committees.

He was a founding trustee of the Heritage Foundation, former national chair of the American Conservative Union, and director of policy advisory task forces for the Reagan presidential campaign. He has taught at Harvard, Georgetown, and Princeton universities and has chaired various task forces for the Constitution Project, the Brookings Institution, and the Council on Foreign Relations. In addition, he is currently an advisor to the US Department of State and a member of the Princeton Project on National Security.

Bruce Fein

Bruce Fein graduated from Harvard Law School with honors in 1972. After a coveted federal judicial clerkship, he joined the U.S. Department of Justice where he served as assistant director of the Office of Legal Policy, legal adviser to the assistant attorney general for antitrust, and the associate deputy attorney general. Mr. Fein then was appointed general counsel of the Federal Communications Commission, followed by an appointment as research director for the Joint Congressional Committee on Covert Arms Sales to Iran.

He has authored several volumes on the United States Supreme Court, the United States Constitution, and international law, and has assisted two dozen countries in constitutional revision. He has been an adjunct scholar with the American Enterprise Institute, a resident scholar at the Heritage Foundation, a lecturer at the Brookings Institute, and an adjunct professor at George Washington University.

Mr. Fein has been executive editor of World Intelligence Review, a periodical devoted to national security and intelligence issues. At present, he writes a weekly column for The Washington Times devoted to legal and international affairs, guest columns for numerous other newspapers, and articles for professional and lay journals. He is invited to testify frequently before Congress and administrative agencies by both Democrats and Republicans. He appears regularly on national broadcast, cable, and radio programs as an expert in foreign affairs, international and constitutional law, telecommunications, terrorism, national security, and related subjects.

Harold Hongju Koh

Harold Hongju Koh, Dean and Gerard C. and Bernice Latrobe Smith Professor of International Law, is one of the country's leading experts on international law, international human rights, national security law and international economic law. He has received more than twenty awards for his human rights work.

A former Assistant Secretary of State, Dean Koh advised former Secretary Albright on U.S. policy on democracy, human rights, labor, the rule of law, and religious freedom. Harold clerked for both Judge Malcolm Richard Wilkey of the U.S. Court of Appeals for the D.C. Circuit and Justice Harry A. Blackmun of the United States Supreme Court. He worked in private practice in Washington, D.C. and as an attorney at the Office of Legal Counsel at the U.S. Department of Justice.

Dean Koh earned a B.A. from Harvard University in 1975, an Honours B.A. from Magdalen College, Oxford University in 1977, and a J.D. from Harvard Law School in 1980. He has been a Visiting Fellow and Lecturer at Magdalen and All Souls Colleges, Oxford University, and has taught at The Hague Academy of International Law, the University of Toronto, and the George Washington University National Law Center.

Charles J. Ogletree

Charles J. Ogletree is the Jesse Climenko Professor of Law at Harvard Law School and Founding and Executive Director of Harvard's Charles Hamilton Houston Institute for Race & Justice. He is a prominent legal theorist who has made an international reputation by taking a hard look at complex issues of law and by working to secure the rights guaranteed by the Constitution for everyone equally under the law.

The Charles Hamilton Houston Institute for Race and Justice (<http://www.charleshamiltonhouston.org>), named in honor of the visionary lawyer who spearheaded the litigation in *Brown v. Board of Education*, opened in September 2005, and focuses on a variety of issues relating to race and justice, and will sponsor research, hold conferences, and provide policy analysis;

Stephen A. Saltzburg

Professor Saltzburg joined the faculty of the George Washington University Law School in 1990. Before that, he had taught at the University of Virginia School of Law since 1972, and was named the first incumbent of the Class of 1962 Endowed Chair there. In 1996, he founded and began directing the master's program in Litigation and Dispute Resolution at GW.

Professor Saltzburg served as Reporter for and then as a member of the Advisory Committee on the Federal Rules of Criminal Procedure and as a member of the Advisory Committee on the Federal Rules of Evidence. He has mediated a wide variety of disputes involving public agencies as well as private litigants; has served as a sole arbitrator, panel Chair, and panel member in domestic arbitrations; and has served as an arbitrator for the International Chamber of Commerce.

Professor Saltzburg's public service includes positions as Associate Independent Counsel in the Iran-Contra investigation, Deputy Assistant Attorney General in the Criminal Division of the U.S. Department of Justice, the Attorney General's ex-officio representative on the U.S. Sentencing Commission, and as director of the Tax Refund Fraud Task Force, appointed by the Secretary of the Treasury. He currently

serves on the Council of the ABA Criminal Justice Section and as its Vice Chair for Planning. He was appointed to the ABA Task Force on Terrorism and the Law and to the Task Force on Gatekeeper Regulation and the Profession in 2001 and to the ABA Task Force on Treatment of Enemy Combatants in 2002.

Hon. William S. Sessions

William S. Sessions has had a distinguished career in public service, as Chief of the Government Operations Section of the Department of Justice, United States Attorney for the Western District of Texas, United States District Judge for the Western District of Texas, Chief Judge of that court, and as the Director of the Federal Bureau of Investigation. He received the 2002 Price Daniel Distinguished Public Service Award and has been honored by Baylor University Law School as the 1988 Lawyer of the Year.

Judge Sessions joined Holland & Knight LLP in 2000 and is a partner engaged primarily in Alternative Dispute Resolution procedures. He holds the highest rating assigned by Martindale-Hubbell and is listed in The Best Lawyers In America for 2005 & 2006 for Alternative Dispute Resolution. He serves as an arbitrator and mediator for the American Arbitration Association, the International Center for Dispute Resolution and for the CPR Institute of Dispute Resolution.

Since June 2002, Judge Sessions has served on The Governor's Anti-Crime Commission and as the Vice Chair of the Governor's Task Force on Homeland Security for the State of Texas. He is a past President of the Waco-McLennan County Bar Association, the Federal Bar Association of San Antonio, the District Judges Association of the Fifth Circuit, and he was a member of the Board of Directors of the Federal Judicial Center. He served as the initial Chair of the ABA Committee on Independence of the Judiciary, honorary co-Chair of the ABA Commission on the 21st Century Judiciary, and as a member of the ABA Commission on Civic Education and the Separation of Powers. He was a member of the Martin Luther King, Jr. Federal Holiday Commission and he serves on the George W. Bush Presidential Library Steering Committee for Baylor University.

Kathleen M. Sullivan

Kathleen M. Sullivan is the Stanley Morrison Professor of Law and the head of Stanford's new Constitutional Law Center. She previously served for five years as Dean of Stanford Law School, having raised over \$100 million in gifts to the School. She has taught at Harvard and USC Law Schools, and is a Visiting Scholar at the National Constitution Center. A nationally known constitutional law expert, she is co-author of the nation's leading casebook in Constitutional Law.

Ms. Sullivan has 25 years of experience in appellate advocacy, having litigated over 30 appeals in federal court and argued three cases in the US Supreme Court. She has represented the broadcasting, wine, and pharmaceutical industries as well as state and city governments including Boston, Honolulu, San Francisco, Berkeley, Puerto Rico and Hawaii. Ms. Sullivan has special expertise in first amendment and constitutional issues as well as experience in a variety of constitutional issues involved in white-collar criminal defense.

She has been named by the National Law Journal as one of the 100 Most Influential Lawyers in America and one of the 50 Most Influential Women Lawyers in America, and by the Daily Journal as one of the top 100 Most Influential Lawyers in California.

Thomas M. Susman

Tom Susman is a partner in the Washington Office of Ropes & Gray, LLP, where he conducts a diverse legislative and regulatory practice. Before joining Ropes & Gray he was general counsel to the U.S. Senate Committee on the Judiciary and various Judiciary subcommittees, and prior to that he served in the Office of Legal Counsel of the Department of Justice.

Presenting serving as Delegate to the ABA House of Delegates, Mr. Susman has been on the Board of Governors and chaired the Section on Administrative Law and Regulatory Practice. He is on the Council of the Council on Legal Education Opportunity, on the Board of Trustees of the National Judicial College, and a member of the ABA Committee on the Law Library of Congress. He is also a member of the American Law Institute, chair of the Ethics Committee of the American League of Lobbyists, President of the D.C. Public Library Foundation, and Adjunct Professor at the Washington College of Law of the American University.

Mr. Susman frequently testifies before Congress and lectures in the U.S. and abroad on legislative process and lobbying, freedom of information, and administrative law. He received the U.S. Court of Federal Claims Golden Eagle Award for Outstanding Service to the Court and has been inducted into the Freedom of Information Hall of Fame. He earned his B.A. from Yale University and his J.D. from the University of Texas, and following law school he clerked for Fifth Circuit Judge John Minor Wisdom.

Hon. Patricia M. Wald

Patricia M. Wald served as a judge on the U.S. Court of Appeals for the D.C. Circuit from 1979-1999 and as its Chief Judge from 1986-1991. She then was appointed to the International Criminal Tribunal for the former Yugoslavia where she served on the trial and appellate benches from 1999-2001. Prior to her judicial service, she was an Assistant Attorney General for Legislative Affairs in the Carter Administration. Judge Wald most recently served as a member of the President's commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction.

Judge Wald is currently a consultant on international justice, the Co-Chair of New Perimeter, a Board member of OSI-Justice Initiative and the American Constitution society. She is the recipient of the ABA Margaret Brant Award for Women Lawyers of Achievement and the American Lawyer Lifetime Achievement Award. She was recently named by the National Law Journal as one of the "100 Most Influential Lawyers in America."

Special Adviser**Alan Rothstein**

Alan Rothstein serves as General Counsel to the Association of the Bar of the City of New York, where he coordinate the extensive law reform and public policy work of this 22,000-member Association. Founded in 1870, the Association has been influential on a local, state, national and international level.

Prior to his 20 years with the Association, Rothstein was the Associate Director of Citizens Union, a long-standing civic association in New York City. Rothstein started his legal career with the firm of Weil, Gotshal & Manges. He earned his B.A. degree from City College of New York and an M.A. in Economics

from Brown University before earning his J.D. from NYU in 1978. Prior to his legal career, Rothstein worked as an economist in the environmental consulting field and for the New York City Economic Development Administration.

Mr. Rothstein serves on the boards of directors of Volunteers of Legal Service and Citizens Union, where he chairs its Committee on State Affairs. He also serves on the New York State Bar Association House of Delegates.

Mr. CONYERS. Without objection, so ordered.

Mr. JONES. Because it is critical that we preserve the division of power in our government and public understanding of our Nation's laws, I hope this Committee will seriously consider the merits of H.R. 5993.

In closing, let me express my appreciation for Senator McCain's pledge to never use—to never use—signing statements if elected. I hope that Senator Obama and candidate Bob Barr each will say the same thing, that they will not issue signing statements should they be elected President of the United States.

Mr. Chairman, we must reveal public trust. The public trust in Congress and the White House is at an all time low. This hearing and the passage of legislation like H.R. 5993 and other legislation, I believe, will help to rebuild the public's trust.

Mr. Chairman, thank you for convening this hearing and giving me the opportunity to further discuss what I think is a very important issue to the Constitution of America.

Thank you, sir.

[The prepared statement of Mr. Jones follows:]

PREPARED STATEMENT OF THE HONORABLE WALTER B. JONES, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF NORTH CAROLINA

Mr. Chairman, thank you for the opportunity to testify regarding the use of presidential signing statements. To me, what we're really talking about today is trust: for our Nation to be free and strong, the people must trust their President to enforce the law. When the President bypasses the will of the people, expressed through Congress, and decides what provisions of law will and will not be enforced, the President goes beyond the Constitutional authority given to him by our Founding Fathers.

Presidential signing statements are official pronouncements that a President may make when signing a bill into law for a variety of purposes: to express thanks to legislators, to acknowledge matters of historical significance, or, to state that the President does not intend to enforce a specific section of the bill when signed into law because he does not believe it to be constitutional. While expressing thanks or making note of an historic piece of legislation is an appropriate use of a presidential signing statement, the increasing use of signing statements to declare the President's intent to ignore the will of Congress is unacceptable.

While signing statements have been used since the Monroe Administration in the early 19th century, their use to qualify or nullify legislation has grown dramatically in recent history. According to a September 2007 Congressional Research Service report entitled "Presidential Signing Statements: Constitutional and Institutional Implications," President Clinton issued 381 statements during his presidency, 70 of which, or 18 percent, raised constitutional or legal objections. That report also noted that as of late last year, President George W. Bush had issued 152 signing statements, 118 of which, or 78 percent, stated constitutional or legal objections.

The American Bar Association (ABA) convened a Task Force on Presidential Signing Statements and the Separation of Powers Doctrine in 2006. That Task Force examined the increased use of signing statements by presidents to effectively line-item veto provisions of bills that they do not intend to enforce. The report issued by the Task Force in August of 2006 cited numerous constitutional objections in signing statements by President Bush. I have submitted a copy of that report for the record. Specifically, the report notes signing statements objecting to provisions in a law banning the use of U.S. troops in combat against rebels in Colombia, as well as a law requiring background checks for civilian contractors in Iraq.

The American people deserve to know the truth about these signing statements—what they say and what they mean. That is why I have introduced H.R. 5993, the Presidential Signing Statements Act. This bill addresses the recommendation of the ABA Task Force that the Congress and the public be fully informed about the use of presidential signing statements by requiring that signing statements be sent to Congressional leadership within 3 days of issuance and published in the Federal Register. H.R. 5993 would also allow the House and Senate Judiciary Committees to request testimony on the meaning and justification for any signing statement.

Lastly, H.R. 5993 would provide that if any of the provisions I've mentioned are not complied with, funding of the underlying bill would be denied.

I would like to conclude my statement by expressing my appreciation for Senator McCain's pledge never to use signing statements if elected president. I would encourage Senator Obama to do the same. Our Nation is suffering from a lack of trust: how can our electorate trust their elected officials when the Executive power disregards provisions of bills passed by Congress and signed into law? The use of signing statements must be examined by the public, and it is my belief that my bill and this hearing today will serve that purpose. Mr. Chairman, I thank you for the opportunity to speak to the Committee on this important issue.

Mr. CONYERS. I thank you and all of our congressional colleagues who constitute panel one.

Mr. CONYERS. We will now invite panel two to come up, all nine of our witnesses, many of whom are former Members of Congress: Elizabeth Holtzman, seat number one; Bob Barr; former Mayor Rocky Anderson; Professor Steven Presser; former Associate Deputy Attorney General Bruce Fein; author and former prosecutor Vincent Bugliosi; Professor Jeremy Rabkin; Elliott Adams of Veterans for Peace; and Frederick Schwarz, senior counsel at the Brennan Center for Justice.

Would all of you please take your seats?

Elizabeth Holtzman is well known to everybody here. First of all, one of her latest books I am holding in my hand. And it deals with the constitutional removal of George Bush, written by her with Cynthia Cooper, who is also here in the audience. But she served as a Congresswoman in New York from 1973 to 1981. And she was a Member of the House Judiciary Committee we are proud to report. During the Nixon impeachment, she served with great distinction, and has since then become the only elected woman district attorney in Brooklyn, New York, and then, following that, the only woman ever elected as New York City Comptroller.

We have your statement, Congresswoman Holtzman, and everybody else's, which will be entered into the record.

And we invite you to proceed. Welcome to the Committee again.

TESTIMONY OF THE HONORABLE ELIZABETH HOLTZMAN, FORMER U.S. REPRESENTATIVE FROM NEW YORK

Ms. HOLTZMAN. Thank you very much, Mr. Chairman, Members of the Committee.

For me, it is a privilege to be here. I had the great honor of serving on this Committee with your esteemed Chairman, John Conyers, during the Nixon impeachment proceedings, and I know the critical and historical role this Committee has played in preserving and protecting democracy and the Constitution in this country. It is a great honor to be here. And I want to thank the Chair for his leadership in calling this hearing.

I will try to summarize my written testimony to you, which is that—and start by saying that the Framers developed the power of impeachment and put it in the hands of Congress to protect the democracy. And as unpleasant as that burden is, it can't be ignored, and it can't be shrugged aside. The buck stops here in this Committee room, in the House of Representatives, and the Congress of the United States in terms of protecting the democracy against a President, against an Administration, against executive officials who run amok. There is no avoiding that.

I believe that there are grounds to make a prima facie case of impeachment with respect to high Administration officials. I said prima facie, and I mean that. Anyone accused should have a full opportunity to present his side of the argument and defend and justify his actions.

I will briefly state what I believe the grounds would be prima facie. The first category would be the systematic refusal to obey the law. In the Constitution, the President is required to take care that the laws are faithfully executed. I often call that a double whammy. It was so important that the President has to take care and be faithful in the execution of the laws. We learned that in the third grade. The President executes the laws. Congress makes the laws.

There is substantial evidence that the Administration repeatedly failed and refused to obey the requirements of the Foreign Intelligence Surveillance Act, which was enacted in light of the abuse in Watergate when Richard Nixon illegally wiretapped, and was designed to prevent any repetition of unilateral Presidential wiretapping because of the abuses seen. Nonetheless, we know that the FISA court repeatedly, was not gone to for the purposes of obtaining approval, as the law required.

A second area in terms of systematic refusal to obey the law would be the Administration's response to the Geneva Conventions, the Conventions Against Torture, both of which are the law of the land under the Constitution, and the War Crimes Act of 1996 and the Anti-Torture Act. All of those acts and acts prohibit the mistreatment of detainees and set strict limits on interrogations. Two of the laws make such mistreatment a Federal crime, with the death penalty in the event that death occurs in the commission of that crime, which means no statute of limitations in cases where death results. The penalties are serious.

Nonetheless, as we know, there has been waterboarding, which has been admitted, which most nations believe constitutes torture. But even if waterboarding doesn't constitute torture, it certainly constitutes cruel and inhuman treatment, which is or used to be a crime under the War Crimes Act of 1996. The Administration has the responsibility under the Take Care Clause to enforce the Geneva Conventions, the Convention Against Torture, the Anti-Torture Act, and the War Crimes Act.

In my opinion, the evidence at this point suggests that those conventions and those laws have been systematically ignored.

I won't mention signing statements to any degree because I think the prior panel discussed that at length.

You also have the misuse of executive privilege. This is another area, by the way, that was a basis for the impeachment of Richard Nixon. The improper claim of executive privilege not only subverts the legitimate operations of Congress, but it can rise to an impeachable offense when it is used to shield improper or illegal executive branch activities. A most recent example, an egregious example, is the refusal to provide to a House Committee the FBI statements of Vice President Cheney's interview with them. There isn't even a colorable ground on which executive privilege can be claimed with respect to that statement.

Deceptions with respect to the Iraq war. Others have talked about that. I believe very strongly that deceptions in connection with the war-making power subvert the Constitution of the United States. As many of you have alluded to just today, Congress plays an essential role in the war-making decision of the United States. It is in the Constitution repeatedly. When an Administration deceives the Congress, it undermines the ability of the Congress to make a reasoned decision. And the decision about war-making is the most serious and grave and consequential one that the Congress can ever make. Those deceptions, I believe, are rampant.

The real question before us is what is to be done. I don't think that this Committee or this Congress can shirk the responsibility that the Constitution put in its hands. Of course, this is very late in the session of Congress, and the options are limited, but there are still options.

I believe the remedy that the Constitution provides, and the one that is most appropriate in this situation, is an impeachment inquiry. Why? It would send the clearest signal of the constitutional limits on abuse of Presidential power. It would also educate the public about the appropriate limits of executive power and the importance of checks and balances. And beyond that, it would also give those people in the Administration against whom accusations are leveled an appropriate forum in which to respond, which I believe is the American way.

Mr. KING. Mr. Chairman, the witness's time has expired.

Ms. HOLTZMAN. I thank the Chair and the Committee for the opportunity to be here.

[The prepared statement of Ms. Holtzman follows:]

PREPARED STATEMENT OF THE HONORABLE ELIZABETH HOLTZMAN

Chairman Conyers, members of the Committee, I thank you for the privilege of appearing before you on the issue of the Executive Power and its Constitutional Limitations. Having served on this Committee during the impeachment proceedings against President Richard Nixon, in the company I might add of your esteemed Chair, I want to express my enormous respect for this Committee and its critical role in preserving our democracy.

During my service on this Committee, I acquired a niche expertise on impeachment. This is frankly not expertise one would voluntarily seek. The issue of impeachment, after all, arises only when a president has abused the great trust placed in his hands, something that few people, despite party or political predilection, like to see happen. Looking back at the Nixon impeachment proceedings, I remember that, much as I disagreed with his policies, he was still my president, and it was painful and sobering to vote for his impeachment, a sentiment I believe all of my colleagues on the Committee shared, Democrat and Republican alike.

But sad as the responsibility to deal with impeachment is, it cannot be shrugged off. The framers put the power to hold presidents accountable in your hands. Our framers knew that unlimited power presented the greatest danger to our liberties, and that is why they added the power of impeachment to the constitution. They envisioned that there would be presidents who would seriously abuse the power of their office and put themselves above the rule of law. And they knew there had to be a way to protect against them, aside from waiting for them to leave office.

I will spell out briefly the grounds that I believe make out a prima facie case of impeachment for certain Administration officials. I have written about the grounds at greater length elsewhere, including in my book, co-authored with Cynthia Cooper, entitled *The Impeachment of George W. Bush*. If the Committee wishes, I would be pleased to provide additional details.

Before I go any further I want to issue a caveat. A prima facie case is just that. It doesn't mean that an impeachable offense has in fact been committed. Anyone accused must be given a full opportunity to rebut the charges and justify the questioned conduct. It is imperative that this principle be adhered to as it was in the

Nixon impeachment process. It was precisely the fairness of those proceedings to the President, not just the strong evidence of abuse of power, that persuaded the American people that impeachment was the appropriate remedy.

The abuses of power related to this Administration fall into several categories.

SYSTEMATIC REFUSAL TO OBEY THE LAW

The first abuse of power has to do with the systematic refusal to obey the law. One of the key constitutional responsibilities of a president, as set forth in the constitution, is to implement the laws. The framers use an elegant term for this: a president must, in their words, “take care that the laws be faithfully executed.” The responsibility is so serious that it is phrased almost redundantly: a president must “take care” and “faithfully” execute.

The principle is instilled in all of us as school children, where we learn at an early age that the Congress makes the laws and the president carries them out.

But has this principle that is enshrined in our constitution and the oath of office been adhered to? Let’s consider these examples:

1. *The Foreign Intelligence Surveillance Act.*

This law was enacted partially in response to President Richard Nixon’s illegal wiretapping where, falsely claiming national security, he wiretapped journalists and his own staffers. (This wiretapping was one of the many grounds for his impeachment). FISA was also enacted after disclosures of surveillance abuses by federal agencies. The 1978 law was designed to prevent these abuses by barring unilateral presidential wiretapping and requiring special court approval instead.

Starting in the fall of 2001, President Bush authorized wiretapping on at least 45 separate occasions without obtaining FISA court approval. He claimed that as Commander in Chief of the army and navy he was empowered to disregard FISA. But no president may simply override laws for this reason. The Supreme Court considered just this issue in *Youngstown v. Ohio*, where President Truman wanted to seize steel mills faced with a strike in order to ensure a continued supply of armaments for the Korean War. He claimed that as Commander in Chief he could do so. The Supreme Court rejected his position. In one of the most famous opinions in American jurisprudence, Justice Robert Jackson wrote: “No penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role. . . .” Justice Jackson, the former chief US prosecutor at the Nuremberg trials, alluded to the excesses of executive power seen in totalitarian regimes and warned that if we allowed the president’s Commander in Chief role to swallow up the checks and balances of our constitution, we would be starting down the road to military dictatorship.

2. *The Geneva Conventions, the Convention against Torture, the War Crimes Act of 1996 and the anti-Torture Act.*

The Geneva Conventions and the Convention against Torture ban torture. As ratified treaties, they are the law of the land under the constitution. Further, the anti-Torture Act makes it a federal crime to engage in torture abroad. President Bush has repeatedly said we “don’t do torture,” but is this true? The US has recently admitted that water boarding was used against three detainees. Water boarding has been considered torture by most countries, including the United States itself under prior administrations. Just recently, a committee of the British Parliament determined that US denials about torture could no longer be credited.

In addition to water boarding, detainees were subjected to many other forms of serious abuse, as is clear from various reports done after the Abu Ghraib disclosures. That mistreatment has been further documented in a number of recent books, including *The Dark Side*, by Jane Mayer.

Apart from torture, the Geneva Conventions and the War Crimes Act of 1996 bar cruel and inhuman treatment of detainees. Thus, even assuming that water boarding, stress positions, threatening use of dogs, exposure to temperature extremes and other similar abuses did not constitute torture singly or in combination, these practices likely constituted cruel and inhuman treatment and thus violated the War Crimes Act. Although the Act was made retroactively inoperative in the fall of 2006 as part of the Military Commissions Act at the Administration’s request, the law was still in effect up to that time.

The role of top Administration officials in detainee mistreatment has not been fully elucidated, but various investigations undertaken after the Abu Ghraib disclosures make it clear that the mistreatment was set into motion once the President decided, in February 2002, to remove all the protections of the Geneva Conventions from Al Qaeda, and some Geneva protections from the Taliban.

President Bush has recently acknowledged that he was aware of the actions of his Principals Committee, a group of National Security Council members who reportedly gathered to approve specific forms of mistreatment during the interrogation of various detainees. Did he know about and approve the techniques of interrogation mentioned above? If so, did that violate the anti-Torture statute and the War Crimes Act, and/or constitute a serious abuse of power and an impeachable offense?

Under the Geneva Conventions, the United States is required to bring to justice those who violate the Conventions. Pursuant to the duty to faithfully execute the laws, a president must take care that this mandate as well as relevant US statutes such as the anti-Torture and the War Crimes Act of 1996 are properly enforced. Yet, it appears that this requirement may not have been met. Former Secretary of Defense Donald Rumsfeld, who admitted to “ghosting” a detainee, which might have violated the Geneva Conventions and US war crimes statutes, was put in charge of the investigation. No higher ups were held responsible and the investigations did not cover top officials of the Administration.

The mistreatment of detainees is not just morally wrong and likely illegal, but it has brought disrepute to the United States and endangered our citizens and soldiers by inflaming anti-American sentiment in Iraq, Afghanistan and elsewhere in the world and by setting a precedent for the mistreatment of captured US troops.

3. *Signing Statements.*

President Bush has issued at least 750 signing statements in connection with his signing certain bills into law. The statements indicate that the President will not be bound to carry out all or parts of the laws in question.

Under the constitution, once a bill becomes law, a president must implement the law under the “take care” clause. If a president does not like the bill, the president may veto it, but pursuant to the carefully calibrated system of checks and balances, once the bill is vetoed, Congress has the power to override the veto, thereby making the bill law despite the president’s opposition.

Signing statements that are not acted upon create no serious constitutional issue. But, the General Accountability Office examined the signing statements of this Administration and reported that the Administration has in fact refused to enforce or implement laws in connection with which signing statements were issued.

The wholesale refusal to enforce duly enacted laws may well be viewed as a failure to carry out the constitutional “take care” duty. Signing statements coupled with the failure to implement the law might also be viewed as nullifying the veto provisions of the constitution and undermining the role of Congress in making the laws.

MISUSE OF EXECUTIVE PRIVILEGE

Another area of possible Administration abuse of power has to do with the abuse of executive privilege.

Under the constitution, Congress has the power to inquire into executive branch operations in furtherance of its legislative powers. The improper claim of executive privilege subverts the legitimate operations of Congress and may rise to the level of an impeachable offense, as occurred in the Nixon proceedings.

Recently, Attorney General Michael B. Mukasey announced that executive privilege was invoked to prevent the disclosure to the House Committee on Oversight and Government Reform of Vice President Cheney’s interview with the FBI about the Valerie Plame affair. Executive privilege protects the confidentiality of advice given to a president by his advisors. But the document being shielded by this invocation of executive privilege was not confidential advice to the President, but rather a statement made by the Vice President to the FBI, a law enforcement agency. There was also no confidentiality in that statement because such statements are typically presented to prosecutors and the grand jury and may even be shared with the public, if a trial involving the contents of the document takes place. There is no colorable basis on which executive privilege can be asserted with respect to this document.

This claim is reminiscent of President Nixon’s claims of executive privilege with respect to the illegal break in into the offices of Daniel Ellsberg’s psychiatrist. The break in was designed to obtain materials to smear Ellsberg, a prominent opponent of the Vietnam War. President Nixon did not want this break in disclosed and used various false claims of national security and executive privilege to keep it from Congress and Watergate prosecutors. The break in and its concealment were part of the Nixon impeachment proceedings.

Ironically, the Plame matter, about which the House Committee was inquiring, also may have involved an effort to smear and retaliate against a war critic, in this case, former Ambassador Joseph Wilson, Plame’s husband, for charging that President Bush had taken the country into the Iraq war on a basis of deception. Congress

was clearly entitled to explore whether executive power was abused in the Plame matter.

Similar extreme claims of executive privilege have been made in connection with Congress' efforts to examine the so-called US Attorneys' scandal. In response to the invocation of executive privilege with respect to their testimony, former and present Administration officials, Harriet Miers, Joshua Bolten and Karl Rove, have refused even to appear before Congress in response to subpoenas seeking information about what role the White House may have played in the scandal. Congress has every right to inquire into whether federal prosecutors were fired to stymie politically harmful prosecutions or whether prosecutors were urged by top Administration officials to prosecute innocent persons.

As the Nixon impeachment process shows, assertions of executive privilege to shield improper or criminal conduct rather than to protect legitimate White House advice may constitute an impeachable offense.

DECEPTIONS LEADING TO THE IRAQ WAR

The deceptions, exaggerations and misstatements made by high level Administration officials to drive the country into the tragically mistaken Iraq war subvert the constitution and may constitute an impeachable offense.

Hearings should have been held to determine what President Bush knew and when he knew it with respect to each and every claim he made as to why the country needed to go to war, but that regrettably was not done. Nonetheless, the latest report from the Senate Intelligence Committee concludes that one of the major claims made by top Administration officials to justify an attack on Iraq, a country that did not attack us—namely that Saddam Hussein was linked to 9/11—was not supported by intelligence. The Committee also found that the claim repeated by top Administration officials before the war that Saddam would hand off weapons of mass destruction to terrorists to attack us, thereby suggesting that Iraq posed a serious threat to the United States, was not supported by intelligence. It found a similar lack of support for a number of other pre-war Administration claims.

Although top Administration officials contended that Iraq's purchase of aluminum tubes and its alleged efforts to purchase Niger yellow cake were evidence of Iraq's efforts to reconstitute its nuclear weapons program, there was more than enough information at high levels of the Administration to raise serious doubts about these contentions.

As I explain in my book, presidential deception of Congress in connection with war-making is an impeachable offense. This is so because the constitution contemplates that Congress will be at least an equal partner with the president on decisions to go to war (aside from emergency situations, which this was not). Deceiving Congress undermines its ability to play the deliberative role the framers intended. We know the tragic consequences for the country of this flawed decision-making process.

What is to be done?

The question before this Committee is how to respond to the assault on the constitution, the rule of law and our system of government resulting from actions taken by this Administration.

Doing nothing is not an option. The failure to act will further fuel the culture of impunity that has grown up around this Administration. The failure to act will send a strong message to future presidents that they need not obey the law, that they can deceive the country and the Congress into future wars and that they can treat Congress with contempt, obstructing legitimate efforts by Congress to exercise responsible oversight over the executive branch, without serious consequences for them.

What is to stop future presidents of either party from doing the same or going further?

As a former prosecutor, I know that unless serious misconduct results in a correspondingly serious penalty, there is a grave likelihood that the misconduct will be repeated. The absence of a penalty breeds cynicism, disrespect for the law and suggests that the misconduct is not so bad, after all.

Congress needs to assert its constitutional prerogatives to check serious executive branch abuses, not because it craves power, but because our democracy depends on it. Our system counts on each branch of government to act as a counterweight to the other branches. If any branch fails to do its job and check the abuses of another branch, the system as a whole may fail, and our liberties will be endangered. Think of how far down this dark road of unchecked powers we have gone already: secret surveillance without judicial review, secret prisons, secret torture and mistreatment,

secret executive orders and possible politicized prosecutions—not to mention a tragic war begun on a basis of deception and misstatement.

The options before Congress for response, at this late stage, are very limited—but Congress still has options.

The remedy the constitution provides, and the one most appropriate to the present situation, is an impeachment inquiry. It would send the clearest signal of the constitutional limits on abusive presidential power. It would also educate the public about the appropriate limits of executive power and the importance of checks and balances in our constitutional system. That is what happened as a result of the impeachment process during Watergate.

I am not unrealistic, however. I understand the great time constraints and the virtual impossibility of completing a full-blown impeachment inquiry before this session of Congress is over. Nonetheless, there are compelling, pragmatic reasons—as well as a constitutional imperative—to commence an inquiry now, and pursue it in a meaningful and, constructive way over the few remaining months.

Even if an impeachment inquiry is not completed or does not result in an impeachment vote in the House or the Committee, it still should be undertaken. It is warranted and since impeachment inquiries cannot be evaded by citing executive privilege, initiating an inquiry now would accomplish several valuable purposes:

a) It would send a clear message to the American people and future presidents that the actions engaged in by top Administration officials are serious enough on their face to warrant an impeachment inquiry. It would create a precedent whereby executive privilege does not effectively vitiate a president's accountability to Congress, as this Administration has sought to do. This would create a deterrent to future administrations. So would the historic nature of impeachment. Opening an impeachment inquiry would put this Administration in a very small category along with only three others in US history that have been the subject of such an inquiry.

b) Because there is no executive privilege in an impeachment inquiry, pursuing one would allow the Committee to obtain additional material on presidential and vice presidential conduct which the Administration has until now refused to provide. That material would disclose the details about Administration actions that are currently secret. Those details would better inform Congress about what the appropriate response to this Administration's actions should be. They would also better inform it about how to avert abuses of power by future presidents. That in itself would be an important outcome of new disclosures. Alternatively, if the Administration still refuses to provide the information and documents requested as part of an impeachment inquiry, that refusal would itself be an impeachable offense under the precedent established in the Nixon proceedings, with the bi-partisan adoption of the third article of impeachment holding that the refusal to respond to committee subpoenas in an impeachment proceeding was an impeachable offense; and

c) It would allow a serious, sober and respectful discussion, in the appropriate and constitutionally mandated forum, of whether or not specific Administration officials committed impeachable offenses. The discussion would include a full and fair airing of evidence and argument on both sides, both allegations and defenses. As I understand it, such a discussion cannot be fully and satisfactorily conducted under House rules without a real impeachment inquiry.

I therefore suggest that the Committee commence an inquiry and send to the President and Vice President relatively short and straightforward requests for information—consisting of some key questions and requests for key documents. The questions would be similar to what lawyers call interrogatories, and document requests would be made at the same time. The Administration could be given until the end of the August recess to respond.

For example, in the area of abuse of executive privilege, the Committee could ask the President to direct the release to the Committee of the transcripts of both his and the Vice President's FBI interviews on the Valerie Plame matter, and if he refused, to provide his constitutional and legal justifications. Similarly, on the Iraq war, the President could be asked some questions such as: Given the Senate Intelligence Committee report that US intelligence agencies had no information to the effect that there were serious operational connections between Al Qaeda and Saddam Hussein, and given your Administration's claims otherwise to Congress and the American people, what information did you have and what was the source of any such information suggesting that there were such connections? On torture, since the President claims that we "do not do torture," he should be asked how he defines torture and the basis for that definition. He should also be asked if he approved of or authorized water boarding either before or after it was used on detainees. He should also be asked to provide copies of all authorizations for interrogations that he issued, including those to the CIA, and all legal documents that have not already been made public regarding his claimed authority to authorize interrogations that

conflict with the constraints contained in the Geneva Conventions, the Convention against Torture and US law. Of course, information that affects national security or that is classified would have to be properly handled by the Committee.

When the Committee obtains the President's responses, or if it becomes clear that the White House will not comply with its requests, then the Committee can determine what further steps it needs to take. Those could include a report by the Committee to the House on the results of the inquiry, a decision to refer the matter to the next Congress, or even a vote of impeachment if the President stonewalls the Committee's requests.

The other options for checking executive abuses are less appealing.

Censure for example is not a constitutional remedy. But even if censure is the course Congress takes, before it is adopted, the targets of any censure resolution should be given the opportunity to justify and explain their actions. The Congress must be seen to be both respectful and fair whether it acts in an impeachment inquiry or votes on censure.

Some have advocated reforming statutes, and that may be useful. But, I want to emphasize to the Committee that presidents intent on putting themselves above the law will not obey a new statute any more than they would obey an old one. Statutes cannot constrain a president who will not be constrained.

Criminal prosecutions alone are also not a sufficiently satisfactory answer to checking abuses of executive power. Leaving the treatment of these abuses to prosecutors to resolve is simply passing the buck. Congress must exercise its own powers to check the executive. Prosecutors vindicate criminal laws; it is only Congress that can vindicate the constitution against a president who abuses the power of his office. And some of the most serious abuses may not even be crimes, such as deceiving Congress and the public in connection with the war in Iraq. In the Nixon impeachment, one of the impeachment articles dealt with abuses of power, including the misuse of federal agencies and the creation of an enemies list of war opponents for the purpose of targeting harassing IRS audits against them. It is not clear that Nixon could have been prosecuted for many of those acts, but they were nevertheless among the articles of impeachment, and rightly so.

That said, prosecutions may play some role in checking those abuses of executive power that are violations of the criminal law. The anti-Torture statute, for example, makes torture a federal crime and when death results there is no statute of limitations. This means that any Administration officials involved in authorizing or carrying out torture where death resulted could be liable to prosecution for the rest of their lives.

The same was true of the War Crimes Act of 1996. That act had a lower standard of liability than the anti-Torture act and criminalized cruel and inhuman treatment of detainees. Similarly there was no statute of limitations for prosecutions under that Act if death resulted. Concerns about criminal prosecution under the War Crimes Act were pressing enough to be brought to the attention of President Bush by White House Counsel Alberto Gonzales in his memo to the President of January 2002. To avoid those prosecutions, Mr. Gonzales recommended making the Geneva Conventions inapplicable to Al Qaida and Taliban detainees, a recommendation that was partially accepted.

Thus, while certain Administration officials may argue that water boarding is not torture, there is little doubt that water boarding would meet the test of cruel and inhuman treatment and would likely violate the War Crimes Act as originally adopted. It may have been for that very reason that the Administration, in October 2006, persuaded Congress, as part of the Military Commission Act, to make the War Crimes Act retroactively inoperative. But Congress could overturn that inoperability provision and restore the full operability of the Act. Allowing Administration officials to be held liable under the War Crimes Act would go far towards re-establishing respect for the rule of law among high Administration officials, both now and in the future.

Even if Congress chooses the path of statutory reform and/or prosecution, those efforts, to be optimally well-informed and effective, would need to take into account the kind of disclosures that would be obtained through an impeachment inquiry because it operates outside the constraints of executive privilege. Administration actions on their face fully warrant such an inquiry. Once begun, the inquiry would both compel substantive disclosure by the Administration on critical issues and provide a constitutionally appropriate forum for full and civil discussion in which the Administration may answer the serious allegations raised. Neither of these things would be accomplished without an impeachment inquiry, and both are important to defending the constitution, upholding the rule of law and preventing abuses of power by future presidents.

Thank you for your consideration of these views.

Mr. CONYERS. Congressman—or former Congressman Bob Barr came from Georgia, represented his state from 1995 to 2003. He was a senior Member on the Judiciary Committee and was vice Chairman of the Government Reform Committee. Since leaving the House, Congressman Barr has worked extensively on privacy issues with organizations like the American Conservative Union and the Harvard Kennedy School of Government.

We are very pleased to have him here today. He is currently the 2008 Libertarian nominee for President of the United States.

Welcome back to the Judiciary Committee, Bob Barr.

TESTIMONY OF THE HONORABLE BOB BARR, FORMER U.S. REPRESENTATIVE FROM GEORGIA AND 2008 LIBERTARIAN NOMINEE FOR PRESIDENT

Mr. BARR. Thank you very much, Mr. Chairman.

It is always a pleasure to come home to this great institution, the Congress, and of course this Committee.

And I very much appreciate the Members here today represented by the sitting Ranking Member, Mr. King of Iowa.

We have heard earlier today, I forget which Members in their opening statements, Mr. Chairman, alluded to various poll numbers regarding the Presidency and the Congress and so forth. But there was a study recently gauging the public's awareness of and impression of something else that is even more important than political polls, and that is the privacy trust rankings of U.S. Government agencies which is put out annually by the nonpartisan Ponemon Institute.

And very revealing, in this most recent 2008 survey, ranking at, not at the top of the list, where the U.S. Postal Service is, which might indicate to some the depth of the problem we have that the U.S. Postal Service is the most trusted institution in the Federal Government, but ranking near the bottom is the Department of Justice. Nearly four times as many Americans place their trust—would sooner place their trust in the U.S. Postal Service than the U.S. Department of Justice. That should concern all of us as Americans and certainly all Members of the Judiciary Committee, certainly, regardless of which side of the aisle they sit on and I think points to the very valid reason for the Chair convening this hearing today, which hopefully will be the first of many inquiring into and following on the earlier work of this Committee to get to the bottom of what appear to be certainly problematic uses of executive power that did great detriment, great harm to the fundamental institutions of our government, namely checks and balances and separation of powers.

One does not need to impugn the reputation or the motives of any one President, whether the current President or any other President, to recognize the validity and importance of the matters before this Committee. As one of America's greatest jurists, Justice Louis Brandeis said many years ago, and I quote, the greatest dangers to liberty lurk in the insidious encroachment by men of zeal, well meaning, but without understanding.

It is up to this Committee to provide that understanding, to point out to the American people those instances, of which they are legion with the current Administration, in which, to be most chari-

table, that understanding of the institution of liberty is sorely lacking.

Most recently, two of America's current jurists I think echoed in their own way in different contexts the sentiments of Justice Brandeis. For example, Supreme Court Justice Anthony Kennedy in a majority opinion, 5-4 majority opinion, regarding the value and place of habeas corpus as an underpinning, not just of our society but of Western Civilization itself, said, and I quote him, the laws and Constitution are designed to survive and remain in force in extraordinary times. Liberty and security can be reconciled, and in our system, they are reconciled within the framework of the law.

And another of America's current jurists, appointed by President Reagan to the D.C. Court, you can fight the war, quote, you can fight the war on terrorism and lose everything if you have no civil liberties left when you get through fighting the war.

We have heard from some of the earlier members of the first panel and Members of this learned Committee on some of the specific instances of executive branch and separation-of-power abuses that we have witnessed with regard to the current Administration and in recent years. Some of these trends began before the current Administration but have been taken to new and unprecedented levels. And those are recounted to certainly a less eloquent extent than we have heard already in my written remarks, which I know the Chair will introduce into the record. But there are a number of specifics that I think need to be mentioned.

We have heard reference to the secret OLC opinions, Office of Legal Counsel, by this Administration. Here, again, this is nothing new, but the degree and depth and secrecy of which I think is new and very, very troubling, again, as an activity that undermines respect for the rule of law, separation of powers, and the legitimate power of the Congress to conduct oversight of the executive branch. I quote just one, and we still don't even know the extent of even this one memorandum from 2001 because it remains still classified, but this was a memorandum that indicated that, quote, the fourth amendment had no application to domestic military operations, close quote. I mean, what in the heck is the Administration talking about, first of all, about domestic military operations? And secondly, to display the audacity to declare that the fourth amendment does not reach and does not surround those operations, whatever they are, with the protections of the fourth amendment to our Constitution.

That is the depth I think of the lack of understanding of the fundamental institutions of our government that have been displayed by and disdained by the current Administration at a level taking them far beyond those problems that we have seen in prior Administrations. This is not a problem with a particular President. It is not a problem with a particular Administration, although the degree to which these problems have manifested themselves with the current Administration is problematic. This is an institutional concern.

For one thing, Mr. Chairman, every Administration in my view, and I think history bears this out, takes the power that it inherits from its predecessor and considers it a floor, not a ceiling. So if we don't get a handle on this now in some form or fashion, the next

Administration and the one after that, regardless of party, will take these abuses, these powers, these liberties with the fundamental institutions of our government, and take them to even higher and higher levels.

So I commend the Chair and the Members of this Committee for taking hold of something that could not possibly be more important, and that is the fundamental underpinnings of our constitutional system of government.

I thank the Chair.

[The prepared statement of Mr. Barr follows:]

PREPARED STATEMENT OF THE HONORABLE BOB BARR



OFFICE OF BOB BARR
Member of Congress, 1995-2003

**PRESERVING CONSTITUTIONAL LIBERTY
THROUGH CHECKS AND BALANCES AND THE
SEPARATION OF POWERS**
TESTIMONY
BEFORE THE HOUSE JUDICIARY COMMITTEE
BY
BOB BARR
JULY 25, 2008



OFFICE OF BOB BARR
Member of Congress, 1995-2003

**PRESERVING CONSTITUTIONAL LIBERTY
THROUGH CHECKS AND BALANCES AND THE
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Mr. Chairman and distinguished Members of this Committee, on which I was privileged to serve throughout my eight years as a Member of the House of Representatives, it is an honor to appear today to speak on the importance of the separation of powers in the federal government as a tool for protecting the people's liberties. Many vital issues confront our nation, but few are more important than repairing and maintaining the constitutional bulwarks that guarantee individual liberty and limit government power.

Mr. Chairman, today I appear as a private citizen, and also as a former Member of this Committee and as a once-again practicing attorney. I am also honored to be serving as the presidential nominee of the Libertarian Party.

It is axiomatic that no matter how much power government has, it always wants more. While the executive branch under George W. Bush has taken this truism to new heights, it is not unique in its quest for power. Unfortunately, the other branches of government have failed to do enough to maintain the constitutional balance. Particularly disturbing has been Congress' recent reluctance, in the face of aggressive executive branch claims, to make the laws and ensure that the laws are properly applied. This failure has inhibited the operation of the separation of powers, necessary to provide the checks and balances which undergird our system of constitutional liberty.

CHECKS AND BALANCES

The Constitution employs several techniques to preserve our liberties and privacy. One is to limit federal authority to enumerated powers. Another is to explicitly restrict government power, most notably through the Bill of Rights. The Founders also used the basic structure of government to protect the people from abuse, relying upon federalism, dividing power between state and national governments, as well as the separation of powers within the federal government itself.

The latter concept goes back to ancient Greece and was explicated by such political philosophers as John Locke and most famously by Baron de Montesquieu, who was much studied by America's Founders. Many countries have implemented the same principle, though with different government structures, ranging up to six branches in Germany. In the U.S. the Founders established the executive, legislative, and judicial branches. The result is intentional inefficiency: the three branches are expected to constantly check and balance each other.

For instance, James Madison declared in Federalist No. 51: "the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others." He went on to explain that, "[i]n framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." This means "the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other."

Despite the inevitable problems which will afflict any political system, the original constitutional scheme has worked extremely well. Although the relative power of the different branches has varied over time, checks and balances have always operated.

More than two centuries have passed, and the constitutional limits on both the legislative and judicial branches remain robust – at least in theory. The president appoints and the Senate confirms judges, for

instance. Presidents veto legislation and administer the laws, while the judiciary assesses the constitutionality of and interprets statutes.

In contrast, however, the constitutional constraints on the executive branch have eroded, with some breaking down substantially or entirely. The process has been underway for many years, but has greatly accelerated since 2001. In particular, President Bush and his appointees have used his power as commander in chief—of the military, not American society, it should be noted—to disregard congressional authority and override explicit constitutional provisions. Indeed, since 9/11, the president has let few opportunities slip by without reminding us that he is not only commander in chief but also a “wartime president,” and to argue that this status justifies whatever new power he claims to possess and wishes to utilize.

The president’s authority is substantial, but limited by law. The Constitution directs him or her to “take care that the laws be faithfully executed.” However, Congress is vested with the sole power to legislate, thereby determining the laws *to be* executed. Moreover, the president’s administration of the law is constrained by the Bill of Rights, including the Fourth Amendment, which bars searches and seizures absent a warrant based on probable cause. Further, though the president by the nature of his office has a lead role in shaping foreign and military policy, the Constitution shares powers in these areas between the legislative and executive branches.

Since the nation’s founding, Congress and the executive have struggled for supremacy. The 20th Century witnessed a steady if irregular expansion of presidential authority, which has carried over into this first decade of the 21st Century. The role of the president as the military’s commander in chief has taken on increasing importance as it has been used to justify the aggrandizement of the executive’s authority at the expense of that of both Congress and the judiciary. The issue is not just an abstract struggle between different government officials. Rather, this expansion of presidential power has increasingly put the people’s liberties and privacy at risk.

WAR-MAKING POWERS

One of the most important expansions of executive authority has been transforming the president’s power to conduct a war into that of *starting*

a war. Congress is vested with the sole power to declare, meaning to start, war; the Constitution's framers explicitly intended to diverge from the British system and vest the authority to initiate war with the many in the legislature rather than the one in the executive. The Constitution also empowers Congress to create the military and enact rules governing both the military and the conduct of war. Although the constitutional convention changed the term from "make" to "declare" to allow the president to respond to a surprise attack, and the president's authority to conduct war as commander in chief suggests that Congress cannot second guess his tactical judgments, he is to exercise all his powers within the larger framework created by the legislative branch.

Yet modern presidents increasingly assert their unilateral authority to bomb and invade other nations, without legislative approval, and to conduct military operations for years even after the original circumstances giving rise to a congressional authorization to use force have changed. This trend did not originate with the Bush administration, but has continued and grown under it. For instance, in 2002 President George W. Bush insisted that Congress not tie his hands, and refused to acknowledge the constitutional necessity of winning legislative approval to invade Iraq. Rather than make the decision for or against war, Congress transferred discretion to initiate war against Iraq to the president.

After launching the Iraq invasion in 2003 based on a 2002 congressionally-passed resolution to do so, the current administration has rejected the argument that a multi-year occupation violates Congress' authorization of force, which legally controls the executive's war objectives. The president also has resisted congressional oversight of its objectives and policies, which is an essential aspect of Congress' authority. Although acknowledging that Congress controls the budgetary purse strings, the president and his aides have fought any attempt to condition appropriations—conveniently bundled in "emergency" supplementals in order to reduce the opportunity for legislative review.

EROSION OF LIBERTY

The administration has attempted to use the same commander in chief power, as well as Congress' Authorization for Use of Military Force (AUMF), approved after 9/11, to trump constitutional protections for

civil liberties and privacy. Yet the Constitution does not create a national security exception to the Bill of Rights or separation of powers, and no member of Congress imagined that voting to authorize the use of force abroad simultaneously authorized the president to engage in unspecified and otherwise unconstitutional conduct at home. There is no basis for the argument the president's authority as commander in chief in effect swallows and trumps the rest of the Constitution.

For instance, the administration undertook warrantless surveillance of Americans without court order or supervision. Conducted by the National Security Agency, the program was inaugurated shortly after the terrorist attacks of 9/11 and was inaccurately dubbed the *Terrorist Surveillance Program*, since in fact it targeted American citizens with no reason to believe they were engaged in any actions involving terrorism. The eavesdropping directly violated even the relaxed warrant requirements of the 1978 Foreign Intelligence Surveillance Act.

Under Republican control, Congress unashamedly refused to conduct serious inquiry into the obviously improper NSA surveillance program. Unfortunately, the GOP majority put partisan comity ahead of fidelity to the law and Constitution. Although more members of the Democratic majority, which took over in January 2007, indicated concern about administration lawlessness, this Congress recently caved in to administration demands and amended FISA to grant the government unprecedented power to surreptitiously spy on the phone calls and emails of American citizens in our own country, based on nothing more than a belief they are communicating with someone not in the U.S. The measure also granted immunity – retro-active and prospective – to telephone companies which aided government law-breaking.

Thus did a genuine need to modernize certain of FISA's technical provisions—for example, to reverse the court interpretation that monitoring calls sent by modern routing mechanisms through the U.S., even though both parties were located abroad, required a court order—became an opportunity to greatly expand the law's reach. The result is to make virtually every international call or email subject to monitoring without court oversight. Thereby carving out an entire class of communication from constitutional protection is a breathtaking decision with the potential to do enormous damage to the very meaning of the Fourth Amendment and to the essential foundation of limited government. This law also has effectively neutered the oversight role the

Congress or the Foreign Intelligence Surveillance Court should play in this area.

Similarly extravagant has been the administration's claimed right, as an adjunct of both the president's constitutional warpowers and the AUMF, to designate American citizens arrested in America as well as alleged terrorists captured overseas as "enemy combatants" beyond the reach of the U.S. Constitution and courts. The detention of combatants captured in battle is a natural adjunct to war, but not the suspension of all constitutional and legislative oversight of the executive's power to imprison anyone it claims to be a combatant for as long as it desires. The argument that the president has the unique power to suspend basic constitutional guarantees, including the "Great Writ" of *habeas corpus*, whereby a person has a fundamental right to be brought before a court to determine the lawfulness of his or her detention or deprivation, is particularly dangerous in the midst of a potentially endless "war" where the American homeland is considered to be a -- and perhaps the chief -- battlefield.

There is nothing in Article II of the Constitution which provides that the president is the military's commander in chief, to suggest that he thereby gains the power to suspend any law and any constitutional provision at his discretion. Indeed, the very next section reminds the president that at *all* times he has a responsibility to "take Care that the Laws be faithfully executed," with no hint of an exception whenever he decides he is acting as commander in chief. In *Youngstown Sheet & Tube Co. v. Sawyer* (1952), the Supreme Court rejected a similar claim by the Truman administration -- that the president's powers as commander in chief allowed him to seize steel mills despite Congress' refusal to authorize such an act.

Nor is it plausible that Congress believed that by authorizing military action in response to 9/11 it was empowering the president to deny American citizens their constitutional rights at home. Authorizing military action overseas does not logically mean authorizing every conceivable use of surveillance, arrest, and imprisonment by the federal government at home. Indeed, if the administration had believed this theory at the time, there would have been no reason for it to have proposed the Patriot Act, since all those powers, too, should have been included in the AUMF. Equally important, Congress itself only has the authority to suspend—and only if our country is invaded or faced with

overt “Rebellion”—not eliminate, *habeas corpus*. Congress cannot authorize the president to limit that right in additional circumstances.

SIGNING STATEMENTS

Another example of a direct presidential assault on the separation of powers, and thus the constitutional structure undergirding our free society, are presidential signing statements. Throughout history, signing statements have been used to thank supporters, provide reasons for signing a bill or express satisfaction or displeasure with legislation passed by Congress. Presidents Ronald Reagan, George H.W. Bush, and Bill Clinton all used signing statements to express constitutional and other objections to legislation, influence judicial interpretation, and otherwise advance policy goals.

President George W. Bush has more aggressively – to an historically unprecedented degree -- employed the presidential signing statement to challenge or deny effect to legislation that he considers unconstitutional, but nonetheless signs. As the Congressional Research Service reported last year, a much higher share of President Bush’s signing statements have contained a constitutional challenge, and they “are typified by multiple constitutional and statutory objections, containing challenges to more than 1,000 distinct provisions of the law.” This tactic, adds CRS, is “an integral part of the administration’s efforts to further its broad view of presidential prerogatives and to assert functional and determinative control over all elements of the executive decision making process.”

In scores of cases President Bush has claimed that legislation has improperly interfered with presidential authority. In a democracy, such assertions of power—most fundamentally the underlying failure to comply rather than the explanatory signing statement—do not happen in a vacuum. They affect the careful balance of power in our system of government. The executive branch is not free to unilaterally change that balance; our Constitution requires legislative and judicial involvement in lawmaking to ensure public debate and oversight and to guard against centralization of power.

Article I of the Constitution gives Congress the power to make the laws. Under Article II, the president has the duty to ensure that the laws are faithfully executed. The Constitution also provides that if the president

objects to a proposed law, he can veto it. This gives Congress the chance to override his veto, enacting the law despite his opposition, or to sustain his veto, and then work to address the president's objections. A president may also challenge a law he believes to be unconstitutional in court.

Instead, the current president, especially, has used signing statements, and a refusal to enforce the law, as a sub rosa form of unreviewable veto, usurping the power of Congress and aggrandizing the power of the executive.

EXECUTIVE PRIVILEGE

Another tool of executive aggrandizement has been the doctrine of executive privilege. No where spelled out in the Constitution itself, the claim has been advanced by presidents starting with George Washington. The doctrine is most persuasively rooted in national security, but presidents often have more generally contended that confidentiality is necessary for the operation of the executive branch.

Although the argument at its core is not without force, executive privilege has become an all-purpose shield and boilerplate excuse to hide embarrassing and potentially incriminating information from Congress and the public. That a claim for executive privilege had to be balanced with other interests was evident in 1807 when Aaron Burr, on trial for treason, sued President Thomas Jefferson to produce a supposedly exculpatory letter. Chief Justice John Marshall rejected Jefferson's argument that disclosure risked public safety and ordered the president to comply. In 1974 the climactic case of *United States v. Nixon* confronted President Richard M. Nixon's attempt to use the claim of executive privilege to avoid having to turn over evidence of criminal misbehavior to Watergate special prosecutor Leon Jaworski. The Supreme Court unanimously acknowledged a generalized right of confidentiality, but ruled that this privilege must yield to other government interests, most notably the criminal process. The order that he yield up the tapes recording his Oval Office conversations led to his resignation.

Other presidents have relied on the doctrine to shield their operations from scrutiny. The Clinton administration avoided disclosure of the deliberations of the president's health care reform task force because

First Lady Hillary Clinton was considered to be a government employee under the relevant legislation. This admittedly strained interpretation allowed the courts to avoid ruling on the question of whether executive privilege applied to conversations between government officials and people outside of government.

As in other areas, the Bush administration has even more energetically sought to keep information about many of its activities, even those with no sensitive national security implications, from public view. For instance, the administration resisted a request for disclosure, based on legislation covering “advisory committees,” of the names of participants and results of discussions by members of the Vice President’s National Energy Policy Development Group. The administration lost in the lower courts, but was partially upheld by the U.S. Supreme Court, which sent the case back to the District Court for reconsideration. The D.C. Circuit Court of Appeals ultimately refused to order disclosure based on its interpretation of the relevant statute, based on the fact that several government officials served on the Group.

Elsewhere the administration’s case for secrecy has been more frivolous and less well received. For instance, the administration attempted to keep secret visitor logs detailing Christian leaders who visited the White House and vice president’s residence. Earlier this month the D.C. Circuit distinguished this case from the energy group decision and ruled that the logs were not the property of the White House—which took custody from the Secret Service (part of the Treasury Department) in order to thwart a request under the Freedom of Information Act—and ordered their release.

These cases centered on statutory interpretation. The Bush administration also has more directly used the doctrine of executive privilege to resist disclosures to Congress, even as part of investigations of potential executive wrong-doing. For instance, at a recent hearing of this Committee, Karl Rove refused to appear, based on advice of the White House Counsel, to discuss his role in possible meddling in Justice Department prosecutions. Last year White House Chief of Staff Josh Bolten and former White House Counsel Harriet Miers similarly refused to obey committee subpoenas to appear to discuss the firing of U.S. attorneys; the House voted to hold them in contempt.

The House Committee on Oversight and Government Reform has been investigating the White House's involvement in the disclosure of Valerie Plame's employment by the CIA. In June Chairman Henry Waxman pointed out to Attorney General Michael B. Mukasey that "In his interview with the FBI, Mr. Libby stated that it was 'possible' that Vice President Cheney instructed him to disseminate information about Ambassador Wilson's wife to the press. This is a significant revelation and, if true, a serious matter. It cannot be responsibly investigated without access to the Vice President's FBI interview." However, in an echo of the Watergate controversies, Mukasey refused to comply, citing fear of "the chilling effect that compliance with the committee's subpoena would have on future White House deliberations." The White House cited executive privilege in refusing to turn over the FBI interview, even though the vice president's chief of staff had been convicted of perjury.

In an extraordinary twist on the doctrine of executive privilege, the Bush administration announced last year that it would not allow any U.S. Attorney to pursue a contempt citation on behalf of Congress. By attempting to control federal employees who also are officers of the courts, the administration attempted to place itself beyond effective accountability by any person or institution. Mark Rozell of George Mason University termed this position "astonishing" and "a breathtakingly broad view of the president's role in this system of separation of powers. What this statement is saying is the president's claim of executive privilege trumps all." Indeed, if sustained, Rozell added, this position will allow "the executive to define the scope and limits of its own powers." As a result, the House has filed suit to enforce its subpoena, the first such lawsuit in history.

"STATE SECRETS" DOCTRINE

Another doctrine used by the executive branch to the detriment of the constitutional separation of powers is the so-called "state secrets privilege." According to this doctrine, the executive branch refuses to release information in court cases on the grounds that disclosure would harm "national security." First recognized by the U.S. Supreme Court in 1953, the doctrine has been treated as well-nigh absolute by some judges.

In this case, like many others, there is an obvious basis for shielding sensitive information in extraordinary instances from public view, even

to the detriment of a valid lawsuit. However, again, a legitimate doctrine has been twisted to frustrate cases that might expose government wrong-doing and executive misconduct. As a result, government accountability, and redress of wrongs suffered by individuals as the result of government action, have suffered greatly.

For instance, Khalid El-Masri filed a civil case against the U.S. government in a case involving “extraordinary rendition,” in which the government illegally detained Mr. El-Masri in a case of mistaken identity. The trial court judge accepted the government’s claimed “state secrets privilege,” which thwarted disclosures necessary to prosecute the case. A similar result was reached in a similar case by Canadian Maher Arar, who was deported, based on false information, by the U.S. to Syria (he was a dual citizen), where he was apparently tortured. The Bush administration also invoked the state secrets privilege to defeat lawsuits challenging the government’s unlawful FISA surveillance program.

Although judges can order, and have ordered, disclosure of disputed documents and other information to them for *in camera* screening, too often courts have given inordinate deference to executive branch claims. But the privilege should be treated as qualified, not absolute. A government refusal to allow judicial inspection could be met with forfeiture of the case. Congress could assist the judiciary by holding hearings and drafting legislation clarifying the authority of judges, procedures to be used to adjudicate executive claims of state secrecy, and sanctions to be imposed for the executive branch’s refusal to comply.

CONGRESSIONAL OVERSIGHT

Unfortunately, Congress has been at least impartially complicit in this and other presidential “power grabs.” It repeatedly has acquiesced to President Bush’s unilateral actions. It has failed in its constitutional obligation to make the laws and to oversee the executive branch to ensure that the latter properly implements the laws passed by Congress.

Enforcing presidential compliance with the law is not easy, especially since a pattern of executive law-breaking has been established. However, the people—the citizens in whose name this House and the rest of the government act—can and should insist that those elected president, this coming November and in the future, respect the separation of powers and other constitutional limits on their authority.

Taking an oath to “preserve, protect and defend the Constitution of the United States” requires no less.

Moreover, the legislature has many tools at its disposal to promote respect for the nation’s fundamental law. It can enlist the courts, of course. It can use its power to hold oversight hearings, backed by the power to subpoena and hold executive officers in contempt. It can refuse to confirm presidential appointments.

Most fundamental is its power to control appropriations. Congress can shape funding in the relevant area to encourage compliance with the law. Moreover, broader retaliation, though less desirable, is another possibility. For instance, the Reagan administration’s attempt to thwart explicit congressional guidelines over federal contracting led to a vote by this Committee to defund the Office of the Attorney General. A compromise was reached: Congress funded the Attorney General’s Office while the administration complied with the law.

The most important requirement is that Congress treat seriously its responsibility to uphold the Constitution. Neither the Bill of Rights nor the separation of powers are self-enforcing documents or principles. The legislative branch has a critical role to play.

The Constitution creates explicit guarantees for individual liberty and limits on government power out of the recognition that even the best-intentioned public officials working to achieve the most public-spirited aims make mistakes. That surely has been evident during the so-called “Global War on Terror,” in which more than a few innocent people have been not just detained, but also imprisoned and tortured. The Bill of Rights and the separation of powers are not mere technicalities, but essentials of our government and our entire system of ordered liberty.

I know this Committee understands that the president’s quest for intelligence and desire for flexibility, legitimate as they are, should not be allowed to serve as a subterfuge for circumventing constitutional protections for liberty and restrictions on presidential power. U.S. District Court Judge Royce Lamberth, appointed by President Ronald Reagan, has reminded us that, “[w]e have to understand you can fight the war [on terrorism] and lose everything if you have no civil liberties left when you get through fighting the war.”

The temptation to cut constitutional corners is not the province of any one party. Rather, it grows when one party controls both the executive and legislature. Then party comity sometimes overrides institutional differences, as it did most recently between 2001 and 2006.

But our constitutional system, and its commitment to limited government and individual liberty, is based both on a series of explicit guarantees that constrain the use of government authority, and a structure that divides government authority. As such, the separation of powers, with the checks and balances expected to naturally follow, is the bedrock foundation of American constitutional government. It is a foundation clearly in danger of crumbling.

Mr. CONYERS. Thank you very much.

I note that our former colleague to your right was nodding her head on occasion.

The Chair is very happy to welcome the former Mayor of Salt Lake City, Utah, who had served as mayor from 2000 up until earlier this year. And after he left just recently, he founded an organization called the High Road For Human Rights, dedicated to facilitating grass roots advocacy on issues of torture, genocide, global warming, and human trafficking. He now serves as that organization's president. He is known to many of us in the Congress. And we welcome him.

TESTIMONY OF THE HONORABLE ROSS C. "ROCKY" ANDERSON, FOUNDER AND PRESIDENT, HIGH ROADS FOR HUMAN RIGHTS

Mr. ANDERSON. Thank you, Mr. Chairman, Members of the Committee.

I am honored to address you today, and along with millions of others, am pleased that you are considering your solemn responsibility to ascertain and disclose to the American people the nature and scope of egregious abuses of power by the Administration.

Ascertaining and disclosing the truth about these matters is vital in order to restore the rule of law and the crucial role Congress plays in a system of checks and balances that has been utterly eviscerated.

We still have no idea about the nature and scope of the Administration's felonious, warrantless wiretapping program. We don't know if dozens, thousands, or millions of Americans have been victims of the illegal spying initiative. How were those communications used? Were my communications intercepted? Were yours? We, the American People, are entitled to know.

United States agents have illegally tortured detainees and have kidnapped, disappeared, and tortured, or caused others to torture, people around the world, including some like Maher Arar and Khalid al-Masri, who had no connection whatsoever to terrorism. However, the American people have not learned how this unprecedented, blatantly illegal program operated, whether it is continuing, or the consequences suffered by the people who have been subjected to these monstrous human rights abuses. Because the courts have blindly accepted the perpetrators' indication of the frighteningly overbroad State Secrets Doctrine and summarily dismissed cases challenging these illegal human rights abusing practices, the American people will learn the truth only if Congress meets its responsibilities.

The Administration has engaged in heinous human rights violations, the most serious breaches of trust, abuses of power injurious to the Nation, astounding denials of due process, including indefinite detention without charges or without even a hearing, war crimes, crimes against peace, misleading Congress and the American people about threats to our Nation's security and the supposed case for war, and grave violations of treaties, the Constitution, and domestic statutory law.

What are the potential remedies? First, there has never been a more compelling case for impeachment. Nothing would speak so

loudly regarding the principled, nonpartisan commitment of our Nation to the rule of law and to our jealous embrace of our constitutional democracy.

I urge the consideration by Congress of Federal legislation that would instruct the courts they are not to consider signing statements when determining the meaning of legislation and provide that no one can rely upon signing statements or opinions of the Office of Legal Counsel as a defense for a violation of the law.

I also urge Congress to seek a declaratory judgment as to the legal effect of the Administration's signing statements. Some members of the Administration appear to be bent on attacking Iran.

I urge Congress to reassert its vital constitutional role, and not just send letters of concern, not just make threats about initiating impeachment proceedings, but forbid, by a criminal statute with severe penalties, any attack against Iran, except as permitted under the United Nations Charters and the Constitution, absent explicit authorization by Congress.

Special prosecutors should be authorized, designated and assigned to investigate and prosecute violations of the law by members of the Administration.

Legislation strictly limiting the application of the state secrets doctrine should be urgently considered in order that the courts will once again provide a meaningful check on abuses of power and violations of the law by members of the executive branch.

Severe punishment should be provided for any government agent who engages in or authorizes torture or cruel, inhuman or degrading treatment of any person being detained anywhere, without exception.

Congress should make clear what process must be followed before any U.S. treaty obligations are violated or terminated by any member of the executive branch, and provide for sanctions in the event such process is not followed.

Vital to our constitutional democracy and to our political and moral standing throughout the world is a comprehensive consideration by Congress of what is to be done for the sake of accountability, and to ensure that the horrendous damage to our Nation and to much of the rest of the world as a result of the illegal and abusive misconduct of Administration officials——

Mr. KING. Mr. Chairman, the gentleman's time has expired.

Mr. ANDERSON [continuing]. Again repeated.

If I could just sum up, the way to get to that accountability and deterrence is the appointment of a select Committee similar to the Church and Ervin committees or an independent commission charged with investigating the abuses and making recommendations concerning reforms——

Mr. KING. Mr. Chairman——

Mr. ANDERSON [continuing]. That would spell a recommitment to our fundamental democratic and moral principles.

Thank you Mr. Chair.

[The prepared statement of Mr. Anderson follows:]

PREPARED STATEMENT OF THE HONORABLE ROSS C. "ROCKY" ANDERSON

Testimony of Ross C. "Rocky" Anderson,
Founder and President,
High Road for Human Rights Education Project
and High Road for Human Rights Advocacy Project

Regarding Illegal Conduct and Other Egregious Abuses by
Members of the Administration
and Possible Steps Toward Accountability,
Deterrence, and Reform

Before the House Committee on the Judiciary
United States House of Representatives

Hearing on Executive Power and Its
Constitutional Limitations

July 25, 2008

I am honored to address you today and am pleased that you are considering your solemn responsibility to ascertain and disclose to the American people the nature and scope of illegal conduct and other egregious abuses of power by the administration. Ascertaining and disclosing the truth about these matters is vital in order to restore our constitutional democracy, the rule of law,¹ and the crucial role Congress plays in a system of checks and balances that has been utterly emasculated by members of the administration.

Astoundingly, even after learning over 2 1/2 years ago that the American people were misled about the government purportedly obtaining a warrant for all electronic surveillance,² we still have no idea about the nature and scope of the felonious warrantless wiretapping program.³ How many citizens' communications were illegally intercepted by our government? At this point, we don't know if it has been dozens, hundreds, thousands, or millions of Americans who were victims of the illegal spying initiative. Whose communications were intercepted, and for what purpose? Are those communications still maintained? If so, why and by whom? How were those communications used? Were my communications intercepted? Were yours? We, the American people, are entitled to know. The only way

we will learn the truth, and the only way we will know what needs to be done to prevent such outrages in the future, is through Congress aggressively ferreting out and disclosing the truth.

We have learned that US government agents have tortured detainees in blatant violation of fundamental treaty obligations⁴ and statutory laws passed by Congress.⁵ We have also learned that US agents have kidnapped, disappeared, and tortured (or caused others to torture) people around the world, including some who had no connection whatsoever to terrorism.⁶ However, the American people have not learned how this unprecedented, blatantly illegal⁷ program operated, by whom, whether it is continuing, or even how many people have been subjected to these monstrous human rights abuses. In our democracy, we are entitled to answers to these questions.

Because the courts have blindly accepted the perpetrators' invocation of the frighteningly over-broad "State Secrets" doctrine and summarily dismissed cases challenging these illegal, human-rights abusing practices, the American people will learn the truth only if Congress assumes its vital responsibilities of investigating, ascertaining, and disclosing the truth.

The administration has, with impunity and arrogant disregard of our long-treasured system of separation of powers among three branches of

government, engaged in heinous human rights violations, the most serious breaches of trust, abuses of power injurious to the nation, war crimes, crimes against peace,⁸ misleading Congress and the American people about threats to our nation's security and the supposed case for war,⁹ and grave violations of treaties, the Constitution, and domestic statutory law.

What are the potential remedies? First, there has never been a more compelling case for impeachment.¹⁰ Nothing would speak so loudly regarding the principled, non-partisan commitment of our nation to the rule of law, to our jealous embrace of our constitutional democracy, and to fundamental morality.

There is much more that Congress can do to restore the rule of law at a time when administration officials assert unbridled, dictatorial power, even to the point of issuing signing statements, declaring that only the president has the last word as to the scope and applicability of the statutes.¹¹

I urge the consideration by Congress of federal legislation that would (1) instruct the courts that they are not to consider signing statements when determining legislative history; (2) prohibit the President from issuing any statement that purports to limit any part of the legislation as being advisory or that purports to assert any authority by the President to determine the

scope or applicability of the legislation; and (3) provide that no one can rely upon signing statements as a defense for a violation of the law. I also urge Congress to seek a declaratory judgment as to the legal effect of many of the signing statements.

Some members of the administration appear to have been making a case for an attack against Iran. Threats by members of Congress to impeach in the event of a unilateral decision to attack or letters expressing concern are insufficient, particularly when dealing with administration officials who have claimed power to do as they please, regardless of the Constitution, federal statutes, or rulings of the courts. I urge Congress to reassert its vital constitutional role and forbid, by a criminal statute with severe penalties, any attack against Iran, except as permitted under the United Nations Charter and the Constitution, absent explicit authorization by Congress.

Special prosecutors should be authorized, designated and assigned to investigate and prosecute violations of the law by members of the administration, particularly for involvement in felonious warrantless wiretapping, torture, and kidnappings of people in the so-called "extraordinary rendition" program.

Legislation limiting the application of the State Secrets doctrine should be urgently considered in order that the courts will once again provide a meaningful check on abuses of power and violations of the law by members of the Executive Branch.

Legislation should be passed immediately providing for severe punishment for any government agent who engages in or authorizes torture, or cruel, inhuman, or degrading treatment of any person being detained, without exception.

Congress should make clear what process must be followed before any US treaty obligations are violated or terminated by any member of the Executive Branch. Congress should also reaffirm its commitment to treaty obligations forbidding aggressive war and torture.

When Congress issues subpoenas, it should assert its power to enforce the subpoenas aggressively and without delay. If the Attorney General of the U.S. will not cooperate with Congress in enforcing subpoenas, Congress should terminate funding for the Office of the Attorney General until such cooperation is forthcoming.¹²

Vital to our constitutional democracy, and to our political and moral standing throughout the world, is a comprehensive consideration by Congress of what is to be done for the sake of democratic accountability,

and to ensure that the horrendous damage to our nation and to much of the rest of the world as a result of the illegal and abusive misconduct of administration officials is never again repeated.

In order to comprehensively determine the nature and extent of abuses by the administration and those who have worked in concert with it, and to prevent such misconduct in the future, a select committee, similar to the Church and Ervin Committees, should be appointed and charged with investigating the abuses and making recommendations concerning reforms that will aid in restoring the rule of law in our great nation, reasserting the crucial role of Congress, and making it clear to American citizens and people throughout the world that the rights and dignity of people will be honored and protected.

Pursuing these measures would be an important beginning to the restoration of the balance of power and system of checks and balances in our federal government, the restoration of the reputation of the United States among other nations, and to the restoration of our constitutional democracy, with the honor and respect it deserves.

¹ The rule of law, as a safeguard against arbitrary governance, was provided for in the Magna Carta in 1215, which made it clear that King John, who previously governed any way he saw fit, was constrained by rules that applied to everyone alike.

Our Constitution is the bedrock of our system of government. It is founded on the principle of the rule of law. It spells out the powers of each branch of government and limits what government and government officials can do.

Although the Constitution is a product of incredible brilliance that has served our nation well, it is only as solid as each generation's determination to uphold it. When government officials violate it, they must be brought to account or the Constitution becomes nothing more than a pretense and a piece of paper. For our constitutional form of government to survive, and for the rule of law to prevail over the rule of dictatorship, each branch of government must be constrained by the rule of law, and by the parameters of its constitutionally designated powers. Each branch of government must jealously protect against the other branches exceeding and abusing their power. That is the beauty, and the necessity, of the balance of power between the Executive, Legislative, and Judicial branches of our government.

Members of the administration have endeavored in a systematic and dangerous fashion to extend the powers of the president in abusive, dictatorial fashion, completely at odds with our Constitution and the rule of law.

Members of the administration have claimed extraordinary, unprecedented executive powers that they believe exempt the president from laws passed by Congress, from treaties to which the United States has bound itself, and from protections of our individual freedoms set forth in the Constitution. They have pursued such authoritarian power, completely at odds with the rule of law, by asserting what they call a "unitary executive" power and a supposed "inherent power" that allows the president to make up the rules, even when contrary to what Congress and our Constitution have required.

² During a rally to support the Patriot Act in 2004, a member of the administration told the public that “any time you hear the United States government talking about wiretap, it requires — a wiretap requires a court order. Nothing has changed, by the way. When we’re talking about chasing down terrorists, we’re talking about getting a court order before we do so.”

In mid-December 2005, we learned through news reports that a member of the administration, for five years had secretly ordered the National Security Agency to engage in wiretapping of American citizens’ emails, phone calls, and other communications in blatant violation of the Constitution and the Foreign Intelligence Surveillance Act.

³ After the abusive warrantless wiretapping by the Nixon administration was brought to light by the Church Committee, Congress passed the Foreign Intelligence Surveillance Act, unequivocally stating that a warrant must be obtained in order to engage in electronic surveillance and that the failure to do so is a federal felony, punishable by a fine of \$10,000 and up to five years imprisonment.

⁴ The Geneva Conventions proscribe cruel treatment, torture, and humiliating and degrading treatment. A violation of these and other safeguards described in the Geneva Conventions are, according to the Conventions, a “grave breach” and a war crime under international law. The International Covenant on Civil and Political Rights proscribes torture and cruel, inhuman, and degrading treatment. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment prohibits the infliction of “torture and other cruel, inhuman and degrading treatment or punishment” of prisoners to obtain information. The treaty, ratified by the United States Senate in 1994, provides: “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other political emergency, may be invoked as a justification of torture.”

⁵ The War Crimes Act of 1996 defines as a "war crime" any conduct defined as a grave breach in any of the Geneva Conventions. In addition to the Senate ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, Congress passed a statute prohibiting U.S. officials, anywhere, from intentionally inflicting "severe physical or mental pain or suffering" upon anyone in their control. A violation would subject the perpetrator to a fine or imprisonment for up to twenty years. Any government official conspiring to abuse a prisoner is subject to the same penalties as the person who inflicts the abuse. 18 USC §2340.

⁶ The following was stated at a press conference:

Q: Mr. President, can you explain why you've approved of an expanded the practice of what's called rendition, of transferring individuals out of U.S. custody to countries where human rights groups and your own State Department say torture is common for people under custody?

THE PRESIDENT: The post-9/11 world, the United States must make sure we protect our people and our friends from attack. That was the charge we have been given. And one way to do so is to arrest people and send them back to their country of origin with the promise they won't be tortured. That's the promise we receive. This country does not believe in torture. We do believe in protecting ourselves. We don't believe in torture.

President Bush, Press Conference, March 16, 2005.

US agents have not "arrested" people to "send them back to their country of origin." They have kidnapped people, "disappeared" them, and sent them to secret prisons to be tortured.

For instance, Maher Arar, a Canadian citizen, was kidnapped by US officials at JFK Airport, where he was seeking to connect to a flight to Canada after a vacation in Tunisia. The Royal Canadian Mounted Police had provided the CIA unsubstantiated “evidence” that Arar was a supporter of al Qaeda. After he was kidnapped, he was flown by the CIA to Syria, where for ten months he was held in a three foot by six foot cell, seven feet high – “like a grave,” according to Arar. He was coerced, through torture, into a false confession of being a supporter of al Qaeda. He was finally released. Syrian officials admitted there was no evidence against him.

The Canadian government paid Arar \$9 million in compensation, plus \$879,000 in legal fees. Also, Canadian Prime Minister Stephen Harper formally apologized to Arar, saying, “We cannot go back and fix the injustice that occurred to Mr. Arar. However, we can make changes to lessen the likelihood that something like this will ever happen again.” The administration has not issued an apology. In fact, then-Attorney General Alberto Gonzales downplayed the situation, saying simply that, “He was initially detained because his name appeared on terrorist lists, and he was deported according to our immigration laws.” What Gonzales failed to note is that Arar was not sent to Canada, where he is a citizen, but he was kidnapped and sent to the torture chambers of Syria.

When Arar sought justice in the United States courts, his case was dismissed after the administration invoked the State Secrets doctrine, claiming that to allow the case to proceed would put vital secrets at risk.

⁷ The Convention Against Torture explicitly prohibits the transportation of “a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, Article 3, Section 1. Congress made its support of that ban clear not only by Senate ratification of that Convention, but by providing in the Foreign Affairs Reform and Restructuring Act of 1998 the following provision: “It shall

be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.”

⁸ The invasion and occupation of Iraq was and is a blatant violation of US treaty obligations and, hence, of the US Constitution. The United Nations Secretary General at the time of the invasion of Iraq, Kofi Annan, has declared unequivocally that the invasion of Iraq was “not in conformity with the UN charter” and that “it was illegal.” Ewen MacAskill and Julian Borger, “Iraq war was illegal and breached UN charter, says Annan,” *Guardian*, September 16, 2004. Likewise, Boutros Boutros-Ghali, who served as UN Secretary General during the first Gulf War, stated that the invasion of Iraq violated international law. He also stressed that the invasion sets a dangerous example because “[o]ther countries may . . . intervene on the basis of this precedent.” “Former UN head calls Iraq war ‘illegal,’” CBC News, March 19, 2003.

The Preamble to the United Nations Charter, provides, in part, as follows:

We the peoples of the United Nations **determined to save succeeding generations from the scourge of war**, which twice in our lifetime has brought untold sorrow to mankind, and **to reaffirm faith in fundamental human rights**, in the dignity and worth of the human person, **in the equal rights** of men and women and **of nations large and small**, and **to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained**, and to promote social progress and better standards of life in larger freedom, and for these **ends to practice tolerance and live together in peace with one another as good neighbors**, and to unite our strength **to maintain international peace and security**, and **to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common**

interest, and to employ international machinery for the promotion of the economic and social advancement of all peoples, have resolved to combine our efforts to accomplish these aims. (Emphasis added.)

Of course, the invasion and occupation of a nation that posed no imminent threat to the security of the United States was contrary to every basic precept of the UN Charter preamble. Further, members of the administration clearly violated the following specific provisions of the UN Charter, which is legally binding upon the US and its leaders:

Article 2, Sections 3, 4:

All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered. . . . [and] refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations. (Emphasis added.)

The invasion and occupation of Iraq, costing hundreds of thousands of lives, causing hundreds of thousands of grievous injuries, and resulting in the dislocation of hundreds of thousands of men, women, and children, violated, and continues to violate, Article 2, Sections 3 and 4 quoted above. The violations were made all the more clear by President Bush's disregard of calls from UN Security Council members for a peaceful resolution.

Article 39:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance

with Articles 41 and 42, to maintain or restore international peace and security.
(Emphasis added.)

Article 40:

In order to prevent an aggravation of the situation, **the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable....**
(Emphasis added.)

Article 41:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures.....

Under Articles 39-50 of the UN Charter, no Member may use military force against another country without the UN Security Council determining that there has been a material breach of the UN Resolution and all nonmilitary and peaceful options to enforce the Resolution must be fully exhausted. Once the criteria for military action have been met, only the UN Security Council can authorize the use of military force. The orders to invade and occupy Iraq without meeting the criteria for military action, and without the approval of the UN Security Council, clearly violated the UN Charter. Members of the administration failed to take the issue to the Council, as they were required by law to do, because they certainly knew that a resolution to use force against Iraq would not be passed.

If there is any hope for the United Nations and international law to protect against aggressive wars, these provisions of the UN Charter must be honored. To permit

members of the administration to be unaccountable for the contemptuous disregard of the UN Charter would not only undermine the rule of law, but would set a disastrous precedent destroying the very essence of the UN Charter – to provide for the peaceful resolution of disputes between nations.

Article 51:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take any time such action as it deems necessary in order to maintain or restore international peace and security.

Article 51 is intended to permit self-defense, but only until the Security Council is able to act to restore peace. The administration can find no solace in the self-defense provision of Article 51. Iraq had not attacked the US and there was no evidence whatsoever indicating that it was about to do so.

The Kellogg-Briand Pact of 1928

The Kellogg-Briand treaty, ratified by the United States in 1929, is as clear in its legal mandate today as it was during the war crimes trials in Nuremberg. A failure to hold members of the administration accountable under that treaty would be a hypocritical repudiation of the international law principles to which the US and several other nations have committed. Very simply, all disputes must be resolved peacefully. The treaty specifically prohibits war as an instrument of foreign policy. In 1945, the Chief

Prosecutor for Great Britain and Northern Ireland, Sir Hartley Shawcross, stated at the trial of German major war criminals in Nuremberg, Germany, as follows:

The Chief Prosecutor for the United States of America referred in his opening speech before this Tribunal to the weighty pronouncement of Mr. Stimson, the Secretary of War, in which, in 1932, he gave expression to the drastic change brought about in International Law by the Pact of Paris, and it is perhaps convenient to quote the relevant passage in full:

“War between nations was renounced by the signatories of the Briand-Kellogg Pact. This means that it has become illegal throughout practically the entire world. It is no longer to be the source and subject of rights. It is no longer to be the principle around which the duties, the conduct, and the rights of nations revolve. It is an illegal thing. Hereafter, when two nations engage in armed conflict, either one or both of them must be wrongdoers – violators of this general treaty law. We no longer draw a circle about them and treat them with the punctilios of the duellist’s code. Instead we denounce them as lawbreakers.”

And nearly ten years later, when numerous independent States lay prostrate, shattered or menaced in their very existence before the impact of the war machine of the Nazi State, the Attorney General of the United States, subsequently a distinguished member of the highest tribunal of that great country, gave significant expression to the change which had been effected in the law as the result of the General Treaty for the Renunciation of War, in a speech for which the freedom-loving peoples of the world will always be grateful. On the 27th March, 1941 – and I mention it now not as merely being the speech of a statesman, although it was certainly that, but as being the considered opinion of a distinguished lawyer – he said this:

"The **Kellogg-Briand Pact Of 1928**, in which Germany, Italy and Japan covenanted with us, as well as with other nations, to renounce war as an instrument of policy, **made definite the outlawry of war** and of necessity altered the dependent concept of neutral obligations.

The Treaty for the Renunciation of War and the Argentine Anti-War Treaty deprived their signatories of the right of war as an instrument of national policy or aggression, and rendered unlawful wars undertaken in violation of their provisions. . . .

* * *

In flagrant cases of aggression where the facts speak so unambiguously that world opinion takes what may be the equivalent of judicial notice, **we may not stymie International Law and allow these great treaties to become dead letter.**

The Trial of German Major War Criminals Sitting at Nuremberg, Germany Vol. 2
Session 12 Page 45-59.

In addition to the treaty obligations described above, the Nuremberg Tribunal Charter, to which the US committed itself, provides as follows:

Principle VI: The crimes hereinafter set out are punishable as crimes under international law:

(a) Crimes against peace;

- (i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties.
- (ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

The Nuremberg Tribunal Charter, to which the United States is a party, established that a war of aggression against a nation posing no imminent threat to the aggressor is a "crime against peace." There can be no question that ordering and presiding over an unjustified and illegal invasion and occupation of Iraq was, and continues to be, in violation of international law, the US Constitution, and domestic law. No greater cause for impeachment has ever been existed.

Members of the administration have blatantly violated every relevant treaty and constitutional provision in leading the US to a so-called "pre-emptive" war against Iraq, without any justification in law or in fact. Those responsible must be held accountable, through impeachment and removal from office.

Article VI, Clause 2 of the United States Constitution

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and **all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land;** and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. (Emphasis added.)

Ordering the commencement of the invasion of Iraq violated Article VI of the Constitution. The same is true of the continuation of armed warfare in violation of US commitments under the treaty provisions described above. The failure of Congress to hold those responsible accountable for their many violations of law, domestic and international, is an ongoing violation of its members' oath to "support and defend the Constitution."

The Fraud Concerning the Supposed Imminent Nuclear Threat Posed by Iraq

An honest assessment of the threats posed to the US by Iraq had been provided by then-National Security Adviser Condoleezza Rice and then-Secretary of State Colin Powell, *before* administration officials engaged in a campaign to mislead Congress and the American people in support of the illegal invasion and occupation of Iraq. Before 9/11, and before the campaign to drum up support for war began, Colin Powell stated as follows:

“He [Saddam Hussein] has not developed any significant capability with respect to weapons of mass destruction. He is unable to project conventional power against his neighbors.” (Emphasis added.)

Statement of Colin Powell, Cairo, Egypt, February 24, 2001.
(www.state.gov/secretary/former/powell/remarks/2001/933.htm.)

On July 29, 2001, Condoleezza Rice, appearing on *CNN Late Edition With Wolf Blitzer*, stated, **“We are able to keep arms from him [Saddam Hussein]. His military forces have not been rebuilt.”** (Emphasis added.)
(<http://transcripts.cnn.com/TRANSCRIPTS/010729/le.00.html>.)

On September 7, 2002, British Prime Minister Tony Blair and President Bush met with members of the press at Camp David. President Bush referred to a “new” report from the International Atomic Energy Agency allegedly stating, according to President Bush, that Iraq was “six months away” from building a nuclear weapon. “I don’t know what more evidence we need,” stated the President. (Remarks by the President and Prime Minister Tony Blair, Camp David, Maryland, September 7, 2002.
www.whitehouse.gov/news/releases/2002/09/20020907-2.html.) There was no such report. In fact, numerous IAEA reports consistently denied any indication that Iraq had

any nuclear capability, and the IAEA's chief spokesperson stated that no such report had been issued by the IAEA.

One news article described the false claim about an IAEA report, and the response of an IAEA spokesman, as follows:

The International Atomic Energy Agency says that a report cited by President Bush as evidence that Iraq in 1998 was "six months away" from developing a nuclear weapon does not exist.

"There's never been a report like that issued from this agency," Mark Gwozdecky, the IAEA's chief spokesman, said yesterday in a telephone interview from the agency's headquarters in Vienna, Austria.

"We've never put a time frame on how long it might take Iraq to construct a nuclear weapon in 1998," said the spokesman of the agency charged with assessing Iraq's nuclear capability for the United Nations.

In a Sept. 7 news conference with British Prime Minister Tony Blair, Mr. Bush said: "I would remind you that when the inspectors first went into Iraq and were denied – finally denied access [in 1998], a report came out of the Atomic – the IAEA that they were six months away from developing a weapon.

"I don't know what more evidence we need," said the president, defending his administration's case that Iraqi leader Saddam Hussein was building weapons of mass destruction.

The White House says Mr. Bush was referring to an earlier IAEA report.

"He's referring to 1991 there," said Deputy Press Secretary Scott McClellan. "In '91, there was a report saying that after the war they found out they were about six months away."

Mr. Gwozdecky said no such report was ever issued by the IAEA in 1991.

Joseph Curl, "Agency Disavows Report on Iraq Arms," *Washington Times*, September 27, 2002.

**The Outrageously Misleading Accusation That Iraq Had Sought to
Purchase Uranium From an African Nation**

Our nation, as well as much of the rest of the world, had been traumatized by the events of 9/11. Many nations rallied to support the United States and looked to America for moral leadership in this time of crisis. We relied upon our top officials in the administration for protection and for an honest assessment of the threats we were facing. That tremendous trust was betrayed by misleading us and our Congress by instilling in many of us the fear that Saddam Hussein was seeking to purchase nuclear materials from an African nation. In fact, however, much of the US intelligence community disagreed. Just as an issuer of stock defrauds investors by withholding material information about a corporation, so too did members of the administration defraud our Congress, our country, and much of the international community by failing to disclose information that was provided them and which was contrary to their representations about Hussein's supposed efforts to build nuclear weapons.

In the January 28, 2003, State of the Union message, President Bush stated: "The British government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa."

In an October 2002 National Intelligence Estimate (NIE), presented at a White House background briefing on weapons of mass destruction in Iraq, "Key Judgments" included an assessment "that Saddam does not yet have nuclear weapons or sufficient material to make any." That assessment was not disclosed to Congress and the American people. To make matters worse, there was no disclosure of the State Department's Bureau of Intelligence and Research (INR) conclusion in the October 2002 NIE, that:

[T]he claims of Iraqi pursuit of natural uranium in Africa are, in INR's assessment, highly dubious.

The failure to disclose that conclusion to Congress and to the American people rendered the statement about Hussein seeking to purchase uranium from an African country materially misleading. Under these circumstances, that is clearly an impeachable offense.

The calculated fraud and nondisclosures about the Niger uranium claims were compounded when there was also a failure to disclose that, upon request for an authoritative judgment by the Pentagon, the National Intelligence Council, a coordinating body for the 15 agencies that constituted the US intelligence community, reported in a January 2003 memo that the Niger story was baseless. Barton Gellman and Dafna Linzer, "A 'Concerted Effort' to Discredit Bush Critic," *Washington Post*, April 9, 2006. ("[T]he Pentagon asked for an authoritative judgment from the National Intelligence Council, the senior coordinating body for the 15 agencies that then constituted the U.S. intelligence community. Did Iraq and Niger discuss a uranium sale, or not? If they had, the Pentagon would need to reconsider its ties with Niger. The council's reply, drafted in a January 2003 memo by the national intelligence officer for Africa, was unequivocal: The Niger story was baseless and should be laid to rest.")

**The Dishonest Claim That Saddam Was Purchasing Aluminum Tubes
to Make Nuclear Weapons**

The fraud about Hussein building up a nuclear capability did not stop with the phony Niger story. During September 2002, officials of the administration represented to the public that Hussein was purchasing aluminum tubes to enrich uranium for a nuclear weapon. The next month, a National Intelligence Estimate (NIE) was delivered to the President. That document virtually screams out the view of various intelligence agencies that the tubes were of no use in a nuclear program.

Included in the NIE are the following statements, none of which were mentioned to Congress, the American people, or the international community as top members of the administration were touting the aluminum tubes as proof of Iraq's nuclear program:

DOE (Department of Energy) agrees that reconstitution of the nuclear program is underway but assesses that the tubes probably are not part of the program. (Emphasis added.)

* * *

State/INR (State Department's Bureau of Intelligence and Research) Alternative View of Iraq's Nuclear Program

The Assistant Secretary of State for Intelligence and Research (INR) believes that Saddam continues to want nuclear weapons and that available evidence indicates that Baghdad is pursuing at least a limited effort to maintain and acquire nuclear weapon-related capabilities. **The activities we have detected do not, however, add up to a compelling case that Iraq is currently pursuing what INR would consider to be an integrated and comprehensive approach to acquire nuclear weapons.** Iraq may be doing so, but INR considers the available evidence inadequate to support such a judgment. **Lacking persuasive evidence that Baghdad has launched a coherent effort to reconstitute its nuclear weapons program,** INR is unwilling to speculate that such an effort began soon after the departure of UN inspectors or to project a timeline for the completion of activities it does not now see happening. As a result, INR is unable to predict when Iraq could acquire a nuclear device or weapon.

In INR's view Iraq's efforts to acquire aluminum tubes is central to the argument that Baghdad is reconstituting its nuclear weapons program, but INR is not persuaded that the tubes in question are intended for use as centrifuge rotors. INR accepts the judgment of technical experts at the U.S.

Department of Energy (DOE) who have concluded that the tubes Iraq seeks to acquire are poorly suited for use in gas centrifuges to be used for uranium enrichment and finds unpersuasive the arguments advanced by others to make the case that they are intended for that purpose. INR considers it far more likely that the tubes are intended for another purpose, most likely the production of artillery rockets. The very large quantities being sought, the way the tubes were tested by the Iraqis, and the atypical lack of attention to operational security in the procurement efforts are among the factors, in addition to the DOE assessment, that lead **INR to conclude that the tubes are not intended for use in Iraq's nuclear weapon program.** (Emphasis added.)

Those strong opinions from the State Department intelligence agency and the Department of Energy did not prevent the statement, without qualification, in a major speech the next month that "Iraq has attempted to purchase high-strength aluminum tubes and other equipment needed for gas centrifuges, which are used to enrich uranium for nuclear weapons." (Speech by President George W. Bush in Cincinnati, Ohio, October 7, 2002.)

In a January 9, 2003 report to the UN Security Council, the IAEA reported that the aluminum tubes were not directly suitable for the manufacture of centrifuges. Again, not allowing the findings of the IAEA or of various US intelligence agencies to get in the way of the fraud upon Congress and the American people, a representation was made in the State of the Union Message on January 28, 2003 that "Our intelligence sources tell us that [Saddam] has attempted to purchase high-strength aluminum tubes suitable for nuclear weapons production." No greater cause for impeachment can be imagined than misleading our Congress and misleading the American people about whether we are facing a nuclear threat while leading our nation to a tragic, illegal war of aggression.

The fraud was dramatically compounded when a so-called summary of the NIE was distributed to Congress, stating, misleadingly, as follows: "**All intelligence experts**

agree that Iraq is seeking nuclear weapons and that these tubes could be used in a centrifuge enrichment program." (Emphasis added.) Clearly, that statement was false. The DOE and INR dissents, which expressed the accurate situation, were omitted. That omission also rendered the representation to Congress, and to the public, false and misleading – a fraud clearly meriting impeachment and removal from office.

¹⁰ Abuses of power, undermining the separation of powers among the three branches of government, violations of our Constitution, statutory law, and treaty obligations, and dishonesty to Congress and to the American people are each grounds for impeachment if injury to our nation results from such wrongdoing. Impeachment need not be based on a violation of criminal law. In fact, it usually is not.

Less than one-third of the eighty-three articles the House has adopted have explicitly charged the violation of a criminal statute or used the word "criminal" or "crime" to describe the conduct alleged, and ten of the articles that do were those involving the Tenure of Office Act in the impeachment of President Andrew Johnson. (Citation omitted.)

* * *

Thus, the contention that articles of impeachment must be drawn in terms of indictable offenses cannot be supported.

* * *

Clearly charges of constitutional violations and gross abuse of power for illegitimate purposes should be included as impeachable offenses regardless of the offender's office.

* * *

Although frequently debated, and the negative advocated by some high authorities, it is now, we believe, considered that impeachment is not confined alone to acts which are forbidden by the Constitution or Federal statutes. The better sustained and modern view is that the provision for impeachment in the Constitution applies not only to high crimes and

misdemeanors as those words were understood at common law but also acts which are not defined as criminal and made subject to indictment, and also to those which affect the public welfare. Thus an official may be impeached for offenses of a political character and for gross betrayal of public interests. Also for abuses or betrayal of trusts, for inexcusable negligence of duty, for the tyrannical abuse of power, or, as one writer puts it, for "a breach of official duties . . ." (The House Committee on the Judiciary, H.R. Rep. No 653, 69th Cong., 1st Sess. At 10 (1926).)

Ed Firmage, "The Substantive Law of Presidential Impeachment," 1973 Utah Law Review 681 (1973), at 696-98.

James Iredell argued in the North Carolina ratifying convention that the withholding of material information from Congress in a matter that causes injury to the nation would be an impeachable offense:

The President must certainly be punishable for giving false information to the Senate. He is to regulate all intercourse with foreign powers, **and it is his duty to impart to the Senate every material intelligence he receives. If it should appear that he has not given them full information, but has concealed important intelligence which he ought to have communicated, and by that means induced them to enter into measures injurious to their country, and which they would not have consented to had the true state of things been disclosed to them,**--in this case, I ask whether, upon an impeachment for a misdemeanor upon such an account, the Senate would probably favor him. With respect to the impeachability of the Senate, that is a matter of doubt. (Emphasis added.)

3 J. Elliott, The Debates in the Several State Conventions 127 (1937).

¹¹ Under Article II, Section 3 of the Constitution, the president must “take care that the laws be faithfully executed.” Members of the administration, in complete dereliction and contempt of that duty, disregarded statutory laws, treaty obligations, and the Constitution. The administration has even claimed in hundreds of signing statements that the president has the authority, as head of the “unitary executive” branch, to determine the scope, effect, and applicability of laws passed by Congress. According to the American Bar Association, the use of signing statements has been “contrary to the rule of law and our constitutional system of separation of powers.” (<http://www.abanet.org/media/releases/news072406.html>)

At least three times during the Bush administration, Congress passed laws forbidding U.S. troops from engaging in combat in Colombia. “After signing each bill into law, Bush used a signing statement to inform the military that he need not obey any of the Colombia restrictions because he was commander in chief. The combat ban and troop cap, he declared, would be interpreted merely ‘as advisory in nature.’” Charlie Savage, *Takeover – The Return of the Imperial Presidency and the Subversion of American Democracy* (Little, Brown and Company: New York, Boston and London, 2007), at 237.

In 2004, Congress passed an intelligence bill that required the Justice Department to inform Congress about the FBI’s use of special national-security wiretaps in the United States. President Bush issued a signing statement asserting that he could disregard the law and withhold all the information sought by Congress. *Id.* at 239.

When President Bush signed the Foreign Relations Authorization Act for Fiscal Year 2003, he issued a signing statement which said that he would treat Congress’s statutory mandate as being only a recommendation to him. In short, he was saying that he did not need to follow the law and, instead of vetoing legislation, he said he will just disregard parts of it, similar to the line item vetoes previously held to be unconstitutional by the Supreme Court (except dissimilar to the extent Congress has no opportunity to

"override" the President's disregard of legislation, as it would have in the case of a veto).

When Congress was considering renewal of parts of the initial USA PATRIOT Act surveillance powers, an agreement, reflected in the new legislation, was reached between Congress and Bush administration officials pursuant to which the President was to provide Congress more details on how the powers were being used. However, after his White House signing ceremony on March 9, 2006, President Bush issued a signing statement, decreeing that, contrary to the terms of the law earlier negotiated between Congress and the Bush administration, he was entitled to withhold information as he saw fit. He stated that he would interpret any provision in the law obliging him to provide information to Congress "in a manner consistent with the president's constitutional authority to supervise the unitary executive branch and to withhold information." In short, he alone decides the law. In the administration's view, checks and balances are simply an archaic relic, no longer applicable to a president, at least during his undeclared so-called war against terrorism.

That utter contempt for Congress, for the rule of law, and for the separation of powers was on display when a signing statement was issued in connection with the Detainee Treatment Act of 2005. The administration had been unsuccessful in convincing Congress to allow the administration to continue having detainees tortured, so a signing statement was issued when the president signed the legislation, saying that the prohibition of cruel, inhuman and degrading treatment of detainees would be construed as the president saw fit. That signing statement is a chilling reminder not only of the administration's support of torture, but of its view that the president can ignore Congress's laws whenever he wants. The signing statement said, in effect, that regardless of the law passed by Congress, the president would order or permit torture as he deemed appropriate. (For excellent discussions about the assertion of the power to pick and choose what laws the president will follow, as reflected in his signing statements, see Savage, at 236-249; Frederick A.O. Schwarz Jr. and Aziz Z. Huq,

Unchecked and Unbalanced, The New Press: New York and London; Brennan Center for Justice: New York, 2007), at 91-92.)

Thomas Paine wrote in *Common Sense*, "In America the law is king. For as in absolute governments the King is law, so in free countries the law ought to be king; and there ought to be no other." The "unitary executive" excuse for an imperial presidency, an assertion of the right to ignore laws as the president wishes, is subversive to the most fundamental principles of our constitution. The hundreds of applications by the administration of that theory to place the president above the law, and to allow him to decide when and under what circumstances he will follow the law, is abundant reason for impeachment.

¹² Compliance by the Attorney General with the demands of Congress has previously been accomplished by a threat to cut off funding for the Attorney General's Office.

In 1984, Congress passed a bill called the Competition in Contracting Act. President Reagan signed the bill but issued a signing statement telling the executive branch that a section of it was unconstitutional, and he directed agencies not to obey the statute created by that section. A losing bidder who would have won a contract if the section had been obeyed sued the government, and a federal judge ruled in March 1985 that the Reagan administration had to obey all of the act's provisions. But Attorney General Ed Meese, insisting that the executive branch had independent power to interpret the Constitution, declared that the government would refuse to comply with the ruling. An appeals court upheld the ruling, chastising the Reagan administration for trying to seize a kind of line-item veto power for itself, and the House Judiciary Committee voted to cut off funding for Meese's office unless the executive branch obeyed the courts. In June 1985, Meese backed down.

Savage, at 231-32.

Mr. CONYERS. Stephen Presser is Northwestern University Law School's Raoul Berger Professor of Legal History. He has been before this Committee at least three times that I can remember, and I don't know where else in the Congress he has appeared. He is a frequent commentator on issues of constitutional law, and we are proud to welcome him back to the Committee again.

TESTIMONY OF STEPHEN PRESSER, RAOUL BERGER PROFESSOR OF LEGAL HISTORY, NORTHWESTERN UNIVERSITY SCHOOL OF LAW

Mr. PRESSER. Thank you very much, Mr. Chairman. I appeared here in late 1998 to give my views on what constituted an impeachable offense, and I have been invited today to comment on whether some suggestions of misconduct by President Bush are acts that might appropriately result in impeachment proceedings.

Impeachment should not simply be at the pleasure of the House and conviction at the pleasure of the Senate. There must be some standards. And for a President to be impeached, as Congressman Pence said earlier today, he must have committed some grave offense that is contrary to his oath to uphold the Constitution and laws of his country. He must put his interests above the Constitution and the laws.

When I appeared here in 1998, I did so because it appeared to some Members of Congress that the allegations made against President Clinton suggested that over many months he had engaged in deception, lying under oath, concealing evidence, tampering with witnesses, and in general obstructing justice by seeking to prevent the proper functioning of the courts, the grand jury and the investigation of the Office of Independent Counsel. Those offenses, if they did occur, would clearly have been undertaken for personal reasons and to frustrate the workings of our system of justice.

I have reviewed the allegations made against President Bush, but they seem different in character from those made against President Clinton, and let me try to hit the highlights here.

First, the allegations against President Bush include the dismissal of United States attorneys for political purposes. Given, however, that Presidents have had complete discretion over the hiring and firing of U.S. attorneys, and given that there is no suggestion that President Bush sought to prosecute innocent defendants, I can't believe that there are any grounds for impeachment here. There does not seem to be any indication that the Justice Department was frustrated from doing its appointed tasks in order to serve the personal needs of the President.

Second, I am unable to discern how the implementation of a particular view of the powers of the executive—the unitary executive theory amounts to a high crime or misdemeanor. There is no doubt that the Constitution does give considerable discretion to each branch of the government to determine for itself the reach of its own powers. As near as I can tell, this is what it meant by the theory of the unitary executive.

In the course of fulfilling his executive responsibilities, particularly in a time of war or national crisis, the President needs the freedom to act effectively in the national interest. If a President in

good faith seeks to act in the national interest rather than in his own, his conduct is not impeachable.

President Bush's practice of signing statements accompanying placing his signature on legislation has also come in for some criticism today. Given that it seems, though, to be a practice followed by several Presidents, the practice should probably not be construed as an impeachable offense. A better solution suggested today is to pass legislation instructing judges, perhaps, to ignore signing statements or making other qualifications.

In a third set of allegations regarding detention and investigations, what President Bush and his Administration have done in seeking to prevent another terrorist attack seems to have been undertaken in good faith, pursuant to the President's understanding of his constitutional powers and with the close oversight of Congress, because Congress has exercised legislative direction in connection with judicial proceedings against enemy combatants, and because the courts have stepped in on several occasions to support or rebuff what the executive has done. This doesn't seem to be an area of abuse that cries out for the impeachment remedy.

Fourth, manipulation of intelligence and misuse of war powers. Here the concern seems to relate to the representations of weapons of mass destruction purportedly possessed by Iraq which later turned out not to exist in the quantities and qualities claimed. But here what the Bush administration claims to have done was what it believed was necessary in our national defense and that of our allies, such as Israel. Again, there appears to be no claim that the President abused his office for personal reasons that would call for his impeachment and removal.

Improper retaliation against administrative critics and obstruction of justice. Obstruction of justice is an offense that was charged against President Clinton, and if there was evidence that the President had sought to obstruct justice, this might be a good impeachment charge, but I haven't seen any evidence that, in fact, that occurred.

Six, misuse of authority and denying Congress and the American people the ability to oversee and scrutinize conduct within the Administration. Misuse of authority is so general a term that it brings to mind the constitutional debate between Mason and Madison over whether malAdministration could be an impeachable offense. I am not sure this kind of misuse of authority is.

My time is up, and I will just sum up by saying, Mr. Chairman, that impeachment is a radical remedy to be used only in the case of executive misconduct that demonstrates that the official has used his abuse for venal purposes. I have seen no evidence that that occurred.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Presser follows:]

PREPARED STATEMENT OF STEPHEN PRESSER

United States House of Representatives

Committee on the Judiciary

"The Imperial Presidency of George W. Bush and Possible Legal Responses"

Friday, July 25, 2008

Written Testimony of Stephen B. Presser

My name is Stephen B. Presser, and I am the Raoul Berger Professor of Legal History at Northwestern University School of Law. I have been teaching and writing about Constitutional law and its history for thirty-one years, and I have been privileged to be an invited witness before many committees and subcommittees of both the Senate and House to testify on Constitutional matters. I appeared before a subcommittee of this committee in late 1998 to give my views on what constituted an impeachable offense, and I have been invited to this hearing to comment on whether some suggestions of misconduct by President George W. Bush are acts that might appropriately result in impeachment proceedings. These Acts, the subject of these hearings, include, to borrow from Chairman Conyers's language in announcing these hearings, "(1) improper politicization of the Justice Department and the U.S. Attorneys offices, including potential misuse of authority with regard to election and voting controversies; (2) misuse of executive branch authority and the adoption and implementation of the so-called unitary executive theory, including in the areas of presidential signing statements and regulatory authority; (3) misuse of investigatory and detention authority with regard to U.S. citizens and foreign nationals, including questions regarding the legality of the administration's surveillance, detention, interrogation, and rendition programs; (4) manipulation of intelligence and misuse of war powers, including possible misrepresentations to Congress related thereto; (5) improper retaliation against administration critics, including disclosing information concerning CIA operative Valerie Plame, and obstruction of justice related thereto; and (6) misuse of authority in denying Congress and the American people the ability to oversee and scrutinize conduct within the administration, including through the use of various asserted privileges and immunities." In what follows I will first review the meaning of the Constitutional phrase "high Crimes and Misdemeanors," in order to derive an understanding of what constitutes an impeachable offense,¹ and I will then briefly apply this understanding to the allegations made against President George W. Bush, to suggest whether he has committed any impeachable offenses. Ultimately, of course, this is not a call for a law professor to make, it rests within the discretion of the House of Representatives, but, at this time, based on the allegations that are before this committee, it does not appear that impeachment proceedings against President Bush are warranted.

¹ This part of my testimony is taken from an article published in the *George Washington Law Review* which was based on the testimony I previously gave before this Committee. The Article is *Would George Washington Have Wanted Bill Clinton Impeached?*, 67 *Geo. Wash. L. Rev.* 666 (1999). I have edited portions of the article for inclusion here.

I. The Constitutional Provisions

The Constitution provides in Article II, Section 4, that "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."² I believe that the proper way to interpret this provision (or any other Constitutional provision) is to ask what the words would have meant to the Constitution's Framers. In order to answer this question we need to place the impeachment remedy in the context of the Framers' assumptions about how the Constitution would work and what would make it work best.

The first important thing to understand is that the federal Constitution came about because of a belief on the part of most of the Framers that following independence, the newly created state legislatures were behaving in a manner that was inimical to the success of our Republic. These state legislatures were passing measures that interfered with preexisting contracts, both by suspending them and by allowing payments to be made in newly printed state-issued paper money. This was regarded as irresponsible action - action believed to be undertaken by unscrupulous state politicians - which cast doubt on whether the American people and their governments possessed the virtue necessary to make a republican government work. The state legislatures, in short, were encouraging dishonesty in commercial matters; suspending, in effect, the legal foundations of property and propriety, and jeopardizing the future smooth functioning of American economy and society.³

The hopes for future success in the new Republic rested on the integrity of the federal government and its laws; if these were subject to displacement by whim or by corruption - as it seemed the state legislatures were doing to the rule of law in the period from 1776 to 1786 - there was little hope that the new American nation could long endure. Integrity in the new national government, its judiciary, and its acts was vital if commercial prosperity was to be secured. This prosperity was deemed essential to achieve domestic tranquility and the other goals of the new federal Constitution.

The new Constitution forbade the state legislatures from interfering with contracts and from continuing to issue paper money. The new federal government was charged with establishing a foundation for continued economic and political stability. Most important for our purposes, elaborate structural safeguards were put in place in the new federal Constitution to make sure that the new federal government would behave with integrity and that its officials would display the kind of disinterested virtue necessary to make American government work.

The debates over the 1787 Constitution often focused on how virtue was to be secured in all three branches of the new government. It is in this context that impeachment must be understood. The Framers considered impeachment to be a vital device intended to guarantee that the President and other federal officials would act with integrity. Indeed, it was a device designed to ensure that the President and other federal officials would do what they were supposed to do, because they would know that they would face removal if they did not.

² U.S. Const. art. II, 4.

³ On this matter, see generally the now-classic account in Gordon S. Wood, *The Creation of the American Republic 1776-1787* (1969).

II. The Federalist on Impeachment

The Federalist, the series of essays on the Constitution written by James Madison, Alexander Hamilton, and John Jay in the years immediately following the drafting of the Constitution at the Philadelphia Convention, provides another important guide, in addition to the text of the Constitution itself, to understanding the working of impeachment. The Federalist is universally acknowledged to be the most important contemporary exposition of the federal Constitution. But it is more than a powerful contemporary account. It is, in many ways, a work exploring timeless political truths. To this day, The Federalist is regarded as the most important American work in political science.⁴

Thomas Jefferson praised The Federalist as "the best commentary on the principles of government which ever was written."⁵ James Madison, one of The Federalist's three authors, suggested in 1825 that The Federalist was "the most authentic exposition of the text of the federal Constitution, as understood by the Body which prepared and the authority which accepted it."⁶ The fact that the third and the fourth Presidents so enthusiastically praised The Federalist suggests that they agreed with The Federalist's views of how the presidency and the impeachment process were to operate.

Federalist No. 64, one of the few numbers written by John Jay, who was to become the first Chief Justice of the United States, provides one very clear indication of what the Framers intended with regard to impeachment. Jay discussed the treaty power, and responded, in particular, to critics of the Constitution who argued that the President and the Senate were given too much discretion in committing the new Nation to treaties with other nations. Jay noted that the presidential power of making treaties - perhaps the most important foreign policy power that the President has discretion to exercise - is important because it "relates to war, peace, and commerce," and that it "should not be delegated but in such a mode, and with such precautions, as will afford the highest security that it will be exercised by men the best qualified for the purpose, and in the manner most conducive to the public good."⁷ Jay went on to explain that the means of picking the President - indirectly through the electoral college - is calculated so that the President will be a person noted for integrity, virtue, and probity, and that the original indirect means of selecting senators - through the state legislatures - was to assure the same for the senators.⁸

Jay made plain that when a President fails to live up to the requirement of trust, honor, and virtue that is necessary to meet his treaty-making and other executive responsibilities - if, in short, he is not an honorable or virtuous person who will perform his duties in the interest of the people - impeachment is available to remove him. When Jay addressed the requisite integrity for presidents and senators, he stated:

With respect to their responsibility, it is difficult to conceive how it could be increased. Every consideration that can influence the human mind, such as honor,

⁴ See Clinton Rossiter, Introduction to *The Federalist* vii (Clinton Rossiter ed., 1961) ("The Federalist is the most important work in political science that has ever been written... in the United States.")

⁵ Isaac Kramnick, Introduction to *The Federalist* 11 (Isaac Kramnick ed., 1987)

⁶ *Id.* at 12.

⁷ *The Federalist* No. 64, at 390 (John Jay) (Clinton Rossiter ed., 1961).

⁸ See *id.* at 390-91.

oaths, reputations, conscience, the love of country, and family affections and attachments, afford security for their fidelity. In short, as the Constitution has taken [through the indirect election of senators and presidents] the utmost care that they shall be men of talents, and integrity, we have reason to be persuaded that the treaties they make will be as advantageous as, all circumstances considered, could be made; and so far as the fear of punishment and disgrace can operate, that motive to good behavior is amply afforded by the article on the subject of impeachments.⁹

Virtue, probity, and honor were so important in the Executive, as Jay's remarks indicate, that it is no surprise that the Framers assumed that the first President of the United States would have to be George Washington. He was the greatest national hero, he was given the lion's share of the responsibility for securing independence, and then as now was regarded as the father of his country. His reputation for integrity, virtue, and honor was unparalleled. George Washington, the national epitome of virtue and honor,¹⁰ was, in short, precisely the kind of executive Federalist No. 64 contemplates.

III. Constitutional Textual Clues to the Meaning of "High Crimes and Misdemeanors"

Federalist No. 64 thus tells us about the requisite character of federal officials, and is persuasive authority for believing that when it becomes clear that the President has committed acts that raise grave doubts about his honesty, his virtue, or his honor, impeachment is available as a remedy. This conclusion is further supported by the text of the Constitution itself, which provides in Article I, Section 3, that the punishments to be imposed following impeachment by the House and conviction by the Senate are "removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States."¹¹ The kind of person who would be impeached was believed to be one without honor and thus one who could not be trusted. *The fear was that such a person, if allowed an office offering the opportunity to profit, would use his office for personal ends and not for the good of the people.* Impeachment, then, is all about deciding whether a particular official can be trusted to act with disinterested virtue, or whether an official will put his own needs or desires above his constitutional duties.

It is for this reason - that impeachment is a remedy against those who would betray their oaths to uphold the Constitution and would instead seek personal advantage - that the Framers chose to describe, although not to limit, impeachable offenses by including and using as an analogy "Treason and Bribery." "Treason" is defined in the Constitution itself as "levying War against [the United States], or in adhering to their Enemies, giving them Aid and Comfort."¹²

The essence of treason, then, is that it involves a betrayal of one's obligation to one's own people, by making war against them, or by adhering to their enemies. Similarly, "Bribery" involves a

⁹ Id. at 395-96.

¹⁰ See generally Stephen B. Presser, The Restoration of George Washington, 25 Rev. in Am. Hist. 545 (1997) (discussing Washington's status as the epitome of American virtue and honor, and his continuing importance to present-day America).

¹¹ U.S. Const. art. I, 3 (emphasis added).

¹² Id. art. III, 3, cl. 1.

betrayal of virtue and a refusal to exercise disinterested judgment in the interests of the people in order to serve the interests of someone else - someone who wrongly and corruptly buys what should only belong to the people. In both cases the official, whether he is a traitor or a person bribed, turns from his duty *and puts his own interests ahead of his public trust*.

This suggestion that impeachment is ultimately about a fundamental betrayal of trust is further supported by the limited records that we have of the Constitutional Convention. On August 20, 1787, the Committee of Detail presented a proposal that would have made federal officers "liable to impeachment and removal from office for neglect of duty, malversation,¹³ or corruption."¹⁴ Somewhat later, however, on September 8, 1787, the Convention considered a revised text that would have limited impeachment only to those cases involving "Treason & bribery." George Mason, of Virginia, thought this too limiting, and argued:

Why is the provision restrained to Treason & bribery only? Treason as defined in the Constitution will not reach many great and dangerous offences. [Warren] Hastings [the administrator of the East India Company and Governor-General of Bengal whom Edmund Burke led an effort to impeach for corruption] is not guilty of Treason. Attempts to subvert the Constitution may not be Treason as above defined - As bills of attainder which have saved the British Constitution are forbidden, it is the more necessary to extend: the power of impeachments.¹⁵

Mason then moved to add after the word "bribery" the words "or maladministration."¹⁶ James Madison, one of the authors of *The Federalist*, and the man most commonly described as the "Father" of the Constitution, objected on the grounds that "maladministration" was too elusive. "So vague a term," he said, "will be equivalent to a tenure during pleasure of the Senate."¹⁷ To meet Madison's objection, and to clarify that removal would require more than senatorial whim, Mason "withdrew 'maladministration' & substituted 'other high crimes & misdemeanors,'" which the Convention then accepted and incorporated into Constitutional text we now seek to interpret.¹⁸

IV. Impeachment and the Preservation of the Rule of Law

¹³ Black's Law Dictionary defines "malversation" as "In French law, this word is applied to all grave and punishable faults committed in the exercise of a charge or commission (office), such as corruption, exaction, concussion, larceny." Black's Law Dictionary 865 (5th ed. 1979). "Concussion," according to Black's is "In the civil law, the unlawful forcing of another by threats of violence to give something of value." *Id.* at 264.

¹⁴ 2 The Records of the Federal Convention of 1787, at 337 (Max Farrand ed., rev. ed. 1937).

¹⁵ *Id.* at 550.

¹⁶ See *id.*

¹⁷ *Id.*

¹⁸ *Id.*

The colloquy between Mason and Madison - the only evidence on the definition of impeachable offenses we have from the debates at the 1787 Constitutional Convention in Philadelphia - appears to suggest that *more* than mere maladministration, something approaching "great and dangerous offenses," or an "attempt[] to subvert the Constitution" is required.¹⁹ Those who emphasize the awful consequences of impeachment and the propriety of its use only for offenses that strike at the heart of American government can find support in Mason's words. But it must be understood what Mason and the other Framers believed the needs of the state were and what American government was all about. The essence of the new Republic was that ours was to be a "government of laws, not men," and that our laws and our legal doctrines were not to be tossed aside at whim for personal or partisan political purposes.²⁰ What the Madison/Mason colloquy teaches us is that impeachment should not simply be at the pleasure of the house and conviction at the pleasure of the Senate. There must be some standards, and for a President to be impeached, then, *he must have committed some grave offense that is contrary to his oath to uphold the Constitution and laws of his country; he must have put his interests above the Constitution and the laws.*

The distinction between mere "maladministration" and the betrayals of the Constitution with which impeachment was supposed to be concerned is also the subject of some rumination by another one of The Federalist's authors, Alexander Hamilton. In Federalist No. 79, Hamilton warns against using "inability," a term similar in meaning to "maladministration,"²¹ as a trigger for impeachment because "an attempt to fix the boundary between the regions of ability and inability would much oftener give scope to personal and party attachments and enmities than advance the interests of justice or the public good."²² *Impeachment, then, is a remedy for, and is not to be used as a tool of, personal or party ambition or enmity; impeachment is to be used to further "justice" and "the public good." Again, the essence of what is impeachable appears to be an unjust turning against public duties, an attempt to work an "injustice" and to betray one's duties to the public - in short, to act contrary to one's oath to uphold the Constitution and laws of the country.*²³

The words "high Crimes or Misdemeanors" similarly suggest the anti- public, oath-abjuring characteristics of what ought to constitute an impeachable offense. A "high" crime or misdemeanor

¹⁹ Id.

²⁰ For the importance of the notion that ours was to be "a government of laws, not men," see Stephen B. Presser, *Recapturing the Constitution* 33-35 (1994).

²¹ The meaning of "maladministration" may be somewhat elusive. According to Black's Law Dictionary, "this term is used interchangeably with misadministration, and both words mean 'wrong administration.'" Black's Law Dictionary, *supra* at 861. The Concise Oxford Dictionary defines "maladministration" as "Faulty administration." The Concise Oxford Dictionary of Current English 693 (H.W. Fowler & F.G. Fowler eds., 3d ed. 1944).

²² The Federalist No. 79, at 474 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

²³ Article II, Section 1, clause 7 requires the President, before assuming office, to take the following "Oath or Affirmation": "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States." U.S. Const. art. II, 1, cl. 7. It should be noted that in Article II, Section 3, one of the duties of the President is to "take Care that the Laws be faithfully executed." Id. 3. Accordingly, part of the President's duty to "protect and defend the Constitution" is to carry out his role to see that "the Laws be faithfully executed."

is distinguishable from run-of-the-mill crimes or misdemeanors in that it requires proof of an "injury to the commonwealth - that is, to the state itself and to its constitution."²⁴

V. Fixing the Meaning of "High Crimes and Misdemeanors": The English Experience

It does appear that the Framers believed that "high Crimes and Misdemeanors," if the impeachment provisions were to serve their purposes of keeping the executive and judiciary faithful to their constitutional trust, could be broadly construed. Thus, Alexander Hamilton, in *The Federalist* No. 65, in which he discussed the judicial function of the Senate in trials of impeachments, broadly defines impeachment as a remedy generally available to correct wrongdoing: "The subjects of [the Senate's impeachment] jurisdiction are those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust."²⁵

Still, Hamilton, as did some of the other Framers noted above, supplied some limitation on the impeachment power when he wrote that impeachable offenses "relate chiefly to injuries done immediately to the society itself."²⁶ Hamilton even observed that when an impeachment proceeding is underway it will seldom fail to agitate the passions of the whole community, and to divide the community into parties more or less friendly or inimical to the accused. "In many cases it will connect itself with the pre-existing factions, and will enlist all their animosities, partialities, influence, and interest on one side or on the other; and in such cases there will always be the greatest danger that the decision will be regulated more by the comparative strength of parties than by the real demonstrations of innocence or guilt."²⁷

Hamilton believed that the Senate, supposedly further removed from the people through election by state legislatures and not by the people themselves, would be better able to put raw partisan political concerns aside and make objective determinations on the guilt or innocence of one impeached. Because the Senate is no longer insulated from popular election,²⁸ it is doubly important that both the House and the Senate try to approach the impeachment of the President as objectively as possible.

Given the breadth of the possible definition of "high Crimes and Misdemeanors," and, as Hamilton noted, the inevitable involvement of partisan politics, it is no wonder that there is debate about what constitutes an impeachable offense. I do believe that it is possible, though, still to fix with

²⁴ Arthur Bestor, *Impeachment*, 49 Wash. L. Rev. 255, 263 (1973) (reviewing Raoul Berger, *Impeachment: The Constitutional Problems* (1973)). Professor Bestor reaches his conclusion based on the English treason and impeachment cases that Berger reviewed. See *id.* at 264-66.

²⁵ *The Federalist* No. 65, at 396 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

²⁶ *Ibid.*

²⁷ *Id.* at 396-97.

²⁸ See U.S. Const. amend. XVII (changing the original constitutional provision, Article I, 3, which called for election of senators by state legislatures, into one that called for election of senators "by the people" of each state).

some certainty the nature of the acts against the state and the Constitution that the Framers would have regarded as coming within the phrase "high Crimes and Misdemeanors."

At the time the Framers inserted the phrase "high Crimes and Misdemeanors" into the Constitution, they had a wealth of English experience with those words on which to draw,²⁹ and it appears clear that the Framers intended and understood that the phrase "high Crimes and Misdemeanors" was to be interpreted according to the meaning it was given by English common law.³⁰ As Justice Joseph Story later wrote, "The only safe guide in such cases must be the common law, which is the guardian at once of private rights and public liberties."³¹

Raoul Berger, in his book on impeachments, has given us a handy summary of some of the impeachment proceedings brought in England before the framing of our Constitution, proceedings described as involving all or part of the phrase "high crimes and misdemeanors." These included the proceedings brought against the Earl of Suffolk (1386), who "applied appropriated funds to purposes other than those specified"; the Duke of Suffolk (1450), who "procured offices for persons who were unfit and unworthy of them [and who] delayed justice by stopping writs of appeal (private criminal prosecutions) for the deaths of complainants' husbands"; Attorney General Yelverton (1621), who "committed persons for refusal to enter into bonds before he had authority so to require," and who also was guilty of "commencing but not prosecuting suits"; Lord Treasurer Middlesex (1624), who "allowed the office of Ordinance to go unrepaired though money was appropriated for that purpose [and who] allowed contracts for greatly needed powder to lapse for want of payment"; the Duke of Buckingham (1626), who "though young and inexperienced, procured offices for himself, thereby blocking the deserving; neglected as great admiral to safeguard the seas; [and who] procured titles of honor to his mother, brothers, kindred"; Justice Berkeley (1637), who "reviled and threatened the grand jury for presenting the removal of the communion table in All Saints Church; [and who] on the trial of an indictment, ... 'did much discourage complainants' counsel' and 'did overrule the cause for matter of law'"; Sir Richard Gurney, lord mayor of London (1642), who "thwarted Parliament's order to store arms and ammunition in storehouses"; Viscount Mordaunt (1660), who "prevented Tayleur from standing for election as a burgess to serve in Parliament; [and who] caused his illegal arrest and detention"; Peter Pett, Commissioner of the Navy (1668), who was guilty of "negligent preparation for the Dutch invasion," and who was responsible for "loss of a ship through neglect to bring it to mooring"; Chief Justice North (1680), who "assisted the Attorney General in drawing a proclamation to suppress petitions to the King to call a Parliament"; Chief Justice Scroggs (1680), who "discharged [a] grand jury before they made their presentment, thereby obstructing the presentment of many Papists; [and who] arbitrarily granted general warrants in blank"; Sir Edward Seymour (1680), who "applied appropriated funds to public purposes other than those specified"; and the Duke of Leeds (1695), who "as president of [the] Privy Council accepted 5,500 guineas from the East India Company to procure a charter of confirmation."³²

One way of characterizing all of this English experience is to say, as Joseph Story did, that "lord chancellors and judges and other magistrates have not only been impeached for bribery, and

²⁹ The first use of the phrase "high crimes and misdemeanors" was in an impeachment proceeding against the Earl of Suffolk in 1386. See Berger, *supra* note 24, at 62.

³⁰ See *id.* at 75, 87, 91-92 and nn. 160-161.

³¹ 1 Joseph Story, *Commentaries on the Constitution of the United States* 797 (photo. reprint 1994) (Melville M. Bigelow ed., 1891).

³² Berger, *supra* note 24, at 71-72.

acting grossly contrary to the duties of their office, but [in addition] for misleading their sovereign by unconstitutional opinions and for attempts to subvert the fundamental laws, and introduce arbitrary power."³³ The English cases lend further support to the notion derived from *The Federalist* and the text of the Constitution that impeachable offenses, "high Crimes and Misdemeanors" if you will, are *acts that are inconsistent with the obligations and duties of office, that involve putting personal or partisan concerns ahead of the interests of the people, and that demonstrate the unfitness of the man to the office.*

The Constitution, *The Federalist*, and the English common law experience give a very good general idea of what was meant by the Constitution's impeachment clauses. The meaning of "high Crimes and Misdemeanors" is thus capable of being understood as it was by the Framers. Nevertheless, it is important also to understand that it is impossible to fix with certainty the complete enumeration of impeachable offenses, and it is impossible to escape the fact that the Constitution vests complete and unreviewable discretion with regard to impeachment and removal in Congress. Hamilton recognized this too:

This [the trial of impeachments] can never be tied down by such strict rules, either in the delineation of the offense by the prosecutors [The House of Representatives] or in the construction of it by the judges [the Senate], as in common cases serve to limit the discretion of courts in favor of personal security. There will be no jury to stand between the judges who are to pronounce the sentence of the law and the party who is to receive or suffer it. The awful discretion which a court of impeachments must necessarily have to doom to honor or to infamy the most confidential and the most distinguished characters of the community forbids the commitment of the trust to a small number of persons [and so it is placed in the hands of the entire Senate].³⁴

VI. Comparing the Alleged Impeachable Offenses of President Clinton

When I appeared before members of this Committee in 1998 to argue that it was appropriate to move forward with the impeachment of President Clinton, I did so because it appeared that the allegations made against President Clinton, if they were true, showed that over many months Mr. Clinton engaged in deception, lying under oath, concealing evidence, tampering with witnesses, and, in general, obstructing justice by seeking to prevent the proper functioning of the courts, the grand jury, and the investigation of the Office of Independent Counsel. Those offenses, if he had committed them, would undoubtedly have amounted to criminal interference with the legal process, but more to the point, they would have demonstrated that the President had failed to live up to the requirements of honesty, virtue, and honor that the Framers of the Constitution and the authors of *The Federalist* believed were essential for the presidency. And those offenses, if they had been committed by President Clinton, would clearly have been undertaken for personal reasons (to conceal evidence of personal misconduct) and to frustrate the workings of our system of justice.

Those purported offenses by President Clinton, if they actually occurred, would clearly resemble many of the English precedents of impeachment for interfering with orderly processes of law,

³³ *Id.* at 73 (quoting Justice Story).

³⁴ *The Federalist* No. 65, *supra* note 27, at 398.

for tampering with the grand jury, and for seeking to use one's office for personal rather than public ends. Those offenses, if true, would have shown that President Clinton engaged in a pattern of conduct that involved injury to the state and a betrayal of his constitutional duties because President Clinton would have thereby abused his office for personal gain and betrayed the ideal that ours is a government of laws and not of men.

If those allegations were true, then President Clinton, rather than carrying out his oath of office to uphold the Constitution and faithfully to execute the laws, sought instead to subvert the judicial process specified in Article III, and, in order to protect himself from an adverse judgment in the Paula Jones proceeding, sought to frustrate the laws designed to protect Ms. Jones and others like her.

Looking only to the allegations made by Independent Counsel Starr and by Chief Investigator Schippers against President Clinton, then, I believed at that time that there was more than enough to require the House of Representatives to move forward and vote on impeachment articles. Those allegations concerned conduct by the President in which he allegedly ignored his constitutional obligations to take care that the laws be faithfully executed, and instead used his august position to frustrate enforcement of the law. If those allegations were true, then President Clinton, I believed, had acted in a manner against the interests of the state and had sought to subvert the essence of our constitutional government - that ours is a government of laws and not of men. If those allegations were true, in short, then President Clinton had engaged in conduct that could only be described as corrupt, and corrupt in a manner that the impeachment process was expressly designed to correct. This was because I believed that if the allegations made against President Clinton were true, then he had abused his powers for personal purposes, and the impeachment remedy was appropriately used against him. I have reviewed the allegations made against President George W. Bush, however, and they seem different in character from those made against President Clinton.

VII. The Allegations Against President George W. Bush

1. Improper politicization of the Justice Department

Under this rubric the allegations against President Bush seem to include the dismissal of United States Attorneys purportedly for political purposes, and, in particular, because some U.S. Attorneys were insufficiently zealous in prosecuting alleged crimes committed by Democrats. Given, however, that Presidents have had complete discretion over the hiring and firing of U.S. Attorneys, and given that there is no suggestion that President Bush sought to prosecute innocent defendants, I find it difficult to believe that there are any grounds for impeachment here. Unlike the allegations against President Clinton, there does not seem to be any indication that the Justice Department was frustrated from doing its appointed tasks in order to serve the personal needs of the President. It is true that the decision whom to prosecute may have political implications, but any prosecutorial misconduct can certainly be addressed in the courts, and, again, there does not seem to be a claim that any prosecutions violated the law.

2. Implementation of the Unitary Executive Theory

I am unable to discern how the implementation of a particular view of the powers of the executive amounts to a “high Crime or Misdemeanor,” or betrays the interests of the republic to serve personal partisan purposes. There is no doubt that the Constitution does give considerable discretion to each branch of the government to determine for itself the reach of its own powers, and our doctrine of separation of powers requires, to a certain extent, that each branch defer to the others in this regard. As near as I can tell, this is what is meant by the theory of the “unitary executive.”³⁵ This doesn’t mean, of course, that if one branch completely usurps the functions of another there is not a Constitutional remedy such as impeachment and removal (or a court’s finding the acts of the executive or Congress to be unconstitutional). There does not seem to be any doubt, though, that in the course of fulfilling his executive responsibilities, particularly in a time of war or national crisis, the President needs the freedom to act effectively in the national interest. If a President, in good faith, seeks to act in the national interest rather than in his own, I don’t believe his conduct is likely to result in the kind of impeachable offense I have discussed.

Under this second area of inquiry for the committee President Bush’s practice of signing statements accompanying placing his signature on legislation has also come in for some criticism. The practice of signing statements is not unique with Mr. Bush, however, President Reagan issued 250 signing statements, and President Clinton issued more than any of the last four Presidents, 381, while President Bush had issued only 152 (as of September 17, 2007).³⁶ Given that this now seems to be a practice followed by several Presidents, the practice itself should probably not be construed as an impeachable offense, and hardly seems to be a “high Crime or Misdemeanor.” No one seems to have suggested the practice was impeachable when done by Reagan, the first President Bush, or President Clinton. One could argue that signing statements that indicate problems with particular laws or suggest particular means of construing them could confuse courts called upon to interpret those laws, but perhaps a better solution than impeachment would be to pass legislation instructing judges to ignore signing statements when interpreting statutes. Such a solution has been proposed by Arlen Specter (R-PA).³⁷ The objection to President Bush’s practice with regard to signing statements seems to center around his criticism of some measures touching on national security, and, in particular, his threats to ignore some legislation that he regards as unconstitutionally restricting his powers as Commander in Chief. As I indicated earlier, though, to a certain extent each branch is entitled if not required to preserve its constitutional discretion, and Bush’s attempt to do so, rather than an impeachable offense seems to be what we ought to expect of a President.

³⁵ For the notion that each branch has always been required to construe and implement its Constitutional prerogatives, see, e.g. Keith Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (1999). On the Unitary Executive theory, see, e.g. Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 L. Rev. 1155 (1992).

³⁶ Presidential Signing Statements: Constitutional and Institutional Implications, Congressional Research Service, September 17, 2007. Available at <http://www.fas.org/sgp/crs/natsec/RL33667.pdf>.

³⁷ S.3731 (109th Congress) - Presidential Signing Statements Act of 2006, introduced by Senator Specter, would have instructed courts to ignore signing statements.

3. Misuse of investigatory and detention authority with regard to U.S. citizens and foreign nationals

Under this rubric would appear to be acts of the administration undertaken in waging the War on Terror, and, in particular, the detaining of prisoners in Guantanamo Bay and other locations. As seems to be the case for several other allegedly questionable acts, what President Bush and his administration have done in seeking to prevent another terrorist attack on the United States seems to have been undertaken in good faith pursuant to the President's understanding of his constitutional powers, and with the close oversight of Congress, and the passage of Congressional legislation in this area. Because Congress has exercised legislative oversight and direction in connection with judicial proceedings against enemy combatants, and because the Courts have stepped in on several occasions to support or rebuff what the Executive has done, this does not seem to be an area of abuse that cries out for the impeachment remedy. Indeed, if a President, in good faith, believes that certain measures are necessary or required to meet his national security responsibilities, it is not at all clear that the threat of impeachment would be something that would operate in the best interests of the safety of the American people. Commander in Chief responsibilities in time of war are entrusted by the Constitution to the President, and Congress should probably hesitate to use the impeachment power as a means of frustrating that Constitutional allocation of power.

4. Manipulation of intelligence and misuse of war powers, including possible misrepresentations to Congress related thereto

Here the concern seems to relate to the representations of weapons of mass destruction ("WMD") purportedly possessed by Saddam Hussein which were used as a justification for starting the war in Iraq, and which later turned out not to exist in the quantities and qualities claimed, as well as the purported linkages of Saddam's regime with terrorists who may have been involved in 9/11. I claim no expertise here on either the facts regarding WMD or terrorist links, but what the Bush administration claims to have done was what was necessary in our national defense and that of our allies, such as Israel. Again, there appears to be no claim that the President abused his office for personal reasons that would call for his impeachment and removal. Indeed, the result of investigations on the administration's understanding of conditions prior to the Iraq war do seem to indicate that there were not misrepresentations of intelligence data, but that the intelligence data itself was faulty. There may well have been failures adequately to plan for the situation in Iraq following our initial toppling of Saddam, but good faith errors in the conduct of armed hostilities have never been construed to amount to impeachable offenses, and are not the kind of acts of abuse for personal gain that characterize such offenses.

5. Improper retaliation against administration critics, including disclosing information concerning CIA operative Valerie Plame, and obstruction of justice related thereto

Obstruction of justice was one of the offenses charged against President Clinton, and if a President, sworn to take care that the laws be faithfully executed, interferes with the execution of those laws for his own personal gain, there might be grounds for impeachment proceedings, just as there may have been in the case of President Clinton. One of the Vice-President's Aides, I. Lewis "Scooter" Libby was convicted of perjury and obstruction of justice in connection with U.S. Attor-

ney Patrick Fitzgerald's investigation of the Valerie Plame "outing," but Libby's conviction had to do with misrepresentations to the investigating grand jury, and not with any violations of law in connection with the revelation that Ms. Plame was a CIA operative. It is true, however, that President Bush commuted Mr. Libby's jail sentence, but I am not aware of any evidence that President Bush directed Mr. Libby to obstruct justice or to perjure himself, or that Mr. Bush was personally involved with any retaliation against Ms. Plame, or her husband, Joseph Wilson, who does appear to be a vehement critic of the Bush administration. Indeed, it seems likely that David S. Broder was correct when he wrote that the whole Libby-Wilson-Plame controversy "is a sideshow – engineered partly by the publicity-seeking former ambassador Joseph Wilson and his wife and heightened by the hunger in parts of Washington to 'get' [former Presidential Aide Karl] Rove for something or other."³⁸ Obstruction of justice might be an impeachable offense, but the committee might be best advised to proceed with caution here in light of Alexander Hamilton's warning that impeachment should not degenerate into a battle over politics instead of true misconduct.

6. Misuse of authority in denying Congress and the American people the ability to oversee and scrutinize conduct within the administration, including through the use of various asserted privileges and immunities.

This last is a very broad charge, and "misuse of authority," is so general a term that it brings to mind the Constitutional debate between Mason and Madison in which the framers rejected the use of the term "maladministration" as an impeachable offense. Again, impeachment is not supposed to be something that Congress can invoke any time it has political objections to the President, but perhaps there are more serious matters to be addressed here. If there are, I assume they center around the invocation of "executive privilege," by the Bush administration to forbid some White House Aides, most notably Harriett Miers and Joshua Bolton formally to appear before Congressional Committees. As you know, this has resulted in a House resolution and report that Miers and Bolton be held in contempt. If, indeed, the White House had sought, for reasons personal to Mr. Bush, to refuse to allow Congress to pursue its investigative role there might be a problem here, but the Minority has put together a convincing argument that the White House was seeking to cooperate with Congressional investigators, and that there has actually been no Presidential wrongdoing in connection with this issue.³⁹ Moreover, there is every reason to believe that the courts will decline to uphold the Congressional contempt citation, and "punt the executive privilege issue back to the political branches."⁴⁰ The exercise of executive privilege has been going on since the early days of the republic, and while there is no explicit Constitutional provision permitting it, it is a practice that is well-established.⁴¹ Standing alone the assertion of executive privilege could hardly constitute an

³⁸ David S. Broder, "Judge Walton's Lesson," *The Washington Post*, June 10, 2007, Pg. B07.

³⁹ See generally, Resolution Recommending That the House of Representatives Find Harriet Miers and Joshua Bolton, Chief of Staff, White House, in Contempt of Congress For Refusal to Comply with Subpoenas Duly Issued by the Committee on the Judiciary, Report of the Committee on the Judiciary, House of Representatives, together with Additional Views and Minority Views 99-155 (November 5, 2007).

⁴⁰ *Id.*, at 150, citing *United States v. House of Representatives*, 556 F.Supp. 150, 153 (D.D.C. 1983), where such a result was reached.

⁴¹ *Id.*, at 151-154.

impeachable offense, and unless there is Presidential misconduct similar in kind to that of which President Clinton was accused, I doubt whether any impeachable offenses have been committed. Indeed, the courts should be able to resolve whether the claims of executive privilege are specious (this is doubtful), and there is every reason to believe that should the courts rule against the administration they will comply with judicial directives, as they have done in the case of the Guantanamo detainees.

Conclusion

Impeachment is a radical remedy to be used only in the case of executive misconduct that demonstrates that the official in question has abused his office for venal purposes. It is not a remedy that the framers believed was appropriate for matters arising simply out of political differences, and impeachment should not be a tool to be used to remove a President simply because a party or faction wants him out of office. Absent misconduct of a kind that I have described here, conduct which does not seem to be present, the removal of an executive should be accomplished by the constitution's two-term limit, and by the actions of the people and the electoral college.

Mr. CONYERS. Bruce Fein, a long-serving member of the Department of Justice where he served as Associate Deputy Attorney General under President Reagan. He has also been before the Congress and forums frequently, and he writes a good deal for a variety of publications. We welcome you here today.

TESTIMONY OF BRUCE FEIN, ASSOCIATE DEPUTY ATTORNEY GENERAL, 1981-1982, AND CHAIRMAN, AMERICAN FREEDOM AGENDA

Mr. FEIN. Thank you, Mr. Chairman and Members of Committee.

In preparing my testimony, I had indulged the rash assumption that I was living under a republican form of government where titles of nobility were forbidden. And the idea of addressing the President as His Excellency or His Highness had been repudiated more than two centuries ago by our first President, George Washington.

Much to my surprise on the eve of this hearing, I discovered that in certain official quarters there was an insistence on prohibiting pejorative references to President George W. Bush or Vice President Richard Cheney; for example, insinuating they he had committed high crimes or misdemeanors. So I puzzled over the dilemma, and then the answer came like an epiphany from Dragnet's Sergeant Friday: I changed the names to protect the guilty.

Mr. Chairman and Members of the Committee, if President George W. Bush had knocked to enter the Constitutional Convention in Philadelphia in 1787, the presiding officer, President George Washington, would have denied him admission, and thereby hangs an alarming tale.

The executive branch has vandalized the Constitution every bit as much as the barbarians sacked Rome in 410 A.D. The executive branch has destroyed the Constitution's time-honored checks and balances, taken the Nation perilously close to executive despotism. The executive branch rejects the basic philosophical tenets of the United States of America. It does not accept that America was conceived in liberty and dedicated to the proposition that sovereignty in a republican forum of government lies with the people, not with the executive; that there are no vassals or serfs in the Constitution's landscape; that every man or woman is a king or queen, but no one wears a crown; and that the rule of law is the Nation's civic religion, and the Founding Fathers fashioned impeachment as a remedy for attacks against the constitutional order.

And let me identify just three. The President's claims of war power. What he has asserted in the aftermath of 9/11 is that every square inch of the world, including the United States, is an active battlefield, including where we are sitting at present, and that if he has a suspicion, maybe by his gut instinct or otherwise, there is al-Qaeda or an international terrorist anywhere, he can use military force, he can impose military law in order to wage war, in his view, successfully. He can invade Iran if he thinks that is necessary to succeed in the war against international terrorism irrespective of what this branch may do.

Now, that truly is an alarming power. That means that we all have a sword of Damocles over our heads, because any time any President claims that he is fighting international terrorism, he can

kidnap, arrest, kill anyone he thinks is an international terrorist. There is no second-guessing him. He doesn't go to court and ask for probable cause, because in wartime you shoot first and ask questions later.

Now, it is true he hasn't asserted that authority in the United States. He shot rockets in Yemen, Macedonia, elsewhere; not in the United States yet. But we shouldn't have to wait until we have a coup before we take protective action.

I recall in our own colonial history in 1766, after the British Parliament had repudiated the Stamp Act because we had protested no taxation without representation, they came back with a declaratory act saying, by the way, even though we withheld that tax now, we still have power to regulate you in any manner whatsoever, and that fueled the Declaration of Independence. The Founding Fathers didn't say, oh, they haven't asserted the authority yet; let us wait until the tyranny comes.

Now, a second area relates to the rule of law. When the President says he is seeking to gather foreign intelligence, he can flout any restriction that this legislative body has placed in the gathering of foreign intelligence. That is what he did after 9/11. Open and notorious, he has confessed. He decided he would flout the Foreign Intelligence Surveillance Act, which placed limits, very modest ones, on the ability to gather foreign intelligence because of 40 years of disclosed abuses by the Church Committee and other Committees of this Congress.

He also claimed not only could he violate the Foreign Intelligence Surveillance Act, but any limitation, in his view—any limitation on his ability to gather foreign intelligence was unconstitutional. Thus you could kidnap, detain in secret prisons, in violation of limitations, saying, I am gathering foreign intelligence. He could open mail, he can burglarize homes, all in the name of gathering foreign intelligence, a frightening power, and he has not renounced that to this day.

He has also asserted the right to shield what he has done from review and oversight by this body. And just to give an example, if you remember your history, and I know Liz does because she was here, like me, in Watergate, Watergate brought down President Nixon largely because a former White House counsel in the same position of Harriet Miers, who refused to show up before this Committee, related the Senate Watergate Committee Oval Office conversations he had with the President of the United States. His name was John Dean. And I remember very vividly the entire Nation, including you, Mr. Chairman, had you eyes riveted on his testimony. Oh, it would be wrong to pay off the burglars. And that was the reason why we restored the rule of law, because we had testimony about the Oval Office conversations, exactly the kind of privilege this President is asserting prevents this Congress from overseeing anything that this President might have done.

Mr. KING. Mr. Chairman, the gentleman's time has expired.

Mr. FEIN. Let me just conclude, with deference to Congressman King, from a quote by Tacitus which I think explains the dilemma we confront now. As the Roman Republic degenerated into the Roman Empire and dictatorship, he said, the worst crimes were dared by few, practiced by more, but tolerated by all.

Thank you.

[The prepared statement of Mr. Fein follows:]

PREPARED STATEMENT OF BRUCE FEIN

Dear Mr. Chairman and Members of the Committee:

If President George W. Bush had knocked to enter the constitutional convention in Philadelphia in 1787, presiding convention president George Washington would have denied him admission. Thereby hangs an alarming tale. The executive branch has vandalized the Constitution every bit as much the barbarians vandalized Rome in 410 A.D. The executive branch has destroyed the Constitution's time-honored checks and balances and raced the nation perilously close to executive despotism. The executive branch rejects the basic philosophical tenets of the United States. It does not accept that America was conceived in liberty and dedicated to the proposition that sovereignty in a republican form of government lies with the people; that there are no vassals or serfs in the Constitution's landscape; that every man or woman is a king or queen but no one wears a crown; and, that the rule of law is the nation's civic religion. The Founding Fathers fashioned impeachment as a remedy for attacks against the constitutional order.

I wish these words were hyperbole. But they are not.

The Declaration of Independence posits that all men and women are endowed with certain unalienable rights, including life, liberty, and the pursuit of happiness. Those rights are not at the sufferance of the executive branch, of Platonic Guardians, or of any government whatsoever.

The executive branch, however, has made our natural rights sport for its political ambitions and craving for power. After 9/11, the executive branch declared—with the endorsement or acquiescence of Congress and the American people—a state of permanent warfare with international terrorism, i.e., the war would not conclude until every actual or potential terrorist in the Milky Way were either killed or captured and the risk of an international terrorist incident had been reduced to zero. The executive branch further maintained without quarrel from Congress or the American people that since Osama bin Laden threatens to kill Americans at any time and in any location, the entire world, including all of the United States, is an active battlefield where military force and military law may be employed at the discretion of the executive branch. For instance, the executive branch claims authority to employ the military for aerial bombardment of cities in the United States if it believes that Al Qaeda sleeper cells are nesting there and are hidden among civilians with the same certitude that the executive branch knew Saddam Hussein possessed weapons of mass destruction. The innocent civilian deaths occasioned by the bombings would be no more than regrettable collateral damage in the war against international terrorism. Just ask the bereaving Iraqis and Afghans who witness indistinguishable collateral damage daily inflicted by the United States military.

If the executive branch decided to place the nation under military rule, unalienable rights to life, liberty, and the pursuit of happiness would be eviscerated. Citizens could be arrested and searched at random. Homes could be destroyed without just compensation if the executive branch asserted that they could serve as hiding places for Al Qaeda. Trials for alleged crimes would be by military commissions denuded of fundamental due process protections, for example, the right to confront adverse evidence.

It might be said in defense of the executive branch that it has not yet extended its claimed military power on a regular basis into the United States. The executive branch has directed United States forces to kill or kidnap persons it suspects have allegiance to Al Qaeda in foreign lands, for instance, Italy, Macedonia, or Yemen, but it has plucked only one United States resident, Ali Saleh Kahlah al-Marri, from his home for indefinite detention as a suspected enemy combatant. But if the executive branch's constitutional justification for its modest actions is not rebuked through impeachment or otherwise, a precedent of executive power will have been established that will lie around like a loaded weapon ready for use by any incumbent who claims an urgent need. Moreover, the Founding Fathers understood that mere claims to unchecked power warranted stern responses. After the British Parliament repealed the 1765 Stamp Tax by the protesting American colonists waving the banner of "No Taxation Without Representation," the Parliament responded with the Declaratory Act that insisted that it retained power to govern the colonies in all matters whatsoever irrespective of their absence of parliamentary representation. That theory of parliamentary omnipotence, simpliciter, awakened a colonial fury that culminated in the Declaration of Independence. The Constitution does not require Congress to await the executive branch's actual imposition of martial law

and the indiscriminate use of military force in the United States against American citizens before exercising the impeachment power against Administration officials who are unworthy stewards of the Constitution. Moreover, the executive branch has buttressed its claimed military omnipotence with the unitary executive theory. It posits, contrary to centuries of constitutional law and the original intent of the Founding Fathers, that any power than can be characterized as executive is shielded from review, inquiry, or checking by any other branch. For example, the power to wage war is an executive power. According to the executive branch, that means that Congress is powerless to regulate how the Commander in Chief seeks to attain victory in Iraq by prohibiting torture, invasions of Iran or Syria, limiting troop levels or permanent military bases, or otherwise.

The Declaration of Independence instructs that all just powers of government derive from the consent of the governed. And the core principle of self-government is that the people must know what their government is doing and why to intelligently adapt, shape, and direct their political loyalties or energies. James Madison, father of the Constitution, lectured that a people who mean to be their own governors must arm themselves with the power that knowledge gives. Democracy resting on popular or congressional ignorance is a farce. In addition, sunshine is the best disinfectant. The executive branch will be deterred from lawlessness, folly, or maladministration by the knowledge that its actions will be made known to the public or Congress in a timely fashion. The executive branch ceased authorizing torture once knowledge of the practice by the United States in the war against international terrorism entered the public domain. A strong presumption favoring transparency in the executive branch is a constitutional imperative. The presumption is at its zenith in matters of war and peace, as Supreme Court Justice Hugo Black underscored in the *Pentagon Papers* case concerning the Vietnam War; otherwise, the executive branch will otherwise concoct reasons for initiating or maintaining war and cause deaths to heroic American soldiers as senseless as the Charge of the Light Brigade.

The Founding Fathers were virtually unanimous that if permitted to be cloaked with secrecy the executive branch would distort facts and deceive the people and Congress by inflating foreign dangers manifold to justify resort to military force or war. As was related to erstwhile White House Press Secretary Scott McClellan, only war holds the prospect of crowning a President with fame and leaving his footprints in the sand of time by transforming the political globe or major regions. War also boosts a President's immediate popularity, heightens his control over information critical to his political fortunes, multiplies his opportunities to favor his political friends through appointments and government contracts, and justifies spying on war opponents as enemy combatants or potential traitors.

The executive branch, however, has routinely invoked executive privilege to conceal what the executive branch is doing and why in both national security and domestic matters. The executive branch has employed secrecy to communicate a sub-optimal level of candor to the American people and Congress about foreign dangers and purported justifications for war. James Iredell, later appointed by President George Washington to the United States Supreme Court, advised the North Carolina ratification convention:

"The President must certainly be punishable for giving false information to the Senate. He is to regulate all intercourse with foreign powers, and it is his duty to impart to the Senate every material intelligence he receives. If it should appear that he has not given them full information, but has concealed important intelligence which he ought to have communicated, and by that means induced them to enter into measures injurious to their country, and which they would not have consented to had the true state of things been disclosed to them—in this case, I ask whether, upon an impeachment for a misdemeanor upon such an account, the Senate would probably favor him."

The executive branch deceived the American people and Congress by concealing material evidence discrediting the claim that Saddam Hussein possessed weapons of mass destruction or was in cahoots with Al Qaeda, chief justifications for invading Iraq in March 2003. The executive branch misled the American people and Congress about the true danger of international terrorism to elicit their endorsements for a state of permanent war. The House Judiciary Committee voted an article of impeachment against President Richard M. Nixon based in part on his deceit to the American people about a bogus internal investigation of the Watergate cover-up.

The executive branch has invoked executive privilege to prevent Congress and the American people from knowing the prime features and the putative intelligence benefits of the Terrorist Surveillance Program undertaken in contravention of the Foreign Intelligence Surveillance Act of 1978, as amended.

On the domestic front, the executive branch has invoked the privilege to conceal from the American people and Congress Vice President Dick Cheney's interview with special prosecutor Patrick Fitzgerald concerning the Valerie Wilson leak investigation. The privilege at its apex was never before thought to extend to vice presidential communications not intended for the president.

The privilege has been invoked to prevent former White House aides Karl Rove and Harriet Meirs from even appearing before Congress regarding the firing of United States attorneys and possible obstruction of justice or perjury, and to prevent White House chief of staff Joshua Bolten from responding to document production requests from Congress concerning the same. The executive branch's counter-constitutional theory of executive privilege is that the President can prevent any current or former executive branch official from appearing before Congress to testify about communications that were aimed to reach the President or emanated from the Oval Office. That would sound the death knell of congressional oversight and the public's right to know what their government is doing and why. It would have permitted President Richard M. Nixon to muzzle former White House counsel John Dean from testifying about the Watergate cover-up before the Senate Watergate Committee by reciting Oval Office conversations whose disclosures engendered Nixon's resignation. No decision of the United States Supreme Court has sustained a presidential privilege to deny information to Congress. Its assumption that executive officials will shortchange candid advice to the President absent an iron-clad guarantee of confidentiality is counterfactual. Every important presidential adviser operates on the assumption that what is said in the Oval Office might through leaks or waivers of privilege later appear in major media outlets. Thus, former CIA Director George Tenet writes in *At the Center of the Storm*: "[T]here are no private conversations, even in the Oval Office."

The executive branch maintains that it is endowed with constitutional authority to gather foreign intelligence in any manner the executive branch wishes in contravention of statutory restraints imposed by Congress. The Constitution, however, obligates the executive branch to faithfully to execute the laws, not to sabotage them. The executive branch operated the Terrorist Surveillance Program to target American citizens on American soil for warrantless electronic surveillance on the executive branch's say so alone from 9/11/2007 in violation of FISA. The executive branch also claims power to torture, kidnap, open mail, or burglarize in violation of congressional limitations in the name of collecting foreign intelligence. The multiple victims of executive branch's authorization of torture, including waterboarding, are documented in Jane Mayer's recent book *The Dark Side*. The executive branch's lawlessness made the nation less safe by deterring expert FBI agents from participating in key interrogations to avoid complicity in crime and alienating foreign allies like Italy whose sovereignty was violated by a CIA-orchestrated kidnapping of Egyptian cleric Abu Omar.

An American Bar Association Task Force on which I served issued a report delineating the constitutional evils of signing statements that I need not amplify at this time. It is another example of the executive branch's usurpation of legislative powers and scorn for the rule of law.

In *Federalist 65*, Alexander Hamilton explained that impeachments would proceed "from the misconduct of public men, or, in other words, from abuse of violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done to society itself." There is no more important task for this Committee than restoring the constitutional equilibrium among the three branches that the Founding Fathers fashioned based on their unsurpassed insight into human nature and the inexorable degeneration of unchecked power into tyranny.

Mr. CONYERS. We are pleased to welcome Vincent Bugliosi, who has authored several timely books. I think this is his latest one, *The Prosecution of George W. Bush for Murder*. And he, of course, is a well-known former Los Angeles County deputy district attorney remembered for his prosecution of Charles Manson in 1970. He has still been very active, and we welcome his appearance before the Committee today.

**TESTIMONY OF VINCENT BUGLIOSI, AUTHOR AND FORMER
LOS ANGELES COUNTY PROSECUTOR**

Mr. BUGLIOSI. Mr. Chairman, and Members of the Committee. I have been told that the rules of this House dictate that although I can quote what President George Bush said, I am forbidden from accusing him of a crime or even any dishonorable conduct, only being allowed to use the words "Bush administration" or "administration officials." This will not make for the best of articulations, but I will do the best that I can.

In my book here, *The Prosecution of George W. Bush for Murder*, I present evidence that proves beyond all reasonable doubt that Bush administration officials took this Nation to war in Iraq on a lie, under false pretenses, and, therefore, under the law, they are guilty of murder for the deaths of over 4,000 young American soldiers who have died so far in Iraq fighting their war. And let us not forget the over 100,000 innocent Iraqi men, women, children and babies who have died horrible, violent deaths because of this war.

I am fully aware that the charge I have just made is a very serious one, but let me say that at this stage of my career, I don't have time for fanciful reveries. I never in a million years would propose a murder prosecution of Bush administration officials if I didn't believe there was more than enough evidence to convict them and that I was standing on strong legal ground.

What is some of that evidence? Because of time constraints, I am only going to mention one piece of evidence today. I have documentary evidence that when George Bush told the Nation on the evening of October 7, 2002, that Saddam Hussein was an imminent threat to the security of this country, he was telling millions of unsuspecting Americans the exact opposite of what his own CIA had told Administration officials just 6 days earlier in a classified report on October the 1st, that Hussein was not an imminent threat.

But it gets worse. On October 4th, the Bush administration put out an unclassified summary version of the classified report so they could give it to Congress and the American people, and this unclassified version came to be known as the White Paper. And in this White Paper, which I have in front of me, the conclusion of U.S. intelligence that Saddam Hussein was not an imminent threat to the security of this country was completely deleted. Every single one of these all-important words was taken out. So Congress and the American people never saw any of this.

Since we are talking about a matter of war and peace with the safety and lives of millions of human beings at that time hanging in the balance, and with Congress about to vote in 1 week on whether or not it should authorize George Bush to go to war in Iraq, what could possibly be worse, I repeat, what could possibly be worse or more criminal than the Bush administration deliberately keeping this all-important conclusion from Congress and the American people?

The terrible reality is that the Bush administration has gotten away with thousands upon thousands of murders. And we, America, the American people, cannot let them do this.

During the question-and-answer period, if requested, I will give you words from George Bush's own mouth that I believe will prove shocking to most of you folks in this Chamber.

On December 9th, 1998, a previous House Judiciary Committee issued four articles of impeachment against President Bill Clinton for doing something infinitely less significant than what the evidence shows the Bush administration did in this case. Indeed, it is a calumny, a slander of the highest rank to even talk about them in the same breath or on the same page. If a House Judiciary Committee could recommend that President Clinton be impeached for what he did, as they say in the law, a fortiori, all the more so, with all the highly incriminating evidence that I set forth in my book, much of it documentary, you shouldn't have any difficulty making a criminal referral to the Department of Justice to commence a criminal investigation of the Bush administration to determine whether first degree murder charges should be brought against certain members of this Administration, and I hereby strongly urge you to do so.

Whether Republican or Democrat, all Americans should be absolutely outraged over what the Bush administration has done. How dare they do what they did? How dare they?

This will take a half minute or so to wrap it up.

Mr. SMITH. I am sorry, have to interrupt you. I am going to ask the Chairman to make——

Mr. CONYERS. I admonish the——

Mr. SMITH [continuing]. A comment or clear the room.

Mr. BUGLIOSI. May I wrap this up this right here?

Mr. SMITH. Just a minute please. I am asking the Chairman a question.

A few minutes ago you said you would clear the room if there was an outburst, and I think there has clearly been an outburst. I leave it up to your discretion.

Mr. CONYERS. I am not going to clear the room, but I would ask the guests here at the hearing to not give any indication of approval or disapproval of any of the statements being made by the witnesses.

Mr. BUGLIOSI. Directly because of this Administration's war, there are well over 100,000 precious human beings in their cold graves right now as I am talking to you. Speaking metaphorically, I want you to hear, as I do, their cries for justice. I say that it would greatly dishonor those in their graves who paid the ultimate price because of this war were you not to refer this case to the Department of Justice.

If we want this Nation to become the great Nation it once was, widely respected around the world, we can hardly do this if we don't take the first step of bringing those responsible for the war in Iraq to justice.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Bugliosi follows:]

PREPARED STATEMENT OF VINCENT BUGLIOSI

Within the pages of my book, *The Prosecution Of George W. Bush For Murder*, I present evidence that proves, beyond a reasonable doubt, that Bush administration officials took this nation to war in Iraq under false pretenses, and therefore, under the law, they are guilty of murder for the deaths of over 4,000 young American sol-

diers who have died so far in Iraq fighting their war. And let's not forget the over 100,000 innocent Iraqi men, women, children and babies who have died horrible, violent deaths because of their war.

I am fully aware that the charge I have just made is an extremely serious one. But let me tell you that at this stage of my career I don't have time for fanciful reveries. I never in a million years would propose this prosecution if I didn't believe there was more than enough evidence to convict administration officials and that I was standing on strong, legal ground.

What is some of that evidence? Although there is much other evidence in my book, because of the press of time, I am only going to mention one piece of evidence in this paper. I have documentary evidence that when George Bush told the nation on the evening of October 7, 2002, that Saddam Hussein was a "great danger" to America who might give his weapons of mass destruction to a terrorist group "on any given day" to attack us (meaning, the threat was imminent), he was telling millions of unsuspecting Americans the exact opposite of what his own CIA had told administration officials just six days earlier, in a classified report on October 1, that Hussein was not an imminent threat.

But it gets worse. On October 4, the Bush administration put out an unclassified, summary version of the classified report so they could give it to Congress and the American people. This unclassified version, as you know, came to be known as the White Paper. And in this White Paper, the conclusion of U.S. Intelligence that Hussein would only be likely to attack us if he feared we were about to attack him was completely deleted. So Congress and the American people never saw any of this. Since we're talking about a matter of war and peace, with the safety and lives of millions of human beings hanging in the balance, and with Congress about to vote in one week on whether it should authorize President Bush to go to war, what could be worse than administration officials keeping this all-important conclusion from Congress and the American people?

Directly because of this administration's war, there are well over 100,000 precious human beings who are in their cold graves, right now, as I am writing these words. Speaking metaphorically, I want Congress to hear, as I do, their cries for justice.

If we want this nation to become the great nation it once was, widely respected around the world, we can hardly do this if we don't take the first step of bringing those responsible for the terrible war in Iraq to justice. I would ask the House Judiciary Committee to take whatever measures that are available to them to further this objective.

Mr. CONYERS. Our next witness is—excuse me, our next witness is Professor Rabkin, Jeremy Rabkin, professor at George Mason University School of Law. Additionally, he taught at Cornell University for over 25 years, is a renowned scholar in international law, and was recently confirmed by the United States Senate as a member of the Board of Directors of the United States Institute of Peace.

Welcome, Jeremy Rabkin, and we await your testimony.

**TESTIMONY OF JEREMY A. RABKIN, PROFESSOR OF LAW,
GEORGE MASON UNIVERSITY SCHOOL OF LAW**

Mr. RABKIN. Thank you. I see that a lot of people are very angry at the Bush administration. I am not here particularly to defend the Bush administration, but I was asked by the Minority.

I hope I can add a little bit of perspective to this. I think the number of previous people testifying have suggested not just that the war in Iraq was a mistake, but that there was some kind of conspiracy to take the Nation into a war for no good reason at all, and that this was done knowingly.

People who believe that, it seems to me, shouldn't be wasting time on FISA. They shouldn't be wasting time on secondary issues. That is an extraordinary, explosive charge if you think it is really true that the President knowingly and deliberately sent the country into a war for reasons which he knew were untrue. We should just zero right in on that charge and have a debate about that.

I don't know that charge is true. I think it is wildly improbable. But that is what we should be talking about. It doesn't make it more credible to say, "I believe these wild conspiracy charges because the President has abused signing statements and I don't like that. Also there is some dispute about the interpretation of the Geneva Convention; I don't like that." All these other secondary things don't add credibility to the main sensational, explosive charge.

What I want to do is just remind people in looking at the secondary charges that these sorts of disputes are not unique to this Administration. They are nothing new. Let us just remind ourselves, with all the talk about surveillance, that in previous wars, right at the beginning and indeed in the Second World War, before the beginning, the President authorized the Attorney General, to engage in open-ended wiretapping.

Congresswoman Holtzman mentioned abuses that led up to the enactment of FISA in 1978. Right, surveillance activities go back decades. This has been a thing that happens frequently in wartime.

Chief Justice Rehnquist wrote a book—not in defense of the Bush administration, he wrote it in the 1990's—about civil liberties and wartime. He tells the story about the dispute within the government about putting more than 100,000 people behind barbed wire, Japanese Americans, and he quotes the saying of the Attorney General at the time, Francis Biddle, who told the President, this is a problem, we shouldn't be doing this. And Biddle said afterwards, "I do not think the constitutional difficulty plagued him—plagued President Roosevelt. The Constitution has not greatly bothered any wartime President."

Chief Justice Rehnquist was so impressed by those words that he not only quoted them in the section of his book about World War II, he quotes them in the last two pages of the book at the conclusion: Wartime Presidents don't take great care about the Constitution; wartime presidents take great care to defend the country because they think that is what they will be judged on. And Chief Justice Rehnquist wasn't making that point in criticism; he was making that point, I think, as a former Assistant Attorney General for Legal Counsel. He knew this is what Presidents do.

All I am saying is, keep in mind the context of all the things that are being charged against the Bush administration. They thought they were acting in wartime. We are now looking back on it 7 years later, there hasn't been another attack, so we now think, "Oh, really there was no good reason for this." But people had no reason to be self-confident as we are now that there wasn't really much of a terror threat. If you keep that in mind, it is much more understandable how people of good faith and sincerity could do things which in retrospect we think maybe were excessive and should be looked into.

I just want to say one last thing before I finish, which is, we should remind ourselves that we are not looking at this now as historians. There is very deep ideological division in the country, or just partisan division in the country. I have to tell you, coming to this hearing, the first time I have been in a hearing in quite a few years, I am really astonished at the mood in this room. I mean. The tone of these deliberations, I think, is somewhat demented. I

am not saying this to criticize people, I am just saying you should all remind yourselves that the rest of the country is not necessarily in this same bubble in which people here think it is reasonable to describe the President as if he were Caligula.

We have reasonable differences. We ought to be able to pursue those differences without reaching for the most extreme interpretation and the most sensational way of viewing what has happened. If the Congress thinks there are things that need to be fixed, you have a legislative process. I think to put everything onto the “somebody must pay for mistakes, and impeachment is the way” is to make the country ungovernable, because each time you start cranking up this kind of extreme response, it just encourages people on the other side to get their backs up and feel, yes, they are our enemies. Our enemies are not Democrats or Republicans, our enemies are terrorists abroad who want to kill us.

Thank you.

[The prepared statement of Mr. Rabkin follows:]

PREPARED STATEMENT OF JEREMY A. RABKIN

TESTIMONY OF JEREMY RABKIN
PROFESSOR OF LAW
GEORGE MASON UNIVERSITY

FOR COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES
JULY 25, 2008

I thank the Committee for inviting me to provide a somewhat different perspective at these hearings. But I should say at the outset that I have not served in the Bush administration. I do not see it as my role to defend the administration against any particular claim of abuse, much less against all claims that critics might want to pursue. I have no doubt that the Bush administration has made some mistakes.

So I'm sure there is room for this Committee to contribute to a constructive public debate on a number of issues. What I hope to do is simply to raise some cautions against letting criticism boil into rage. It is right to raise questions. But we should keep the larger context in view.

The first point I want to make is my main point: Nothing that has happened since September of 2001 is more extreme or more disturbing than what has been done by other presidents in the past. Let me cite some reasonably well known examples from our history.

Is there question now about the adequacy of congressional debate or the form of the resulting resolutions authorizing war in Afghanistan and Iraq? In the spring of 1941, President Roosevelt directed our navy to patrol into the mid-Atlantic in order to provide protection for ships bringing arms to Britain. Britain was engaged in full-throated naval war with Germany, the "Battle of the Atlantic." The U.S. Navy was not simply enlisted to make a show of force but to attack German U-boats when it encountered them – which it did repeatedly, with the full understanding that U-boats were likely to treat U.S. warships as enemy targets in return. Hundreds of American sailors were lost to U-boat attacks and the whole venture probably goaded Hitler into declaring war on the U.S. right after the U.S. navy suffered what seemed a terrible blow on December 7. But President Roosevelt, through this entire military venture, never asked Congress for a resolution of support, let alone a formal declaration of war.

Less than a decade later, President Truman committed half a million troops to a war in Korea. He also declined to ask for a congressional resolution of approval or support. Truman could not, as FDR did with his naval policies in summer and fall of 1941, speak of "steps short of war." President Truman committed U.S. forces to a full-scale war in Korea from the outset. But Truman claimed that because the UN Security Council had authorized a military response to North Korea's invasion of South Korea, it was not necessary for the U.S. Congress to make any separate determination of what should be done with U.S. forces.

State Department lawyers insisted at the time that ratification of the UN Charter had implied U.S. consent to such arrangements. But no president since then has dared to claim UN authorization made it unnecessary for Congress to have its own say. (Certainly President George H.W. Bush was careful to follow up UN authorization for military action against Saddam in 1990 with a separate resolution of approval from the U.S. Congress.) Yet President Clinton, when he committed U.S. air power to the war against Serbia in 1999 did not get authorization from the UN. He did seek authorization from Congress – but then went ahead with weeks of intense bombing, even after Congress refused to provide such authorization.

Are critics worried about abuse of civil liberties at home? President Roosevelt authorized wire tapping of anyone suspected of involvement with potential security threats. The authorization was not limited to overseas lines. Nor was it limited to known enemies. The authorization was given in the spring of 1940 – almost two years before congressional declarations of war established which powers were our official enemies. Once the Second World War started, President Roosevelt insisted that enemy combatants found in the United States – the famous German saboteurs landed from a U-boat on Long Island – should be tried by a secret military commission, which paid no attention to the fact that some of the saboteurs were U.S. citizens. Meanwhile, Hawaii was placed under martial law and even charges involving financial improprieties of local (civilian) stock brokers were left to military officials to judge and punish by their own lights.

During the First World War, the Wilson administration sent anti-war critics to prison for publishing cartoons that derided military conscription. The Lincoln administration had actually closed down some newspapers during the Civil War. Using the military as an enforcement arm, it sent more than ten thousand civilians to military detention without benefit of ordinary judicial process. Critics did not suffer in this way during the Second World War. But some 120,000 Japanese-Americans were placed behind barbed wire for most of the war. They were not charged with any crime. They were held in detention camps on the sole basis of suspicious ancestry.

Compared to such extreme measures in the past, the Bush administration has acted with great caution. I don't at all mean to suggest that recollection of past abuses should immunize all current policies from criticism. Many things were accepted in the 1940s – racial segregation in the armed forces is an obvious example – which would now be regarded as utterly outrageous. We live in a different historical context and we are obliged to judge many questions from our own perspective, not the perspective of our grandparents.

But history is at least a reminder that not every abuse becomes a precedent for subsequent, more extreme abuses. If there is any evident pattern in our experience since the Civil War, it is that each war experience has left a residue of caution that affected the way the next war was conducted at home. President Wilson did not think to suspend habeas corpus, as Lincoln did during the Civil War. President Roosevelt did not think to invoke criminal process against expressions of anti-war opinion, as Wilson did. Part of

the reason is that there were post-war second thoughts about wartime abuses. Lincoln's suspension of habeas corpus was condemned in the Supreme Court's post-war (1866) ruling in *Ex Parte Milligan*. Wilson's prosecutions were challenged, at least in spirit, in the post-war dissents of Justices Holmes and Brandeis, demanding that the government meet some burden of proof before claiming mere denunciations of government policy – mere speech – could be treated as “clear and present danger.”

In short, we have, in the past, recovered our balance after the excesses of wartime. So we should not treat every abuse as if it paves the way for an unobstructed slide into peacetime tyranny. If we have gone too far, we can recover our balance – as we have in the past.

This brings me to the next main point I want to make. It is, of course, precisely in wartime that presidents feel entitled to relax (or disregard) ordinary legal scruples. And, of course, there is a good reason for this. In wartime, the president must give priority to questions of basic security. It's more important to keep the enemy at bay than to uphold every peacetime standard of due process or constitutional limitation. The public tends to share this view – which is why Presidents Lincoln, Wilson and Roosevelt are all still honored, even though they presided over many questionable wartime measures.

Our late Chief Justice, William Rehnquist, wrote a book on “Civil Liberties in Wartime” (called ALL THE LAWS BUT ONE, after President Lincoln's argument that he must not let all the laws go to ruin out of excessive tenderness toward the one law on habeas corpus). In analyzing President Roosevelt's decision to place Japanese-Americans in detention camps, Rehnquist quotes the recollection of FDR's Attorney General, Francis Biddle about the president's thinking at the time: “Nor do I think that the Constitutional difficulty plagued him. The Constitution has not greatly bothered any war time president.” Rehnquist was taken with the statement that he repeats it in the last pages of the book.

One can say that the war against terror – or indeed the war in Iraq – has now gone on longer than any previous war. One can say a war “against terror,” is so open-ended, it may go on for decades. One can say, therefore, we cannot accept controversial Bush administration policies with quite the equanimity that past generations showed toward hard presidential war measures, because – unlike past generations – we have no assurance that these measures will prove temporary.

All of these are fair points and worth considering. But we should remind ourselves that in the immediate aftermath of the 9/11 attacks, we had no reason to think the country could go on for seven years without a repeat of terror attacks on that scale. We are now looking at these questions with the benefit of hindsight. We should remind ourselves that decision-makers in the Bush administration did not have that luxury. We should at least accord them the some of the charitable presumption we granted to other wartime administrations – whose actions we have sometimes repudiated (as with the detention of Japanese-Americans in World War II) while still recognizing the context that

allowed generally decent people in those administrations to make some wrong turns. And we should recall that, if we can't see a definite endpoint to a "war on terror," it was not easy to say when precisely we shifted from post-9/11 emergency to a more long-term policy environment of routine vigilance.

And that brings me to my last point. It's hard to have a sober debate in wartime, because passions run too high – including the strongest passions, fear and anger. In that sense, we should be in a better position to debate issues of presidential power and civil liberties in 2008 than we were in 2001 or 2002-03. But we have the opposite disability today. Where war tends to bring people together, we now face extreme partisan division.

Our partisan divisions aren't the result of the war and they aren't the result of the peace. They have been building for a long time. They were only briefly in remission, perhaps for a year or so, after the original 9/11 attacks. Political scientists have constructed fairly precise models to measure partisan voting in Congress. (Keith Poole of UCSD and Howard Rosenthal of NYU are the most prominent analysts of these trends.) What they find is that partisan voting in Congress has been building steadily over the past two decades and is higher now than at any time in the past century. Southern Democrats are no longer a different party from Northern Democrats. Liberal Republicans in the Northeast – well, there aren't many of them left.

We have had two very close presidential elections – and angry disputes about whether votes were counted fairly. We have, behind that, an electorate that is more readily mobilized on partisan lines than in the past. We used to rely on the same three television networks and the same few news services or national news magazines for our printed news. Now we have narrow-casting cable programs, talk radio, the Internet. It's possible to get constant coverage of all political and world developments all the time – and entirely from a left-liberal or entirely from a highly conservative perspective.

The one thing that follows is that issues tend to cluster. Feelings about one issue tend to reinforce inclinations about the next issue. It's logically possible to support gay marriage, a woman's right to choose on abortion and strong measures to avert global warming -- while simultaneously supporting the claim that the Second Amendment confers an individual right to bear arms and we should stay in Iraq until we finish the job. Someone holding this set of views would not necessarily be incoherent or befuddled. But it is hard to find such a person in Congress, on the radio, on the op-ed pages, on any popular website.

What this means is that people who are angry at the Bush administration for other reasons – because they oppose tax cuts, say, or Bush policies on the environment – will be much more likely to suspect the worst about Bush administration war policies and security policies and respect for constitutional proprieties in these areas. So there are strong temptations to appeal to the people who think this way by escalating charges in this area. The Constitution is the most precious thing we have in our common political keeping. What could be more of a betrayal than betraying the Constitution? Anyone who seeks to paint the Bush administration in a bad light will gravitate to such charges.

The Bush team aren't just misguided, they aren't just deaf to the lessons of recent experience, they aren't just blind to emerging trends – they're enemies of the Constitution!

We can't, of course, remove politics from debates about how presidents have performed. And we can't go into a presidential election campaign without a lot of heated rhetoric about how high the stakes are for the country. But we should remind ourselves that we're not in the best position to make good judgments when we're at our most emotional.

We should have a debate about presidential power and presidential policies. But we should try to keep it within bounds. Democrats don't want to leave the country more exposed to terror attacks. Republicans don't want to leave the country devoid of constitutional safeguards for liberty and privacy. We will all have to live in the same country and share the same Constitution. We do have real enemies – and they aren't Democrats or Republicans. Our real enemies want to kill people in America. We should not lose sight of that deep fact in the background – even though so many other trends encourage us to focus our enmities on partisan rivals within this country.

Mr. CONYERS. We have the pleasure of welcoming Frederick Schwarz, senior counsel at the very well-known Brennan Center in New York. Before heading that up, he was a partner at Cravath, et al. He was also once chief counsel to the Senate select committee to study governmental operations with respect to intelligence activity, and he chaired the commission that revised New York City's charter.

We welcome you this afternoon to our proceedings.

TESTIMONY OF FREDERICK A.O. SCHWARZ, JR., SENIOR COUNSEL, BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW

Mr. SCHWARZ. Thank you very much, Mr. Chairman. That Committee was known as the Church Committee, which several of the other witnesses have made reference to.

I have covered details of what is going wrong elsewhere in my written testimony and in my book, *Unchecked and Unbalanced*. I would just like to summarize what I think is the most—largest problem, which is that in our efforts to protect ourselves, we have made the mistake of adopting tactics of the enemy.

The most important mistake has been with respect to torture. And waterboarding, by the way, we prosecuted Japanese soldiers for using it against Americans. And we have abandoned the rule of law and slipped away from checks and balances, and those all have created a serious constitutional problem.

The Vice President 20 years ago said we should have monarchical powers for the Presidency, and I believe that is his view today. The consequence of what we have done is that America has been made not only less free, but also less safe. And just to illustrate that with some examples, by abandoning our values and choosing instead to adopt some tactics of our vicious enemies, we have given enemy recruiters powerful tools to stir up passions in the Muslim world. Those tactics have also undermined necessary cooperation from our closest allies. Colin Powell said in a letter to John McCain just 2 years ago, the world is beginning to doubt the moral basis of our fight against terrorism, and that is a terrible loss.

After the rush of support and emotional bonding with America immediately after 9/11, we are met with disappointment, caution and resistance from even our closest allies. For example, the British now refuse to cooperate with us on lots of intelligence matters because they fear they will be used in rendition.

Now the full story needs to be told, and the full story of the consequences of what has been done needs to be told. I recommend, therefore, something different than what is being heard today. I recommend that the Congress and the new President sign a bill that sets up an independent, nonpartisan and bipartisan investigatory commission that will look at what has been done wrong, look at what has been done right, and recommend remedies for things that have been done wrong.

I don't recommend impeachment, because I believe it is too late; that could have been considered earlier. I think it is too late now, and the timing now would make it not only impossible to have a mature and responsible and detailed investigation, but the timing

would also make such an investigation more partisan than it ought to be.

We need to know from an investigation the full truth so we do not repeat mistakes. We need to know the full truth to produce accountability for those that have committed wrongdoing. And we need to know the full truth because to produce the truth begins to restore America's moral luster, which is a great part of our strength.

Now, you could say that putting out the full truth will embarrass the country. That has been said before. It might embarrass people, but the great strength of America is to remain a people who confront our mistakes and resolve not to repeat them. If we do not do that, we will decline, but if we do confront our mistakes, our future will be worthy of the best of our past.

Now let me just conclude with these thoughts. The first thing is we must remember that the conduct that has undermined our values and zapped our strength arose in the context of seeking to protect the country from further attacks. But as Justice Louis Brandeis warned in a somewhat different context, at times the greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding. These issues transcend partisanship. They are far more important than the controversies that divide us. Indeed, to fully understand these issues should bring all Americans together. The development of novel and erroneous constitutional theories has, in my view, led to conduct that is contrary to American values, and that has actually made us less safe.

Now, again, there are some words that the Church Committee uttered 30 years ago—32 years ago that are no less true today than they were three decades ago. The United States must not adopt the tactics of the enemy. Means are as important as ends. Crisis always 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.

Now, I believe that with a sober investigation into what has been done, both what has gone wrong and what has gone right, we can actually bring our country together, and that we can show that, when properly respected, our constitutional structure and our core fundamental values can, as they have for so many years, provide the people of this country and of the world the hope for a better, fuller, fairer life.

Thank you.

[The prepared statement of Mr. Schwarz follows:]

PREPARED STATEMENT OF FREDERICK A.O. SCHWARZ, JR.

BRENNAN
CENTER
FOR JUSTICE

HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY

“EXECUTIVE POWER AND ITS
CONSTITUTIONAL LIMITATIONS”

Friday, July 25, 2008

Written Testimony of

Frederick A.O. Schwarz, Jr.
Senior Counsel

*Urging Congress to establish an investigatory Commission
to determine what has gone wrong with our policies in
confronting terrorism and to suggest solutions.*

Brennan Center for Justice
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**Testimony of Frederick A. O. Schwarz, Jr., before the Hearing on
“Executive Power and Its Constitutional Limitations” by the Committee on the
Judiciary of the House of Representatives on July 25, 2008.¹**

I am grateful to have the chance to share with you some thoughts on 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

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. These bursts of misconduct are often closely related to emergency circumstances. Crisis 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. Our self-correcting mechanism is one of the great strengths of our democracy. It is time for such a searching assessment and self-correction again.

I. An Investigatory Commission Should be Established.

In this testimony, I urge that Congress and the next President pass a law establishing an investigatory Commission to determine what has gone wrong (and right) with our policies and practices in confronting terrorism since September 11, 2001, and to recommend solutions. There are many other points related to the subject matter of this hearing that I could make (see ns. 1 and 2, *supra*, and ns. 7 and 11 *infra*). But, I believe that the suggestion of a Commission needs to be emphasized in order to make it part of the current public dialogue.

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 chartered over the last seven years has in fact made us less safe, as well as less free:

¹ Mr. Schwarz is Senior Counsel at the Brennan Center for Justice at NYU Law School. He was Chief Counsel for the United States Senate’s Committee to Study Governmental Operations with Respect to Intelligence Activities, commonly known as the Church Committee. He is co-author (along with Aziz Huq) of *UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR* (The New Press, 2007). For many years a litigation partner in a leading New York City law firm, Mr. Schwarz’s other governmental service includes being the Corporation Counsel for New York City, and chairing the New York City Charter Revision Commission and the City’s Campaign Finance Board.

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/.

- We have squandered one of our greatest assets—respect for our values.
- We have given vicious terrorists like Bin Laden powerful recruiting tools by letting them, of all people, decry our tactics.
- And we have lost much of the support of our allies, as admiration for America has dropped substantially.³

Things have indeed gone wrong. For example, just on the subject of torture:

- Former Secretary of State Colin Powell warned that “The world is beginning to doubt the moral basis of our fight against terrorism.”⁴
- Attorney General Michael Mukasey cannot bring himself to bar waterboarding; 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.
- 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.
- Similarly, President Bush and Secretary of State Condoleezza Rice defend sending prisoners to Egypt and Syria for questioning [“extraordinary rendition”], despite the fact that our State Department repeatedly issues human rights reports that condemn Egypt and Syria for using torture on prisoners. The excuse of the President and the Secretary: they promised not to torture “our prisoners.” Not believable. Particularly not believable given that there is proof that “our prisoners” have been tortured.⁵

For America to adopt tactics of the enemy—such as torture—saps our strength. It is all the worse when our leaders’ public positions appear to be hypocritical.

³ 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>.

⁴ Letter Colin S. Powell to Senator John McCain, September 13, 2006.

⁵ 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.

The Administration's legal justification for its conduct is as troubling as the conduct itself. Other moments in history have seen abusive conduct. But the constitutional and legal theory under which this Administration has acted is unprecedented. It is remarkably troubling. It presents a theory of presidential power that flies in the face of the Revolution, is inconsistent with the language and history of the Constitution, ignores crucial Supreme Court decisions, and closes the door to checks and balances.

Thus, the Administration's post-9/11 position is that the President—like a seventeenth century British monarch—is above the law. Surprisingly, this theory 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.”⁶ 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 and erroneous reading of America's history and America's Constitution.⁷

The law also has been perverted to justify the invasion of Americans' constitutional privacy rights through warrantless surveillance. Most importantly, it has been perverted to advise the President that he need not comply with the law of the land. And the entire criminal law apparatus has been appropriated to serve petty partisan purposes.

In short, in the nearly eight years that have passed under the current Administration, and especially in the seven years since the tragedy of 9/11, the White House has arrogated to itself unprecedented powers of coercion, detention and surveillance. All the while, it has tried to use a patina of legal and constitutional excuses to disguise the degree to which it has abandoned the very ideals in whose defense these immoral tactics have been employed.

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. Thus:

- 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.
- We have undermined necessary cooperation from our closest allies. As Colin Powell said: “the world is beginning to doubt the moral basis of our fight against terrorism.”

⁶ *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).

⁷ Chapter 7 [“Kings and Presidents”] of *Unchecked and Unbalanced*, 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, resisting torture.

- 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.
- A dramatic example of how the Administration's chosen tactics have hurt us comes from the United Kingdom, where British intelligence agencies are increasingly reluctant to share information with the United States for fear that it will be used in rendition operations.⁸

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.

Given that there will be a new administration on January 20, 2009, a question naturally arises: Why bother rehashing the past?

The short answer is that when we fail to fully understand what went wrong and why we strayed so far, we risk repetition.

To avoid repeating history requires understanding history. As the Framers recognized, openness and transparency in government is a prerequisite to democratic legitimacy and to lawful government. As James Madison 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."⁹

While some of our recent history has dribbled or leaked out, the Government itself has denied a free people knowledge of many of the actions it has taken in their names. Excessive secrecy smothers popular power.

Many details of the programs we know about have been suppressed, or glossed over with generalities, or misrepresented. Other programs may still remain unknown. In addition, we do not know the extent to which the Administration was told (or understood) how a departure from America's ideals actually risked undermining the battle against terrorism.¹⁰ 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,

⁸ Britain's Intelligence and Security Committee, *Rendition Report* (2007). See also the conclusions of the Foreign Affairs Committee of the British House of Commons that the U.K. "can no longer rely on U.S. assurances that it doesn't use torture." *British Panel Doubts U.S. on Torture*, N.Y. TIMES, July 21, 2008 at A11. Due to similar fears, Sweden has determined that foreign agents may not participate in prisoner transfers or body searches. Victor L. Simpson, *U.S. Allies Resist Secret Deportations*, ASSOC. PRESS, June 19, 2005. And Italy and Germany have indicted American officials for participation in rendition operations on their soil.

⁹ Letter from James Madison to W.T. Barry (Aug. 4, 1822), reprinted in 1 THE FOUNDERS' CONSTITUTION 690 (Philip B. Kurland & Ralph Lerner eds., 1987).

¹⁰ *Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities*, 1 S. REP. NO. 94-755, at 156 (1976).

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 my testimony is this: The abuses that have taken place must be accounted for. We need to know who is responsible for what has gone wrong, and how it has 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 especially given the ample evidence that policy is out of balance, it is far more likely that the greatest need is institutional repair and restoration of the rule of law. It is imperative that Congress and the next President take steps not only to rectify the damage done, but to put in place measures to prevent similar damage in the future.

A Commission would serve several important functions. It would reveal the many as-yet-unknown aspects of what our government has done and how it evaluated or rationalized its actions. We still do not know, for example, the legal justifications advanced for the so-called “extraordinary rendition” or “terrorist surveillance” programs. (Incidentally, 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.¹¹ The next president should promptly release all Justice Department opinions to the public.) 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.

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.¹² In practice, they have not lived up to this pledge. Renewing that commitment by confronting and acknowledging our recent failings gives substance to our national moral commitment, and thus can 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 for future government officials that they should take no action for which they would not like to be held publicly responsible.

¹¹ Nicholas deB. Katzenbach & Frederick A.O. Schwarz Jr., “Release Justice’s Secrets,” *New York 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?*, NA¹¹ L.J., July 14, 2008.

¹² 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.

Finally, and perhaps 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 act to avoid doing so. 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, as the Church Committee concluded, that embarrassment is a price that must be paid: "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."¹³

II. Essential Qualities of a Commission.¹⁴

To accomplish this, I urge Congress and the next President to establish by law an Investigatory Commission, which 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. It could then make recommendations for reform within both the executive and legislative branches to prevent similar abuses in the future.

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. It must handle secrecy issues responsibly. It should be as open as possible. Its investigation must be comprehensive. It must have access to all relevant information in all agencies and the White House—obtained by agreement if possible and by subpoena if necessary.

¹³ *Interim Report of the Select Committee to Study Governmental Preparations with Respect to Intelligence Activities*, S. REP. NO. 94-465, at 285 (1975). [hereinafter *Interim Report*]. While this thought was in the Interim Report, it pervaded all the Church Committee's work.

¹⁴ 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* (University Press of Kentucky, 1985); Frank John Smist, *Congress Oversees the United States Intelligence Community, 1947-1994* (University of Tennessee Press, 1994), at pp. 25-81; and LeRoy Ashby and Rod Gramer, *Fighting the Odds: The Life of Senator Frank Church* (Washington State University Press, 1994), at pp. 453, 468-92.)

More recently I have summarized some of the 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, Editor) (Routledge Research, 2008). (The relevant pages on how the Church Committee operated are pp. 27-31.)

All of these points are elaborated elsewhere (*see n. 14*). Here, I want to make only two more detailed points:

First, without facts, oversight and investigation will necessarily be empty. Only with a record that is detailed and covers a wide range can one be sure that one understands patterns, be confident of conclusions, or 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 form the best key to the truth and to developing good testimony. A good investigatory commission involves much time and hard work.

Second, 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.¹⁵ Ultimately, it may require the describing and revealing of secrets. Nonetheless, obviously, there are legitimate secrets. Oversight, or an investigation that is heedless of that, is doomed, as well as irresponsible.

* * *

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.

Throughout the history of the nation, commissions have been used to serve these purposes: President Washington appointed a commission to investigate the causes of the Whiskey Rebellion in 1794.¹⁶ There have been many commissions since, some successful, some not so. The 9/11 Commission (a success) sought to determine how we found ourselves so unprepared for the events of that day and how to reduce the likelihood of its recurrence.¹⁷

You will note that I urge the creation of a commission, rather than establishing a congressional committee (such as the Church Committee). Of course, if the newly elected president resists a commission, Congress could 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, difficult topics that undoubtedly will take time. An independent commission would free up Congress from responsibility for an in depth, time-consuming analysis of

¹⁵ 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.

¹⁶ Jonathan Simon, *Parrhesiastic Accountability: Investigatory Commissions and Executive Power in an Age of Terror*, 114 YALE L.J. 1419, 1428 (2005).

¹⁷ THE 9/11 COMMISSION REPORT XV (2004).

the past. It is worth noting, too, that an independent panel would be free to touch on Congress and its role in ways that might prove uncomfortable for a sitting committee.

III. Conclusion.

We must remember 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, as Justice Louis Brandeis warned in a somewhat different context, at times “the greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.”¹⁸

Today we address issues that transcend partisanship. They are far more important than the controversies that divide us. Instead, understanding these issues should bring all Americans together. The development of novel and erroneous constitutional theories has 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.

Again, the Church Committee’s words are no less true today than they were three decades ago:

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.¹⁹

Despite the abuses and failings that they documented, both the Church Committee and the 9/11 Commission remained hopeful, with “great faith in this country”²⁰ and its ability “to reconcile its view on how to balance humanity and security with our nation’s commitment to these same goals.”²¹ I, too, continue to believe that, when properly respected, our constitutional structure and our core fundamental values can, as they have for so many years, provide “the people of this country and of the world the hope for a better, fuller, fairer life.”²²

¹⁸ *Olmstead v. United States*, 277 U.S. 438, 479 (1928).

¹⁹ *Interim Report*, *supra* note 13, at 285.

²⁰ *Id.*

²¹ THE 9/11 COMMISSION REPORT 379 (2004).

²² *Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities*, Book II, S. REP. NO. 94-755, at v (1976).

Mr. CONYERS. Finally we have Elliott Adams, national president of Veterans for Peace, of which I am a proud member. Mr. Adams has served in the Army as a paratrooper in Vietnam, Japan and Korea. He has been a mayor, a president of his school board, and president of Rotary Club.

Welcome to the Judiciary Committee.

**TESTIMONY OF ELLIOTT ADAMS, PRESIDENT OF THE BOARD,
VETERANS FOR PEACE**

Mr. ADAMS. Thank you, Mr. Chairman. It is a pleasure to be here.

Upon leaving the Constitutional Congress in—Convention in 1787, Ben Franklin was asked, well, Doctor, what have we, a republic or a monarchy? Dr. Franklin reapplied, a republic, if you can keep it.

Honorable representatives, that single sentence sums up the essence of what we are here today for, if we can keep it. In the Armed Forces we took an oath, the same oath Congressmen take to support and defend the Constitution of the United States against all enemies, foreign and domestic. Now as veterans we still take that oath seriously. Some of us are gray-haired, long of tooth, but are here on the Hill still defending that Constitution.

Briefly, Veterans for Peace have members from every war this country has fought since the World War II. We are 23 years old, we have 120 chapters, an NGO seat at the U.N. We have a small part of the 1997 Nobel Peace Prize. We provide 85,000 Iraqis with drinking water, 57,000 free phone cards and 148 veterans hospitals. We work on Agent Orange victims, both U.S. veterans and Vietnam citizens. We support schools and orphanages in Vietnam and Afghanistan. We have bought body armor for our soldiers in Iraq because the U.S. Government could not provide them with the proper equipment. We work deeply in Central America working for democracy and free elections.

With all this work, many of our members have set aside that work for what de deemed be more important in defending the very democracy of this country by working for impeachment. There can be no question whether criminal offenses have been committed by members of this Administration. The only question now is what, if anything, each Member of Congress will do about it.

This is not about impeaching a few Administration officials. This is about maintaining the structure of our government. All future Presidents of both parties will start their Presidency where this one leaves off. For Congress to continue to allow the usurpation of power and the flaunting of violations of the Constitution to go unanswered is in itself a violation of the law.

While there is no need to enumerate the long list of impeachable offenses committed by officials of this Administration, I cannot escape the visceral pain and indignation that we who served our country in combat feel when we find our own government condoning and/or committing war crimes and/or crimes against humanity.

It is appalling as a veteran to hear a discussion that justifies any form of torture. In the Army we were taught not to torture not only because it was illegal, but because, and especially because, it ruins

the integrity of the intelligence you gather. Simply put, any victim of torture will eventually say whatever their torturer wants them to say.

For us veterans when our time came, we volunteered our very lives for this Republic. Now, Congressmen, it is your time, yet I hear there is not enough time. Yet I hear, oh, it will hurt one party or another party. Or I hear there is not enough of a political will. Gentlemen, when our Founding Fathers signed the Declaration of Independence, they were not worried about political will or about how much time there was or what parties might affect their political future. They were just worried that they were to get hanged by the neck. Yet they did the right thing. Now, gentlemen, it is your time to stand up.

And let me close with Einstein's statement: The world is a dangerous place not because of those who do evil, but because of those who look on and do nothing.

Thank you.

[The prepared statement of Mr. Adams follows:]

PREPARED STATEMENT OF ELLIOTT ADAMS

Upon leaving the Constitutional Convention of 1787—

Ben Franklin was asked: "Well, Doctor, what have we got—a Republic or a Monarchy?"

Dr. Franklin replied: "A Republic, if you can keep it."

Ladies and Gentlemen in that a sentence is the essence of what this hearing is about today—"if you can keep it." Right now hanging in the balance, in one pan is our republic and all the principles that made the United State a shining beacon of freedom around the world and in the other pan is a totalitarian state and all the despotism that it brings.

In the armed forces we took an oath, the same oath congressmen take, "to support and defend the Constitution of the United States against all enemies, foreign and domestic." Now as veterans we still take oath very seriously. Which is why we are here on the Hill some of us gray haired and getting long in the tooth, but still defending the Constitution.

Veterans For Peace is comprised of veterans from every war our country has fought back to and including World War II. VFP has a long history of important work. VFP is 23 years old, has over 120 chapters spread around the country, has an NGO seat in the UN, and a small share in the 1997 Nobel Peace Prize. Our members help 85,000 Iraqis get safe drinking water, gave 54,000 free phone cards to patients in 148 VA hospitals, help Agent Orange victims both US soldiers and Vietnamese civilians, aided Hurricane Katrina victims, supports schools and orphanages in Afghanistan & Vietnam, have worked extensively in Central American for freedom and fair elections, bought appropriate body armor for soldiers in Iraq when the government could not supply it, and organized blood drives.

But many of our members have set aside all these other important works to defend our democracy by calling for impeachment.

There can be no question about whether criminal offenses have been committed by officials of this administration. The only question now is, what, if anything, you ladies and gentlemen are going to do about it.

There are those who say, "oh heck, there are only a few months left, just let them finish their terms, and then we can get on with our lives like waking from a bad dream." But we cannot afford that luxury. This is not about impeaching a few administration officials. This is about maintaining the structure of our government. This is about protecting the Geneva Conventions, the Nuremberg Principles, and the Law of Land Warfare. This is about defending the rights and freedoms of the US citizens.

This brings to mind the words of Ben Franklin "Any society that would give up a little liberty to gain a little security will deserve neither and lose both."

The officials of this administration have usurped power from congress, stolen the rights of the people, and by ignoring it Congress reinforces it and joins it. All future presidents of both parties will start where this presidency leaves off. For Congress to continue to allow the usurpation of power and the flagrant violations of the Constitution to go unanswered is in itself be a violation of law.

While there is no need for re-enumerating the long lists of impeachable offenses committed by officials of this administration, I can not escape the visceral pain and indignation that we, who served our country in combat, feel when we find our own government condoning and/or committing war crimes and/or crimes against humanity.

I cannot believe that members of our government are trying to obscure and distort what is torture and what is not torture. What is human has not changed in the past 8 years. What is torture has not changed in the past 8 year. The saddest thing to me about torture discussion is that it obscures the central point that, except in the movies, torture does not work. We were taught do not torture, not only because it is illegal, but especially because it ruins the integrity of the information you gather. Simply put, any victim of torture will eventually just try to say what ever it is the torturer wants them to say. Put another way it is the very power of torture that keeps it from giving us the truth.

As Congressmen you have available to you some of the greatest constitutional minds. But I learned in war that sometimes too much information can make it hard to see the essence. With your permission I will highlight a few salient points.

Without impeachment, requests and subpoenas and contempt citations are ignored (Congress has been mocked by an administration that has repeated ignored its subpoenas with impunity).

With impeachment, witnesses are freer to speak, "executive privilege" is gone, and subpoenas must be complied with.

The Constitution discusses impeachment in six places and never once mentions other remedies like censure, criminal referrals, legislative "solutions", or even prosecution (except to indicate it can occur separate from impeachment). The drafters of the constitution incorporated impeachment as the simple and proper process for dealing with all high crimes and even misdemeanors.

Without impeachment there looms the specter of an audacious broad sweeping self-serving pardon, even one that includes, a constitutionally dubious, but not explicitly forbidden, self-pardon! Which would further erode Congress' place in the balance of power rendering it virtually irrelevant. The only thing a president cannot pardon is an impeachment and a conviction in the Senate. But once removed from office, he can pardon nobody of anything.

For us veterans, when our time came, we volunteered our very lives for this republic; for the principle of freedom for all, for equal opportunity for all, to defend the Constitution and the principles embodied in the Declaration of Independence, to guarantee the opportunity for life, liberty, and the pursuit of happiness. Now it is your time, and I hear there is not enough time! Now is your time, and I hear it will not be good for one party or the other party! Now is your time, and I hear there is not enough political will around you!

When our founding fathers signed the Declaration of Independence they were not worried about political will, how much time there was, or about any parties' political future, they were just worried they were going to be hanged by the neck. But they did what was right. Now it is your time

Einstein said—"The world is a dangerous place, not because of those who do evil, but because of those who look on and do nothing."

Mr. CONYERS. I thank you all, and I am going to ask each one of you—no. I am going to ask each one of you to just make a brief observation about what you have heard your fellow panelists comment on that you might want to make a remark about, or anything else you would like to add to your own testimony. We will begin with Congresswoman Elizabeth Holtzman.

Ms. HOLTZMAN. Thank you, Mr. Chairman. I will try to be brief.

Sorry, I do have a copy—for other Members of the Committee who want more depth, I do recommend my book on the subject called *The Impeachment of George W. Bush*. It is a little bit out of date, but it has got a lot of information in it.

I think the question for this Committee is what is to be done now and what can be done now. Prosecution is unrealistic. The Administration will never prosecute itself. Truth commissions, the Administration will stonewall them as they have so many Committees of Congress. So what is the realistic remedy?

The only remedy, and that is the one the Framers gave to the Congress of the United States, the House and the Senate, is the remedy of impeachment, because no one can interfere with it. The critically important thing about impeachment is that there is no executive privilege in impeachment. That becomes an impeachable offense. You ask the President to tell you what he knew and when he knew it. You ask the President or the Vice President to give you the contents of the FBI statement; they don't do that, that becomes an impeachable offense. You can ask them to provide the information under oath.

You may not be able to finish the task, but you certainly can start the task, which will send an important signal not just to this President, but to future Presidents, because I completely agree with Congressman Barr that this can only be a floor, and God help us if that is the case—I mean for the country, the Constitution and our democracy.

Mr. CONYERS. Congressman Bob Barr.

Mr. BARR. Thank you again, Mr. Chairman.

Many years ago some of us older folks like yourself and myself recall we had a nuclear clock that would count down how close we were to nuclear Armageddon. And then back in the 1990's, I recall the national debt clock that would count up the amount over time of the national debt.

Mr. Chairman, what we are facing now is a constitutional clock, and it is counting down what remains of the Constitution of this great land. If I might ask to be introduced into the record the disappearing Bill of Rights. This is the Bill of Rights that we, as the Members of the Judiciary Committee, know it as adopted in 1791. This is what it is fast becoming. And I quote, "the right of the people to be secure in their persons, houses, papers and effects shall be delegated to the United States." If I might introduce that into the record.

Mr. CONYERS. Without objection, so ordered into the record.

[The information referred to follows:]

The Bill of Rights

As Adopted in 1791

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment II

A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

Amendment III

No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

Mr. BARR. We have heard, even though this is not, as the Chairman correctly points out, an impeachment inquiry, this Committee has the awesome responsibility to decide whether or not at some point in time to conduct such a momentous inquiry. It is not a responsibility of myself, now as a private citizen. But if, in fact, the decision before this Committee and the American people is constitutional inquiry or constitutional silence, then by God I choose constitutional inquiry.

Thank you, Mr. Chairman.

Mr. CONYERS. Mayor Rocky Anderson.

Mr. ANDERSON. Thank you very much.

Representative Pence and Professor Presser made a comment upon which all of the rest of their following comments was based; that is, that impeachment is to be limited only to those instances where the person being impeached exercised his or her own personal interest above that of the Nation. That is atrocious scholarship. It does not reflect what has happened in history. It does not reflect what the Founders had to say or the comments made during the ratification convention regarding impeachment.

Ed Firmage, who is coauthor of *To Chain the Dog of War*, still the seminal book on the war powers, wrote an article in 1973, a Law Review article, about substantive law of impeachment. There he noted that clearly charges of constitutional violations—and here there certainly have been many discussed—and gross abuses of power for illegitimate purposes should be included as impeachable offenses regardless of the offender's office.

And then Professor Firmage goes on to cite this Committee, the Judiciary Committee, a statement in 1926 where the Judiciary Committee noted that the better sustained and modern view is that the provision for impeachment in the Constitution applies not only to high crimes and misdemeanors as those words were understood at common law, but also acts which are not defined as criminal and made subject to indictment, but also to those which affect the public welfare. Thus an official may be impeached for offenses of a political character and for gross betrayal of public interest; also for abuses of betrayal of trust, for inexcusable negligence of duty, for the tyrannical abuse of power, or, as one writer puts it, for a breach of official duties. That has been established beyond any doubt.

And I would add just one thing in terms of the misrepresentations. I would say fraud committed by—we can't name anybody by name here, so I would say by the Administration or a high-ranking official of the Administration, and that is when this Congress and the American people were told about the security risks to this country posed by Iraq and by the case for war, we were only told one part of the story. We were not told, for instance, besides some of the reports that were noted before, about the dissents by the intelligence agency within the State Department and by the Department of Energy, their statements in the October National Intelligence Estimate that said there is nothing to back this up about these aluminum tubes being used to help Iraq's supposed nuclear initiative. And there certainly is nothing to this claim about Iraq trying to buy uranium from Niger.

It was right there in the National Intelligence Estimate, the President—excuse me, high-ranking members of the Administration, as they were telling we the American people and you, the Congress, just the opposite, failed to disclose those dissenting opinions from the State Department and the Department of Energy. That constitutes a fraud which helped lead this country to this disaster in Iraq.

Mr. CONYERS. Professor Stephen Presser.

Mr. PRESSER. I will try to be brief, Mr. Chairman. And I want to say I really am grateful that you are conducting these hearings. Socrates said the unexamined life isn't worth living, and I think it will be inevitable, the Constitution requires it, that each branch of the government carefully guard its prerogatives and carefully make sure that the other branches aren't exceeding theirs. That is the undertaking that you have made. I think that is laudable.

At the same time, though, I think Professor Rabkin got some things that he said correct. The real question here is is the Administration proceeding in good faith, or is it, as some have suggested, proceeding on a fraudulent basis for God knows what nefarious motives?

I don't think that there is evidence of those kind of motives, and I think in particular the Minority report from this Committee with regard to the contempt proceedings against Mr. Bolten and Ms. Miers make pretty clear that this Administration has cooperated with this Committee to what, I think, is a fairly great extent. So really what you are looking for—and I stick by the definition of impeachable offenses that Mr. Pence gave earlier and that I have tried to develop. What you are looking for is an absence of good faith, and I am not sure you are going to find it.

I think, as Mr. Smith said a little bit earlier, this Administration has done the best it could in a difficult set of circumstances, and I don't think it gives rise to impeachable offense.

Mr. CONYERS. Chairman Bruce Fein.

Mr. FEIN. You have elevated me without even an election.

Mr. CONYERS. But it is your organization.

Mr. FEIN. I think the title of this hearing speaks volumes about our misconception of the United States, its executive power constitutional limitations. But as Barbara Jordan said, I remember, many years ago in the impeachment proceedings of Richard Nixon, the executive has no power that we don't give it. "We, the people" is the beginning of the Constitution of the United States. It is not whether there are limits on the executive power, it is whether we have given the executive power to do what he is doing. That is a critical element of thinking properly about our Constitution.

Now, as said by a previous speaker that all Presidents have flouted law during wartime, but I think, number one, it is incorrect as an historical matter, but, number two, this particular war is different than all others because it is permanent, it will never end. The definition of an end is when there will never be anyone who threatens an American with a terrorist incident in any way in the Milky Way. No one has even conceived of a benchmark that says the war is over. So this is permanent war, exactly what James Madison said was inconsistent with freedom.

And with regard to Presidents who spied, it is certainly true that they spied without warrants and had abuses. That is what led to the Foreign Intelligence Surveillance Act, precisely what Liz Holtzman explained.

It is one thing for the President to act when there is no express congressional prohibition. It is quite another to say, we didn't care what Congress says, the law is irrelevant to me, I can act on my own initiative.

The last thing I would like to say is that with regard to the necessity of impeachment, it was Robert Jackson, our prosecutor at Nuremberg, who said, if you have a principle, a precedent, that goes unrebuked, and it is an abuse, it will lie around like a loaded weapon ready to be used by any future incumbent who establishes an urgent need.

If this President's actions and claims of monarchical power—actually supermonarchical, because if you examine our Declaration of Independence, the indictment against King George, III, this President has claimed far more power than King George, III. But if we do not rebuke these powers, they then become precedents that will lie around like loaded weapons, a sword of Damocles over us forever.

Then there was—it also mentioned previously about Caligula, and while this President shouldn't be at all associated with that particular emperor—you remember one of his infamies, that he placed the laws very high on the walls so that no one could see them, and then he could trap them into violations. But we have had testimony before this Congress, Senator Feingold's office, that shows that this Administration promulgates Executive Orders, revokes them in secrecy, and then claims they are classified so we don't know whether they are in existence or not. That really betters the instruction of Caligula.

Last, I won't go on further, I do have a book called *Constitutional Peril* being published next month, and if Liz can promote her book, I think I can follow. Thank you.

Well, I didn't have a copy of it to hold up. I am so sorry.

Attorney Vincent Bugliosi?

Mr. BUGLIOSI. Yes, sir. To summarize what I believe Mr. Presser said, he apparently feels that President Clinton, having consensual sexual relations outside of marriage and lying about it, is worse than the Bush administration taking this Nation to war on a terrible lie, a war that has caused incalculable death, horror and suffering.

And I would ask Mr. Presser, what previously recognized form of logic would allow such a conclusion?

I would like to give you words from Mr. Bush's own mouth that I think are relevant to this proceeding. January 31st, 2003, less than 2 months before Bush ordered the invasion of Iraq, on the rationale that Hussein was an imminent threat to the security of this country so we had to strike first in self-defense, Bush and British Prime Minister Tony Blair met in the Oval Office with six of their top aides, including Blair's chief foreign policy advisor, David Manning. After the meeting, Manning prepared a 5-page memo stamped, "Extremely Sensitive," summarizing what was said at the meeting." He wrote that George Bush—not Blair now—George

Bush was so worried about the failure of U.N. inspectors to find weapons of mass destruction in Iraq that he talked about three possible ways to, quote, “provoke a confrontation,” unquote, with Hussein, one of which was to, quote—this is quoting George Bush—quote, “fly U-2 reconnaissance aircraft over Iraq painted in United Nations colors, and if Hussein fired on them,” Bush said, “he would be in violation” of U.N. resolutions, and this would justify our going to war.

So Bush is telling the American people, telling the world that Hussein is an imminent threat to the security of this country, but behind closed doors, George Bush was talking about how to provoke Hussein into a war.

Now, Chairman, may I draw an inference from this? If George Bush honestly believed that Hussein was an imminent threat to the security of this country, which is the main reason he gave the American people for going to war, the thought—the thought—of provoking Hussein into a war, by definition, would never, ever, ever have entered his mind.

And I say this, that by taking this Nation to war on a lie, all of the killings of American soldiers in Iraq became unlawful killings and, therefore, murder.

[Audience disruption.]

Mr. CONYERS. Okay, now.

There are Members urging me to take more action than merely reminding our audience.

Professor Rabkin—

[Audience disruption.]

Mr. CONYERS. All right, then. Sheehan, you are out. Yeah, good-bye.

Professor Jeremy Rabkin?

Mr. RABKIN. I wasn’t moved by having people repeat their emotional statements with more emotion, and I don’t think it will be useful for me to say, “Calm down,” with more emotion. It won’t get people to calm down. Besides that, I am not selling a book. So I will pass.

Mr. CONYERS. Thank you.

Mr. SCHWARZ. So you yield all the time to me. [Laughter.]

Actually, I thought Professor Rabkin usefully called our attention to history, but I would draw somewhat different lessons from the history.

Everything up to the time of the Cold War that was done by Presidents in time of crisis was known. And, in the case of Lincoln, what he did, he said to the Congress, you know, “You may disapprove of what I have done. If you do, please criticize me. But I would like you to ratify what I have done.” And they did ratify what he did.

Then came along the Cold War, and we began to have excessive secrecy. And the great lesson that the Church Committee learned and that we are learning again today is, if you have secrecy and you have a lack of oversight, you are bound to have two things: one, abuse; but even more importantly, you are likely to have mistakes. Because the great lesson of James Madison in the 51st Federalist, where he said, men—we say now men and women—are not angels, the great lesson was, because we are not angels, the Gov-

ernment, in his words, must be obliged to control itself. That is what checks and balances mean; that is what oversight means.

Now, the other thing that is unique about the current Administration is that, for the first time in American history, the Administration takes the position, first voiced by the Vice President when he was a Congressman 20 years ago and he dissented from the Iran-Contra report, the Administration takes the position that, like the British monarchs in the 17th century, the President has the right to break the law. If he believes that the law gets in the way of what he thinks are national security objectives, he can break the law, and he can do so secretly.

Now, that is an enormously dangerous loaded gun, to pick up on that expression, that lies, unless it is squashed, that lies for future Presidents to take advantage of, future Presidents of either party.

This is totally unique. Richard Nixon, only when he left office did he tell first the Church Committee in a rather obscure affidavit and then David Frost in that famous television interview that, in his words, "When the President does it, that means it's not illegal."

But we are now in a position where the OLC's position still is that the President can break the law if he thinks there is a need to do it, and can do so secretly. And that's something that every American from either party should say is a dangerous doctrine that needs to be squashed, disagreed with, exposed and never accepted by anybody in this Government or by the American people.

Mr. CONYERS. President of Veterans for Peace, Elliott Adams.

Mr. ADAMS. I will follow the model of Rabkin here. But I would like to—since everybody else promoted their book, I would like to promote my book, but I haven't written it yet. [Laughter.]

Mr. CONYERS. I can hardly wait.

I thank all of the witnesses. You have been extraordinarily cooperative.

We will accept into the record any additional comments, documents or enlightening paperwork that you would like to have go into the record.

Thank you all very, very much.

And the Chair now turns to the Ranking Member, who has patiently been waiting for his turn. We recognize him for any questions to any of the panel.

Mr. SMITH. Thank you, Mr. Chairman.

The witnesses have not only been unusually cooperative, they have been unusually voluble. And I have to say, Mr. Chairman, I do believe you set the record today, with eliciting 22 minutes' worth of answers under the 5-minute rule. And I hope I don't break that record myself.

Mr. Chairman, I am not altogether sure that the witnesses get your message about this not being an impeachment hearing. By my account, they have used the word "impeachment" at least 30 times, and I think euphemisms amount to at least three times that many. Nevertheless, a lot of important subjects have been brought up.

The first thing I want to do is to thank Professor Presser and Professor Rabkin. If you could move to a mike, I am going to direct some questions toward you all in just a minute. I want to thank you all for making a big effort to be here today, which I know is at some personal inconvenience but is much appreciated as well.

Mr. Presser, very quickly, Mr. Bugliosi seemed to have attacked you personally a while ago, and I didn't know if you wanted to respond or not.

Mr. PRESSER. Well, I thank you for the opportunity.

I suppose it is not the right thing to do to relitigate the Clinton impeachment hearings, but Mr. Bugliosi said, I think twice, that they were all about lying about sex.

They weren't. More than half of this House believed that they were about obstruction of justice and tampering with witnesses and doing other acts that seemed to suggest no regard to the President's obligation to take care that the laws be faithfully executed. That is what I thought the Clinton impeachment was all about, not lying about sex.

But that is over now, and we can move on.

Mr. SMITH. Okay.

Professor Presser, then, let me ask a couple of other questions. First of all, have you heard any credible allegation today that you think amounts to any kind of an impeachable offense?

Mr. PRESSER. No.

Mr. SMITH. A few minutes ago, you said that you thought the real problem was—or suggested that the real problem was just a difference of opinion, a difference of policy, and you thought that the same legitimate actions taken by this President had been taken by any other President.

So I assume that you don't think there is any evidence of misconduct in this Administration.

Mr. PRESSER. That is my view. I think the comments about what other Presidents have done was probably from Professor Rabkin. But I think the answer to your question is still, I haven't seen acts that would rise to the level of any impeachable offense.

Mr. SMITH. Professor Rabkin, now that you are at a mike, you have regretted strongly the tone of the debate that surrounds this particular subject. If you look beneath the anger and the hatred and the bitterness, do you see any impeachable offenses? And sort of a secondary question: What accounts for that—that is, the tone?

Mr. RABKIN. Let me start with the first question, is there something impeachable? If people believed that the President knowingly, deliberately got us into a war for reasons completely unrelated to national security and he did it, I don't know, to enrich oil companies—I really have not been able to understand what people were alluding to, but they seem to be suggesting that the actual reasons for going into Iraq were so completely removed from national security that he wasn't just engaged in constructing an argument someone might disagree with, but he was totally misrepresenting what were the real reasons.

If that were true, of course that would be impeachable. You absolutely need to defend the country against a chief executive who would wantonly take the country into war for illicit purposes, sure. But nobody has tried to explain what that conspiracy theory is; it is just alluded to, as if already well understood.

Now, to the second thing, which is why are people so bitter, which I think has something to do with why they even find it plausible that such a charge is worth investigating, which just, to me, just seems so demented, really—I mean, you have to believe not

only that the President is a Shakespearean villain, right, a sort of Iago, just pure evil. You have to believe not only that, but you have to believe that all through the White House there are people saying, "I think I will just cover it up, I think I just won't let anyone know this," and that seems, to me, just unbelievable.

So I think if people are open to this view, they must be extremely bitter, I mean, the people making these charges. And why is that? I will just give you one thing that is worth reminding ourselves of, which is that the country has been closely divided for a long time, and that tends to build up, you know, a sense of frustration and sometimes rage.

And here we are now, on the eve of what seems likely to be the third election in a row which is really, really close. I am not criticizing anyone for that; I'm just reminding people. In a situation like that, tempers flare, people get a little bit overwrought. And I think some of what we have heard here today was just overwrought.

Mr. SMITH. Mr. Chairman, I have one last question that I would like to direct both to Professor Presser and to Professor Rabkin.

And it is this: If we were to use the charges that we have heard today, the accusations that we have heard today as a standard for an impeachable offense, what other Presidents would also be guilty of impeachable offenses?

Now, this would be a good question to ask in your classes, I realize, and allow at least an hour to respond, because it seems to me you have to start with the first President, George Washington, Thomas Jefferson, all wartime Presidents, including Abraham Lincoln and all the wartime Presidents of the last century and so forth.

But I would like for you to take your time and tell me what Presidents you feel the accusations today would apply to, if they were credible accusations of impeachable offenses. And, Professor Presser, start with you, and we will end with Professor Rabkin.

Mr. PRESSER. I am probably going to be a little briefer than you would like. I mean, certainly you'd have to add Franklin Roosevelt to the list because there are allegations that he wanted to get us into World War II. There may be other Presidents.

But the point I think you made in your opening statement, and that is, the House of Representatives has to be very, very careful when it comes to attempts to criminalize political decisions. And I think that is the real thing that you have to watch out for.

And I think war is a matter of high politics. And I think the Constitution gives both the House and the President considerable discretion in these areas. And I think you have to tread with great care when you think about them.

Mr. SMITH. Okay. Thank you, Professor.
Professor Rabkin?

Mr. RABKIN. Let me just give three examples that are worth reminding ourselves about.

In the Spanish-American War, President McKinley asked for a declaration of war on the grounds that the Spanish had blown up the Battleship Maine. And we discovered much later that, actually, they didn't blow up the Battleship Maine. It was an accident; there was a faulty boiler. Did President McKinley know this? I don't be-

lieve so, but he didn't pause too closely to have a close investigation of this.

In the Second World War, President Roosevelt was really goading the Japanese. I mean, he imposed severe restrictions on their access to oil. He was really goading them to attack. And then he didn't take precautions that the Chief of Naval Operations urged on him, to move the fleet away from Hawaii where it would be exposed to attack. I do not believe he meant to have the fleet sunk.

But it is good to remind people—I see Congressman Nadler smiling—

Mr. NADLER. Shaking my head.

Mr. RABKIN. Well, a lot of crazy people—you may know this—a lot of crazy people, not in Manhattan but elsewhere, said Roosevelt deliberately betrayed the country. Now, I think that was crazy, but there was a certain plausible basis for saying that if you were prepared to believe that a President of the United States could behave in such an outrageous way, which I am not.

But I am just saying, if you take this standard of there is something on the surface that looks suspicious and it ended badly, and then say, "A-ha, let's go," there are a lot of Presidents who you could ask questions about.

And let me just give a third example quickly—Truman in 1950. Truman said, this is not just a dispute between North Korea and South Korea; this is obviously communist aggression, this was obviously planned in the Kremlin. And that was entirely plausible. He probably did believe it. We know now from records that we found, actually, no, North Korea did this on its own, and Stalin had to catch up with it his Korean client.

So we have had a number of Presidents in important situations say things which turned out to be false and a lot of people died. Sorry.

Mr. SMITH. Would you put the Vietnam War-era President—

Mr. RABKIN. Yes, there is another example. A lot of representations by President Johnson turned out to be not quite the way he represented them—I am not accusing him of deliberately deceiving the country. But the Gulf of Tonkin resolution, there are substantial disputes now about what actually happened there, and it doesn't seem to be exactly how LBJ represented it to Congress at the time.

So, yes, I think that is a very helpful question. All of us should remind ourselves that Presidents have to act in situations where often there is a great deal of uncertainty. And to construe everything in the worst possible light and then say, "Someone has to be punished; let's start with the President," this makes it impossible for future Presidents to think calmly about what they need to do on the basis of limited information.

Mr. SMITH. Okay. Thank you, Professor Rabkin.

Thank you, Mr. Chairman.

Mr. CONYERS. Jerry Nadler?

Mr. NADLER. Thank you, Mr. Chairman.

Let me start with a couple of observations.

First, I think what Professor Presser and Professor Rabkin said are totally wrong. Impeachment has nothing to do with personal benefit, nothing to do with motives or good faith. That is not the

issue of impeachment. The issue of impeachment is, did the President commit an abuse of power that would tend to destroy liberty or flout the structure and function of government, in particular by reducing or traducing a separation of powers, which is the basic protection of our liberty. And that is what we look to, and that is what the report of the House Judiciary Committee in 1974 said, and that is what we look to at any time.

Secondly, let me just comment on Mr. Rabkin. If the President lied to Congress—and I think there is good evidence that he did—if the President lied to Congress in order to motivate Congress to go into war, he may have had a motive thinking that it was in the national security interest of the United States to go to war for some other reason which would not be persuasive to Congress, and therefore he lied to Congress, that would be impeachable.

Mr. RABKIN. Maybe.

Mr. NADLER. Because it is not up to him to decide what phony excuse would give Congress to do what he believed in good faith was the right thing to do. Because that is up to Congress to exercise its powers.

Thirdly, we are in a very, very dangerous situation now in terms of our liberty. We have a President and an Administration that claims the power—I don't believe the Supreme Court is going to let him get away with it, but that holds by one vote—to point their finger at any person in this room and say, "You are an enemy combatant because I say so. And because I say so, we are going to throw you in jail forever, with no hearing, no due process, no anything until the war on terror is over," six or seven generations from now when some President declares it over. No executive in English-speaking countries since Magna Carta has claimed such a power. So far, they have been getting away with it. It is the foundation for future tyranny.

And finally, the way they have tied us in knots, the Administration in effect says, we can—you know, they don't put it in these terms, but they have asserted the power to kidnap someone off the streets, send them to another country to be tortured, or torture them themselves, or do any other illegal thing. And when you say, "Well, that is a crime; prosecute it," they don't prosecute. And when you bring a lawsuit, they say, "Wait, you can't bring a lawsuit. The case must be dismissed because it violates the state secrets doctrine." So there is no way, no remedy to any misconduct by the executive branch of Government, because they won't prosecute at law. They claim executive privilege; they won't tell Congress about it. And anybody brings a lawsuit, they claim state secrets, so you can't even get it into court. So there is no remedy to any abuse of power or any action whatsoever by the executive. We have to figure out a way around all this.

Now, I have been quoted in the past as saying that I did not think impeachment was a practical remedy, though God knows it is deserving.

My first question to Mr. Fein, because I heard in your testimony I believe you said that, in impeachment inquiry, executive privilege does not apply. I think it was——

Mr. FEIN. That is correct. And Liz Holtzman was right there.

Mr. NADLER. I think you said executive privilege does not apply. Now, my understanding—and correct me if I am wrong, please—is that Congress has taken that position, but the executive branch has never agreed to it. And if, in fact, the Administration has gone so far beyond any previous interpretation of executive privilege as to say to Karl Rove and other people, “Don’t show up, just ignore the subpoenas,” and to the U.S. attorney, “Never mind the mandatory language of the statute, don’t enforce the contempt citation,” how would we, were there to be an impeachment inquiry, effectuate executive privilege against the same sort of conduct?

Mr. FEIN. Simple. You do what was done in the Nixon inquiry. You vote on Articles of Impeachment saying it is an impeachable offense to refuse to comply with a request for information from the House.

Mr. NADLER. So, in other words, what you are saying is they could have the same far-reaching claim of executive privilege in an impeachment inquiry as they could in any other Committee hearing, but the remedy is to vote on impeachment.

Mr. FEIN. And then they are out of office, yes, sir.

Mr. NADLER. In other words, holding the impeachment inquiry doesn’t get around the executive privilege problem. But voting the impeachment and exactly removing them from office is the only thing that would?

Mr. FEIN. That worked with Nixon.

Mr. NADLER. And that would work with a lot of other problems.

Let me ask you a different question. Let me ask, I think it should be either you or—well, Professor Schwarz, you expressed hesitation at the impracticality of impeachment. Now, the first President Bush pardoned senior members of his Cabinet who were involved in the Iran-Contra scandal. It foreclosed any possibility of pursuing those individuals for their activities, no matter how lawless it may have turned out to have been. It also foreclosed any option of coercing their testimony as to the possible culpability of the President in that.

Now we are beginning to see suggestions that this President Bush had pardoned people involved in illegal torture, illegal wiretapping, outing a CIA agent, and anything else.

Does Congress need to explore changes to the pardon clause of the Constitution to prevent it from being abused by a President who may wish to prevent scrutiny of illegal acts of his own Administration or of himself personally?

Mr. SCHWARZ. You could not effect the pardon power, which is one of the very few things—

Mr. NADLER. I said, should we look at a constitutionality amendment?

Mr. SCHWARZ. That is exclusively in the hands of the President unless you amended the Constitution.

Mr. NADLER. Well, my question is, should we look at amending the Constitution in that respect?

Mr. SCHWARZ. I think if you have a justification for it being abused, that is fair to look at. That is definitely fair to look at.

Mr. FEIN. Congressman, I think there is a statutory procedure that would deter abuses of the pardon power. That is, if you—and I think this would be constitutional—if the President was to use

the pardon power to pardon people of his Administration for alleged crimes that involved abuses, it would have to be 6 months, 8 months before his term ends, so he would clearly suffer a political penalty.

Mr. NADLER. Why couldn't it be the day before his term ends?

Mr. FEIN. Well, the approach would be the statute would try to regulate, not prohibit use of the pardon power——

Mr. NADLER. Oh, you're saying——

Mr. FEIN [continuing]. To say that you make him exercise the power sufficiently before his term ends, so he's got to pay a political price, so he can't go like Marc Rich, out the door, and pardon someone and then escape any political retribution. If you forced him to make that decision 6, 7, 8 months before he left, then he needs to confront the possibility——

Mr. NADLER. Well, let me ask Mr. Schwartz and Mr. Fein, would a bill, not a constitutional amendment, a bill to say that the President couldn't pardon any member of his own Administration after 6 months or whatever before the end of his Administration, would that be constitutional as a limitation of the pardon power?

Mr. SCHWARZ. It would be a litigable matter, I would think.

Mr. FEIN. Congressman, the authority comes from article 1, section 8, clause 18; it is the necessary and proper clause. And what it says is that Congress has authority to enact all laws necessary and proper for the execution of any power under the United States or any department or officer thereof. That is, it applies to the execution of executive power, like the pardon power, like any other power. This isn't an attempt to nullify the President's ability to pardon, but make certain that——

Mr. NADLER. By that theory, could Congress pass a bill saying that the President—a bill, not a constitutional amendment—saying that the President could not pardon anyone in his Administration for alleged crimes committed pursuant to Administration policy, for example?

Mr. FEIN. Well, I think that goes too far. Of course, all Constitution law becomes matters of degree when you hit tough cases. But there you are eliminating the President's discretion to exercise pardon at all for this particular category. And the pardon power is broad enough, in terms of its scope, to protect people against retaliation from somebody who the President thinks has been unjustly hounded. I doubt that would survive. But that is different than just a time limitation.

Mr. NADLER. Could I have one more question, Mr. Chairman?

Mr. CONYERS. Why, of course.

Mr. NADLER. Thank you.

I would like to ask former Congresswoman Holtzman: Obviously, we know the Framers of the Constitution established impeachment as one of the checks on the President under the judiciary. Nonetheless, no President has ever been impeached and removed from office.

Part of this is because a successful impeachment requires the support of Members of the President's party, which has proved virtually unattainable. In the case of the one President who would have been removed had he not resigned, President Nixon, it took

the smoking-gun tape to push Members of his party over the edge to the point where impeachment became a real possibility.

As a Member of the Committee during the impeachment of President Nixon, how would you approach impeachment in the highly charged, partisan environment we have today so that impeachment could be a viable option?

Ms. HOLTZMAN. Thank you, Congressman Nadler. I think that is an important question. I think the reason that the impeachment process worked during the Nixon impeachment was because it was bipartisan and because the American people had confidence that when both parties were involved that, even though they didn't understand every fact, the House was proceeding in a proper way.

It is not correct to say that without the smoking-gun tape, impeachment would not have happened. You have to remember that prior to the smoking-gun tape, three Articles of Impeachment were voted with substantial Republican or bipartisan support, including an article on obstruction of justice, including an article on abuse of power, and including an article on the President's refusal to cooperate with the impeachment inquiry.

When we started the impeachment process, it was not done by Congress. It was done because of the Saturday Night Massacre and the resulting outrage of the American people. That is what triggered the Congress to act. When we started, nobody knew what the head count was going to be on the House Judiciary Committee. It was partisan; you had Republicans who stood their side and Democrats who stood their side. But nobody had been in this kind of proceeding for 100 years, and so people were feeling their way.

How did it work? How did we bring Republicans and Democrats together? Well, partly, it was—and I think the Chair will remember this—the fact that Congressman Rodino understood that the process had to be completely fair, so the Democrats picked for the Committee counsel for impeachment a Republican and the Republicans picked a Republican. So that was one way of saying, look, we are not going to do this on a partisan way. That was a way of bringing people along.

There was no poll that was taken. There was no head count that was taken. We were in totally uncharted waters. And what we tried to do was to do it right. And, ultimately, the facts and the fairness of the process persuaded people on both sides of the aisle that this was the right thing to do.

And it wasn't just Republicans. You had Southern Democrats who had more, if you will, pro-Nixon constituents than some of the Republicans on the Committee, and they had to come along. How did you bring people along? By a fair process, by assuring—fairness to the President, too. The President's counsel said, "Well, I want to have one witness." We said, "Take five." It was so that there were never issues that got in the way. That is what helped bring this process together.

I am not saying that there is enough time to do a full-blown impeachment process. But impeachment inquiry itself, handled fairly, completely fairly, with the full participation of the minority, so that no one says this process is out to get somebody, but that it is a fair process and if Congress uses the constitutional powers that it has, I think that in an atmosphere where people are willing to work to-

gether and you are being fair and the evidence is there and you have constitutional scholars supporting it, I think it can work.

Now, maybe I am a cock-eyed optimist. Nobody would have thought the impeachment would have worked in 1973, that that process would have worked. Remember, what we were looking at was the Andrew Johnson impeachment. That was what was staring us in the face. And that didn't work because it was partisan. And the Clinton impeachment didn't work because it was partisan. But I think good people, working in good faith together, as we did, can overcome those partisan hurdles and have to for the good of the country.

Mr. CONYERS. Steve King?

Mr. KING. Thank you, Mr. Chairman.

I appreciate the nonpartisan remarks from the gentlelady, former Congresswoman Holtzman, and with regard to the responsibilities of both sides. And I did watch intently the impeachment hearings in this Committee in 1998, and I could see that there was definitely a partisan divide. Now, there were some things that were irrational and illogical that took place, as referenced, I think, by Mr. Rabkin.

And it occurs to me that this is the most polarized Committee on the Hill. It is the most political and the most polarized, ideologically, of all Committees on the Hill. And I am trying to imagine a scenario by which we could have a Democrat President who could be brought before this Committee with this majority who would be subjected to this kind of scrutiny, let alone move forward with a vote on impeachment. In fact, I am trying to imagine if Caligula himself, if he were a Democrat before this Committee, could be even undergoing some kind of scrutiny.

And so I appreciate the level of discretion used by the gentleman from New York when he said, "if the President lied to Congress"—a delicate statement.

The reference has been made by Mr. Wexler and others of the 16 words in the President's State of the Union address, January 28, 2003. These 16 words are this: "The British Government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa." That is the statement in question. Now, whether or not it turns out to be true, the question really is, did the President believe it at the time? Did the CIA believe it at the time? I have a mountain of documentation here that says the CIA did believe it at the time.

But I would ask unanimous consent to introduce this now-unclassified document into the record that I referenced in my earlier remarks, Mr. Chairman.

Mr. CONYERS. What is it about?

Mr. KING. This is a debrief document that was formulated—a secret document of the CIA's debriefing of Ambassador Joe Wilson. And it is 8 March, 2002, the date that he testified that he was debriefed.

Mr. CONYERS. Without objection, so ordered.

[The material referred to is available on page 7 of this hearing.]

Mr. KING. Thank you, Mr. Chairman.

And this document says within it, it says, the debriefing of former Ambassador Joe Wilson, upon his return of his 2-week trip

to Niger, sent there to draw a determination if he could illuminate on whether the Iraqis were seeking yellow cake uranium from Niger, and reading from this report, he met with former Nigerien Prime Minister Ibrahim Mayaki. Mayaki was the former Foreign Minister from 1996 until 1997.

Mayaki did relate that in, June 1999, a businessman named Barka, a Nigerien-Algerian businessman, approached him and insisted that Mayaki met with an Iraqi delegation to discuss, quote, "expanding commercial relations," closed quote, between Niger and Iraq. The meeting took place. Mayaki let the matter drop due to the United Nations sanctions against Iraq and the fact that he opposed doing business with Iraq. Mayaki said that he interpreted the phrase "expanding commercial relations" to mean that Iraq wanted to discuss uranium yellow cake sales.

There is more. It is in the record. I think that should be something that could cause all of you to put the brakes on and take a good look at the basis for the conclusion that you have so easily swept to.

And going further, again, the statement from President Bush, "The British Government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa." I am looking for a hole in that statement. "Significant" might be a word that one could look at and say, well, no, it wasn't a significant effort to seek significant quantities.

I hold in my hand Middle East Times, dated July 7, 2008. This document I would ask unanimous consent to introduce into the record.

Mr. CONYERS. Without objection, so ordered.

[The information referred to follows:]

MIDDLE EAST TIMES. 25

Monday, July 28, 2008

Homepage

International

Politics

Security

Business

Technology

Editorial

Opinion

Iraqi uranium transferred to Canada

by Jim Mannion Published: July 07, 2008

WASHINGTON (AFP) At Iraq's request, the US military recently transferred hundreds of metric tons of yellowcake uranium from Iraq to Canada in a secret, weeks-long operation, a Pentagon spokesman said Monday.

The 550 metric tons of uranium, which was sold to a Canadian company, was moved by truck convoy to Baghdad's "Green Zone," then flown by military aircraft to a third country where it was put on a ship for Canada, said Bryan Whitman, the spokesman.

"The operation was completed over the weekend, on Saturday," Whitman said.

The yellow cake was discovered by US troops after the 2003 US invasion of Iraq at the Tuwaitha Nuclear Research Facility south of Baghdad, and was placed under the control of the International Atomic Energy Agency.

Yellowcake is a form of processed uranium ore that can be used to make fuel for nuclear reactors, or if further enriched as fuel for nuclear weapons.

Whitman said the Iraqi government asked the United States for help in selling and transferring the uranium to another country.

Cameco, a Canadian company, agreed to buy the yellowcake for a reported sum in the tens of millions of dollars.

The cost to the United States of transferring the uranium came to about 70 million dollars, Whitman said. He said the Iraqi government has agreed in principle to repay part of the transfer costs.

The US State and Energy Departments also played roles in the operation, Whitman said. But the Defense Department took the lead in carrying out the transfer, he said.

It took 110 shipping containers to carry the drums loaded with yellowcake, he said.

They were transferred by convoy from Tuwaitha to a secure facility within the Green Zone, the international zone, Whitman said.

Then they were flown by C-17 military transport planes to an undisclosed third country. Whitman said it took 37 plane loads to complete that portion of the transfer.

"At this intermediate location the cargo was loaded onto a US-flagged cargo ship, a military sealift container ship, the USS Gopher State," he said.

Whitman said the arrangements for the sale began several months ago, but the transfer itself took "weeks not months."

With the transfer, no yellowcake was known to be left in Iraq, Whitman said.

News of the operation broke over the weekend when Cameco acknowledged the arrival of the uranium shipment at Montreal.

Lyle Khvan, a Cameco spokesman, said the company had responded to a bid request made last year by the US government.

"We are satisfied at having been able to remove uranium from one of the most unstable regions of the world, and to have transferred it to a stable region to produce our own electric

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power," he said on Sunday.

He said the yellowcake would be used at the Blind River and Port Hope nuclear power plants north of Toronto.

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Mr. KING. I thank you, Mr. Chairman.

This document is headlined, "Iraqi Uranium Transferred to Canada." And it says in part, "At Iraq's request, the U.S. military recently transferred hundreds of metric tons of yellow cake uranium from Iraq to Canada in a secret weeks-long operation, a Pentagon spokesman said Monday." Reading further, "The yellow cake was discovered by U.S. troops after the 2003 U.S. invasion of Iraq at the Tuwaitha Nuclear Research Facility south of Baghdad and was placed under the control of the International Atomic Energy Agency. Quantity: 550 metric tons." That is a significant quantity, ladies and gentlemen, 550 metric tons. And it says, "With the transfer, no yellow cake was known to be left in Iraq."

So I think we have concluded now there is no sense in looking there any longer. We have done a pretty adequate job of loading 550 tons of yellow cake out of Iraq.


When I look at the statements that are made by leaders and depositions that have been taken, what do people believe? September of 2002, Al Gore: "We know that Saddam has stored secret supplies of biological and chemical weapons." This similar statement was made—and these are by former Secretary of State Madeline Albright in February of 2003, she said "clearly has a lot of weapons of mass destruction"; by the Chairman of the Select Committee on Intelligence in the Senate, Jay Rockefeller, October of 2002; a similar statement by the Chairman of the Armed Services Committee, Senator Carl Levin, September 2002; Robert Byrd, October 2002. The list goes on. I turn the page, and I get to Senator Kennedy, September 2002; and Senator John Kerry, October 2002; Hillary Clinton, October 2002.

But the thing that is really interesting is Chicago Tribune published, July 27, 2004—and here is a statement: "There is not much of a difference between my position and George Bush's position at this stage," Senator Barack Obama.

I would ask unanimous consent to introduce this Tribune document into the record, Mr. Chairman.

Mr. CONYERS. I am a little reluctant to consider this document, but I will introduce it into the record, of course.

[The information referred to follows:]



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John Kass
 Obama's a star who doesn't stick to the script

Published July 27, 2004

BOSTON -- Despite all the Democratic criticism of the war in Iraq, there isn't much of a difference on war policy between their man, John Kerry, and President Bush.

Republicans have been insisting as much for months, even as Democrats thwack the president. With the economy improving, Democrats must make the election a referendum on Bush's handling of the war in Iraq.

But it wasn't a conservative Republican who said there isn't much difference between Kerry and Bush on the war.

It was Barack Obama.

The Democratic Party's new icon and opponent-less candidate for the U.S. Senate in Illinois, Obama was preparing to give the keynote speech Tuesday night at the convention here. He sat down for lunch with Tribune writers. He opposed the war.

"On Iraq, on paper, there's not as much difference, I think, between the Bush administration and a Kerry administration as there would have been a year ago," Obama said. "There's not much of a difference between my position and George Bush's position at this stage."

That wouldn't have surprised the Deaniacs and other anti-war activists of the Left gathered here. While Kerry has acknowledged as much on the main points--a Kerry presidency wouldn't mean a withdrawal of U.S. armed forces from Iraq--it is not something the Democrats draw attention to or brag about.

Because if it's not "the economy, stupid," and if there's no difference between Bush and Kerry on Iraq, then what the heck are we doing here?

Watching a scripted TV show, waiting for Bill and Hillary sightings, wondering which Baldwin brother will say something ridiculous while munching on great Italian food in the North End?

Obama didn't deviate entirely from the bash-Bush theme. He did stress that Americans like Bush but don't trust him. I disagree, but that's his argument. And though I respectfully disagree with some of his politics, I couldn't help but be impressed by the man.

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Sitting there watching him discuss issues--seeing him willing to consider the faults in arguments, not simply dispensing sound bites like a political mannequin--made me realize something: He's the real thing, and Illinois Republicans had no chance, sex clubs or no sex clubs.

All recent columns

Obama reiterated that if he had been in the Senate during the vote on the war, he would have voted no. Kerry voted yes. At the same time, Obama wouldn't advocate pulling out now, responsibly arguing that the U.S. cannot accept a failure there.

"How do you stabilize a country that is made up of three different religious and in some cases ethnic groups with a minimal loss of life and minimum burden to the taxpayers?" he said. "I am skeptical that the Bush administration, given the baggage from the past three years, not just on Iraq, ... I don't see them having the credibility to be able to execute. I mean, you have to have a new administration to execute what the Bush administration acknowledges has to happen."

Republicans might suggest that's a tough argument--hiring Kerry to complete Bush's war policy--but what I like about Obama is his willingness to consider different angles out loud. Such as race.

It is one reason he was chosen to offer the keynote address, obvious to politicians and voters but difficult to acknowledge publicly. He acknowledged it himself, straightforwardly.

"You know, look, there's no doubt that part of the reason I was asked to speak is because I'm an African-American candidate," he said, picking at a salad.

He was asked: So how does Kerry connect with African-American voters?

"There's no doubt John Kerry has not captured the hearts of the black community the way [Bill] Clinton did," Obama said. "... His style is pretty buttoned down. He's not the guy who is going to play the saxophone on MTV."

Still, Obama said Kerry didn't have to stoke emotions to connect with black voters before November. "He'll make them feel he cares about them," Obama said. "The African-American community doesn't need a preacher. We see preachers every Sunday."

Again, Obama answered honestly. I'm not used to that from Chicago politicians. As he grows into the job of senator, he may change his style and stick to the script. But he's riding so high now that he doesn't have to.

For all the adulation and the rock-star status, Obama is levelheaded enough to know there will come a time when all his incredible political fortune will tempt others to try to knock him down. Some of those people may be young, ambitious Illinois Democrats, whom he has eclipsed.

"There will be some deflation, which is good. It's healthy," Obama said. "... I have to walk a careful balancing act, of not seeming ungrateful for all the hype around my election, which I think is a little over the top."

All glory is fleeting. But for now, there's Tuesday night, and the speech he'll give to the nation. Good luck, Senator.

jskass@tribune.com

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Mr. KING. And out of deference to the Chairman's, let me say, genteel nature, I would simply conclude and yield back the balance of my time. And I thank you.

Mr. CONYERS. Bobby Scott?

Mr. SCOTT. Thank you, Mr. Chairman.

It is interesting that the name of the hearing is "Executive Power and Its Constitutional Limitations" or, as Mr. Fein says, what power does the executive have? And virtually every Republican Member in the opening statements said if we are having a hearing discussing constitutional limitations on power, therefore it must be, by nature, an impeachment inquiry.

I would like to ask the witnesses what things, kind of, short of impeachment we may be pursuing. Because if we want to enforce laws against misleading Congress and getting us into a war, enforcing the laws against torture or illegal wiretaps, or corruption in the Department of Justice, do we have to be talking about impeachment?

We heard, in terms of impeachment, Mr. Rabkin suggests that the suggestion that we have gotten into a war by misleading information is ideology, demented, explosive charge. Some of these, we know as a matter of documented fact that what was said turned out not to be true.

And I think the comments from Professor Presser have been commented on by Mr. Anderson and Mr. Fein. And the suggestion that covering up a sexual affair is impeachable because it had some personal motivation, whereas misleading us into war, corruption in the Department of Justice, torture and those kind of things were irrelevant, I think we have discussed that.

So I guess my question is, is there a limitation on the ability of the executive to provide false information to Congress that we rely on that gets us into a war? And if we don't pursue impeachment, what else could we do if we—how do we enforce the constitutional limitations on the use of torture? We have had this Administration essentially just redefine "torture" to permit what everybody else in the world believes is torture.

And we have had allegations by Republican-appointed officials who have accused this Administration of firing U.S. attorneys because they refuse to indict Democrats in time to affect an upcoming election and suggesting that others may have kept their jobs because they, in fact, have pursued frivolous charges. Another said under oath that—or, at least, she did not deny taking partisan, political considerations into consideration in hiring Department of Justice personnel in violation of the law.

In our investigation of these allegations, we have been faced with witnesses who've refuse to respond to subpoenas, refuse to testify without immunity; others refuse to cooperate claiming unprecedented privileges.

So I guess my question is how we can enforce the limitations on executive power, in light of the situation we find ourselves in, without using the impeachment inquiry process.

Mr. Fein?

Mr. FEIN. When President Nixon was under investigation by the special prosecutor and there was a concurrent Senate Watergate hearing and a House impeachment hearing, there was very deep

examination—I was in the Department of Justice at the time, and then-Acting Attorney General was Bob Bork, later a Supreme Court nominee—as to whether you could criminally prosecute a President in lieu of impeachment.

Well, he remained in office. And it had been highlighted, in part, because you may recall that Vice President Agnew was actually prosecuted for tax evasion, and then he resigned afterwards. He probably would have been impeached if he didn't resign. But the conclusion was that you cannot criminally prosecute a President who is incumbent because there is just one figure who can make executive decisions. You can't have an acephalous branch, so to speak, unlike the possibility of prosecuting a Member of Congress or a Supreme Court Justice, where the institution would continue to function.

But the corollary of that conclusion is that, short of impeachment, there isn't anything you can do about a President. And that, in some sense, underscores the political nature of the decision. It is one that can't be shirked, because there isn't any other way to get at an abuse of power.

I would just like to make one observation about the idea of misleading Congress as an impeachable offense. And this is a quotation from James Iredell. Now, he was appointed by George Washington to be on the first Supreme Court of the United States. He was there, if you will, at the creation, to borrow from Dean Acheson. And he was speaking to the North Carolina Ratification Convention.

And this is what he said: "The President must certainly be punishable for giving false information to the Senate. He is to regulate all intercourse with foreign powers, and it is his duty to impart to the Senate every material intelligence he receives, whether he believes it or not. If it should appear that he has not given them full information but has concealed important intelligence which he ought to have communicated and, by that means, induced them to enter into measures injurious to their country in which they would not have consented had the true state of things been disclosed to them, in this case, yes, isn't that clearly an impeachable offense?"

So the Founding Fathers understood exactly the situation that has been alleged in this case—not necessarily that President Bush lied; it is clear he didn't give the full slate of information to the Congress that was available regarding weapons of mass destruction, collusion between Saddam and al-Qaeda or otherwise. And this is, as the Supreme Court has said, a virtual definitive interpretation of an impeachable offense because it was made by someone who was there at the time, participated in the convention and ratification. It is not something that is concocted after the fact.

Mr. SCOTT. Mr. Barr and Ms. Holtzman?

Mr. BARR. Thank you.

If I could, with the indulgence of the Chair, respond just briefly, there are, of course, a number of things the Congress can do legislatively. We have touched on a number of them today, with regard to state secrets, signing statements, executive privilege and so forth.

But I think, in answer to the gentleman's question, at an absolute minimum, Congress cannot make matters worse, which it did

in passing recently the amendments to the Foreign Intelligence Surveillance Act, which not only vastly expanded the power of the executive branch to surveil American citizens in their own country without cause or without court order, but gave both retroactive and prospective immunity to companies that demonstrably, even from what little we know thus far given the parameters and secrecy practiced by this Administration, clearly violated the law as well.

And Congress, not this Committee certainly but a majority of Members of both houses, basically have set the constitutional clock back considerably by caving in to the Administration on that just one particular instance where the executive branch has not abided by the law and not abided by the very clear intent and wishes of the Congress.

Ms. HOLTZMAN. Congressman, you asked a very important question, and I completely agree with Mr. Fein. In a way, Congress can pass all the statutes that it wants, and a President who doesn't feel bound by the law can ignore them. That is the problem.

Prosecution—I agree that the precedent that was set with regard to President Nixon is that a sitting President cannot be prosecuted.

The Anti-Torture Act, because it carries a death penalty, has no statute of limitations at all in cases where death occurs in the course of torturous interrogations. That statute applies to any U.S. national. I take that to include people at the highest rungs of the U.S. Government. So anyone who engaged in torture where death resulted could be prosecuted for the rest of his or her life under that statute.

The War Crimes Act similarly could apply, but Congress changed the terms of it and made it retroactively inoperable, in the Military Commissions Act. If Congress wanted to rejuvenate that act and make it applicable, it could remove the inoperability of it, restore it to its full effect. And what would happen is that people who engaged in cruel and inhuman conduct—and there is no question that waterboarding, for example, would fall under that—would be prosecutable, and in the cases where death resulted, there would be no statute of limitations, so that threat of prosecution would hang over them for the rest of their lives. That statute also applies to any U.S. national. And I take it that applies to people at the highest as well as lowest rungs of our Government.

That statute was a matter of grave concern to this Administration. If you read the memorandum that was prepared by Alberto Gonzalez to the President, it reflects that was one of the reasons that the suggestion was made that we opt out of the Geneva Convention.

But aside from prosecution that may be down the road, truth commission—I am sure there are other remedies that can be applied—the real remedy for a President who believes that he is above the law and continues to act on that belief systematically is impeachment. And there is no running away from that. That is the problem.

And so the question is, what do we do about it? What does the Congress do about it? And I think the American people want to see Congress act.

Mr. BUGLIOSI. Mr. Chairman, I would like to elaborate on what Mr. Fein said. I make it very clear in my book that President Bush

has temporary immunity from criminal prosecution. But the law is very clear that, once he leaves office, he can be prosecuted for any crimes he committed while he was in office. The U.S. Constitution provides that. It goes all the way back to "The Federalist Papers," 1787, Alexander Hamilton. Once he leaves office, he can be prosecuted for any crime he committed while he was in office.

When President Nixon resigned in 1974, there was quite a demand, as you probably know, from many people to prosecute him for Watergate-related crimes. I think the crimes were obstruction of justice, wiretapping, subornation or perjury. And this necessitated, in President Ford's mind, pardoning him. Now, if he had immunity, there would be no need for Ford to intervene and pardon President Nixon.

So Bush does not have immunity from prosecution for murder once he leaves office. And the criminal investigation of whether he committed murder can commence at this time right now. And when he leaves office, I guess it is what, January 20, 2009, they can hit the ground running.

But I want to make that very clear. I have never suggested that he could be prosecuted for murder while he is in office.

Mr. CONYERS. Trent Franks?

Mr. FRANKS. Well, thank you, Mr. Chairman.

Mr. Chairman, I have already expressed my dismay at the focus of this hearing. But let me just start by saying that it seems to me that the big so-called issue here is that somehow the President of the United States either deliberately falsified information as to the danger that potential terrorists had for us in Iraq or that he deliberately falsified their intent. So what I am going to do, rather than give you a lot of my own words, I am going to read some other people's words.

Former Vice President Al Gore said, quote, "Iraq's search for weapons of mass destruction has proven impossible to deter, and we should assume that it will continue for as long as Saddam Hussein is in power."

Secretary of State Madeline Albright said, "Iraq has a very serious problem and clearly has a lot of weapons of mass destruction."

Senate Intelligence Committee Chairman Jay Rockefeller said, "There is unmistakable evidence that Saddam Hussein is working aggressively to develop nuclear weapons and will likely have nuclear weapons capability within the next 5 years."

Senator Hillary Clinton said, "In the 4 years since the inspectors left, intelligence reports show that Saddam Hussein has worked to rebuild his chemical and biological weapons stock, his missile delivery capability and his nuclear program. I voted for the Iraqi resolution," she said, "because I considered this prospect of a nuclear-armed Saddam Hussein who can threaten not only his neighbors but the stability of the region and the world a very, very serious threat to the United States."

John Kerry said, "I will be voting to give the President of the United States the authority to use force to disarm Saddam Hussein because I believe that a deadly arsenal of weapons of mass destruction in his hands are a very grave and real threat to our security."

Now, those were the people talking at the time, Mr. Chairman. Let me also, if I could, just go ahead and give us a few quotes from the terrorists.

Al Qaeda's al-Zawahiri said, "The jihad movement is growing and rising. It reached its peak with the two blessed raids on New York and Washington. And it is now waging a great heroic battle in Iraq, Afghanistan, Palestine and even the crusaders' own home."

Al-Manar said on BBC, "Let the entire world hear me: Our hostility to the great state, America, is absolute. Regardless of how the world has changed after September 11, death to America will remain our reverberating and powerful slogan"—death to America.

Osama bin Laden's chief deputy, al-Zawahiri, said right after 9/11 took place, in his book, quote—the book is "Knights Under the Prophet's Banner"—"Al Qaeda's most important strategic short-term goal is to seize control of a state or part of a state somewhere in the Muslim world. Confronting the enemies of Islam and launching jihad against them require a Muslim authority established on Muslim land. Without achieving this, our actions will mean nothing."

Osama bin Laden himself said, "The most important and serious issue today for the world is this third world war. It is raging in the land of the two rivers, Iraq. The world's millstone and pillar is in Baghdad, the capital of the Caliphate."

Mr. Chairman, if the majority is correct here today, that winning the struggle against terrorism has nothing to do with Iraq, then I wish to God they would tell the terrorists, because they don't seem to understand.

And the bottom line here is that we have focused so much on these fairy tales that we are missing our primary goal here, which is to protect the American people and their constitutional rights.

And I would suggest, Mr. Chairman, if terrorists do have their way at some point, I hope the majority has some better explanation than what I have heard today for focusing in this direction rather than what our primary responsibility is, which is protecting the American people and their constitutional rights.

And with that, I would suggest that the greatest failure of the Administration—and I don't suggest it was their fault, but, I mean, if there was a failure of the Administration, it was allowing 9/11 to occur. There is the failure. And this President tried to respond by doing everything he could to protect the American people.

And I want to ask Mr. Rabkin, I want to ask you, before I get a little overwrought here, where do you think that Presidents fail us more, where are they more impeachable, in failing to protect our country or in what the President has done here in doing everything he could, within the bounds of the Constitution, to protect us from terrorists?

Mr. RABKIN. I wouldn't claim to be an expert on what is or isn't impeachable. You should ask Professor Presser.

But I remember this, that when President Truman was deliberating whether to use the atomic bomb, he was told by his Secretary of State—what was his name from South Carolina who was on the Supreme Court afterwards?

Mr. FEIN. Jimmy Byrnes.

Mr. RABKIN. James Byrnes, who was subsequently Justice of the Supreme Court, so presumably had some authority to interpret the

Constitution. And he said, "If the American people find out that you had this weapon and you failed to use it, they will demand your impeachment immediately."

And I don't know, maybe that was not right, but I think we should all remind ourselves that the President does feel, and rightly feels, an intense responsibility to see that the country is safe. And for a President who just had, whatever it was, 3,000 people killed in September of 2001, he had to have felt that very intensely. And we should just try to factor that into our understanding.

I don't know whether really we would impeach somebody for military failure. But we would certainly say, "You're incompetent and shouldn't be President," and we would curse his name.

Somebody said earlier that Bush was the worst President. I think clearly the worst President was James Buchanan, who allowed the country to fall apart on his watch.

Mr. FRANKS. Mr. Chairman, part of the question, of course, was rhetorical. I was simply suggesting that somehow we are going after this President for trying to protect us and we are missing the whole issue here. And if terrorists do hit us again, I think that we are all going to be pretty ashamed of what we have done here today.

Mr. SCHWARZ. You know, could I just say something, Mr. Chairman?

Let's accept both the question and the answer. But the problem is that the tactics that have been used in the name of defending the country have actually made us less safe by trashing, by undercutting our values. Using torture is not something which Americans should—

Mr. GOHMERT. Mr. Chairman, I'd ask that we proceed with regular order instead of allowing the witnesses to dictate the procedure. If we are going to have witnesses get final arguments after each Member of Congress has their time, then we should be able to respond in rebuttal.

Mr. CONYERS. Does Mr. Franks have any objection to Mr. Schwarz making his statement?

Mr. FRANKS. Mr. Chairman, I don't have any real objection. But the idea that—it doesn't really go to my question in any way. And the bottom line is here I am astonished at our lack of priority on the real issue here.

Mr. CONYERS. Well, it sounds like you have objections. [Laughter.]

Mr. FRANKS. Mr. Chairman, if it is all right, I will go ahead and yield back.

Mr. CONYERS. All right.

Mel Watt?

Mr. WATT. Thank you, Mr. Chairman.

And I guess the only thing I can say in response to Mr. Franks' comments is what I have often said after having voted against various iterations of the PATRIOT Act. If the President and Attorney General Ashcroft—later Attorney General somebody else, later Attorney General somebody else—is protecting me against terrorism, who is protecting me against them? [Applause.]

So that's kind of where I come down on that. If you trash the Constitution in the name of protecting me, I'm not sure I want to be there.

Mr. CONYERS. Well, maybe the gentleman should yield to Mr. Schwarz then.

Mr. WATT. No, no, I'm not—I wasn't trying to pursue that because it wasn't even where I was going. I just happened to be the next in line after Mr. Franks, and it seemed to be to be an appropriate response.

I want to do two things. Number one, I wanted to welcome our former colleague Representative Barr back. In his absence, on several occasions in this Committee, I have longed for the day that he would be back here. We had our differences when he was here, and sometimes he strayed from some of these principles. But I can tell you, there has not been anybody on that side of the aisle who has stepped into that void to defend the Constitution since he left. And I want to thank him for that.

I want to thank the Chair for having this hearing today. It is not an impeachment hearing. But it is the most important hearing, I think—in fact, I was on a 2:05 flight, moved back to 3:30, moved back to 5:25, so that I could continue to participate. And this is the most important issue that we could be exploring at this time.

I am on record, much to the dismay and disenchantment of a lot of my constituents, of saying that I am not going to lead a charge for impeachment. I will read you what my standard letter says. It says, "As a member of the House Judiciary Committee, I would certainly be an active participant if such a resolution is considered and I would consider their input."

And then I go on to say, "I share your frustration about the Vice President or the President's decisions on many policy matters. However, I served on the House Judiciary Committee during the impeachment proceedings against President Clinton and received valuable lessons about how high the impeachment standard is and about how an impeachment can distract from other important work of the American people."

"Our Founding Fathers intentionally set an extremely high constitutional standard for impeachment to assure that impeachment could not be routinely used for political or policy disagreements or as a substitute for political participation. Additionally, as a practical political matter, it is clear to me that we would not have sufficient votes in the House or Senate at present to do a successful impeachment."

Now there are practical considerations.

All of those things have really been talked about by this panel in one way or another.

But I will tell you, I remember sitting in this Committee; the Chair has been here three times on impeachments. And in the distractions of all the cameras rolling and everything, I sat beside my good buddy, Representative Bobby Scott from Virginia, and we would, in the quiet of those moments when the cameras were projected everywhere, debate whether we would be making the same decision if this were a Republican President or a Democratic President.

And it is clear to me that the allegations here are substantially more substantive than the sexual allegations that were being made against President Clinton.

And obviously, Mr. Presser has a different standard now than he possibly had earlier. But I don't think that ought to be the standard. I really don't, because I thought the Republicans were wrong when they did it then.

I don't say we would be wrong if we did it now. But I am firmly convinced that it would so distract us. I am convinced that we couldn't have a fair, bipartisan evaluation of this issue in this environment. I am convinced that we couldn't get to the end of it between now and the end of the year. I am convinced that it might even distract from the most important thing that my good friend Bob Barr said, which is, you know, each subsequent President starts from the standard that the prior President has set. I aspire to a different set of standards, and I hope the next President of the United States doesn't live up to that prediction that my good friend Bob Barr has made.

I hope we can raise the standard back to some element of reasonableness. And perhaps maybe we can go back in a different time and place and do what Mr. Schwarz has suggested or indict or prosecute the President. But I don't think, as a practical matter and maybe my obligation is different than practical politics under the Constitution, and if somebody brings the resolution, I am going to be right here every step of the way. But I would have to say I am not going to be—I am going to say the same thing that I say—I am not going to be leading the parade right now.

And I guess once somebody is out of office, you can't impeach him. But we need—we definitely need to raise the standard. And that is the aspiration I have when I say I don't want this to be a substitute for political participation. I want the American people to impeach this President in November of 2008 and this whole Administration and all of its concepts that have been associated with it, including the notion that the President can protect me from terrorists by doing whatever in the hell he wants to do.

Mr. KING. Mr. Chairman?

A parliamentary inquiry?

Mr. CONYERS. Yes, the gentleman will state his inquiry.

Mr. KING. I would just ask the Chairman if you have a predicted time on when you might be seeking to conclude this hearing so those that are planning to travel today, like Mr. Watt, might be able to make their plans.

Mr. CONYERS. Well, as soon as we finish having all the Members make their inquiry and not a minute later.

Mr. WATT. I would yield it back, Mr. Chairman.

Mr. KING. I thank the Chairman for that definitive response, and I will help you proceed accordingly.

Mr. CONYERS. Mike Pence.

Judge Louie Gohmert.

Mr. GOHMERT. Thank you, Mr. Chairman.

And I appreciated some of the testimony here today. I am often a little surprised how free some people feel when they come before a Committee in Congress to testify when we have heard people say misleading Congress is an impeachable offense. But, you know,

making brash statements without adequate support ought to be a pretty serious matter when you are testifying here in front of the Committee and in front of the world.

Now my friend Mr. Jones, we disagree strongly on some things, but I like his idea that if there is going to be a signing statement it ought to at least be made public in 3 days. I would say simultaneously. So I will talk to my friend Mr. Jones about pushing that issue.

We have had a number of concerns. I was very concerned about the National Security Letter abuse, when we found out that had happened. There is no evidence whatsoever that the President knew that was going on. The FBI Director said he took full responsibility, and there were no consequences there. But I was also one who fought for—one of the Republicans who fought very strongly for sunsets on the PATRIOT Act, because I believe we needed that kind of safeguard on those kind of powers.

But we come back to some of these brash allegations. You know, President Clinton was in office for 8 years. George Bush was in office for about 8 months, and we know, looking in retrospect, that the World Trade Center was bombed in 1993. That was an act of terrorism. It was an act of war, just like the act of war when our embassy was attacked in 1979, was actually an act of war, and we didn't see it for what it was.

Now, the attack on the World Trade Center, unsuccessfully—even though people were hurt, people were killed—the plans soon began to try again. Now, I have a hard time blaming President Clinton for not suspecting that there were radical Muslim elements out there who wanted to destroy the United States, because every time—I believe every time President Clinton committed troops, it was, well at least most every time, it was to help Muslims against Christians. How was he to know that there was a radical element out there all the time that he was helping Muslims in their effort against Christians, that he had Muslims that were planning on attacking him? That was so grossly unfair.

So I know people keep saying over and over, he lied about—the President lied about weapons of mass destruction. The President lied about weapons of mass destruction. The Secretary of State lied about weapons of mass destruction. And we have heard the quotes. If he really lied about weapons of mass destruction, I say it is time to forgive President Clinton and Madeleine Albright and move on. Let's forgive them for the lies and move on. It is not constructive at this time to keep blaming President Clinton for lying about them. And if George Bush was so naive that he would accept those representations that were passed on to him by the Clinton administration, then, okay, he gets blamed for being too naive in accepting all those representations.

But if you bring this timeline back to what really happened, you come back to Joseph Wilson. And in February of 2002, his wife said, oh, I never suggested him. She is under oath saying that. And when we finally got the e-mail, it turns out she says in her e-mail, my husband is willing to help if it makes sense, but no problem if not. End of story.

Well, it wasn't end of story because she goes on, my husband has good relationships with both the P.M. and the former minister of

mines, not to mention lots of French contacts. And then she goes on down, however, my husband may be in a position to assist. Of course she suggested that. And that was untrue to say otherwise.

And then he went to Niger. And what people don't realize, October of 2002, he wrote an op-ed in which he said he was urging that we not go in and attack Saddam, that we just try to get him to accept inspections. And he said, one of the strongest arguments for military-supported inspection plan is that it doesn't threaten Saddam with extinction, a threat that could push him to fight back with the very weapons we are seeking to destroy.

There was no mention that he didn't have weapons of mass destruction. It was not until many months later, after the United States had gone into Iraq, and we found that his good friends and contacts in France had been making great deals of money by cheating on the Oil-for-Food scandal. So we took France out of the headlines when he came forward and said, well, Bush lied, I told them there were no weapons of mass destruction. That was not supported by the evidence, wasn't supported by the CIA notes. It wasn't supported by his op-ed. And yet he turns on the President and gets a lot of celebrity out of it.

But I think it is time to move forward. And in response to the issue of, is there a more important issue than this, we heard in this room this week the Attorney General of the United States say, because the Supreme Court has put us in the position virtually to release, or the threat of releasing terrorists on American soil because of the ridiculous decision in the Boumediene case, we have got to do something to fix that. Even though, as both Justice Roberts and Scalia pointed out, they pulled a bait and switch. We did what the Supreme Court asked us to do, and then they said it was unconstitutional. That is something that would be important to very quickly deal with.

And I see I am out of time, so I yield back at this point.

Mr. CONYERS. Zoe Lofgren.

Ms. LOFGREN. Thank you, Mr. Chairman.

This has been a very helpful hearing. Just some of the comments that have been made I wanted to deal with.

I voted against the FISA bill, but I do want to stick up for some portions of it. I very much objected to the retroactive immunity provisions of that act. But it does increase the opportunity for oversight by the Congress. And if we utilize that new authority, that is going to be a very significant element in making sure that, in the future, activities that do not comport with the Constitution are curbed. And that has been rarely discussed in the public debate over this, which is why I am raising it now, because I think it is a very important thing, in addition to the expansion of fourth amendment protections for Americans when they are outside of the United States.

You know, I remember I was watching Congresswoman Holtzman and watching Congressman Conyers as a young staffer back in the Nixon impeachment. And certainly the articles were adopted as Congressman Holtzman described. But I remember that the senior Members of the Committee on the Republican side were really not on board until Chuck Wiggins, I will always remember the look on his face when he found out that the President, Presi-

dent Nixon, had not been telling him the truth. And when the truth came out, he was an honorable guy and an honest conservative, and the look on his face when he found out that his faith in his President had been betrayed will always be with me. It was a bipartisan group that came together in the Congress. We will never know whether the full House would have approved the articles of impeachment or not, but certainly you can see here today that we are not in the same spot in this Congress that that Congress was in.

And so there has been a discussion of whether, as a practical matter, impeachment is a remedy available to this Congress. In addition to where we are as a Committee and a Congress, there is the element of time. It is almost August. And I recall really the substantial months-long efforts to acquire evidence and review it.

And so my real question is, assuming just for the sake of argument that we are not in an impeachment mode, we have a very strong need to set things right. I have a bill to extend the statute of limitations for any President for the number of years that they have served in office just automatically as a matter of just good jurisprudence. But whether that will pass I do not know. I think it should.

But how do we set this right? I mean, "I told you so" really isn't very helpful. It is very unsatisfying. When we provided for, essentially, suspension of habeas corpus, I pointed out in the House debate that we don't have the authority to do that except in cases of rebellion and invasion, which is exactly what the Court found later. I remember telling the White House that they lacked the authority to establish the military courts. It is only Congress in article III, section 1, that may from time to time establish inferior courts. But being right doesn't do me any good.

I am intrigued by, Mr. Schwarz, by your suggestion that we have commissions, that we have maybe a truth-and-reconciliation effort that would really dig in to find out, we know some of the offenses, but to find out the things we don't know and set a course to readjust. It is not just the legislative branch that has been pushed and trampled, but it has also been the judicial branch—and it is a very conservative court—to rein in the executive so that, once again, we have a functioning three-branches-of-government system. How would we enforce the findings against the executive in a three-branch truth-and-reconciliation commission?

Mr. SCHWARZ. If there is such an inquiry that I believe the next Congress and the next President should promptly put in motion, then it will have a responsible inquiry, which does take a lot of time. I mean, from the Church Committee, it took us 15, 18 months.

Ms. LOFGREN. If I may, I think there is some benefit in having the commission not be the Congress, but having it be some experts and acknowledged people so it is not a partisan issue. It could never be claimed to be partisan.

Mr. SCHWARZ. That is what I recommend, actually, that it be something like the 9/11 Commission, where the President and the Congress appointed people from American society who understand the Constitution, who appreciate the importance of both protecting ourselves and keeping our constitutional checks and balances work-

ing. I think it would work well. It is not easy to do. But the 9/11 Commission did a good job. And that would free the Congress to work on the many things that also have to be addressed, like secrecy and state secrets.

Ms. LOFGREN. Right. Legislative efforts.

Mr. SCHWARZ. Legislative matters.

Ms. LOFGREN. Let me just ask Congressman Barr, and it is good to see you here again, let's say that through hard campaigning and maybe a little luck, you become our next President. What would your effort be to restore the checks and balances? What would you recommend as a course of action?

Mr. BARR. Well, it is hard to know where to start. We have touched on every single area that the policies in the Barr administration would be quite different from those under the current Administration. The doctrine of state secrets would not be employed to hide embarrassing or improper acts by an Administration. It would not be used to thwart the legitimate complaints seeking redress by American citizens for wrongs committed against them by the government.

Signing statements, you know, I certainly would accept the challenge laid down by your colleague, my former colleague, Walter Jones. Signing statements would not be employed to undercut the will of the Congress and to move forward the notion that the executive branch is above the law.

Executive privilege would not be used as a shield behind which to hide embarrassing or political information legitimately sought by the Congress. The commander in chief power would be returned to its proper place, and that is not the power to make or run—make war or run the Armed Forces, but simply to carry out the administrative duty of serving as the chief and top officer in the military. The FISA law would be adhered to. And I would seek legislation to undo what I consider the unwarranted and constitutionally damaging expansion of foreign intelligence surveillance gathering on American citizens in their own country reflected in the legislation that was just passed by the Congress.

And then we would look at my next week in office.

Ms. LOFGREN. Thank you, Mr. Chairman.

I think my time has expired.

Mr. CONYERS. Dan Lungren.

Mr. LUNGREN. Thank you very much, Mr. Chairman.

And I thank the gentlelady from California, making reference to the late Chuck Wiggins, who truly was a wonderful Member of this Committee and later served on the Ninth Circuit.

Although when you refer to him as an honest conservative, in my family that is considered a redundancy.

Ms. LOFGREN. I see.

Mr. LUNGREN. I appreciate that.

Ms. LOFGREN. I always respected Congressman Wiggins.

Mr. LUNGREN. With former prosecutors, such as former Congresswoman Holtzman and Vincent Bugliosi, here, I appreciate the contributions you made to the criminal justice system in the past.

The only thing I would observe is that I know both of you being very valuable members of the prosecution bar in the past understand the importance of not overcharging cases. And one of the con-

cerns I have here is this is tantamount, in my judgment, to overcharging in a case. And we run the risk of criminalizing political disputes. And I am not sure that is in the best interests of this country.

And let me just reflect on a couple things. During World War One, as I recall reading history, Woodrow Wilson had cartoonists imprisoned because they published cartoons critical of our troops during that time. He thought that was offensive and harmful to troop morale.

I was privileged to serve on a national commission that reviewed the treatment of Japanese nationals and Japanese Americans during World War II. And the executive order issued by President Franklin Delano Roosevelt caused hundreds of thousands of Japanese Americans, Japanese nationals to be put into camps, removed from their homes. Not so coincidentally, many of them lost their property.

I remember after the election in 1960, when Richard Nixon returned to California, he was immediately subjected to IRS audits. Some suggested that that was political in nature. We know the stories of the wiretapping of the great civil rights leader Martin Luther King, and that LBJ seemingly revelled in listening to those things. And does anybody suggest that we should have impeached those Presidents for those actions, as erroneous and improper as they may have been? And how does that sit with the allegations I have heard here that this Administration has trampled on the Constitution worse than any others?

That is not to absolve Administrations of improper conduct, but it is the question of whether impeachment is the proper tool that we ought to use.

And I wonder, Mr. Rabkin, Mr. Presser, if you might first start off by reflecting on that. That is, I believe the impeachment is a strong and important tool of the legislative branch, but I think it ought to be used judiciously. Otherwise, its importance is undercut, but more importantly it becomes a distortion of the tension between the branches of government that are justifiably placed there by the Constitution. Yes, sir.

Mr. PRESSER. It is difficult to add much to what you said. I think you laid out the problem very nicely. Impeachment is a tool.

[Audience disruption.]

Mr. LUNGREN. Mr. Chairman, you know, that is about the fifth time we have had a reaction. We have people in the audience who have signs that, under our rules, are inappropriate to be here. And I wish that the Chairman would have the Rules of the House respected and enforced.

Mr. CONYERS. Well, I will instruct the staff and the officers to ask anyone with such signs to either remove them or leave the hearing room from this point on.

[Audience disruption.]

Mr. CONYERS. Will everybody that wants to leave leave? Everybody that wants to leave is excused.

[Audience disruption.]

Mr. CONYERS. Let's leave.

[Audience disruption.]

Ms. JACKSON LEE. Don't do that.

[Audience disruption.]

Mr. KING. Mr. Chairman, if we can't maintain order, you do have the authority to recess this hearing. And I would suggest that if it can't be maintained, you do that.

Mr. LUNGREN. Could Mr. Presser now answer, Mr. Chairman?

Mr. PRESSER. Sure. Impeachment is a remedy that is available to the House when it believes that a President is corrupt and can't or won't do his job.

It strikes me that the question before you here is, do you have a President who acted in good faith to carry out the responsibilities of his office or do you have somebody who, as was suggested before, simply wasn't interested in doing that? I think your choice is pretty clear here, as you have indicated.

Mr. LUNGREN. Mr. Rabkin?

Mr. RABKIN. Let me say something a little different.

I agree with what you said, but I think if people really are determined on accountability, they should remember that the President doesn't do anything alone. If you think there have been abuses over signing statements, you think there have been abuses over not referring things to the FISA court, you can impeach the Attorney General. You can impeach the White House Counsel, I think. You could certainly impeach a lot of other officials whose offices are created by statute.

I am not saying that is a great idea. But it is just not true that there is no recourse other than impeaching the President. The impeachment clause applies to executive officers—actually, to “officers of the United States.” So it is not true that the House is powerless. And I think the reason why we are talking about impeaching the President is that a lot of people find it extremely titillating to talk about impeaching the President. But there are recourses short of that. And if you wanted to focus responsibility, you could do it. Let's see if there is a majority of the House interested in doing it.

Mr. LUNGREN. Thank you, Mr. Chairman.

Mr. CONYERS. Sheila Jackson Lee.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman.

I want to associate myself with the words of my colleague from California. This is an enormously important hearing. It is creating a legislative and congressional record for what I have maintained. And I am so glad that Bruce Fein mentioned the previous holder of this seat, who really captured not only the sentiment of the Constitution but really the hearts and minds of Americans when she reminded them, the Honorable Barbara Jordan, that this is an institution of We the People.

And I would like to characterize my questions in the context of preserving the institution that I think our Founding Fathers, in their wisdom and intellect, and the scholars that helped write the legislation, when I say that self-imposed scholars, the Constitution, were very concerned about.

And I think Mr. Fein, your eloquent recounting of the elimination of His Excellency and your Honor really do point to what America is all about, and that is the protection of the rights of simple people. And I don't say that in any negative terminology.

So I think it is important to note, if I might, Mr. Chairman, I would like to ask unanimous consent to put into the record a draft of H.R. 264, please.

Mr. CONYERS. What is the title of that?

Ms. JACKSON LEE. That is the title is, Congressional Lawmaking Authority Protection Act of 2007 and 2008, regarding signing statements.

Mr. CONYERS. Without objection, so ordered.

[See Appendix, page 462.]

Ms. JACKSON LEE. Thank you.

In the discussion of signing statements, I want to make sure we now have a vehicle to move forward, legislation that I have offered regarding signing statements. And I know others have been suggested as well.

But I would like to put it in the context, if I can pose my questions around my premise of protecting the Constitution, that there may be a number of vehicles that we might use. First, I want to say to the Chairman, a series of abuse-of-power hearings, and I know how challenging it is for us to issue subpoenas, but to impress upon the Congress the importance of subpoenaing Karl Rove, as we have done, and to utilize, as we want to do, and to utilize the subpoena power, because it is in the context of protecting the American people.

And I think there have been crucial fractures, Mr. Presser, that really look to the question of whether the American people have been protected. And whether or not we define it as high crimes and misdemeanors, which frankly I do believe we have a very firm basis of suggesting high crimes and misdemeanors, because the inquiry made—the impeachment inquiry made in this body, the Judiciary Committee, is what it is, is a prosecutorial approach. It is the indictment. It is the question of determining whether we move forward. And then the trial is held in the Senate. So, in essence, we are giving the, in essence, defendant or defendants the opportunity to be heard. Why in the world would we be afraid of allowing the prosecutorial approach to go forward?

I think timing is an issue. But if I might, so to clarify that we should not be intimidated by the process or time, that what we are doing is not personalizing this. I have no angst against a personal individual, as we have tried to use the name of President Clinton, and Franklin Delano Roosevelt, and President Johnson. This is not a personal question. This is a question of protecting the institution and the Constitution.

Now let me go back and pay tribute to those who have lost their lives on the front lines of Iraq and Afghanistan, and to pay tribute to the veterans who are here. But in the memory of those who lost their lives in Iraq, this is the question that I want to raise: One of the oaths of office says to take care that the laws be faithfully executed. And our colleague, Congressman Kucinich, has included those very, very precise words in one of his articles. And so if I might, one of the premises of this whole issue of the Iraq war was the representation of the government, the Administration, the commander in chief, the presentation made before the United Nations, what I believe is ignoring 2002, where we gave the President the right to use force if all other things didn't work.

Mr. Fein, can you help me with juxtaposing the representations that were made, the players in the representation, and article I, section 8, about Congress declaring war? But just focus there as to whether or not our duty to, if you will, protect the institution on behalf of the people of the United States, is there some merit there as we might look at those facts?

Mr. FEIN. Yes. James Madison said that a people who mean to govern themselves must arm themselves with the power that knowledge and information gives and that a popular government without popular information is a farce.

And obviously, the Congress of the United States is making its deliberative choice to authorize war or not based on information in the hands of the executive branch. And as I explained earlier, James Iredell, who was a Founding Father, subsequent member of the U.S. Supreme Court, made it very clear that it would be an impeachable high crime and misdemeanor to withhold information from Congress that, if they had known about, would have caused them to decide differently on a matter of war and peace. This was unambiguous. He wasn't a Democrat. He wasn't a Republican, he was just a Founding Father interpreting a document that he had helped fashion.

Now based upon the Administration's own former occupants of office, including George Tenet and others who have served in the CIA that have not been denied by this Administration, there was withheld from this Congress strong information that Congress had a right to evaluate on its own, not just based upon President Bush, that undercut the idea that there were weapons of mass destruction in Iraq that the President held out as a justification for Congress to authorize war and that al-Qaeda was in cahoots with Saddam Hussein. And these are—this is information that comes out from Bush administration officials. Now, it may be true that has been quoted by Congressman King that Madeleine Albright or Albert Gore made statements that Iraq has this kind of—these kinds of weapons or collusion. But what was their information based on? I have no doubt that President Bush didn't say, come and survey all of our documents. They got the same briefing, I am sure, that everybody else got. That was the same one-sided, distorted information. And to say this characterization isn't out of—this is out of Bush administration officials themselves. And it seems quite clear that the declaring war function is corrupted if the President has complete control over the information flow and gives you part of the story but not all of it, because the power to declare war means you get to make your own independent evaluation of what to believe or not, just not what the President wants you to hear.

Ms. JACKSON LEE. And any of that could bear on—just if we were in an inquiry, could bear on treason to the extent of how you undermine the infrastructure of government and could also lay the precedent for say, for example, an attack on Iran. So we are forward thinking when we do this kind of inquiry, are we not?

Mr. FEIN. Of course. Suppose there is conflicting information about whether Iran in fact has a nuclear weapon. And there is just one snippet and says, oh, all the information I am giving you suggests that there is a nuclear weapon and they are about ready to launch an attack against Jerusalem. There is volumes of informa-

tion otherwise, but that is all suppressed. So you only hear part of the story. That clearly in my judgment is an impeachable offense under the standard of the Founding Fathers, not under the standard of anybody who came afterwards with partisan axes to grind. James Iredell didn't have any grudge against a Republican or Democrat. He was seeking to defend the Constitution.

Ms. JACKSON LEE. Maybe Mr. Bugliosi, who has commented on this, would add to the framework of what you are——

Mr. BUGLIOSI. Yes. I want to respond——

Ms. JACKSON LEE. Thank you, Mr. Fein.

Mr. BUGLIOSI [continuing]. On this whole issue of weapons of mass destruction that Congressman Franks and Gohmert talked about. In this book of mine here, "The Prosecution of George W. Bush for Murder," believe it or not I do not say——

Mr. FRANKS. Hold it higher.

Mr. BUGLIOSI. You want me to hold it higher?

Mr. FRANKS. Hold it way up.

Mr. BUGLIOSI. You are being funny now, aren't you? You are being funny. Okay.

Ms. JACKSON LEE. Mr. Bugliosi, you may continue.

Mr. BUGLIOSI. Yes. Believe it or not, I do not say in this book where I am asking that George Bush be prosecuted for murder that he lied about weapons of mass destruction.

Actually, he did lie about weapons of mass destruction, but that is not why I am saying he should be prosecuted for murder. The evidence that he lied about weapons of mass destruction, by the way, which is not the basis for this book, are right in front of me. I have it right here. Here is the evidence. This document here is the National Intelligence Estimate. I didn't name it before. I talked about a classified report. This is it right here. October 1st, 2002, classified NIE report. It is called Iraq's Continuing Programs of Weapons of Mass Destruction. In this document right here, the CIA and 15 other U.S. intelligence agencies use words like this, "we assess that" or "we judge that" Hussein has weapons of mass destruction. This document here is the white paper that was given to you folks here in Congress and the American people. And the words "we assess that" or "we judge that" were removed, meaning that you folks here heard a fact, and in fact, it was only an opinion.

Number two, on nuclear weapons, this document right here, the classified report has several important dissents. This document right here, the white paper that you folks were given and the American people, all of those dissents were deleted. That is where the line about——

Ms. JACKSON LEE. And were those dissents presented at the U.N.?

Mr. BUGLIOSI. Pardon?

Ms. JACKSON LEE. Were those dissents at the presented at the U.N.?

Mr. BUGLIOSI. I am sorry?

Ms. JACKSON LEE. Those dissents, were they presented at the U.N.? The presentation made at the U.N., were those dissents presented there? No.

Mr. BUGLIOSI. No.

But the dissents that are in the classified document right here do not appear, do not appear in this white paper that you folks were given. There is the lies about weapons of mass destruction.

But here is the point I want to make. And I really feel, and this sounds presumptuous of me, I guess Mr. Franks already knows enough that he doesn't want to hear. But here is the evidence that I want to present to this Committee that weapons of mass destruction, that is not the issue here. The issue is not whether Hussein had weapons of mass destruction. If that were the issue, Pakistan, China, Russia, Britain, France, North Korea——

Mr. KING. Mr. Chairman, the gentleman's time has long ago expired.

Mr. BUGLIOSI. Wait a while. I am talking about something I think is pretty important, okay?

Mr. KING. Mr. Chairman, the gentleman is talking about classified information in this meeting.

[Audience disruption.]

Mr. BUGLIOSI. Wait——

Mr. KING. And the gentleman's time has expired. And I insist that you impose the rules on this.

Mr. NADLER. Mr. Chairman? Mr. Chairman? Mr. Chairman?

Mr. CONYERS. Let's have order.

The gentlelady asked a question, and after it is responded to, her time will have been expired.

Ms. JACKSON LEE. I thank the gentleman for his indulgence.

Mr. BUGLIOSI. This document right here has been declassified. This one here was an unclassified version. So you are wrong.

But here is the point I want to make, here is the point I want to make: Britain, France, Russia, China, Pakistan, they have weapons of mass destruction. Are we going to war with them? No. Why? I will tell you why. Because the only issue, not two issues or three issues, the only issue is whether a Nation that has weapons of mass destruction is an imminent threat to the security of this country. That is the only issue. And 16 U.S. intelligence agencies in this previously classified document, including the CIA, all said unanimously that Hussein was not an imminent threat to the security of this country. And they knew all about these weapons of mass destruction. They thought they did. Actually, Hussein did not have weapons of mass destruction. Let's overlook that fact. They thought—these 16 U.S. agencies thought that Hussein had weapons of mass destruction, and they still said he was not an imminent threat to the security of this country. It is a terrible non sequitur to say that just because you have weapons of mass destruction, you are an imminent threat to the security of this country. The proposition that Hussein was an imminent threat to the security of this country is outrageous on its face. Why? I will tell you why. Hussein wanted to live.

Mr. KING. Mr. Chairman, I am getting really close to an aneurysm here. Do you think you could help him wind this thing up?

Mr. BUGLIOSI. Hussein wanted to live. And when you want to live, you do not attack the United States of America or help anyone else do so. And all 16 U.S. intelligence agencies agreed with what I just told you.

Mr. KING. The man is repeating himself, and long ago, the gentlelady's time has expired.

Mr. CONYERS. The gentlelady's time has expired.

Ms. JACKSON LEE. I thank the Chairman.

Mr. BUGLIOSI. I have more to say, but I won't.

Mr. CONYERS. Mr. Pence.

Mr. PENCE. Thank you, Mr. Chairman.

Thank you to our panel of witnesses.

I want to address my questions, if I can, to Professor Presser. I am not entirely sure that you weren't just referred to as a self-imposed scholar, although I would be happy to be corrected on that. I do know that earlier reference was made by another witness at this panel who characterized your work for this Committee for this hearing as quote, atrocious scholarship. How long have you been a professor of legal history and constitutional law at Northwestern University School of Law?

Mr. PRESSER. Thirty-one years.

Mr. PENCE. I didn't hear that. I don't know if your microphone—

Mr. PRESSER. Thirty-one years.

Mr. PENCE. Thirty-one years. Are you the same Stephen B. Presser who has co-authored one of the seminal casebooks on constitutional law in the United States of America?

Mr. PENCE. Yes.

Mr. PRESSER. What is the title of that book? It is a while I am out of law school.

Mr. PRESSER. It is called "Law and Jurisprudence in American History."

Mr. PENCE. And you co-authored that with?

Mr. PRESSER. A fellow named Jamil Zainaldin, who I think was then in the History Department at Northwestern.

Mr. PENCE. Now, I am a Hoosier, but I think Northwestern is a pretty good school. It seems to be a pretty credible place.

You ever published any other works on constitutional law and history other than the widely utilized seminal casebook that you co-authored on constitutional law and history?

Mr. PRESSER. Yes, several other books and articles.

Mr. PENCE. I might take the opportunity to welcome you back to the Committee. It was 10 years ago you testified before the Judiciary Committee in another hearing on the subject that has found its way into the subject matter of this hearing. Again, as I said in my opening statement, I accept the Chairman's assurances that this hearing was not called on the subject of impeachment, but it is the elephant in the room. We found our way there.

I am fascinated by your analysis. Because we just heard from the immediate prior witness and witnesses, it just seems to me that the objections that have been raised are, in the main, differences on policy. The decisions to go to war, which of course the Congress and the House and the Senate gave the President the authority to go to war in Afghanistan and Iraq, voted in overwhelming majorities to do that, people can differ with that policy, but it seems to me in some of your analysis in what has been characterized, regrettably, as atrocious scholarship, you point out the Founders of this country, the Framers of the Constitution were very, very careful

about this business of not allowing impeachment to be a basis to challenge policy differences with an Administration.

There is one part of that I would like you to elaborate on. I think it is fascinating. I think one of our witnesses just cited James Madison glowingly. He should always be cited glowingly, in my judgment.

James Madison and George Mason had this argument that you cite in your report to this Committee. I am absolutely fascinated by it. It turns out, and tell me if I get this wrong, George Mason, who seems to me kind of to be the forgotten Founder, he is a brilliant man, understood liberty and constitutional rights maybe like no one other than James Madison, but the two of them had an argument about this very provision, this business of whether or not the term malAdministration would be included, I believe in the text of the Constitution, would be included as a basis for impeachment.

Now, I don't quarrel with any of my colleagues on this Committee on policy differences with this Administration. As I said earlier, anyone tuning into C-SPAN 20 or something earlier this week would have seen me in a rather pointed conversation with this Administration's Attorney General on the subject of the first amendment freedom of the press. So I cherish policy differences of opinion.

But it seems that there is a—you point, Mr. Presser, to the Founders rejecting this term of maladministration as a basis for impeachment, because you quote here that Madison, one of the authors of the Federalist and the man commonly described as Father of the Constitution, objected on the grounds that maladministration was too elusive. He said, quote, so vague a term will be equivalent to a tenure during the pleasure of the Senate.

In effect, my understanding of that, but I would really like you to elaborate on it, is it seems like that—and he won that argument with George Mason, and the term maladministration was not included in the Constitution—it seems that specifically they were rejecting—they made the decision to reject differences in the administration of and the pursuit of policies in the government. Fair characterization?

Mr. PRESSER. I think that is entirely accurate.

Mr. PENCE. Okay. I got a passing grade on that.

The other one is this other business is—and I said a little bit earlier, I have great respect for Congressman Kucinich. I have actually great affection for him. He is a man that is as passionate on the left as I am on the right. I don't begrudge him utilizing whatever tools are available to him as a legislator to raise and to press the issues that he cares about.

It seems to me, though, you make a point in your report that this business of high crimes and misdemeanors goes to the question of whether or not the person serving as President of the United States put their own interests, their personal interests, ahead of public service.

Now, when you testified here 10 years ago, you indicated that—you testified about the allegations made against President Clinton; you said if they were true, it showed that over many months Mr. Clinton engaged in deception, lying under oath, concealing evidence, tampering with witnesses, and in general obstructing justice

by seeking to prevent the proper functioning of the courts, the grand jury, and the investigation of the Office of Independent Counsel. I believe, I am inferring here, I believe you testified that if those things were proven to be true, those would be instances where a President put his personal interests above public service.

Do you see in evidence of any of these policy differences with the current Administration the same types of—same type of conduct that would be high crimes and misdemeanors?

Mr. PRESSER. No, sir.

Mr. PENCE. That is the briefest law school professor I have ever met in my life.

I want to thank you for being here. And I so appreciate what I want to affirm, and anyone can, I suspect, look at the public record of this hearing and see to be outstanding scholarship in your report to this Committee. And I am grateful for your work.

And I yield back the balance of my time.

Mr. CONYERS. Robert Wexler.

Mr. WEXLER. Thank you, Mr. Chairman.

I just want to again thank you, Chairman Conyers, for holding this important hearing.

I would like to just begin by taking up where my good friend and someone I respect enormously, Mr. Pence, just spoke about.

And essentially, Mr. Pence I believe referred to policy differences as being distinguished from constitutional issues or legal issues. And I would beg, respectfully, to differ with Mr. Pence, particularly as to three issues: Ignoring congressional subpoenas, spying on American citizens, and whether or not torture is ordered, illegally or in some other fashion, to me are not policy issues; they go to the issue of abuse of executive power.

For instance, with respect to ignoring congressional subpoenas, I think it is at this point not debatable that President Bush has ordered his executive branch officials, such as Karl Rove, Harriet Miers, Josh Bolton, and other Administration officials not to testify to Congress. I believe that is an indisputable fact. And what has occurred is a set of circumstances where this Administration has made itself immune from congressional oversight to a degree that no other Administration in American history has done.

Respectfully, in my estimation, that is not a policy issue. That is a constitutional action, and it is a legitimate inquiry to determine whether or not that abuse of executive privilege amounts to the constitutional standard of or required for impeachment.

I would like to ask—I was going to ask Mr. Barr, but Mr. Barr has gone, I know. That is why I said I was going to ask Mr. Barr. I would like to ask the other members of the panel, Mr. Barr, in the last impeachment, during the impeachment of President Clinton, repeated what was also said earlier today in terms of President Nixon and his comment, quote, President Nixon was, when the President does it, that means it is not illegal. And Mr. Barr, to his credit during the Clinton impeachment, his quote was, Nixon's statement, quote, was dead wrong then, and it is dead wrong today—wrong that is, unless one subscribes to the principle that the President is not only above the law, but that he is the law, end quote.

The issue of refusing to appear before Congress, just that one count of impeachment, what is—in my mind, is that a—or I am asking, is that a constitutional issue or a policy issue? And what justification can there possibly be, to the degree that the President has employed this tactic, to justify its use in the context that this President has done so?

Please, Mr. Anderson.

Mr. ANDERSON. It is clearly a constitutional issue. It is not just a matter of policy. And it goes right to the core of our constitutional system. It is up to Congress as to whether its power is going to slip through its fingers. And now is the time to assert Congress's power. It is not waiting for the good will of another President, hoping that they will restrain themselves. It is up to Congress.

And you know, it is unbelievable in this body how people have cavalierly downplayed the abuses of power that go far beyond what was talked about during the Nixon impeachment, which by the way, they didn't end—in the articles of impeachment, they weren't talking about criminal offenses, *per se*. They were talking about abuses and breaches of trust and subversion of constitutional government.

Here it is absolutely unprecedented. It is not a matter of whether you like it or not; it is not a matter of policy. It has been a matter of egregious violations of domestic statutory law, laws passed by this Congress, treaties that have been ratified by the Senate, and the Constitution. We are talking about violations of those laws that prohibit torture, the indefinite detention of American citizens with no due process, no lawyers, no trials, no charges against them. Absolutely unprecedented. Kidnapping, disappearing and torturing people around the world. And then the FISA violations, which, again, they want to be downplaying those, saying, well, other people have caused the warrantless wiretapping of this sort. Never has a President, in engaging in warrantless wiretapping, before violated the terms of FISA, which provide that every instance is a felony. These blatant violations of law—

Mr. WEXLER. I think Mr. Fein would like to answer.

And I would just like to add, if you include in what Attorney General Mukasey has come before this Committee and said blankety, we refuse to honor the congressional subpoenas that you issued.

Mr. FEIN. That by itself in my judgment is a clear impeachable offense. The Founding Fathers understood the most important function of Congress is the informing function. That self-government can't work unless the people know what their rulers are doing and why. And that can't happen if they don't appear before Congress, the President doesn't voluntarily disclose things. And simply by refusing even to appear, it is the equivalent of contempt of court, like refusing to obey a court order, which I think everyone would concede would be an impeachable offense. I think that is one of the things that that question points out, Congressman, is I don't think you would need a very long period of time to decide whether what the President has done is an impeachable offense. It is open; it is notorious. You just need to know what Constitution means. The facts are, on their face, contemptuous of this legislative body.

Mr. WEXLER. Thank you.

Ms. Holtzman?

Mr. HOLTZMAN. Congressman Wexler, I think, if you take the constitutional standard for impeachment, which is a high crime and misdemeanor, Mr. Mason said that it meant subverting great and dangerous offenses that subvert the Constitution. Subverting the Constitution here is when the President, for no reason, not even a colorable claim, refuses to give Congress the information it needs to do its job and obstructs the work of Congress. That can be an impeachable offense.

If you translate it into the context of an impeachment inquiry, in other words, if you were to commence an impeachment inquiry and then you were to ask the President to provide the information again, the obstruction of an impeachment inquiry, the failure to cooperate with an impeachment inquiry, the failure to provide the information is itself an impeachable offense, as we established in the Nixon proceedings and in the Nixon precedent.

So these are very serious abuses. And because what the inquiry, if you go back, what were you asking about? You were asking about whether the Justice Department undermined the rule of law by engaging either in improper prosecutions or by firing people because they refused to engage in improper prosecutions.

Mr. WEXLER. Thank you, Mr. Chairman. My time has long expired. Thank you very much.

Mr. CONYERS. Steve Cohen.

Mr. COHEN. Thank you, Mr. Chairman.

Congressman Holtzman, you suggested that you think there is a prima facie case for impeachment of the President. Is that correct?

Ms. HOLTZMAN. Well, I am not allowed to say those last two words.

Mr. COHEN. Prima facie case——

Ms. HOLTZMAN. I get to say 14 of the 16 words. But the last two I can't say.

Mr. COHEN. They are like George Carlin's words or something.

Ms. HOLTZMAN. What do we say, high government—high Administration officials, yes.

Mr. COHEN. Would that include somebody who was considered to be not a member of the executive but a barnacle attached to the legislative branch?

Ms. HOLTZMAN. Such as?

Mr. COHEN. Such as the man who would succeed to the office of President if he got out of the——

Ms. HOLTZMAN. I think you could do a twofer.

Mr. COHEN. They could be a twofer?

Ms. HOLTZMAN. Uh-huh.

Mr. COHEN. But if that person was assigned to the legislative branch, could you impeach him? Is a person who is assigned to the legislative branch, attached, as Mr. Addington has said the Vice President is, would he then not be subject to impeachment?

Ms. HOLTZMAN. No, I don't know what Mr. Addington says about that, but there is no question the Vice President could be impeached.

Mr. COHEN. But he would have to be a member of the executive branch to be impeached, would he not?

Ms. HOLTZMAN. I think there is some—maybe Mr. Fein knows this—but I think there is also some precedent for holding that members of the congressional branch can be impeached as well.

Mr. FEIN. The very first impeachment was against a senator, Senator William Blount of the Senate. The standard has clearly been established that Members of Congress can be impeached.

Mr. COHEN. Thank you.

I was trying to see if there was some method to their madness. We had General Mukasey before us this week, and he said the Vice President is obviously and definitely a member of the executive branch. In the previous week, Mr. Addington said, no, he is not—or he could be, and he went back to Katzenbach in 1961, some opinion, and suggested he was attached to the legislative branch, so he was neither. He wasn't really an executive. And of course, the National Archives wanted him to classify papers; they are not part of the executive. So I guess there is not a method to their madness. There is just madness.

Ms. HOLTZMAN. Right.

Mr. FEIN. Well, it is very clear the Vice President has claimed he stands in the shoes of the President when he claims immunity from suit; that he argued in the suit brought by Valerie Plame and Mr. Wilson following the disclosure, that he was entitled, like the President, to absolute immunity. So he claimed he was an executive officer there. And obviously, when he refused to respond to the request, I think it was by Mr. Berman's—or I think it was Mr. Berman's—

Mr. COHEN. Maybe Waxman.

Mr. FEIN. Waxman, excuse me, Mr. Waxman's request for documentation of the statements he had made to the special prosecutor in the Valerie Plame investigation, it was executive privilege of the President that he claimed. Now maybe that destroys their idea of a unitary executive, because now that sounds like a duumvirate under the Roman Empire. But I doubt whether they were thinking of that analogy.

Mr. COHEN. Mr. Fein, when you did research I know on General Gonzales, did you feel like there was a prima facie case for some type of impeachment proceeding at that time?

Mr. FEIN. Well, I think there needed to be more investigation of the facts as to whether or not, during his testimony, he had misled Congress as to what he knew about the reasons for the firing of U.S. Attorneys, communications he had had with the White House or otherwise. But certainly, if that could be established, obstruction of a congressional investigation surely would rise to the standard of a high crime and misdemeanor.

Mr. COHEN. Do you think it serves a good social purpose to go into impeachment, or do you think, as Congressman Watt feels, that we should concentrate on the omissions on health care and education and other issues and environment that we have had over the last 6 years?

Mr. FEIN. Well, my experience certainly—it depends upon what the allegations of impeachable offenses are. There can be bad impeachments and good ones. The one that preceded Nixon was a bad one against President Andrew Johnson. But my sense, having participated in, from a different angle than Ms. Holtzman, on the

Nixon impeachment, that it was an enormously unifying exercise. I never felt prouder as an American than when I saw Mr. Nixon leave the White House. Because he said, if I do it, it is legal. And that wasn't our constitutional system. And it was President Ford who said our national nightmare was over after we got rid of President Nixon through an impeachment proceeding.

Now, certainly, if the impeachment would be interrupted because of time, then you would have to question whether that would be satisfactory, because it wouldn't be fair to have only half of an investigation, and people's names being maligned because there wasn't an opportunity to hear everything.

But my view of the institutional wrongdoing against the Constitution here isn't something that you need archeological expeditions to discover. These are open and notorious. The President has openly stated on the record. He has gone on public radio and television saying, I flouted the FISA law. He stated, I had a terrorist surveillance program, and I didn't care what the law said. And he has had his own Attorney General say, if I am gathering foreign intelligence, I don't have to obey anything Congress has done. That simply is a decision here, is a that an impeachable offense if the President says, I don't need to obey the laws that Congress has enacted? It is another version of the President Nixon; if the President does it, it is not illegal.

And, therefore, you don't need a prolonged investigation of facts, he has already conceded what he has done.

The same kind of thing has come up with his claim that he has power to detain any U.S. citizen as an enemy combatant and put them in detention indefinitely without any customary accusation or charge. And that is not hypothetical. There is someone right now, his case in the Fourth Circuit Court of Appeals, his name is Mr. al-Masri, he was plucked 5 years ago from his home. He was initially charged with a crime, and he is now being held as an enemy combatant.

Those kinds of things are just a judgment. Does that satisfy our understanding of what executive power is? That can go very quickly, and I think that would be a very healthy debate.

Mr. COHEN. Thank you.

Mr. CONYERS. Hank Johnson.

Mr. JOHNSON. Thank you, Mr. Chairman.

Professor Presser, I mean, you testified at the impeachment hearing of President Clinton before this Committee; is that true?

Mr. PRESSER. Yes.

Mr. JOHNSON. And you testified that if the President—if President Clinton lied—if he lied, and if he concealed evidence, then if those things were true, then that would make the President's actions self-serving, and so therefore it becomes an impeachable offense. Is that the gist of your testimony?

Mr. PRESSER. I think it is fair to say that was the gist of it. What I was trying to suggest was when you examine in impeachment proceedings the President, what you are looking for is whether you have got an official who is corrupt and can't carry out for one reason or another his constitutional tasks.

Mr. JOHNSON. I want to pose this question to you. If a President lied and concealed information, and did so for purposes of taking

the country to war, do you believe that that would be an impeachable offense?

Mr. PRESSER. I think you would have to examine the circumstances. It strikes me that—

Mr. JOHNSON. Without—without—I mean, wouldn't an impeachment inquiry examine the circumstances? I mean, you would support that notion; would you not?

Mr. PRESSER. Sure. Mr. Rabkin made his point a little bit earlier.

Mr. JOHNSON. And when one has probable cause to believe that that has occurred, it is certainly wise and prudent to proceed with action to determine whether or not the allegations can be proved by a higher level of evidence; is that correct?

Mr. PRESSER. Yeah. I think what it turns on is your suggestion whether you have got probable cause or not.

Mr. JOHNSON. Okay. Well, now, we have heard all kinds of testimony and information today, some of which is very well known, in the public domain. Are you here to tell the American people and the people on this Committee that you don't think that that information rises to the level of a legitimate inquiry, Professor?

Mr. PRESSER. I will stick by what I said earlier and what is in the written testimony. I don't see the facts that way.

Mr. JOHNSON. You don't—well, it's not so much of how you—how you look at the facts.

Mr. PRESSER. No. It is your call to make.

Mr. JOHNSON. Prosecutor Mr. Bugliosi could look at the facts one way and Defense Attorney Fein look at them a different way, but I think they would both agree—excuse me, did I say defense lawyer? In other words, a defense lawyer and a prosecutor may look at the facts a different way, but the question would be whether or not we should even be looking at the facts. And you take the position, it seems to me, that we shouldn't be looking at the facts today. Is that what you mean to portray to me and the American people?

Mr. PRESSER. No. I like very much the way that you characterized it earlier. It is a question of whether you have probable cause or not. I don't see it; maybe others do.

Mr. JOHNSON. Okay. Well, you would not fault us for wanting to go forward. You don't think that it would be fanciful for someone to believe that perhaps there might be probable cause, and we should proceed with some inquiry.

Mr. PRESSER. I think you take an oath to uphold the Constitution, you have to do what you think is the right thing to do.

Mr. JOHNSON. Now, do you think that it would be irresponsible if this Congress, in light of the information that has come to pass over the past 4, 5 years, that we would neglect our responsibility to look into this?

Mr. PRESSER. I think I have said I don't see the facts the same way that you do.

Mr. JOHNSON. Well, I mean, yes, I admit that, and I respect that. But do you think it would be irresponsible for us to not look further into this, given what we—given the allegations, the seriousness of the allegations that have been raised and the factual data that supports those allegations?

Mr. PRESSER. No, I don't think it would be irresponsible of you not to move forward.

Mr. JOHNSON. Well, now, Prosecutor, Ms. Holtzman and also Mr. Bugliosi, how would you respond to my questions?

Ms. HOLTZMAN. Well, I think it would be shirking your constitutional duty to fail to hold this Administration accountable constitutionally for these serious abuses of power. And then I think, agreeing with Mr. Fein, that an abbreviated, and short, and very careful examination and inquiry could be made, and the President and the Vice President and the members of the Administration could be called to respond. And then you could determine based on the responses how you wanted to proceed. And I think that that would be the responsible thing to do.

I want to add one thing that wasn't really brought out before. When people said, well, how did it work in the Nixon process, how did Republicans and Democrats come together? Well, the process itself educated Members of Congress about the Constitution, educated Members of Congress about the facts, and probably most important educated the American public about the Constitution and its requirements and the evidence, and that is what made impeachment work. The process made it work.

Mr. JOHNSON. Mr. Rabkin—

Mr. CONYERS. The time of the gentleman has expired.

Brad Sherman.

Mr. JOHNSON. Thank you, Mr. Chair.

Mr. SHERMAN. Thank you, Mr. Chairman.

Congress has become basically an advisory body to the President, and the fault lies many places, including here in Congress, because we have done to ourselves that which Jesse Jackson has said to have wanted to do to someone else. We have put our party above article I of the Constitution, and any statute which would protect congressional power is not only certain to be vetoed, but that veto is certainly to be sustained by whichever party is represented in the White House.

Now, one example of where we are and how not only the Congress, but the public and the press. I mean, we have a big Presidential election. Nobody makes a big deal out of whether the President will actually follow laws, whether the President will respond to Congress.

And I have got one example, and that is the Iran Sanctions Act, an act that many of those supporting impeachment disagree with, which raises the question do people support impeachment for failing to carry out a law that they themselves disagree with?

Now, the Iran Sanctions Act requires the President to identify those foreign oil companies that are making investments in Iran. The Administration has told me privately and testified publicly that they think that this is bad foreign policy to upset the governments of Europe. And so the question is—I will address it to Mr. Fein—is nonfeasance an impeachable offense?

Mr. FEIN. The take care clause of the Constitution that provides that the President shall take care that the laws be faithfully executed was a response to the Stuart monarchs who had refused to execute laws passed by the British Parliament. They were oftentimes recusancy laws against the Catholics and Stuart monarchs.

Certainly James was a Catholic and even refused to execute the laws. And so in the English Bill of Rights of 1688, following the glorious revolution, there was a specific assertion prohibiting any king, any executive officer from refusing to execute the laws faithfully——

Mr. SHERMAN. I hate to—you seem to be giving us a long answer that adds up to yes?

Mr. FEIN. Yes. And, by the way, that impeachment article that was voted against Nixon by this Committee made that same recitation.

Mr. SHERMAN. Thank you.

Now, every President would like a line-item veto. They would like something even better; they would like to just cross out any section of an enactment that we sent to them, those provisions would be inapplicable, and the parts of the bill they like would be applicable, because every President likes some part of each piece of legislation we pass and dislikes others. And one—the way they accomplish this is they sign a bill containing, say, four or five provisions, and then they say the provisions they don't like are unconstitutional, and they are not going to enforce them.

One way we could protect ourselves from this is to add to every statute a provision that says, no provision of this statute shall go into effect until the President signs a statement that says he believes that every provision of the bill is constitutional, and he will do everything possible to carry out every provision of the law.

Mr. SCHWARZ, would that be an effective way to be sure that either the President vetoes the bills he thinks are partially unconstitutional, or that he waives any assertion that he shouldn't enforce this or that provision?

Mr. SCHWARZ. It might give the President—might give the President more power in a way.

Mr. SHERMAN. If he could refuse to sign such a statement, and then we could pass the law again without the statement, and he would have to veto it, we would return—retain the right to deal with those bills that the President would want to veto.

Mr. SCHWARZ. It is an interesting device that might get at the abuse of the signing statements, and I think it is worthy of really some more further work on it. But it is a good get at the subject.

Mr. SHERMAN. I will be trying to add that provision to many bills next year. I have only a second.

Ms. Holtzman, you are a former prosecutor. Is it appropriate for a prosecutor to seek an indictment if he or she is virtually certain they cannot obtain a conviction?

Ms. HOLTZMAN. Well, probably—well, it depends on the system. It depends on the evidence. Why wouldn't you get a conviction? Is it because you don't have a good staff, you haven't done your homework?

Mr. SHERMAN. Maybe you couldn't get a conviction because——

Ms. HOLTZMAN. If the evidence warrants it, it is a very tough call, very tough call.

Mr. SHERMAN. So if the evidence convinces you that the person is guilty but for this or that extraneous factor, say, the person is a big-time celebrity, and you know absolutely, positively you can't get a conviction, it still might be appropriate to indict or not?

Ms. HOLTZMAN. Well, I have never had to face that, so I am not going to give you a—

Mr. SHERMAN. You were never a prosecutor in Los Angeles.

I yield back.

Mr. CONYERS. Attorney Tammy Baldwin.

Ms. BALDWIN. Thank you, Mr. Chairman.

I hope I will get a chance to propound just two questions. Mr. Fein, about a year ago, I had the good fortune of seeing an appearance of yours and a constituent of mine John Nichols on the Bill Moyers Journal show. Since we are plugging books, my constituent John Nichols is the author of *The Genius of Impeachment: The Founders' Cure For Royalism*. And it was during that show Mr. Nichols used a metaphor that I have found quite—it stuck with me, and I know it stuck with many others. I am just going to quote it for you.

He said, let us say that when George Washington chopped down the cherry tree, he used the wood to make a little box, and in that box the President put his powers. We have taken things out and we have put things in over the years. On January 20, 2009, if this Administration is not appropriately held to account, they will hand off a toolbox with more powers than any President has ever had, more powers than the Founders could ever have imagined, and that box will be handed to the next President. Whoever gets it, one of the things we know about power is that people don't give away tools. They don't give them up. The only way we take tools out of that box is if we sanction this Administration now and say the next President cannot govern as these men have.

Mr. Fein, as you may recall, you responded to Mr. Nichols with the observation that Congress has, to the contrary, seemingly given up its powers voluntarily. Could you briefly elaborate on that answer?

Mr. FEIN. Well, the reason why—the way in which Congress has surrendered the power is simply by being unresponsive to the President's usurpations, like claiming executive privilege to say he doesn't have to respond to oversight requests; really expanding the President's authority with the FISA amendments; passing the Military Commissions Act, which is perhaps the most sweeping delegation of authority ever given to any President at any time, any place; and acquiescing in signing statements. If there is no rebuke to these claims of power, that is a surrender.

And perhaps one of the most dangerous ones, I think, is—I think this body tacitly has accepted the idea the President can initiate the war on his own. He can extend the war against terrorism into Iran if he thinks that is critical, and that is something the Founding Fathers would have been shocked about. They said no one man should ever take us into war.

Ms. BALDWIN. Thank you. And that leads directly into my second question.

Certainly, based on what I have observed in the last 7½ years of this Administration, I can honestly say that I have serious concerns about what I may yet see in the remaining 6 months of this Administration. I have no reason to believe that the conduct that we have been focusing on today has stopped. I am finding some very disturbing and eerie similarities in my mind between the be-

havior and rhetoric of this Administration during the lead-up to the war in Iraq and the behavior and rhetoric of this Administration regarding Iran.

As one example, the Administration seems to be disregarding National Intelligence Estimates again. I would like to ask the two witnesses who I heard reference Iran in their testimony what impact an impeachment inquiry or other congressional action might have on the conduct of this Administration from this day forward, and so I direct that question to Mr. Anderson and Mr. Bugliosi.

Mr. ANDERSON. I don't think if this Administration is bent on attacking Iran that anything short of criminal sanctions is going to stop them. I think there needs to be criminal legislation passed with severe sanctions for anyone who causes an attack against Iran inconsistent with our Constitution or the United Nations Charter without the explicit consent of Congress.

Mr. BUGLIOSI. Your question is whether an impeachment proceeding would deter this President from invading Iran?

Ms. BALDWIN. The question is whether an impeachment inquiry or other congressional action—what impact do you think that will have on this Administration's conduct moving forward?

Mr. BUGLIOSI. Well, I think you have learned from me today, if anything, that I only deal with evidence and the facts, and you are asking me for just speculation. I have no answer to your question.

Ms. BALDWIN. Fair enough.

Mr. BUGLIOSI. Thank you.

Mr. CONYERS. Adam Schiff is a former assistant United States attorney and a valued Member of the Committee.

Mr. SCHIFF. Thank you, Mr. Chairman. Thank you for holding this hearing.

Over the last 8 years, I have been deeply disturbed by much of the conduct of the Administration and its overreach of constitutional lines. Some of what has disturbed me and some of this overreach has taken place in the dark in the categories of surveillance and interrogation. And some of this conduct has taken place very much in the open, as when the Administration ignores the plain language of a statute that when the Congress finds someone in contempt of the Congress, that matter shall be brought before the grand jury; not may or might, but shall. And some of the Administration's conduct that disturbs me has been both in the open and in the dark, as in the intelligence leading up to the war in Iraq.

I would like to use this opportunity to make an open call to this Congress to form a Church Committee to conduct an investigation into any of the encroachments upon the Constitution, any of the encroachments upon the legislative branch by the Administration. It should be a bipartisan Committee, as the Church Committee was. It should go back, I think, even before this Administration and look at perhaps some of the roots of what has led to the abuses in this Administration. I think that that inquiry should start now and should continue during the next session of Congress.

What I would like to ask today are some of the steps that we might take immediately in addition to initiating a Church inquiry. I think, for example, it would be enormously important to require that when the executive takes the position that an act of Congress has overstepped Congress's constitutional bounds and intruded on

the prerogatives of the executive, that it notify Congress of its intention not to comply. There is no guarantee even with signed statement that Congress will find out in a timely way or ever that the Administration had decided to act upon its statement in a signing statement. I think Congress should be notified whenever the Administration takes an action or refrains from taking an action that is compelled by law under its own claim of constitutional authority.

I would also like to get your opinion on something else which I think is deeply problematic, and that is the Office of Legal Counsel, and in particular the Office of Legal Counsel as related to the issue of torture. We seem to have a situation where the Administration chose a lawyer to head the Office of Legal Counsel who was either a very bad lawyer, or who was a competent lawyer, but saw his job in an improper manner; saw his job as that of being an advocate of the Administration and everything it wanted to do.

We have had good and credible witnesses come before the Committee to say that because of an opinion of that counsel, anyone who acted upon it, even if the conduct that was taken in reliance upon it crossed the line into torture, that no one could be held accountable, not the people who acted upon it, not the people who wrote the opinions, not the people who chose the lawyer to write the opinion.

And I would like to get your thoughts about how it is possible to determine accountability. Is there legal accountability? If there isn't, how do we instill legal accountability? Should we impose a requirement that on issues like this, that not long after the fact, these opinions be disclosed to Congress, but that contemporaneously they be disclosed either to the Judiciary Committee or the Intelligence Committee or both. Would such a requirement interfere with the attorney-client nature of the opinions that come out of the OLC?

And if you could direct some of your comments, I would like to start with you, Mr. Schwarz. I appreciate a great deal the work and recommendations the Brennan Center has made. And is that a possible way to provide some accountability?

Mr. SCHWARZ. First, the reliance on opinions is surely not a defense unless the reliance is reasonable, and I don't believe reliance on those opinions could have been reasonable.

The second thought that occurred to me in listening to your remarks, which I thought were right on target, is there is already a law that says the President must notify the Congress if he decides that a portion of the law that is passed is not constitutional and that he is not going to enforce it. And one of President Bush's signing statements is, I am not going to comply with the law, that I should tell you that I am not complying with the law. That somehow has the world totally upside down.

The opinions, all the opinions, of the Office of Legal Counsel should be released. We are not a country where we can have laws—and their opinions have some force of law. We are not a country where we can have laws that are secret. They should all be released, and Attorney General Mukasey was asked to do that by former Attorney General Katzenbach and I—

Mr. SCHIFF. Mr. Schwarz, if I could just interject very quickly for a very specific follow-up for my time, which is, I think, already up, runs out even more. Does the Congress have jurisdiction to bring suit on a claim that the Administration has not disclosed to Congress as it was required to do when it made a determination that it would not comply with a law based on its belief of its constitutional prerogative?

Mr. SCHWARZ. I mean, that is sort of the issue that is raised in the suit you are now pressing in the district court in Washington about the refusal of Harriet Miers to appear and the refusal of Mr. Bolton to produce the documents. I think your counsel has put in an extremely powerful brief about the power of Congress to enforce those, but it hasn't been decided by the courts yet.

If I could just add one other thing, on the subject of documents and things that could be done at the last minute, particularly if the Vice President's counsel is taking the position that the Vice President is not part of the executive branch, which, as Mr. Fein pointed out, is a strange position in light of what they have previously argued, but you ought to go look at the Presidential Records Act and what is going to happen and make sure there aren't loopholes in that act that might facilitate people in the Administration carrying away documents which ought to be part of the public domain.

Mr. FEIN. Could I just—because I was in Office of Legal Counsel for several years, this was during the Nixon impeachment, in fact, my first task was to examine after 100 years what was an impeachable offense. Nothing that ever produced was classified; they were all published. And the importance of openness is that shoddy scholarship is so embarrassing, they changed their mind.

One of the things that happened, for instance, when the Department for the first time tried to provide a public explanation for flouting FISA by conducting this terrorist surveillance program, the so-called White Paper, after it was disclosed and shredded by many, after a year they went back and said, now we are going to get a FISA warrant in 2007. That was because it was so obvious that they had no legal argument.

Sunshine is the best disinfectant, and that is why you would have a right to have access to every one of those opinions. Some of them might be classified, but you would have access of the legislative body because you are overseeing it.

And I want to underscore what I think is a great forgetfulness of this branch. You have authority to oversee the exercise of every power, legislative, executive and judicial. Oversight means checking; not asserting it by itself, but checking. That is what publicity and checking is about, sunshine.

Mr. SCHIFF. Thank you, Mr. Chairman.

Mr. CONYERS. Yes. The problem has been that we have got so much oversight after 12 years, that it is piled up and running out of 2141.

The Chair recognizes an invaluable Member of the Committee from Florida, Debbie Wasserman Schultz.

Ms. WASSERMAN SCHULTZ. Thank you, Mr. Chairman. And you really took the words right out of my mouth. I want to commend the Chairman for the leadership he has shown on the 45 public hearings that we have had during this Congress on topics ranging

from improper surveillance to torture, and unlawful detention and signing statements. And to the degree that our colleagues and good friends on the other side of the aisle are lamenting those 45 hearings, it is simply because there was a 6-year backlog. In the first 6 years of this Administration, there was virtually no oversight done by the Congress because the former leadership of this Congress ceded our oversight role and took a very hands-off approach and let the Administration run amok and do whatever they wanted. So Lord knows that we certainly had a lot of make-up and catch-up work to do.

And what I want to do is focus on the Administration's abuse of Presidential signing statements. I have to tell you that when I joined the Congress and joined this Committee, I was surprised to learn that Presidential signing statements even existed. I know since the early 19th century American Presidents have occasionally signed a large bill while declaring they would not enforce a specific provision that they believed unconstitutional.

I mean, I would argue, and I am surprised over the years and would be interested in the scholarship at the table of thought on that as to why there has never been any suit brought on those, because I don't really think there is anything in the Constitution that allows the President to interpret law or refuse to enact or follow a portion of the law. I know on rare occasions historians says Presidents have also issued signing statements interpreting the law and explaining any concerns about it, which also really seems baffling to me.

But this President has issued almost 1,100 provisions of law and signing statements, and I just think that that stretches the abuse of power beyond imagination. And as someone who has spent 16 years in a legislative body, I jealously guard our congressional responsibilities and the system of checks and balances, and I really think signing statements are an assault on the legislative branch, basically the same as a line-item veto as what came out during the hearing that you had on that subject, Mr. Chairman, and that the Supreme Court ruled was unconstitutional, a line-item veto, in our system of government.

So with that overview, I did want to ask Congressman Barr this question, but I know he had to go. But I was also going to ask Mr. Schwarz the same question: Can you comment—and I am really glad our colleague Congressman Jones brought up the subject on the first panel, but do you have an opinion about whether President Bush's use of signing statements is precedented in history or even a comment on the more egregious examples of signing statements?

Mr. SCHWARZ. Well, it is clearly unprecedented in its volume, and it is clearly unprecedented in its audacity, like saying when Congress asks that it be told if the President believes something is unconstitutional, he says, I am not even going to tell you that. That just turns the Constitution upside down.

The President's power is meant to be to veto laws. He can veto them for any reason, policy reason, legal reason. And then the if the Congress passes the law, the President ought to enforce it. If he wants to send someone to court and have a challenge made,

maybe, but not secretly decide to not fulfill his obligation to take care that the laws are faithfully executed.

Ms. WASSERMAN SCHULTZ. I know you in your publication, the Brennan Center for Justice's publication 12 Steps to Restore Checks and Balances, you address this subject. Can you also address what you think the remedies are that are available to Congress?

Mr. SCHWARZ. Well, you do have ultimately the impeachment remedy. I expressed some skepticism about whether, given how much time has passed, how little time there is to go now, and whether this is the right time to do that. But you have the impeachment remedy, and Congress—

Ms. WASSERMAN SCHULTZ. The impeachment remedy, I am talking as a specific response to the abuse of signing statements?

Mr. SCHWARZ. You could, sure.

Ms. WASSERMAN SCHULTZ. But short of that, what other remedies are available? Because, I mean, I am not just—I mean, I think this President has engaged in horrific abuses of power, but we also have the future Presidents to deal with. And I know that Senator Specter sponsored legislation in the 109th Congress that would prohibit the practice of signing statements, and I know the Chairman is supportive of that entire concept. So beyond impeaching this President, I am taking a longer-term view.

Mr. SCHWARZ. I mean, you know, could they be absolutely prohibited—for the President not to be able to say, I think there is a problem probably would be a problem to say that you can't say there is a problem.

Ms. WASSERMAN SCHULTZ. Okay.

Mr. SCHWARZ. But they are being abused. You have—Mr. Sherman, I think it was, had a quite interesting technique—

Ms. WASSERMAN SCHULTZ. I mean, is there—let me give you an example. When I was in the Florida Legislature, there were instances in which the legislature went to the State supreme court to basically fight or challenge the abuse of—our perceived abuse of power on specific examples where the Governor—where we believed the Governor overreached. Is there a provision in which—short of passing a law to say that they are prohibited or narrowing their use; is there a provision in the Constitution or anything that would allow us as the legislative branch to do that?

Mr. SCHWARZ. Well, I am not sure. I think the power of the political system should be used, too. I mean, these are now clearly controversial signing statements. They have clearly been abused in a way that is harmful to America. And I think it is quite appropriate for, in the political campaign, pressure to be put on the candidates for President to say we are not going to—

Ms. WASSERMAN SCHULTZ. Yeah, but I want more than that. I want—I want some real legal—and, Mr. Fein, I actually want to hear your comments on that, too.

Mr. FEIN. Yes. I think what you can do through the appropriations powers—

Ms. WASSERMAN SCHULTZ. This President has no shame, so, I mean, political pressure doesn't work—

Mr. SCHWARZ. No, no, no. I am talking about pressure on the people who are running for President.

Ms. WASSERMAN SCHULTZ. No, I know.

Mr. FEIN. What can be done is through the power of the purse. You simply say that there is no money that the President can utilize to execute any law where he has issued a signing statement saying that he is going to pick and choose what he chooses to enforce. So he then has to choose all or nothing. So he says, all right. So then, unlike the situation now, he can take what he likes and then White-Out what he doesn't, so there you tell him, you have no money to enforce any law.

Ms. WASSERMAN SCHULTZ. So look at that. That is when I am glad that I am an appropriator. That is wonderful. I am glad to hear that I personally can get involved in that.

Mr. Chairman, I thank you and yield back the balance of my time.

Mr. CONYERS. The Chair recognizes Keith Ellison, former State legislator and a trial attorney for over 13 years.

Mr. ELLISON. Mr. Fein, could you do a signing statement—based on the President—precedent of this White House, could you do a signing statement that says—for a law that said there is no money to carry out a law in which you have done a signing statement?

Mr. FEIN. That certainly would be a new high watermark of audacity, but that doesn't mean it might not be reached.

Mr. ELLISON. Right.

Mr. FEIN. He could try to veto it and say he won't execute that. The problem, however, is it is a crime to spend money that hasn't been properly authorized and appropriated by the Congress of the United States, so if he tried to do that, he would really be risking—

Mr. ELLISON. Risking what.

Mr. FEIN. Impeachment. I think for whatever reason, there seems to be still a consensus that the power of the purse is inviolate, and the President can't spend money that this House has not appropriated.

Mr. ELLISON. So based on the signing statements we have seen, it wouldn't shock anybody to see one in the case you have described.

Congressman Kucinich, what is the factual basis for your claim that the President made knowing, untrue state—for the White House made untrue statements to the Congress which led us into war?

Mr. KUCINICH. Mr. Chairman, Members of Congress and Mr. Ellison, I took Senate Joint Resolution 45, which came from the White House; I took H.J. Res. 114, which we passed, which was essentially the same. I examined it line by line, and in doing so was able to come to an easy conclusion that the representations that were made in both of these resolutions, substantive representations, were, in fact, not backed up by fact.

Mr. ELLISON. Could you sort of—

Mr. KUCINICH. Were not backed up by fact. Excuse me?

Mr. ELLISON. I was going to ask the Congressman to summarize the representation for people—

Mr. KUCINICH. Well, for example, in both—and when I speak to this, I speak to both S.J. Res. 45 and House Joint Resolution 114, and this is what we acted upon. We were told that Iraq was con-

tinuing to threaten the national security interest of the United States. That is a direct quote from this—these resolutions. It not only turned out not to be true, but there was intelligence that existed at the time that suggested that the White House knew then that it wasn't true. That we were told in this resolution that Iraq was continuing to possess and develop a significant chemical and biological weapons capability. We have learned since then that was not true, and there is evidence to suggest that the White House understood at that time that it was not true and nevertheless represented to the Congress that it was.

And so we were told that Iraq was actively seeking a nuclear weapons capability, that Iraq had a willingness to attack the United States, that Iraq had demonstrated capability and willingness to use weapons of mass destruction, that Iraq could launch a surprise attack against the United States or its Armed Forces, that there was an extreme magnitude of harm that would result in the United States—that would result to the United States and its citizens from such an attack, that there was justification for the use of force by the United States to defend itself, that Iraq had—that there was an attempt to connect Iraq with 9/11 and with al-Qaeda's role in 9/11, and over and over saying Iraq had weapons of mass destruction.

This came from the resolutions which Congress was presented and which, based on information and belief, Members of Congress acted upon and gave the President the authorization to use force. So what I have done is to very narrowly present a case so it is narrowly tailored to exactly what it is we were told.

I don't even—Mr. Chairman, I don't even get into the discussion of what the Senate Intelligence Committee got into in terms of the statements that were made about biological, chemical and nuclear weapons. I would say you don't even have to go that far.

And so what I would humbly recommend that the Committee do is to—is to start with the postwar analysis that has incontrovertible proof that all of these assertions that were made in here were not fact-based. Then you look at the prewar intelligence, and you can see that the intelligence that was said to have been acted upon was selective, and there is questions raised about the role of the Office of Special Plans in helping to produce it, even though it contradicted time-honored intelligence that was available from established Federal agencies in both the CIA and the State Department.

Then you look at which intelligence was right, but not used or acted upon; which intelligence was wrong and acted upon, and then go into who was it who helped shape the wrong intelligence and caused it to be acted upon. And that then, I think, will lead to a chain of events that inalterably, inevitably must lead to people in very high positions in this government.

Mr. ELLISON. Professor Presser, based on the presentation that Congressman Kucinich just made, wouldn't you agree that there is at least a basis for an inquiry that could lead to impeachment, just based on those facts if proved.

Mr. PRESSER. If proved, I would think so, but we have heard some suggestions that that view of the facts is incorrect.

Mr. ELLISON. Right. But wouldn't you agree that it would be the Senate's obligation to weigh the facts, not—is that right; wouldn't you agree with that?

Mr. PRESSER. I think you mean the House in this case.

Mr. ELLISON. Well, I would say ultimately the Senate would be the one to decide whether or not a case had been proved or not, but it would be the House to see whether the—these facts could rise to the level to form an accusation.

Mr. PRESSER. Yeah. You have to decide whether they are accurate or not.

Mr. ELLISON. Right. But if proved, if Congressman Kucinich's offerings were proved, wouldn't you agree that would form the basis of an inquiry that could lead to impeachment.

Mr. PRESSER. I think they could form the basis of inquiry, sure.

Mr. ELLISON. And, Mr. Rabkin, wouldn't you also agree that if proved—now, of course, you don't—you may not agree with the facts as Mr. Kucinich offered them, but wouldn't you agree that if proved, that would form the basis of an inquiry for impeachment.

Mr. RABKIN. I am not sure what exactly we are talking about now. What I understood Congressman Kucinich to be saying, was that he thinks what the Administration presented to Congress has not been borne out by what we have learned since. Now, that does not seem to me impeachable. If what he was saying is the Administration knowingly and deliberately deceived Congress, that would be in a different category. If that is what we are talking about, that they knowingly and deliberately deceived Congress, yes, that could be the basis of an inquiry.

Mr. ELLISON. Okay. Now, Congressman Kucinich, am I—

Mr. KUCINICH. If I may.

Mr. ELLISON. Could you clarify for—

Mr. KUCINICH. If I may, it is the proper role of the Judiciary Committee, given that we—that Congress received a resolution that made representations that all turned out to be categorically—that most of which turned out to be categorically false. It would then seem to me that it would be appropriate to make an inquiry so you can get the truth. Then if the truth backs up that the Administration made misrepresentations, then it would be up to the Committee to decide whether to forward that in a form of a report to the full House and whether the House then as individual Members would act upon it.

Mr. ELLISON. But, Congressman—

Mr. KUCINICH. The only reason I am here, and the only reason that I have been pushing for a moment like this, where in a 6-hour hearing now where Members of the Judiciary Committee could have things laid out in front of them, is to get to the truth. Let us find out what the truth is. Was Congress presented with a case for war that was not based on the truth? And if that happened, then we have to—there has to be consequences.

Mr. CONYERS. The gentleman's time has expired.

The Chair by unanimous consent would recognize the gentleman from California.

Mr. LUNGREN. Thank you, Mr. Chairman. I appreciate it, and I realize the indulgence as a result of you allowing Congressman Kucinich to come back and testify once again on a separate panel.

I would just like to point out a couple things, because you have asked questions of some of the people here who have been prosecutors, and a number of us have been. I remember prosecuting a very difficult case on perjury coming out of one of the most racially charged issues, cases in California, the O.J. Simpson case, and I was required to prosecute perjury that came out of that. And one thing that guided me in that was there is an essential difference between a misstatement and an intentional misstatement. While we were able to show perjury in a particular case, we had to prove in the first instance that it was a misstatement, that it was material and intentional, in this case under oath.

There were plenty of allegations during the time I was attorney general of crimes committed by individuals, and the one thing I learned, that allegations or assertions of criminal misconduct or misconduct are easily made. And the distance between an assertion and proof and conviction, or in this case impeachment, is a long road. And I would just hope that we would understand there is a huge difference between a misstatement of facts and an intentional misstatement of facts, and that 20/20 hindsight is not the basis upon which you bring a charge of either perjury or impeachment.

Mr. NADLER. Will the gentleman yield?

Mr. LUNGREN. Well, I will be happy to yield, but, you know, I have sat here for a half hour or 45 minutes without a single opportunity for this side to say anything.

Mr. NADLER. I just want to ask you a question.

Mr. LUNGREN. Yeah, sure.

Mr. NADLER. In connection with what you were just saying, it has been brought out here today that assertions or reports were made to Congress saying that the intelligence says this, that and the other thing, when, in fact, intelligence said, we think this, that and the other thing, but we are not sure, and we have dissents, and all the dissents and the caveats were not there. Is that not, in your opinion, *prima facie* deliberate misrepresentation?

Mr. LUNGREN. No, no, that it is not. And once again, Mr. Chairman, I have not raised objections here to the conduct of this hearing, but when, in fact, there are allowed to be responses by the audience, it tends to be an attempt to either change or intimidate witnesses here. And that is why people should understand why this is important. It is not that people are attempting to try and muzzle first amendment rights; it is when we invite people here to testify, they should testify to the best of their ability without any sense that behind their back, that behind their back there is going to be a response in one direction or another. And I am saddened to see that continue here.

Mr. CONYERS. Will the gentleman yield?

Mr. LUNGREN. Yes, I would yield.

Mr. CONYERS. I want to make it clear that we have been exceedingly tolerant of responses from our invited guests, but staff is going to—when we adjourn immediately after Mr. Lungren finishes, if there are any disruptions, those people identified will not be invited to these hearings again. So I ask everyone to please join us in an orderly dismissal of these hearings.

Mr. LUNGREN. I thank the Chairman for that.

The only point I would make in response to my friend from New York is that we have it on the record that the CI Director, at that time Mr. Tenet, who I believe was a carryover CIA Director, if I am not mistaken, used the word "slam dunk" with respect to the crucial part of this evidence, number one.

Number two, and I know some people may be tired of hearing this, but I have been rereading Eisenhower's memoirs of World War II called *Crusade in Europe*. He makes the point on several occasions that intelligence is never perfect, that intelligence is often wrong, and that you go on the best intelligence that you have. Perhaps the best example he gives of that is when we went into North Africa for the purpose of trying to secure that area prior to the time we moved up the Mediterranean into Europe, and he was assured by our best intelligence at that time that our troops would be welcomed with open arms by the French citizens and others that were under French control. In fact, when the American forces and British forces got there, they were bitterly opposed and went through days of attack. And Eisenhower makes the point specifically in his memoirs that that was the best intelligence they had. It was dead wrong, and it probably resulted in the death of people that were under his command, but he didn't do it intentionally. He did it based on the best intelligence he had. And he goes on to say, it is difficult for people who are not there to be able to convey or understand the fog that exists with respect to intelligence.

That is the only point I am trying to make. We make presentation here as if intelligence is something so clear. The reason it is called a National Intelligence Estimate is because it is an estimate.

Mr. NADLER. Would the gentleman—

Mr. LUNGREN. And the President tries to make the best judgment with that information. And for him to reach a conclusion that he believes the evidence and presents that is not a case of lying, it is a case of the President making his best judgment at that time.

The last thing I would say is this: We should be reminded that in these cases—and when we talk about—and FISA has been brought up here a number of different times and different investigative techniques. The Administration did bring in leadership on a bipartisan basis to give them this information and to ask for their advice. And we in this Congress have the right perhaps to pass legislation to expand the number of people who are brought into those consultations. We have made the judgment in the past that ought to be limited to the Democrat and Republican on the Intelligence Committees and of our leadership in the House Chambers. Maybe that is something we should consider. Maybe we should pass legislation saying we want a wider circle of Members of Congress on a bipartisan basis.

But I am just—the way that has been portrayed as all evil versus all goodness and a President that is absolutely champing at the bit to somehow violate the Constitution I just think is—

Mr. NADLER. Would the gentleman yield?

Mr. LUNGREN. I would be happy to yield.

Mr. NADLER. Thank you.

First of all, I just must comment that when we invaded North Africa, there was considerable uncertainty as to what Admiral

Darlan would do, and there were a lot of negotiations with him behind the scenes.

But be that as it may, the issue is not whether the President was correct in his estimate or whether the intelligence was correct. The intelligence is always a fog, you are quite correct in that. The issue is that whereas the intelligence that the President was given had all sorts of caveats and said, we think this, but some people think that, this division thinks that, that division thinks that, we are not sure, we think that this is correct, the President is absolutely entitled to take the minority or the majority view, you know, and say, I think that, this, fine.

But I think it is a *prima facie*—the problem here is that when he reported to Congress on the—and the misrepresentations, he did not say there is a division in the intelligence; the majority thinks this, the “Department of Whatchamacallit” thinks that. He made categorical statements. He said, we know this, we know that, when, in fact, it was quite clear we didn’t know this, we thought this.

Mr. LUNGREN. Well, I will reclaim my time and just say the President was basing it not only on the National Intelligence Estimate, but also the conclusions of the Intelligence Communities around the world. Tony Blair has stated that he believed it. The French Government believed it. The Israelis, who have about as good an intelligence service as in the world relative to ours—I think ours is the best—also believed it.

I don’t think you can find an impeachable offense based on the fact the President took these estimates and, in the context of the other Intelligence Communities of the world agreeing with it unanimously, then made the presentation to Congress.

Now, we can agree or disagree. You can say this is maladministration, a mistake by the President, but it is not the basis for impeachment. And I know we have gone on very long—

Mr. SCOTT. Will the gentleman yield?

Mr. LUNGREN. I will be happy to yield.

Mr. SCOTT. Just very briefly. If you draw those conclusions, then I think you are right, but some, based on the facts that were available, think that if we review it, we may or may not find that—a different conclusion, that we were, in fact, misled, if we can get all the information. But we haven’t gotten all the information.

Mr. LUNGREN. Well, I appreciate it, although it is incontrovertible with respect to the conclusions of the other intelligence agencies, and I think—well, I—

Mr. CONYERS. Gentlemen.

Mr. LUNGREN. I thank the Chairman for his indulgence.

Mr. CONYERS. The time of everybody has expired. And I want to thank the Members that were able to stay through 5 hours of hearings, but what about the witnesses who stayed through 5 hours of hearings? We thank you very much.

I think Mel Watt was right. These are the most important hearings that we have held in the Judiciary Committee during the 110th Congress. This transcript will be examined. We leave it open for 5 days so that if there are any corrections that witnesses want to make, or any additional submissions that they would like, or any

questions that Members of the Judiciary would like to present to our witnesses, the record will be open for that period of time.

This hearing is adjourned. Thank you so much.

[Whereupon, at 4:15 p.m., the Committee was adjourned.]

A P P E N D I X

MATERIAL SUBMITTED FOR THE HEARING RECORD

107TH CONGRESS
2D SESSION

S. J. RES. 45

To authorize the use of United States Armed Forces against Iraq.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 26, 2002

Mr. DASCHLE (for himself and Mr. LOTT) introduced the following joint resolution; which was read the first time

JOINT RESOLUTION

To authorize the use of United States Armed Forces against Iraq.

Whereas Congress in 1998 concluded that Iraq was then in material and unacceptable breach of its international obligations and thereby threatened the vital interests of the United States and international peace and security, stated the reasons for that conclusion, and urged the President to take appropriate action to bring Iraq into compliance with its international obligations (Public Law 105–235);

Whereas Iraq remains in material and unacceptable breach of its international obligations by, among other things, continuing to possess and develop a significant chemical and biological weapons capability, actively seeking a nuclear weapons capability, and supporting and harboring terrorist organizations, thereby continuing to threaten the

national security interests of the United States and international peace and security;

Whereas Iraq persists in violating resolutions of the United Nations Security Council by continuing to engage in brutal repression of its civilian population, including the Kurdish peoples, thereby threatening international peace and security in the region, by refusing to release, repatriate, or account for non-Iraqi citizens wrongfully detained by Iraq, and by failing to return property wrongfully seized by Iraq from Kuwait;

Whereas the current Iraqi regime has demonstrated its capability and willingness to use weapons of mass destruction against other nations and its own people;

Whereas the current Iraqi regime has demonstrated its continuing hostility toward, and willingness to attack, the United States, including by attempting in 1993 to assassinate former President Bush and by firing on many thousands of occasions on United States and Coalition Armed Forces engaged in enforcing the resolutions of the United Nations Security Council;

Whereas members of al Qaida, an organization bearing responsibility for attacks on the United States, its citizens, and interests, including the attacks that occurred on September 11, 2001, are known to be in Iraq;

Whereas Iraq continues to aid and harbor other international terrorist organizations, including organizations that threaten the lives and safety of American citizens;

Whereas the attacks on the United States of September 11, 2001, underscored the gravity of the threat that Iraq will transfer weapons of mass destruction to international terrorist organizations;

Whereas the United States has the inherent right, as acknowledged in the United Nations Charter, to use force in order to defend itself;

Whereas Iraq's demonstrated capability and willingness to use weapons of mass destruction, the high risk that the current Iraqi regime will either employ those weapons to launch a surprise attack against the United States or its Armed Forces or provide them to international terrorists who would do so, and the extreme magnitude of harm that would result to the United States and its citizens from such an attack, combine to justify the use of force by the United States in order to defend itself;

Whereas Iraq is in material breach of its disarmament and other obligations under United Nations Security Council Resolution 687, to cease repression of its civilian population that threatens international peace and security under United Nations Security Council Resolution 688, and to cease threatening its neighbors or United Nations operations in Iraq under United Nations Security Council Resolution 949, and United Nations Security Council Resolution 678 authorizes use of all necessary means to compel Iraq to comply with these "subsequent relevant resolutions";

Whereas Congress in the Authorization for Use of Military Force Against Iraq Resolution (Public Law 102-1) has authorized the President to use the Armed Forces of the United States to achieve full implementation of Security Council Resolutions 660, 661, 662, 664, 665, 666, 667, 669, 670, 674, and 677, pursuant to Security Council Resolution 678;

Whereas Congress in section 1095 of Public Law 102-190 has stated that it "supports the use of all necessary

means to achieve the goals of Security Council Resolution 687 as being consistent with the Authorization for Use of Military Force Against Iraq (Public Law 102-1),” that Iraq’s repression of its civilian population violates United Nations Security Council Resolution 688 and “constitutes a continuing threat to the peace, security, and stability of the Persian Gulf region,” and that Congress “supports the use of all necessary means to achieve the goals of Resolution 688”;

Whereas Congress in the Iraq Liberation Act (Public Law 105-338) has expressed its sense that it should be the policy of the United States to support efforts to remove from power the current Iraqi regime and promote the emergence of a democratic government to replace that regime;

Whereas the President has authority under the Constitution to take action in order to deter and prevent acts of international terrorism against the United States, as Congress recognized in the joint resolution on Authorization for Use of Military Force (Public Law 107-40); and

Whereas the President has authority under the Constitution to use force in order to defend the national security interests of the United States: Now, therefore, be it

1 *Resolved by the Senate and House of Representatives*
2 *of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This joint resolution may be cited as the “Further
5 Resolution on Iraq”.

1 **SEC. 2. AUTHORIZATION FOR USE OF UNITED STATES**
2 **ARMED FORCES.**

3 The President is authorized to use all means that he
4 determines to be appropriate, including force, in order to
5 enforce the United Nations Security Council Resolutions
6 referenced above, defend the national security interests of
7 the United States against the threat posed by Iraq, and
8 restore international peace and security in the region.

○

107TH CONGRESS
2D SESSION

H. J. RES. 114

To authorize the use of United States Armed Forces against Iraq.

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 2, 2002

Mr. HASTERT (for himself and Mr. GEPHARDT) introduced the following joint resolution; which was referred to the Committee on International Relations

JOINT RESOLUTION

To authorize the use of United States Armed Forces against
Iraq.

Whereas in 1990 in response to Iraq's war of aggression against and illegal occupation of Kuwait, the United States forged a coalition of nations to liberate Kuwait and its people in order to defend the national security of the United States and enforce United Nations Security Council resolutions relating to Iraq;

Whereas after the liberation of Kuwait in 1991, Iraq entered into a United Nations sponsored cease-fire agreement pursuant to which Iraq unequivocally agreed, among other things, to eliminate its nuclear, biological, and chemical weapons programs and the means to deliver and develop them, and to end its support for international terrorism;

Whereas the efforts of international weapons inspectors, United States intelligence agencies, and Iraqi defectors led to the discovery that Iraq had large stockpiles of chemical weapons and a large scale biological weapons program, and that Iraq had an advanced nuclear weapons development program that was much closer to producing a nuclear weapon than intelligence reporting had previously indicated;

Whereas Iraq, in direct and flagrant violation of the cease-fire, attempted to thwart the efforts of weapons inspectors to identify and destroy Iraq's weapons of mass destruction stockpiles and development capabilities, which finally resulted in the withdrawal of inspectors from Iraq on October 31, 1998;

Whereas in 1998 Congress concluded that Iraq's continuing weapons of mass destruction programs threatened vital United States interests and international peace and security, declared Iraq to be in "material and unacceptable breach of its international obligations" and urged the President "to take appropriate action, in accordance with the Constitution and relevant laws of the United States, to bring Iraq into compliance with its international obligations" (Public Law 105-235);

Whereas Iraq both poses a continuing threat to the national security of the United States and international peace and security in the Persian Gulf region and remains in material and unacceptable breach of its international obligations by, among other things, continuing to possess and develop a significant chemical and biological weapons capability, actively seeking a nuclear weapons capability, and supporting and harboring terrorist organizations;

Whereas Iraq persists in violating resolutions of the United Nations Security Council by continuing to engage in brutal repression of its civilian population thereby threatening international peace and security in the region, by refusing to release, repatriate, or account for non-Iraqi citizens wrongfully detained by Iraq, including an American serviceman, and by failing to return property wrongfully seized by Iraq from Kuwait;

Whereas the current Iraqi regime has demonstrated its capability and willingness to use weapons of mass destruction against other nations and its own people;

Whereas the current Iraqi regime has demonstrated its continuing hostility toward, and willingness to attack, the United States, including by attempting in 1993 to assassinate former President Bush and by firing on many thousands of occasions on United States and Coalition Armed Forces engaged in enforcing the resolutions of the United Nations Security Council;

Whereas members of al Qaida, an organization bearing responsibility for attacks on the United States, its citizens, and interests, including the attacks that occurred on September 11, 2001, are known to be in Iraq;

Whereas Iraq continues to aid and harbor other international terrorist organizations, including organizations that threaten the lives and safety of American citizens;

Whereas the attacks on the United States of September 11, 2001, underscored the gravity of the threat posed by the acquisition of weapons of mass destruction by international terrorist organizations;

Whereas Iraq's demonstrated capability and willingness to use weapons of mass destruction, the risk that the cur-

rent Iraqi regime will either employ those weapons to launch a surprise attack against the United States or its Armed Forces or provide them to international terrorists who would do so, and the extreme magnitude of harm that would result to the United States and its citizens from such an attack, combine to justify action by the United States to defend itself;

Whereas United Nations Security Council Resolution 678 authorizes the use of all necessary means to enforce United Nations Security Council Resolution 660 and subsequent relevant resolutions and to compel Iraq to cease certain activities that threaten international peace and security, including the development of weapons of mass destruction and refusal or obstruction of United Nations weapons inspections in violation of United Nations Security Council Resolution 687, repression of its civilian population in violation of United Nations Security Council Resolution 688, and threatening its neighbors or United Nations operations in Iraq in violation of United Nations Security Council Resolution 949;

Whereas Congress in the Authorization for Use of Military Force Against Iraq Resolution (Public Law 102-1) has authorized the President “to use United States Armed Forces pursuant to United Nations Security Council Resolution 678 (1990) in order to achieve implementation of Security Council Resolutions 660, 661, 662, 664, 665, 666, 667, 669, 670, 674, and 677”;

Whereas in December 1991, Congress expressed its sense that it “supports the use of all necessary means to achieve the goals of United Nations Security Council Resolution 687 as being consistent with the Authorization of Use of Military Force Against Iraq Resolution

(Public Law 102–1),” that Iraq’s repression of its civilian population violates United Nations Security Council Resolution 688 and “constitutes a continuing threat to the peace, security, and stability of the Persian Gulf region,” and that Congress, “supports the use of all necessary means to achieve the goals of United Nations Security Council Resolution 688”;

Whereas the Iraq Liberation Act (Public Law 105–338) expressed the sense of Congress that it should be the policy of the United States to support efforts to remove from power the current Iraqi regime and promote the emergence of a democratic government to replace that regime;

Whereas on September 12, 2002, President Bush committed the United States to “work with the United Nations Security Council to meet our common challenge” posed by Iraq and to “work for the necessary resolutions,” while also making clear that “the Security Council resolutions will be enforced, and the just demands of peace and security will be met, or action will be unavoidable”;

Whereas the United States is determined to prosecute the war on terrorism and Iraq’s ongoing support for international terrorist groups combined with its development of weapons of mass destruction in direct violation of its obligations under the 1991 cease-fire and other United Nations Security Council resolutions make clear that it is in the national security interests of the United States and in furtherance of the war on terrorism that all relevant United Nations Security Council resolutions be enforced, including through the use of force if necessary;

Whereas Congress has taken steps to pursue vigorously the war on terrorism through the provision of authorities and

funding requested by the President to take the necessary actions against international terrorists and terrorist organizations, including those nations, organizations or persons who planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored such persons or organizations;

Whereas the President and Congress are determined to continue to take all appropriate actions against international terrorists and terrorist organizations, including those nations, organizations or persons who planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored such persons or organizations;

Whereas the President has authority under the Constitution to take action in order to deter and prevent acts of international terrorism against the United States, as Congress recognized in the joint resolution on Authorization for Use of Military Force (Public Law 107–40); and

Whereas it is in the national security of the United States to restore international peace and security to the Persian Gulf region: Now, therefore, be it

1 *Resolved by the Senate and House of Representatives*
 2 *of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This joint resolution may be cited as the “Authoriza-
 5 tion for the Use of Military Force Against Iraq”.

1 **SEC. 2. SUPPORT FOR UNITED STATES DIPLOMATIC EF-**
2 **FORTS.**

3 The Congress of the United States supports the ef-
4 forts by the President to—

5 (1) strictly enforce through the United Nations
6 Security Council all relevant Security Council resolu-
7 tions applicable to Iraq and encourages him in those
8 efforts; and

9 (2) obtain prompt and decisive action by the
10 Security Council to ensure that Iraq abandons its
11 strategy of delay, evasion and noncompliance and
12 promptly and strictly complies with all relevant Se-
13 curity Council resolutions.

14 **SEC. 3. AUTHORIZATION FOR USE OF UNITED STATES**
15 **ARMED FORCES.**

16 (a) **AUTHORIZATION.**—The President is authorized to
17 use the Armed Forces of the United States as he deter-
18 mines to be necessary and appropriate in order to—

19 (1) defend the national security of the United
20 States against the continuing threat posed by Iraq;
21 and

22 (2) enforce all relevant United Nations Security
23 Council resolutions regarding Iraq.

24 (b) **PRESIDENTIAL DETERMINATION.**—In connection
25 with the exercise of the authority granted in subsection
26 (a) to use force the President shall, prior to such exercise

1 or as soon thereafter as may be feasible, but no later than
2 48 hours after exercising such authority, make available
3 to the Speaker of the House of Representatives and the
4 President pro tempore of the Senate his determination
5 that—

6 (1) reliance by the United States on further
7 diplomatic or other peaceful means alone either (A)
8 will not adequately protect the national security of
9 the United States against the continuing threat
10 posed by Iraq or (B) is not likely to lead to enforce-
11 ment of all relevant United Nations Security Council
12 resolutions regarding Iraq; and

13 (2) acting pursuant to this resolution is con-
14 sistent with the United States and other countries
15 continuing to take the necessary actions against
16 international terrorists and terrorist organizations,
17 including those nations, organizations or persons
18 who planned, authorized, committed or aided the
19 terrorists attacks that occurred on September 11,
20 2001.

21 (c) WAR POWERS RESOLUTION REQUIREMENTS.—

22 (1) SPECIFIC STATUTORY AUTHORIZATION.—

23 Consistent with section 8(a)(1) of the War Powers
24 Resolution, the Congress declares that this section is
25 intended to constitute specific statutory authoriza-

1 tion within the meaning of section 5(b) of the War
2 Powers Resolution.

3 (2) APPLICABILITY OF OTHER REQUIRE-
4 MENTS.—Nothing in this resolution supersedes any
5 requirement of the War Powers Resolution.

6 **SEC. 4. REPORTS TO CONGRESS.**

7 (a) The President shall, at least once every 60 days,
8 submit to the Congress a report on matters relevant to
9 this joint resolution, including actions taken pursuant to
10 the exercise of authority granted in section 3 and the sta-
11 tus of planning for efforts that are expected to be required
12 after such actions are completed, including those actions
13 described in section 7 of Public Law 105–338 (the Iraq
14 Liberation Act of 1998).

15 (b) To the extent that the submission of any report
16 described in subsection (a) coincides with the submission
17 of any other report on matters relevant to this joint resolu-
18 tion otherwise required to be submitted to Congress pursu-
19 ant to the reporting requirements of Public Law 93–148
20 (the War Powers Resolution), all such reports may be sub-
21 mitted as a single consolidated report to the Congress.

22 (c) To the extent that the information required by
23 section 3 of Public Law 102–1 is included in the report
24 required by this section, such report shall be considered

1 as meeting the requirements of section 3 of Public Law
2 102-1.

○

110TH CONGRESS
1ST SESSION

H. RES. 333

Impeaching Richard B. Cheney, Vice President of the United States, for
high crimes and misdemeanors.

IN THE HOUSE OF REPRESENTATIVES

APRIL 24, 2007

Mr. KUCINICH submitted the following resolution; which was referred to the
Committee on the Judiciary

RESOLUTION

Impeaching Richard B. Cheney, Vice President of the United
States, for high crimes and misdemeanors.

1 *Resolved*, That Richard B. Cheney, Vice President of
2 the United States, is impeached for high crimes and mis-
3 demeanors, and that the following articles of impeachment
4 be exhibited to the United States Senate:

5 Articles of impeachment exhibited by the House of
6 Representatives of the United States of America in the
7 name of itself and of the people of the United States of
8 America, against Richard B. Cheney, Vice President of the
9 United States of America, in maintenance and support of

1 its impeachment against him for high crimes and mis-
2 demeanors.

3 **Article I**

4 In his conduct while Vice President of the United
5 States, Richard B. Cheney, in violation of his constitu-
6 tional oath to faithfully execute the office of Vice Presi-
7 dent of the United States and, to the best of his ability,
8 preserve, protect, and defend the Constitution of the
9 United States, and in violation of his constitutional duty
10 to take care that the laws be faithfully executed, has pur-
11 posely manipulated the intelligence process to deceive the
12 citizens and Congress of the United States by fabricating
13 a threat of Iraqi weapons of mass destruction to justify
14 the use of the United States Armed Forces against the
15 nation of Iraq in a manner damaging to our national secu-
16 rity interests, to wit:

17 (1) Despite all evidence to the contrary, the
18 Vice President actively and systematically sought to
19 deceive the citizens and Congress of the United
20 States about an alleged threat of Iraqi weapons of
21 mass destruction:

22 (A) “We know they have biological and
23 chemical weapons.” March 17, 2002, Press
24 Conference by Vice President Dick Cheney and
25 His Highness Salman bin Hamad Al Khalifa,

1 Crown Prince of Bahrain at Shaikh Hamad
2 Palace.

3 (B) “. . . and we know they are pursuing
4 nuclear weapons.” March 19, 2002, Press
5 Briefing by Vice President Dick Cheney and
6 Israeli Prime Minister Ariel Sharon in Jeru-
7 salem.

8 (C) “And he is actively pursuing nuclear
9 weapons at this time . . .” March 24, 2002,
10 CNN Late Edition interview with Vice Presi-
11 dent Cheney.

12 (D) “We know he’s got chemicals and bio-
13 logical and we know he’s working on nuclear.”
14 May 19, 2002, NBC Meet the Press interview
15 with Vice President Cheney.

16 (E) “But we now know that Saddam has
17 resumed his efforts to acquire nuclear
18 weapons . . . Simply stated, there is no doubt
19 that Saddam Hussein now has weapons of mass
20 destruction. There is no doubt that he is amass-
21 ing them to use against our friends, against our
22 allies, and against us.” August 26, 2002,
23 Speech of Vice President Cheney at VFW
24 103rd National Convention.

1 (F) “Based on intelligence that’s becoming
2 available, some of it has been made public,
3 more of it hopefully will be, that he has indeed
4 stepped up his capacity to produce and deliver
5 biological weapons, that he has reconstituted
6 his nuclear program to develop a nuclear weap-
7 on, that there are efforts under way inside Iraq
8 to significantly expand his capability.” Sep-
9 tember 8, 2002, NBC Meet the Press interview
10 with Vice President Cheney.

11 (G) “He is, in fact, actively and aggres-
12 sively seeking to acquire nuclear weapons.”
13 September 8, 2002, NBC Meet the Press inter-
14 view with Vice President Cheney.

15 (II) “And we believe he has, in fact, recon-
16 stituted nuclear weapons.” March 16, 2003,
17 NBC Meet the Press interview with Vice Presi-
18 dent Cheney.

19 (2) Preceding the March 2003 invasion of Iraq
20 the Vice President was fully informed that no legiti-
21 mate evidence existed of weapons of mass destruc-
22 tion in Iraq. The Vice President pressured the intel-
23 ligence community to change their findings to enable
24 the deception of the citizens and Congress of the
25 United States.

1 (A) Vice President Cheney and his Chief of
2 Staff, Lewis Libby, made multiple trips to the
3 CIA in 2002 to question analysts studying
4 Iraq's weapons programs and alleged links to al
5 Qaeda, creating an environment in which ana-
6 lysts felt they were being pressured to make
7 their assessments fit with the Bush administra-
8 tion's policy objectives accounts.

9 (B) Vice President Cheney sought out
10 unverified and ultimately inaccurate raw intel-
11 ligence to prove his preconceived beliefs. This
12 strategy of cherry picking was employed to in-
13 fluence the interpretation of the intelligence.

14 (3) The Vice President's actions corrupted or
15 attempted to corrupt the 2002 National Intelligence
16 Estimate, an intelligence document issued on Octo-
17 ber 1, 2002, and carefully considered by Congress
18 prior to the October 10, 2002, vote to authorize the
19 use of force. The Vice President's actions prevented
20 the necessary reconciliation of facts for the National
21 Intelligence Estimate which resulted in a high num-
22 ber of dissenting opinions from technical experts in
23 two Federal agencies.

24 (A) The State Department's Bureau of In-
25 telligence and Research dissenting view in the

1 October 2002 National Intelligence Estimate
2 stated “Lacking persuasive evidence that Bagh-
3 dad has launched a coherent effort to reconsti-
4 tute it’s nuclear weapons program INR is un-
5 willing to speculate that such an effort began
6 soon after the departure of UN inspectors or to
7 project a timeline for the completion of activi-
8 ties it does not now see happening. As a result
9 INR is unable to predict that Iraq could ac-
10 quire a nuclear device or weapon.”.

11 (B) The State Department’s Bureau of In-
12 telligence and Research dissenting view in the
13 October 2002 National Intelligence Estimate
14 also stated that “Finally, the claims of Iraqi
15 pursuit of natural uranium in Africa are, in
16 INR’s assessment, highly dubious.”.

17 (C) The State Department’s Bureau of In-
18 telligence and Research dissenting view in the
19 October 2002 National Intelligence Estimate
20 references a Department of Energy opinion by
21 stating that “INR accepts the judgment of
22 technical experts at the US Department of En-
23 ergy (DOE) who have concluded that the tubes
24 Iraq seeks to acquire are poorly suited for use
25 in gas centrifuges to be used for uranium en-

4 The Vice President subverted the national security
5 interests of the United States by setting the stage for the
6 loss of more than 3300 United States service members;
7 the loss of 650,000 Iraqi citizens since the United States
8 invasion; the loss of approximately \$500 billion in war
9 costs which has increased our Federal debt; the loss of
10 military readiness within the United States Armed Ser-
11 vices due to overextension, lack of training and lack of
12 equipment; the loss of United States credibility in world
13 affairs; and the decades of likely blowback created by the
14 invasion of Iraq.

In all of this, Vice President Richard B. Cheney has acted in a manner contrary to his trust as Vice President, and subversive of constitutional government, to the prejudice of the cause of law and justice and the manifest injury of the people of the United States. Wherefore, Vice President Richard B. Cheney, by such conduct, is guilty of an impeachable offense warranting removal from office.

23 In his conduct while Vice President of the United
24 States, Richard B. Cheney, in violation of his constitu-
25 tional oath to faithfully execute the office of Vice Presi-

1 dent of the United States and, to the best of his ability,
2 preserve, protect, and defend the Constitution of the
3 United States, and in violation of his constitutional duty
4 to take care that the laws be faithfully executed, purposely
5 manipulated the intelligence process to deceive the citizens
6 and Congress of the United States about an alleged rela-
7 tionship between Iraq and al Qaeda in order to justify the
8 use of the United States Armed Forces against the nation
9 of Iraq in a manner damaging to our national security
10 interests, to wit:

11 (1) Despite all evidence to the contrary, the
12 Vice President actively and systematically sought to
13 deceive the citizens and the Congress of the United
14 States about an alleged relationship between Iraq
15 and al Qaeda:

16 (A) "His regime has had high-level con-
17 tacts with Al Qaeda going back a decade and
18 has provided training to Al Qaeda terrorists."
19 December 2, 2002, Speech of Vice President
20 Cheney at the Air National Guard Senior Lead-
21 ership Conference.

22 (B) "His regime aids and protects terror-
23 ists, including members of Al Qaeda. He could
24 decide secretly to provide weapons of mass de-
25 struction to terrorists for use against us." Jan-

1 uary 30, 2003, Speech of Vice President Che-
2 ney to 30th Political Action Conference in Ar-
3 lington, Virginia.

4 (C) “We know he’s out trying once again
5 to produce nuclear weapons and we know that
6 he has a long-standing relationship with various
7 terrorist groups, including the Al Qaeda organi-
8 zation.” March 16, 2003, NBC Meet the Press
9 interview with Vice President Cheney.

10 (D) “We learned more and more that there
11 was a relationship between Iraq and Al Qaeda
12 that stretched back through most of the decade
13 of the ’90s, that it involved training, for exam-
14 ple, on biological weapons and chemical
15 weapons . . .” September 14, 2003, NBC
16 Meet the Press interview with Vice President
17 Cheney.

18 (E) “Al Qaeda had a base of operation
19 there up in Northeastern Iraq where they ran
20 a large poisons factory for attacks against Eu-
21 ropeans and U.S. forces.” October 3, 2003,
22 Speech of Vice President Cheney at Bush-Che-
23 ney ’04 Fundraiser in Iowa.

24 (F) “He also had an established relation-
25 ship with Al Qaeda providing training to Al

1 Qaeda members in areas of poisons, gases, and
2 conventional bombs.” October 10, 2003, Speech
3 of Vice President Cheney to the Heritage Foun-
4 dation.

5 (G) “Al Qaeda and the Iraqi intelligence
6 services have worked together on a number of
7 occasions.” January 9, 2004, Rocky Mountain
8 News interview with Vice President Cheney.

9 (H) “I think there’s overwhelming evidence
10 that there was a connection between Al Qaeda
11 and the Iraqi government.” January 22, 2004,
12 NPR: Morning Edition interview with Vice
13 President Cheney.

14 (I) “First of all, on the question of—of
15 whether or not there was any kind of relation-
16 ship, there clearly was a relationship. It’s been
17 testified to; the evidence is overwhelming.”
18 June 17, 2004, CNBC: Capital Report inter-
19 view with Vice President Cheney.

20 (2) Preceding the March 2003 invasion of Iraq
21 the Vice President was fully informed that no cred-
22 ible evidence existed of a working relationship be-
23 tween Iraq and al Qaeda, a fact articulated in sev-
24 eral official documents, including:

1 (A) A classified Presidential Daily Briefing
2 ten days after the September 11, 2001, attacks
3 indicating that the United States intelligence
4 community had no evidence linking Saddam
5 Hussein to the September 11th attacks and
6 that there was “scant credible evidence that
7 Iraq had any significant collaborative ties with
8 Al Qaeda”.

9 (B) Defense Intelligence Terrorism Sum-
10 mary No. 044-02, issued in February 2002 by
11 the United States Defense Intelligence Agency,
12 which challenged the credibility of information
13 gleaned from captured al Qaeda leader al-Libi.
14 The DIA report also cast significant doubt on
15 the possibility of a Saddam Hussein-al-Qaeda
16 conspiracy: “Saddam’s regime is intensely sec-
17 ular and is wary of Islamic revolutionary move-
18 ments. Moreover, Baghdad is unlikely to pro-
19 vide assistance to a group it cannot control.”.

20 (C) A January 2003 British intelligence
21 classified report on Iraq that concluded that
22 “there are no current links between the Iraqi
23 regime and the al-Qaeda network”.

24 The Vice President subverted the national security
25 interests of the United States by setting the stage for the

1 loss of more than 3,300 United States service members;
2 the loss of 650,000 Iraqi citizens since the United States
3 invasion; the loss of approximately \$500 billion in war
4 costs which has increased our Federal debt; the loss of
5 military readiness within the United States Armed Serv-
6 ices due to overextension, lack of training and lack of
7 equipment; the loss of United States credibility in world
8 affairs; and the decades of likely blowback created by the
9 invasion of Iraq.

10 In all of this, Vice President Richard B. Cheney has
11 acted in a manner contrary to his trust as Vice President,
12 and subversive of constitutional government, to the preju-
13 dice of the cause of law and justice and the manifest injury
14 of the people of the United States.

15 Wherefore, Vice President Richard B. Cheney, by
16 such conduct, is guilty of an impeachable offense war-
17 ranting removal from office.

18 **Article III**

19 In his conduct while Vice President of the United
20 States, Richard B. Cheney, in violation of his constitu-
21 tional oath to faithfully execute the office of Vice Presi-
22 dent of the United States and, to the best of his ability,
23 preserve, protect, and defend the Constitution of the
24 United States, and in violation of his constitutional duty
25 to take care that the laws be faithfully executed, has open-

1 ly threatened aggression against the Republic of Iran ab-
2 sent any real threat to the United States, and done so
3 with the United States proven capability to carry out such
4 threats, thus undermining the national security of the
5 United States, to wit:

6 (1) Despite no evidence that Iran has the inten-
7 tion or the capability of attacking the United States
8 and despite the turmoil created by United States in-
9 vasion of Iraq, the Vice President has openly threat-
10 ened aggression against Iran as evidenced by the fol-
11 lowing:

12 (A) “For our part, the United States is
13 keeping all options on the table in addressing
14 the irresponsible conduct of the regime. And we
15 join other nations in sending that regime a
16 clear message: We will not allow Iran to have
17 a nuclear weapon.” March 7, 2006, Speech of
18 Vice President Cheney to American Israel Pub-
19 lic Affairs Committee 2006 Policy Conference.

20 (B) “But we’ve also made it clear that all
21 options are on the table.” January 24, 2007,
22 CNN Situation Room interview with Vice Presi-
23 dent Cheney.

24 (C) “When we—as the President did, for
25 example, recently—deploy another aircraft car-

1 rier task force to the Gulf, that sends a very
2 strong signal to everybody in the region that
3 the United States is here to stay, that we clear-
4 ly have significant capabilities, and that we are
5 working with friends and allies as well as the
6 international organizations to deal with the Ira-
7 nian threat.” January 29, 2007, Newsweek
8 interview with Vice President Cheney.

9 (D) “But I’ve also made the point and the
10 President has made the point that all options
11 are still on the table.” February 24, 2007, Vice
12 President Cheney at Press Briefing with Aus-
13 tralian Prime Minister in Sydney, Australia.

14 (2) The Vice President, who repeatedly and
15 falsely claimed to have had specific, detailed knowl-
16 edge of Iraq’s alleged weapons of mass destruction
17 capabilities, is no doubt fully aware of evidence that
18 demonstrates Iran poses no real threat to the United
19 States as evidenced by the following:

20 (A) “I know that what we see in Iran right
21 now is not the industrial capacity you can [use
22 to develop a] bomb.” Mohamed ElBaradei, Di-
23 rector General of International Atomic Energy
24 Agency, February 19, 2007.

1 (B) Iran indicated its “full readiness and
2 willingness to negotiate on the modality for the
3 resolution of the outstanding issues with the
4 IAEA, subject to the assurances for dealing
5 with the issues in the framework of the Agency,
6 without the interference of the United Nations
7 Security Council”. IAEA Board Report, Feb-
8 ruary 22, 2007.

9 (C) “. . . so whatever they have, what we
10 have seen today, is not the kind of capacity that
11 would enable them to make bombs.” Mohamed
12 El Baradei, Director General of International
13 Atomic Energy Agency, February 19, 2007.

14 (3) The Vice President is fully aware of the ac-
15 tions taken by the United States towards Iran that
16 are further destabilizing the world as evidenced by
17 the following:

18 (A) The United States has refused to en-
19 gage in meaningful diplomatic relations with
20 Iran since 2002, rebuffing both bilateral and
21 multilateral offers to dialogue.

22 (B) The United States is currently en-
23 gaged in a military buildup in the Middle East
24 that includes the increased presence of the
25 United States Navy in the waters near Iran,

1 significant United States Armed Forces in two
2 nations neighboring to Iran, and the installa-
3 tion of anti-missile technology in the region.

4 (C) News accounts have indicated that
5 military planners have considered the B61-11,
6 a tactical nuclear weapon, as one of the options
7 to strike underground bunkers in Iran.

8 (D) The United States has been linked to
9 anti-Iranian organizations that are attempting
10 to destabilize the Iranian government, in par-
11 ticular the Mujahideen-e Khalq (MEK), even
12 though the state department has branded it a
13 terrorist organization.

14 (E) News accounts indicate that United
15 States troops have been ordered into Iran to
16 collect data and establish contact with anti-gov-
17 ernment groups.

18 (4) In the last three years the Vice President
19 has repeatedly threatened Iran. However, the Vice
20 President is legally bound by the U.S. Constitution's
21 adherence to international law that prohibits threats
22 of use of force.

23 (A) Article VI of the United States Con-
24 stitution states, "This Constitution, and the
25 Laws of the United States which shall be made

1 in Pursuance thereof; and all Treaties made, or
2 which shall be made, under the Authority of the
3 United States, shall be the supreme Law of the
4 Land.” Any provision of an international treaty
5 ratified by the United States becomes the law
6 of the United States.

7 (B) The United States is a signatory to
8 the United Nations Charter, a treaty among the
9 nations of the world. Article II, Section 4 of the
10 United Nations Charter states, “All Members
11 shall refrain in their international relations
12 from the threat or use of force against the ter-
13 ritorial integrity or political independence of
14 any state, or in any other manner inconsistent
15 with the Purposes of the United Nations.” The
16 threat of force is illegal.

17 (C) Article 51 lays out the only exception,
18 “Nothing in the present Charter shall impair
19 the inherent right of individual or collective
20 self-defense if an armed attack occurs against a
21 Member of the United Nations, until the Secu-
22 rity Council has taken measures necessary to
23 maintain international peace and security.”
24 Iran has not attacked the United States; there-

1 fore any threat against Iran by the United
2 States is illegal.

3 The Vice President's deception upon the citizens and
4 Congress of the United States that enabled the failed
5 United States invasion of Iraq forcibly altered the rules
6 of diplomacy such that the Vice President's recent bellig-
7 erent actions towards Iran are destabilizing and counter-
8 productive to the national security of the United States.

9 In all of this, Vice President Richard B. Cheney has
10 acted in a manner contrary to his trust as Vice President,
11 and subversive of constitutional government, to the preju-
12 dice of the cause of law and justice and the manifest injury
13 of the people of the United States.

14 Wherefore Richard B. Cheney, by such conduct, war-
15 rants impeachment and trial, and removal from office.

○

110TH CONGRESS
2D SESSION

H. RES. 1258

Impeaching George W. Bush, President of the United States, of high crimes
and misdemeanors.

IN THE HOUSE OF REPRESENTATIVES

JUNE 10, 2008

Mr. KUCINICH submitted the following resolution

JUNE 11, 2008

By motion of the House, referred to the Committee on the Judiciary

RESOLUTION

Impeaching George W. Bush, President of the United States,
of high crimes and misdemeanors.

1 *Resolved*, That President George W. Bush be im-
2 peached for high crimes and misdemeanors, and that the
3 following articles of impeachment be exhibited to the
4 United States Senate:

5 Articles of impeachment exhibited by the House of
6 Representatives of the United States of America in the
7 name of itself and of the people of the United States of
8 America, in maintenance and support of its impeachment

1 against President George W. Bush for high crimes and
2 misdemeanors.

3 In his conduct while President of the United States,
4 George W. Bush, in violation of his constitutional oath to
5 faithfully execute the office of President of the United
6 States and, to the best of his ability, preserve, protect,
7 and defend the Constitution of the United States, and in
8 violation of his constitutional duty to take care that the
9 laws be faithfully executed, has committed the following
10 abuses of power.

11 ARTICLE I—CREATING A SECRET PROPAGANDA CAM-
12 PAIGN TO MANUFACTURE A FALSE CASE FOR WAR
13 AGAINST IRAQ

14 In his conduct while President of the United States,
15 George W. Bush, in violation of his constitutional oath to
16 faithfully execute the office of President of the United
17 States and, to the best of his ability, preserve, protect,
18 and defend the Constitution of the United States, and in
19 violation of his constitutional duty under article II, section
20 3 of the Constitution “to take care that the laws be faith-
21 fully executed”, has both personally and acting through
22 his agents and subordinates, together with the Vice Presi-
23 dent, illegally spent public dollars on a secret propaganda
24 program to manufacture a false cause for war against
25 Iraq.

1 The Department of Defense (DOD) has engaged in
2 a years-long secret domestic propaganda campaign to pro-
3 mote the invasion and occupation of Iraq. This secret pro-
4 gram was defended by the White House Press Secretary
5 following its exposure. This program follows the pattern
6 of crimes detailed in articles I, II, IV, and VIII. The mis-
7 sion of this program placed it within the field controlled
8 by the White House Iraq Group (WHIG), a White House
9 task-force formed in August 2002 to market an invasion
10 of Iraq to the American people. The group included Karl
11 Rove, I. Lewis Libby, Condoleezza Rice, Karen Hughes,
12 Mary Matalin, Stephen Hadley, Nicholas E. Calio, and
13 James R. Wilkinson.

14 The WHIG produced white papers detailing so-called
15 intelligence of Iraq's nuclear threat that later proved to
16 be false. This supposed intelligence included the claim that
17 Iraq had sought uranium from Niger as well as the claim
18 that the high strength aluminum tubes Iraq purchased
19 from China were to be used for the sole purpose of build-
20 ing centrifuges to enrich uranium. Unlike the National In-
21 telligence Estimate of 2002, the WHIG's white papers
22 provided "gripping images and stories" and used "literary
23 license" with intelligence. The WHIG's white papers were
24 written at the same time and by the same people as

1 speeches and talking points prepared for President Bush
2 and some of his top officials.

3 The WHIG also organized a media blitz in which, be-
4 tween September 7–8, 2002, President Bush and his top
5 advisers appeared on numerous interviews and all provided
6 similarly gripping images about the possibility of nuclear
7 attack by Iraq. The timing was no coincidence, as Andrew
8 Card explained in an interview regarding waiting until
9 after Labor Day to try to sell the American people on mili-
10 tary action against Iraq, “From a marketing point of view,
11 you don’t introduce new products in August.”.

12 September 7–8, 2002:

13 NBC’s “Meet the Press”: Vice President Che-
14 ney accused Saddam of moving aggressively to de-
15 velop nuclear weapons over the past 14 months to
16 add to his stockpile of chemical and biological arms.

17 CNN: Then-National Security Adviser Rice
18 said, regarding the likelihood of Iraq obtaining a nu-
19 clear weapon, “We don’t want the smoking gun to
20 be a mushroom cloud.”.

21 CBS: President Bush declared that Saddam
22 was “six months away from developing a weapon”,
23 and cited satellite photos of construction in Iraq
24 where weapons inspectors once visited as evidence
25 that Saddam was trying to develop nuclear arms.

1 The Pentagon military analyst propaganda program
2 was revealed in an April 20, 2002, New York Times arti-
3 cle. The program illegally involved “covert attempts to
4 mold opinion through the undisclosed use of third par-
5 ties”. Secretary of Defense Donald Rumsfeld recruited 75
6 retired military officers and gave them talking points to
7 deliver on Fox, CNN, ABC, NBC, CBS, and MSNBC, and
8 according to the New York Times report, which has not
9 been disputed by the Pentagon or the White House, “Par-
10 ticipants were instructed not to quote their briefers di-
11 rectly or otherwise describe their contacts with the Pen-
12 tagon.”.

13 According to the Pentagon’s own internal documents,
14 the military analysts were considered “message force mul-
15 tipliers” or “surrogates” who would deliver administration
16 “themes and messages” to millions of Americans “in the
17 form of their own opinions”. In fact, they did deliver the
18 themes and the messages but did not reveal that the Pen-
19 tagon had provided them with their talking points. Robert
20 S. Bevelacqua, a retired Green Beret and Fox News mili-
21 tary analyst described this as follows: “It was them saying,
22 ‘We need to stick our hands up your back and move your
23 mouth for you.’”.

24 Congress has restricted annual appropriations bills
25 since 1951 with this language: “No part of any appropria-

1 tion contained in this or any other Act shall be used for
2 publicity or propaganda purposes within the United States
3 not heretofore authorized by the Congress.”.

4 A March 21, 2005, report by the Congressional Re-
5 search Service states that “publicity or propaganda” is de-
6 fined by the U.S. Government Accountability Office
7 (GAO) to mean either (1) self-aggrandizement by public
8 officials, (2) purely partisan activity, or (3) “covert propa-
9 ganda”.

10 These concerns about “covert propaganda” were also
11 the basis for the GAO’s standard for determining when
12 government-funded video news releases are illegal:

13 “The failure of an agency to identify itself as the
14 source of a prepackaged news story misleads the viewing
15 public by encouraging the viewing audience to believe that
16 the broadcasting news organization developed the informa-
17 tion. The prepackaged news stories are purposefully de-
18 signed to be indistinguishable from news segments broad-
19 cast to the public. When the television viewing public does
20 not know that the stories they watched on television news
21 programs about the government were in fact prepared by
22 the government, the stories are, in this sense, no longer
23 purely factual—the essential fact of attribution is miss-
24 ing.”.

1 The White House’s own Office of Legal Council stat-
2 ed in a memorandum written in 2005 following the con-
3 troversy over the Armstrong Williams scandal:

4 “Over the years, GAO has interpreted ‘publicity or
5 propaganda’ restrictions to preclude use of appropriated
6 funds for, among other things, so-called ‘covert propa-
7 ganda’. . . . Consistent with that view, the OLC deter-
8 mined in 1988 that a statutory prohibition on using ap-
9 propriated funds for ‘publicity or propaganda’ precluded
10 undisclosed agency funding of advocacy by third-party
11 groups. We stated that ‘covert attempts to mold opinion
12 through the undisclosed use of third parties’ would run
13 afoul of restrictions on using appropriated funds for ‘prop-
14 aganda’.”.

15 Asked about the Pentagon’s propaganda program at
16 White House press briefing in April 2008, White House
17 Press Secretary Dana Perino defended it, not by arguing
18 that it was legal but by suggesting that it “should” be:
19 “Look, I didn’t know look, I think that you guys should
20 take a step back and look at this look, DOD has made
21 a decision, they’ve decided to stop this program. But I
22 would say that one of the things that we try to do in the
23 administration is get information out to a variety of people
24 so that everybody else can call them and ask their opinion
25 about something. And I don’t think that that should be

1 against the law. And I think that it's absolutely appro-
2 priate to provide information to people who are seeking
3 it and are going to be providing their opinions on it. It
4 doesn't necessarily mean that all of those military analysts
5 ever agreed with the administration. I think you can go
6 back and look and think that a lot of their analysis was
7 pretty tough on the administration. That doesn't mean
8 that we shouldn't talk to people.”.

9 In all of these actions and decisions, President
10 George W. Bush has acted in a manner contrary to his
11 trust as President and Commander in Chief, and subver-
12 sive of constitutional government, to the prejudice of the
13 cause of law and justice and to the manifest injury of the
14 people of the United States. Wherefore, President George
15 W. Bush, by such conduct, is guilty of an impeachable
16 offense warranting removal from office.

17 ARTICLE II—FALSELY, SYSTEMATICALLY, AND WITH
18 CRIMINAL INTENT CONFLATING THE ATTACKS OF
19 SEPTEMBER 11, 2001 WITH MISREPRESENTATION
20 OF IRAQ AS AN IMMINENT SECURITY THREAT AS
21 PART OF A FRAUDULENT JUSTIFICATION FOR A
22 WAR OF AGGRESSION

23 In his conduct while President of the United States,
24 George W. Bush, in violation of his constitutional oath to
25 faithfully execute the office of President of the United

1 States and, to the best of his ability, preserve, protect,
2 and defend the Constitution of the United States, and in
3 violation of his constitutional duty under article II, section
4 3 of the Constitution “to take care that the laws be faith-
5 fully executed”, has both personally and acting through
6 his agents and subordinates, together with the Vice Presi-
7 dent, executed a calculated and wide-ranging strategy to
8 deceive the citizens and Congress of the United States into
9 believing that there was and is a connection between Iraq
10 and Saddam Hussein on the one hand, and the attacks
11 of September 11, 2001, and al Qaeda, on the other hand,
12 so as to falsely justify the use of the United States Armed
13 Forces against the nation of Iraq in a manner that is dam-
14 aging to the national security interests of the United
15 States, as well as to fraudulently obtain and maintain con-
16 gressional authorization and funding for the use of such
17 military force against Iraq, thereby interfering with and
18 obstructing Congress’s lawful functions of overseeing for-
19 eign affairs and declaring war.

20 The means used to implement this deception were
21 and continue to be, first, allowing, authorizing and sanc-
22 tioning the manipulation of intelligence analysis by those
23 under his direction and control, including the Vice Presi-
24 dent and the Vice President’s agents, and second, person-
25 ally making, or causing, authorizing and allowing to be

1 made through highly-placed subordinates, including the
2 President's Chief of Staff, the White House Press Sec-
3 retary and other White House spokespersons, the Secre-
4 taries of State and Defense, the National Security Advi-
5 sor, and their deputies and spokespersons, false and fraud-
6 ulent representations to the citizens of the United States
7 and Congress regarding an alleged connection between
8 Saddam Hussein and Iraq, on the one hand, and the Sep-
9 tember 11th attacks and al Qaeda, on the other hand, that
10 were half-true, literally true but misleading, and/or made
11 without a reasonable basis and with reckless indifference
12 to their truth, as well as omitting to state facts necessary
13 to present an accurate picture of the truth as follows:

14 (1) On or about September 12, 2001, former
15 terrorism advisor Richard Clarke personally in-
16 formed the President that neither Saddam Hussein
17 nor Iraq was responsible for the September 11th at-
18 tacks. On September 18, Clarke submitted to the
19 President's National Security Adviser Condoleezza
20 Rice a memo he had written in response to George
21 W. Bush's specific request that stated: (1) the case
22 for linking Hussein to the September 11th attacks
23 was weak; (2) only anecdotal evidence linked Hus-
24 sein to al Qaeda; (3) Osama Bin Laden resented the
25 secularism of Saddam Hussein; and (4) there was no

1 confirmed reporting of Saddam Hussein cooperating
2 with Bin Laden on unconventional weapons.

3 (2) Ten days after the September 11th attacks
4 the President received a President's Daily Briefing
5 which indicated that the U.S. intelligence community
6 had no evidence linking Saddam Hussein to the Sep-
7 tember 11th attacks and that there was "scant cred-
8 ible evidence that Iraq had any significant collabo-
9 rative ties with Al Qaeda".

10 (3) In Defense Intelligence Terrorism Summary
11 No. 044-02, issued in February 2002, the United
12 States Defense Intelligence Agency cast significant
13 doubt on the possibility of a Saddam Hussein-al
14 Qaeda conspiracy: "Saddam's regime is intensely
15 secular and is wary of Islamic revolutionary move-
16 ments. Moreover, Baghdad is unlikely to provide as-
17 sistance to a group it cannot control."

18 (4) The October 2002 National Intelligence Es-
19 timate gave a "Low Confidence" rating to the notion
20 of whether "in desperation Saddam would share
21 chemical or biological weapons with Al Qaeda". The
22 CIA never informed the President that there was an
23 operational relationship between al Qaeda and Sad-
24 dam Hussein; on the contrary, its most "aggressive"
25 analysis contained in "Iraq and al-Qa'ida: Inter-

1 preting a Murky Relationship” dated June 21, 2002,
2 was that Iraq had had “sporadic, wary contacts with
3 al-Qa’ida since the mid-1990s rather than a relation-
4 ship with al-Qa’ida that has developed over time”.

5 (5) Notwithstanding his knowledge that neither
6 Saddam Hussein nor Iraq was in any way connected
7 to the September 11th attacks, the President al-
8 lowed and authorized those acting under his direc-
9 tion and control, including Vice President Richard
10 B. Cheney and Lewis Libby, who reported directly to
11 both the President and the Vice President, and Sec-
12 retary of Defense Donald Rumsfeld, among others,
13 to pressure intelligence analysts to alter their assess-
14 ments and to create special units outside of, and un-
15 known to, the intelligence community in order to se-
16 cretely obtain unreliable information, to manufacture
17 intelligence or reinterpret raw data in ways that
18 would further the Bush administration’s goal of
19 fraudulently establishing a relationship not only be-
20 tween Iraq and al Qaeda, but between Iraq and the
21 attacks of September 11th.

22 (6) Further, despite his full awareness that
23 Iraq and Saddam Hussein had no relationship to the
24 September 11th attacks, the President, and those
25 acting under his direction and control have, since at

1 least 2002 and continuing to the present, repeatedly
2 issued public statements deliberately worded to mis-
3 lead, words calculated in their implication to bring
4 unrelated actors and circumstances into an artifi-
5 cially contrived reality thereby facilitating the sys-
6 tematic deception of Congress and the American
7 people. Thus the public and some members of Con-
8 gress, came to believe, falsely, that there was a con-
9 nection between Iraq and the attacks of 9/11. This
10 was accomplished through well-publicized statements
11 by the Bush Administration which contrived to con-
12 tinually tie Iraq and 9/11 in the same statements of
13 grave concern without making an explicit charge:

14 (A) “[If] Iraq regimes [sic] continues to
15 defy us, and the world, we will move delib-
16 erately, yet decisively, to hold Iraq to ac-
17 count. . . . It’s a new world we’re in. We used
18 to think two oceans could separate us from an
19 enemy. On that tragic day, September the 11th,
20 2001, we found out that’s not the case. We
21 found out this great land of liberty and of free-
22 dom and of justice is vulnerable. And therefore
23 we must do everything we can—everything we
24 can—to secure the homeland, to make us safe.”

1 Speech of President Bush in Iowa on Sep-
2 tember 16, 2002.

3 (B) “With every step the Iraqi regime
4 takes toward gaining and deploying the most
5 terrible weapons, our own options to confront
6 that regime will narrow. And if an emboldened
7 regime were to supply these weapons to ter-
8 rorist allies, then the attacks of September 11th
9 would be a prelude to far greater horrors.”
10 March 6, 2003, Statement of President Bush in
11 National Press Conference.

12 (C) “The battle of Iraq is one victory in a
13 war on terror that began on September the 11,
14 2001—and still goes on. That terrible morning,
15 19 evil men—the shock troops of a hateful ide-
16 ology—gave America and the civilized world a
17 glimpse of their ambitions. They imagined, in
18 the words of one terrorist, that September the
19 11th would be the ‘beginning of the end of
20 America’. By seeking to turn our cities into kill-
21 ing fields, terrorists and their allies believed
22 that they could destroy this nation’s resolve,
23 and force our retreat from the world. They have
24 failed.” May 1, 2003, Speech of President Bush
25 on U.S.S. Abraham Lincoln.

1 (D) “Now we’re in a new and unprece-
2 dented war against violent Islamic extremists.
3 This is an ideological conflict we face against
4 murderers and killers who try to impose their
5 will. These are the people that attacked us on
6 September the 11th and killed nearly 3,000
7 people. The stakes are high, and once again, we
8 have had to change our strategic thinking. The
9 major battleground in this war is Iraq.” June
10 28, 2007, Speech of President Bush at the
11 Naval War College in Newport, Rhode Island.

12 (7) Notwithstanding his knowledge that there
13 was no credible evidence of a working relationship
14 between Saddam Hussein and al Qaeda and that the
15 intelligence community had specifically assessed that
16 there was no such operational relationship, the
17 President, both personally and through his subordi-
18 nates and agents, has repeatedly falsely represented,
19 both explicitly and implicitly, and through the mis-
20 leading use of selectively-chosen facts, to the citizens
21 of the United States and to the Congress that there
22 was and is such an ongoing operational relationship,
23 to wit:

24 (A) “We know that Iraq and al Qaeda
25 have had high-level contacts that go back a dec-

ade. Some al Qaeda leaders who fled Afghanistan went to Iraq. These include one very senior al Qaeda leader who received medical treatment in Baghdad this year, and who has been associated with planning for chemical and biological attacks. We've learned that Iraq has trained al Qaeda members in bomb-making and poisons and deadly gases." September 28, 2002, Weekly Radio Address of President Bush to the Nation.

(B) "[W]e need to think about Saddam Hussein using al Qaeda to do his dirty work, to not leave fingerprints behind." October 14, 2002, Remarks by President Bush in Michigan.

(C) "We know he's got ties with al Qaeda." November 1, 2002, Speech of President Bush in New Hampshire.

(D) "Evidence from intelligence sources, secret communications, and statements by people now in custody reveal that Saddam Hussein aids and protects terrorists, including members of al Qaeda. Secretly, and without fingerprints, he could provide one of his hidden weapons to terrorists, or help them develop their own." January 28, 2003, President Bush's State of the Union Address.

1 (E) “[W]hat I want to bring to your atten-
2 tion today is the potentially much more sinister
3 nexus between Iraq and the al Qaeda terrorist
4 network, a nexus that combines classic terrorist
5 organizations and modern methods of murder.
6 Iraq today harbors a deadly terrorist net-
7 work. . . .” February 5, 2003, Speech of
8 Former Secretary of State Colin Powell to the
9 United Nations.

10 (F) “The battle of Iraq is one victory in a
11 war on terror that began on September the 11,
12 2001—and still goes on. . . . [T]he liberation
13 of Iraq . . . removed an ally of al Qaeda.” May
14 1, 2003, Speech of President Bush on U.S.S.
15 Abraham Lincoln.

16 (8) The Senate Select Committee on Intel-
17 ligence Report on Whether Public Statements Re-
18 garding Iraq by U.S. Government Officials Were
19 Substantiated by Intelligence Information, which
20 was released on June 5, 2008, concluded that:

21 (A) “Statements and implications by the
22 President and Secretary of State suggesting
23 that Iraq and al-Qa’ida had a partnership, or
24 that Iraq had provided al-Qa’ida with weapons

1 training, were not substantiated by the intel-
2 ligence.”.

3 (B) “The Intelligence Community did not
4 confirm that Muhammad Atta met an Iraqi in-
5 telligence officer in Prague in 2001 as the Vice
6 President repeatedly claimed.”.

7 Through his participation and instance in the breath-
8 taking scope of this deception, the President has used the
9 highest office of trust to wage a campaign of deception
10 of such sophistication as to deliberately subvert the na-
11 tional security interests of the United States. His dishon-
12 esty set the stage for the loss of more than 4,000 United
13 States servicemembers; injuries to tens of thousands of
14 soldiers, the loss of more than 1,000,000 innocent Iraqi
15 citizens since the United States invasion; the loss of ap-
16 proximately \$527 billion in war costs which has increased
17 our Federal debt and the ultimate expenditure of three
18 to five trillion dollars for all costs covering the war; the
19 loss of military readiness within the United States Armed
20 Services due to overextension, the lack of training and lack
21 of equipment; the loss of United States credibility in world
22 affairs; and the decades of likely blowback created by the
23 invasion of Iraq.

24 In all of these actions and decisions, President
25 George W. Bush has acted in a manner contrary to his

1 trust as President and Commander in Chief, and subver-
2 sive of constitutional government, to the prejudice of the
3 cause of law and justice and to the manifest injury of the
4 people of the United States. Wherefore, President George
5 W. Bush, by such conduct, is guilty of an impeachable
6 offense warranting removal from office.

7 ARTICLE III—MISLEADING THE AMERICAN PEOPLE AND
8 MEMBERS OF CONGRESS TO BELIEVE IRAQ POS-
9 SSESSED WEAPONS OF MASS DESTRUCTION, SO AS
10 TO MANUFACTURE A FALSE CASE FOR WAR

11 In his conduct while President of the United States,
12 George W. Bush, in violation of his constitutional oath to
13 faithfully execute the office of President of the United
14 States and, to the best of his ability, preserve, protect,
15 and defend the Constitution of the United States, and in
16 violation of his constitutional duty under article II, section
17 3 of the Constitution “to take care that the laws be faith-
18 fully executed”, has both personally and acting through
19 his agents and subordinates, together with the Vice Presi-
20 dent, executed instead a calculated and wide-ranging
21 strategy to deceive the citizens and Congress of the United
22 States into believing that the nation of Iraq possessed
23 weapons of mass destruction in order to justify the use
24 of the United States Armed Forces against the nation of
25 Iraq in a manner damaging to our national security inter-

1 ests, thereby interfering with and obstructing Congress's
2 lawful functions of overseeing foreign affairs and declaring
3 war.

4 The means used to implement this deception were
5 and continue to be personally making, or causing, author-
6 izing and allowing to be made through highly-placed sub-
7 ordinates, including the President's Chief of Staff, the
8 White House Press Secretary and other White House
9 spokespersons, the Secretaries of State and Defense, the
10 National Security Advisor, and their deputies and spokes-
11 persons, false and fraudulent representations to the citi-
12 zens of the United States and Congress regarding Iraq's
13 alleged possession of biological, chemical and nuclear
14 weapons that were half-true, literally true but misleading,
15 and/or made without a reasonable basis and with reckless
16 indifference to their truth, as well as omitting to state
17 facts necessary to present an accurate picture of the truth
18 as follows:

19 (1) Long before the March 19, 2003, invasion
20 of Iraq, a wealth of intelligence informed the Presi-
21 dent and those under his direction and control that
22 Iraq's stockpiles of chemical and biological weapons
23 had been destroyed well before 1998 and that there
24 was little, if any, credible intelligence that showed
25 otherwise. As reported in the Washington Post in

1 March of 2003, in 1995, Saddam Hussein's son-in-
2 law Hussein Kamel had informed U.S. and British
3 intelligence officers that "all weapons—biological,
4 chemical, missile, nuclear were destroyed." In Sep-
5 tember 2002, the Defense Intelligence Agency issued
6 a report that concluded: "A substantial amount of
7 Iraq's chemical warfare agents, precursors, muni-
8 tions and production equipment were destroyed be-
9 tween 1991 and 1998 as a result of Operation
10 Desert Storm and UNSCOM actions . . . [T]here is
11 no reliable information on whether Iraq is producing
12 and stockpiling chemical weapons or whether Iraq
13 has—or will—establish its chemical warfare agent
14 production facilities." Notwithstanding the absence
15 of evidence proving that such stockpiles existed and
16 in direct contradiction to substantial evidence that
17 showed they did not exist, the President and his sub-
18 ordinates and agents made numerous false represen-
19 tations claiming with certainty that Iraq possessed
20 chemical and biological weapons that it was devel-
21 oping to use to attack the United States, to wit:

22 (A) "[T]he notion of a Saddam Hussein
23 with his great oil wealth, with his inventory
24 that he already has of biological and chemical
25 weapons . . . is, I think, a frightening propo-

1 sition for anybody who thinks about it.” State-
2 ment of Vice President Cheney on CBS’s Face
3 the Nation, March 24, 2002.

4 (B) “In defiance of the United Nations,
5 Iraq has stockpiled biological and chemical
6 weapons, and is rebuilding the facilities used to
7 make more of those weapons.” Speech of Presi-
8 dent Bush, October 5, 2002.

9 (C) “All the world has now seen the foot-
10 age of an Iraqi Mirage aircraft with a fuel tank
11 modified to spray biological agents over wide
12 areas. Iraq has developed spray devices that
13 could be used on unmanned aerial vehicles with
14 ranges far beyond what is permitted by the Se-
15 curity Council. A UAV launched from a vessel
16 off the American coast could reach hundreds of
17 miles inland.” Statement by President Bush
18 from the White House, February 6, 2003.

19 (2) Despite overwhelming intelligence in the
20 form of statements and reports filed by and on be-
21 half of the CIA, the State Department and the
22 IAEA, among others, which indicated that the claim
23 was untrue, the President, and those under his di-
24 rection and control, made numerous representations
25 claiming and implying through misleading language

1 that Iraq was attempting to purchase uranium from
2 Niger in order to falsely buttress its argument that
3 Iraq was reconstituting its nuclear weapons pro-
4 gram, including:

5 (A) “The regime has the scientists and fa-
6 cilities to build nuclear weapons, and is seeking
7 the materials needed to do so.” Statement of
8 President Bush from White House, October 2,
9 2002.

10 (B) “The [Iraqi] report also failed to deal
11 with issues which have arisen since 1998, in-
12 cluding: . . . attempts to acquire uranium and
13 the means to enrich it.” Letter from President
14 Bush to Vice President Cheney and the Senate,
15 January 20, 2003.

16 (C) “The British Government has learned
17 that Saddam Hussein recently sought signifi-
18 cant quantities of uranium from Africa.” Presi-
19 dent Bush Delivers State of the Union Address,
20 January 28, 2003.

21 (3) Despite overwhelming evidence in the form
22 of reports by nuclear weapons experts from the En-
23 ergy, the Defense and State Departments, as well
24 from outside and international agencies which as-
25 sessed that aluminum tubes the Iraqis were pur-

1 chasing were not suitable for nuclear centrifuge use
2 and were, on the contrary, identical to ones used in
3 rockets already being manufactured by the Iraqis,
4 the President, and those under his direction and
5 control, persisted in making numerous false and
6 fraudulent representations implying and stating ex-
7 plicitly that the Iraqis were purchasing the tubes for
8 use in a nuclear weapons program, to wit:

9 (A) “We do know that there have been
10 shipments going . . . into Iraq . . . of alu-
11 minum tubes that really are only suited to—
12 high-quality aluminum tools [sic] that are only
13 really suited for nuclear weapons programs,
14 centrifuge programs.” Statement of then Na-
15 tional Security Advisor Condoleezza Rice on
16 CNN’s Late Edition with Wolf Blitzer, Sep-
17 tember 8, 2002.

18 (B) “Our intelligence sources tell us that
19 he has attempted to purchase high-strength alu-
20 minum tubes suitable for nuclear weapons pro-
21 duction.” President Bush’s State of the Union
22 Address, January 28, 2003.

23 (C) “[H]e has made repeated covert at-
24 tempts to acquire high-specification aluminum
25 tubes from 11 different countries, even after in-

1 spections resumed. . . . By now, just about ev-
2 eryone has heard of these tubes and we all
3 know that there are differences of opinion.
4 There is controversy about what these tubes are
5 for. Most U.S. experts think they are intended
6 to serve as rotors in centrifuges used to enrich
7 uranium.” Speech of Former Secretary of State
8 Colin Powell to the United Nations, February
9 5, 2003.

10 (4) The President, both personally and acting
11 through those under his direction and control, sup-
12 pressed material information, selectively declassified
13 information for the improper purposes of retaliating
14 against a whistleblower and presenting a misleading
15 picture of the alleged threat from Iraq, facilitated
16 the exposure of the identity of a covert CIA opera-
17 tive and thereafter not only failed to investigate the
18 improper leaks of classified information from within
19 his administration, but also failed to cooperate with
20 an investigation into possible federal violations re-
21 sulting from this activity and, finally, entirely under-
22 mined the prosecution by commuting the sentence of
23 Lewis Libby citing false and insubstantial grounds,
24 all in an effort to prevent Congress and the citizens
25 of the United States from discovering the fraudulent

1 nature of the President's claimed justifications for
2 the invasion of Iraq.

3 (5) The Senate Select Committee on Intel-
4 ligence Report on Whether Public Statements Re-
5 garding Iraq by U.S. Government Officials Were
6 Substantiated by Intelligence Information, which
7 was released on June 5, 2008, concluded that:

8 (A) "Statements by the President and Vice
9 President prior to the October 2002 National
10 Intelligence Estimate regarding Iraq's chemical
11 weapons production capability and activities did
12 not reflect the intelligence community's uncer-
13 tainties as to whether such production was on-
14 going."

15 (B) "The Secretary of Defense's statement
16 that the Iraqi government operated under-
17 ground WMD facilities that were not vulnerable
18 to conventional airstrikes because they were un-
19 derground and deeply buried was not substan-
20 tiated by available intelligence information."

21 (C) Chairman of the Senate Intelligence
22 Committee Jay Rockefeller concluded: "In mak-
23 ing the case for war, the Administration repeat-
24 edly presented intelligence as fact when in re-
25 ality it was unsubstantiated, contradicted, or

1 even non-existent. As a result, the American
2 people were led to believe that the threat from
3 Iraq was much greater than actually existed.”.

4 The President has subverted the national security in-
5 terests of the United States by setting the stage for the
6 loss of more than 4,000 United States servicemembers and
7 the injury to tens of thousands of U.S. soldiers; the loss
8 of more than 1,000,000 innocent Iraqi citizens since the
9 United States invasion; the loss of approximately \$500 bil-
10 lion in war costs which has increased our Federal debt
11 with a long term financial cost of between three and five
12 trillion dollars; the loss of military readiness within the
13 United States Armed Services due to overextension, the
14 lack of training and lack of equipment; the loss of United
15 States credibility in world affairs; and the decades of likely
16 blowback created by the invasion of Iraq.

17 In all of these actions and decisions, President
18 George W. Bush has acted in a manner contrary to his
19 trust as President and Commander in Chief, and subver-
20 sive of constitutional government, to the prejudice of the
21 cause of law and justice and to the manifest injury of the
22 people of the United States. Wherefore, President George
23 W. Bush, by such conduct, is guilty of an impeachable
24 offense warranting removal from office.

1 ARTICLE IV—MISLEADING THE AMERICAN PEOPLE AND
2 MEMBERS OF CONGRESS TO BELIEVE IRAQ POSED
3 AN IMMINENT THREAT TO THE UNITED STATES

4 In his conduct while President of the United States,
5 George W. Bush, in violation of his constitutional oath to
6 faithfully execute the office of President of the United
7 States and, to the best of his ability, preserve, protect,
8 and defend the Constitution of the United States, and in
9 violation of his constitutional duty under article II, section
10 3 of the Constitution “to take care that the laws be faith-
11 fully executed”, has both personally and acting through
12 his agents and subordinates, together with the Vice Presi-
13 dent, executed a calculated and wide-ranging strategy to
14 deceive the citizens and Congress of the United States into
15 believing that the nation of Iraq posed an imminent threat
16 to the United States in order to justify the use of the
17 United States Armed Forces against the nation of Iraq
18 in a manner damaging to our national security interests,
19 thereby interfering with and obstructing Congress’s lawful
20 functions of overseeing foreign affairs and declaring war.

21 The means used to implement this deception were
22 and continue to be, first, allowing, authorizing and sanc-
23 tioning the manipulation of intelligence analysis by those
24 under his direction and control, including the Vice Presi-
25 dent and the Vice President’s agents, and second, person-

1 ally making, or causing, authorizing and allowing to be
2 made through highly-placed subordinates, including the
3 President's Chief of Staff, the White House Press Sec-
4 retary and other White House spokespersons, the Secre-
5 taries of State and Defense, the National Security Advi-
6 sor, and their deputies and spokespersons, false and fraud-
7 ulent representations to the citizens of the United States
8 and Congress regarding an alleged urgent threat posed by
9 Iraq, statements that were half-true, literally true but mis-
10 leading, and/or made without a reasonable basis and with
11 reckless indifference to their truth, as well as omitting to
12 state facts necessary to present an accurate picture of the
13 truth as follows:

14 (1) Notwithstanding the complete absence of in-
15 telligence analysis to support a claim that Iraq posed
16 an imminent or urgent threat to the United States
17 and the intelligence community's assessment that
18 Iraq was in fact not likely to attack the United
19 States unless it was itself attacked, President Bush,
20 both personally and through his agents and subordi-
21 nates, made, allowed and caused to be made re-
22 peated false representations to the citizens and Con-
23 gress of the United States implying and explicitly
24 stating that such a dire threat existed, including the
25 following:

1 (A) “States such as these [Iraq, Iran, and
2 North Korea] and their terrorist allies con-
3 stitute an axis of evil, arming to threaten the
4 peace of the world. By seeking weapons of mass
5 destruction, these regimes pose a grave and
6 growing danger. They could provide these arms
7 to terrorists, giving them the means to match
8 their hatred. They could attack our allies or at-
9 tempt to blackmail the United States. In any of
10 these cases, the price of indifference would be
11 catastrophic.” President Bush’s State of the
12 Union Address, January 29, 2002.

13 (B) “Simply stated, there is no doubt that
14 Saddam Hussein has weapons of mass destruc-
15 tion. He is amassing them to use against our
16 friends, our enemies, and against us.” Speech
17 of Vice President Cheney at VFW 103rd Na-
18 tional Convention, August 26, 2002.

19 (C) “The history, the logic, and the facts
20 lead to one conclusion: Saddam Hussein’s re-
21 gime is a grave and gathering danger. To sug-
22 gest otherwise is to hope against the evidence.
23 To assume this regime’s good faith is to bet the
24 lives of millions and the peace of the world in
25 a reckless gamble. And this is a risk we must

1 not take.” Address of President Bush to the
2 United Nations General Assembly, September
3 12, 2002.

4 (D) “[N]o terrorist state poses a greater
5 or more immediate threat to the security of our
6 people than the regime of Saddam Hussein and
7 Iraq.” Statement of Former Defense Secretary
8 Donald Rumsfeld to Congress, September 19,
9 2002.

10 (E) “On its present course, the Iraqi re-
11 gime is a threat of unique urgency . . . it has
12 developed weapons of mass death.” Statement
13 of President Bush at White House, October 2,
14 2002.

15 (F) “But the President also believes that
16 this problem has to be dealt with, and if the
17 United Nations won’t deal with it, then the
18 United States, with other likeminded nations,
19 may have to deal with it. We would prefer not
20 to go that route, but the danger is so great,
21 with respect to Saddam Hussein having weap-
22 ons of mass destruction, and perhaps even ter-
23 rorists getting hold of such weapons, that it is
24 time for the international community to act,
25 and if it doesn’t act, the President is prepared

1 to act with likeminded nations.” Statement of
2 Former Secretary of State Colin Powell in
3 interview with Ellen Ratner of Talk Radio
4 News, October 30, 2002.

5 (G) “Today the world is also uniting to an-
6 swer the unique and urgent threat posed by
7 Iraq. A dictator who has used weapons of mass
8 destruction on his own people must not be al-
9 lowed to produce or possess those weapons. We
10 will not permit Saddam Hussein to blackmail
11 and/or terrorize nations which love freedom.”
12 Speech by President Bush to Prague Atlantic
13 Student Summit, November 20, 2002.

14 (H) “But the risk of doing nothing, the
15 risk of the security of this country being jeop-
16 ardized at the hands of a madman with weap-
17 ons of mass destruction far exceeds the risk of
18 any action we may be forced to take.” Presi-
19 dent Bush meets with National Economic
20 Council at White House, February 25, 2003.

21 (2) In furtherance of his fraudulent effort to
22 deceive Congress and the citizens of the United
23 States into believing that Iraq and Saddam Hussein
24 posed an imminent threat to the United States, the
25 President allowed and authorized those acting under

1 his direction and control, including Vice President
2 Richard B. Cheney, former Secretary of Defense
3 Donald Rumsfeld, and Lewis Libby, who reported
4 directly to both the President and the Vice Presi-
5 dent, among others, to pressure intelligence analysts
6 to tailor their assessments and to create special
7 units outside of, and unknown to, the intelligence
8 community in order to secretly obtain unreliable in-
9 formation, to manufacture intelligence, or to reinter-
10 pret raw data in ways that would support the Bush
11 administration's plan to invade Iraq based on a false
12 claim of urgency despite the lack of justification for
13 such a preemptive action.

14 (3) The Senate Select Committee on Intel-
15 ligence Report on Whether Public Statements Re-
16 garding Iraq by U.S. Government Officials Were
17 Substantiated by Intelligence Information, which
18 was released on June 5, 2008, concluded that:
19 "Statements by the President and the Vice Presi-
20 dent indicating that Saddam Hussein was prepared
21 to give weapons of mass destruction to terrorist
22 groups for attacks against the United States were
23 contradicted by available intelligence information."

24 Thus the President willfully and falsely misrepre-
25 sented Iraq as an urgent threat requiring immediate ac-

1 tion thereby subverting the national security interests of
2 the United States by setting the stage for the loss of more
3 than 4,000 United States servicemembers; the injuries to
4 tens of thousands of U.S. soldiers; the deaths of more than
5 1,000,000 Iraqi citizens since the United States invasion;
6 the loss of approximately \$527 billion in war costs which
7 has increased our Federal debt and the ultimate costs of
8 the war between three trillion and five trillion dollars; the
9 loss of military readiness within the United States Armed
10 Services due to overextension, the lack of training and lack
11 of equipment; the loss of United States credibility in world
12 affairs; and the decades of likely blowback created by the
13 invasion of Iraq.

14 In all of these actions and decisions, President
15 George W. Bush has acted in a manner contrary to his
16 trust as President and Commander in Chief, and subver-
17 sive of constitutional government, to the prejudice of the
18 cause of law and justice and to the manifest injury of the
19 people of the United States. Wherefore, President George
20 W. Bush, by such conduct, is guilty of an impeachable
21 offense warranting removal from office.

22 ARTICLE V—ILLEGALLY MISSPENDING FUNDS TO
23 SECRETLY BEGIN A WAR OF AGGRESSION

24 In his conduct while President of the United States,
25 George W. Bush, in violation of his constitutional oath to

1 faithfully execute the office of President of the United
2 States and, to the best of his ability, preserve, protect,
3 and defend the Constitution of the United States, and in
4 violation of his constitutional duty under article II, section
5 3 of the Constitution “to take care that the laws be faith-
6 fully executed”, has both personally and acting through
7 his agents and subordinates, together with the Vice Presi-
8 dent, illegally misspent funds to begin a war in secret prior
9 to any Congressional authorization.

10 The President used over \$2 billion in the summer of
11 2002 to prepare for the invasion of Iraq. First reported
12 in Bob Woodward’s book, *Plan of Attack*, and later con-
13 firmed by the Congressional Research Service, Bush took
14 money appropriated by Congress for Afghanistan and
15 other programs and—with no Congressional notification—
16 used it to build airfields in Qatar and to make other prep-
17 arations for the invasion of Iraq. This constituted a viola-
18 tion of article I, section 9 of the U.S. Constitution, as well
19 as a violation of the War Powers Act of 1973.

20 In all of these actions and decisions, President
21 George W. Bush has acted in a manner contrary to his
22 trust as President and Commander in Chief, and subver-
23 sive of constitutional government, to the prejudice of the
24 cause of law and justice and to the manifest injury of the
25 people of the United States. Wherefore, President George

1 W. Bush, by such conduct, is guilty of an impeachable
2 offense warranting removal from office.

3 ARTICLE VI—INVADING IRAQ IN VIOLATION OF THE
4 REQUIREMENTS OF H.J. RES. 114

5 In his conduct while President of the United States,
6 George W. Bush, in violation of his constitutional oath to
7 faithfully execute the office of President of the United
8 States and, to the best of his ability, preserve, protect,
9 and defend the Constitution of the United States, and in
10 violation of his constitutional duty under article II, section
11 3 of the Constitution “to take care that the laws be faith-
12 fully executed”, exceeded his Constitutional authority to
13 wage war by invading Iraq in 2003 without meeting the
14 requirements of H.J. Res. 114, the “Authorization for Use
15 of Military Force Against Iraq Resolution of 2002” to wit:

16 (1) H.J. Res. 114 contains several Whereas
17 clauses consistent with statements being made by
18 the White House at the time regarding the threat
19 from Iraq as evidenced by the following:

20 (A) H.J. Res. 114 states “Whereas Iraq
21 both poses a continuing threat to the national
22 security of the United States and international
23 peace and security in the Persian Gulf region
24 and remains in material and unacceptable
25 breach of its international obligations by,

1 among other things, continuing to possess and
2 develop a significant chemical and biological
3 weapons capability, actively seeking a nuclear
4 weapons capability, and supporting and har-
5 boring terrorist organizations;”; and

6 (B) H.J. Res. 114 states “Whereas mem-
7 bers of Al Qaeda, an organization bearing re-
8 sponsibility for attacks on the United States, its
9 citizens, and interests, including the attacks
10 that occurred on September 11, 2001, are
11 known to be in Iraq;”.

12 (2) H.J. Res. 114 states that the President
13 must provide a determination, the truthfulness of
14 which is implied, that military force is necessary in
15 order to use the authorization, as evidenced by the
16 following:

17 (A) Section 3 of H.J. Res. 114 states:

18 “(b) PRESIDENTIAL DETERMINATION.—In connec-
19 tion with the exercise of the authority granted in sub-
20 section (a) to use force the President shall, prior to such
21 exercise or as soon thereafter as may be feasible, but no
22 later than 48 hours after exercising such authority, make
23 available to the Speaker of the House of Representatives
24 and the President pro tempore of the Senate his deter-
25 mination that—

1 “(1) reliance by the United States on further
2 diplomatic or other peaceful means alone either (A)
3 will not adequately protect the national security of
4 the United States against the continuing threat
5 posed by Iraq or (B) is not likely to lead to enforce-
6 ment of all relevant United Nations Security Council
7 resolutions regarding Iraq; and

8 “(2) acting pursuant to this joint resolution is
9 consistent with the United States and other coun-
10 tries continuing to take the necessary actions
11 against international terrorist and terrorist organi-
12 zations, including those nations, organizations, or
13 persons who planned, authorized, committed, or
14 aided the terrorist attacks that occurred on Sep-
15 tember 11, 2001.”.

16 (3) On March 18, 2003, President George Bush
17 sent a letter to Congress stating that he had made
18 that determination as evidenced by the following:

19 (A) March 18th, 2003 Letter to Congress
20 stating: “Consistent with section 3(b) of the
21 Authorization for Use of Military Force Against
22 Iraq Resolution of 2002 (Public Law 107–243),
23 and based on information available to me, in-
24 cluding that in the enclosed document, I deter-
25 mine that:

1 “(i) reliance by the United States on
2 further diplomatic and other peaceful
3 means alone will neither (A) adequately
4 protect the national security of the United
5 States against the continuing threat posed
6 by Iraq nor (B) likely lead to enforcement
7 of all relevant United Nations Security
8 Council resolutions regarding Iraq; and

9 “(ii) acting pursuant to the Constitu-
10 tion and Public Law 107–243 is consistent
11 with the United States and other countries
12 continuing to take the necessary actions
13 against international terrorists and ter-
14 rorist organizations, including those na-
15 tions, organizations, or persons who
16 planned, authorized, committed, or aided
17 the terrorist attacks that occurred on Sep-
18 tember 11, 2001.”.

19 (4) President George Bush knew that these
20 statements were false as evidenced by:

21 (A) Information provided with articles I,
22 II, III, IV, and V.

23 (B) A statement by President George Bush
24 in an interview with Tony Blair on January
25 31st, 2003: [WH]

1 Reporter: “One question for you both. Do
2 you believe that there is a link between Saddam
3 Hussein, a direct link, and the men who at-
4 tacked on September the 11th?”

5 President Bush: “I can’t make that
6 claim”.

7 (C) An article on February 19th by Ter-
8 rorism expert Rohan Gunaratna states “I could
9 find no evidence of links between Iraq and Al
10 Qaeda. The documentation and interviews indi-
11 cated that Al Qaeda regarded Saddam, a sec-
12 ular leader, as an infidel.”. [International Her-
13 ald Tribune]

14 (D) According to a February 2nd, 2003
15 article in the New York Times: [NYT]

16 At the Federal Bureau of Investigation,
17 some investigators said they were baffled by the
18 Bush administration’s insistence on a solid link
19 between Iraq and Osama bin Laden’s network.
20 “We’ve been looking at this hard for more than
21 a year and you know what, we just don’t think
22 it’s there”, a government official said.

23 (5) Section 3C of H.J. Res 114 states that
24 “Nothing in this joint resolution supersedes any re-
25 quirement of the War Powers Resolution.”.

1 (6) The War Powers Resolution Section 9(d)(1)
2 states:

3 “(d) Nothing in this joint resolution—

4 “(1) is intended to alter the constitutional au-
5 thority of the Congress or of the President, or the
6 provision of existing treaties; or”.

7 (7) The United Nations Charter was an exist-
8 ing treaty and, as shown in article VIII, the invasion
9 of Iraq violated that treaty.

10 (8) President George Bush knowingly failed to
11 meet the requirements of H.J. Res. 114 and violated
12 the requirement of the War Powers Resolution and,
13 thereby, invaded Iraq without the authority of Con-
14 gress.

15 In all of these actions and decisions, President
16 George W. Bush has acted in a manner contrary to his
17 trust as President and Commander in Chief, and subver-
18 sive of constitutional government, to the prejudice of the
19 cause of law and justice and to the manifest injury of the
20 people of the United States. Wherefore, President George
21 W. Bush, by such conduct, is guilty of an impeachable
22 offense warranting removal from office.

1 ARTICLE VII—INVADING IRAQ ABSENT A DECLARATION
2 OF WAR

3 In his conduct while President of the United States,
4 George W. Bush, in violation of his constitutional oath to
5 faithfully execute the office of President of the United
6 States and, to the best of his ability, preserve, protect,
7 and defend the Constitution of the United States, and in
8 violation of his constitutional duty under article II, section
9 3 of the Constitution “to take care that the laws be faith-
10 fully executed”, has launched a war against Iraq absent
11 any congressional declaration of war or equivalent action.

12 Article I, section 8, clause 11 (the War Powers
13 Clause) makes clear that the United States Congress holds
14 the exclusive power to decide whether or not to send the
15 nation into war. “The Congress”, the War Powers Clause
16 states, “shall have power . . . To declare war . . .”

17 The October 2002 congressional resolution on Iraq
18 did not constitute a declaration of war or equivalent ac-
19 tion. The resolution stated: “The President is authorized
20 to use the Armed Forces of the United States as he deems
21 necessary and appropriate in order to (1) defend the na-
22 tional security of the United States against the continuing
23 threat posed by Iraq; and (2) enforce all relevant United
24 Nations Security Council resolutions regarding Iraq.” The
25 resolution unlawfully sought to delegate to the President

1 the decision of whether or not to initiate a war against
2 Iraq, based on whether he deemed it “necessary and ap-
3 propriate.” The Constitution does not allow Congress to
4 delegate this exclusive power to the President, nor does
5 it allow the President to seize this power.

6 In March 2003, the President launched a war against
7 Iraq without any constitutional authority.

8 In all of these actions and decisions, President
9 George W. Bush has acted in a manner contrary to his
10 trust as President and Commander in Chief, and subver-
11 sive of constitutional government, to the prejudice of the
12 cause of law and justice and to the manifest injury of the
13 people of the United States. Wherefore, President George
14 W. Bush, by such conduct, is guilty of an impeachable
15 offense warranting removal from office.

16 ARTICLE VIII—INVADING IRAQ, A SOVEREIGN NATION,
17 IN VIOLATION OF THE U.N. CHARTER AND INTER-
18 NATIONAL CRIMINAL LAW

19 In his conduct while President of the United States,
20 George W. Bush, in violation of his constitutional oath to
21 faithfully execute the office of President of the United
22 States and, to the best of his ability, preserve, protect,
23 and defend the Constitution of the United States, and in
24 violation of his constitutional duty under article II, section
25 3 of the Constitution “to take care that the laws be faith-

1 fully executed”, violated United States law by invading the
2 sovereign country of Iraq in violation of the United Na-
3 tions Charter to wit:

4 (1) International Laws ratified by Congress are
5 part of United States Law and must be followed as
6 evidenced by the following:

7 (A) Article VI of the United States Con-
8 stitution, which states “This Constitution, and
9 the Laws of the United States which shall be
10 made in Pursuance thereof; and all Treaties
11 made, or which shall be made, under the Au-
12 thority of the United States, shall be the su-
13 preme Law of the Land;”.

14 (2) The U.N. Charter, which entered into force
15 following ratification by the United States in 1945,
16 requires Security Council approval for the use of
17 force except for self-defense against an armed attack
18 as evidenced by the following:

19 (A) Chapter 1, article 2 of the United Na-
20 tions Charter states:

21 “3. All Members shall settle their international
22 disputes by peaceful means in such a manner that
23 international peace and security, and justice, are not
24 endangered.

1 “4. All Members shall refrain in their inter-
2 national relations from the threat or use of force
3 against the territorial integrity or political independ-
4 ence of any state, or in any other manner incon-
5 sistent with the Purposes of the United Nations.”.

6 (B) Chapter 7, article 51 of the United
7 Nations Charter states:

8 “51. Nothing in the present Charter shall im-
9 pair the inherent right of individual or collective self-
10 defense if an armed attack occurs against a Member
11 of the United Nations, until the Security Council
12 has taken measures necessary to maintain inter-
13 national peace and security.”.

14 (3) There was no armed attack upon the
15 United States by Iraq.

16 (4) The Security Council did not vote to ap-
17 prove the use of force against Iraq as evidenced by:

18 (A) A United Nation Press release which
19 states that the United States had failed to con-
20 vince the Security Council to approve the use of
21 military force against Iraq. [UN]

22 (5) President Bush directed the United States
23 military to invade Iraq on March 19th, 2003 in vio-
24 lation of the U.N. Charter and, therefore, in viola-

1 tion of United States Law as evidenced by the fol-
2 lowing:

3 (A) A letter from President Bush to Con-
4 gress dated March 21st, 2003 stating “I di-
5 rected U.S. Armed Forces, operating with other
6 coalition forces, to commence combat operations
7 on March 19, 2003, against Iraq.”. [WH]

8 (B) On September 16, 2004, Kofi Annan,
9 the Secretary General of the United Nations,
10 speaking on the invasion, said, “I have indi-
11 cated it was not in conformity with the U.N.
12 charter. From our point of view, from the char-
13 ter point of view, it was illegal.”. [BBC]

14 (C) The consequence of the instant and di-
15 rection of President George W. Bush, in order-
16 ing an attack upon Iraq, a sovereign nation is
17 in direct violation of United States Code, title
18 18, part 1, chapter 118, section 2441, gov-
19 erning the offense of war crimes.

20 (6) In the course of invading and occupying
21 Iraq, the President, as Commander in Chief, has
22 taken responsibility for the targeting of civilians,
23 journalists, hospitals, and ambulances, use of anti-
24 personnel weapons including cluster bombs in dense-
25 ly settled urban areas, the use of white phosphorous

1 as a weapon, depleted uranium weapons, and the use
2 of a new version of napalm found in Mark 77 fire-
3 bombs. Under the direction of President George
4 Bush, the United States has engaged in collective
5 punishment of Iraqi civilian populations, including
6 but not limited to blocking roads, cutting electricity
7 and water, destroying fuel stations, planting bombs
8 in farm fields, demolishing houses, and plowing over
9 orchards.

10 (A) Under the principle of “command re-
11 sponsibility”, i.e., that a de jure command can
12 be civilian as well as military, and can apply to
13 the policy command of heads of state, said com-
14 mand brings President George Bush within the
15 reach of international criminal law under the
16 Additional Protocol I of June 8, 1977, to the
17 Geneva Conventions of August 12, 1949, and
18 Relating to the Protection of Victims of Inter-
19 national Armed Conflicts, article 86(2). The
20 United States is a state signatory to Additional
21 Protocol I, on December 12, 1977.

22 (B) Furthermore, article 85(3) of said
23 Protocol I defines as a grave breach making a
24 civilian population or individual civilians the ob-
25 ject of attacks. This offense, together with the

1 principle of command responsibility, places
2 President George Bush's conduct under the
3 reach of the same law and principles described
4 as the basis for war crimes prosecution at
5 Nuremburg, under article 6 of the Charter of
6 the Nuremberg Tribunals: including crimes
7 against peace, violations of the laws and cus-
8 toms of war and crimes against humanity, simi-
9 larly codified in the Rome Statute of the Inter-
10 national Criminal Court, articles 5 through 8.

11 (C) The Lancet Report has established
12 massive civilian casualties in Iraq as a result of
13 the United States invasion and occupation of
14 that country.

15 (D) International laws governing wars of
16 aggression are completely prohibited under the
17 legal principle of jus cogens, whether or not a
18 nation has signed or ratified a particular inter-
19 national agreement.

20 In all of these actions and decisions, President
21 George W. Bush has acted in a manner contrary to his
22 trust as President and Commander in Chief, and subver-
23 sive of constitutional government, to the prejudice of the
24 cause of law and justice and to the manifest injury of the
25 people of the United States. Wherefore, President George

1 W. Bush, by such conduct, is guilty of an impeachable
2 offense warranting removal from office.

3 ARTICLE IX—FAILING TO PROVIDE TROOPS WITH
4 BODY ARMOR AND VEHICLE ARMOR

5 In his conduct while President of the United States,
6 George W. Bush, in violation of his constitutional oath to
7 faithfully execute the office of President of the United
8 States and, to the best of his ability, preserve, protect,
9 and defend the Constitution of the United States, and in
10 violation of his constitutional duty under article II, section
11 3 of the Constitution “to take care that the laws be faith-
12 fully executed”, has both personally and acting through
13 his agents and subordinates, together with the Vice Presi-
14 dent, has been responsible for the deaths of members of
15 the U.S. military and serious injury and trauma to other
16 soldiers, by failing to provide available body armor and
17 vehicle armor.

18 While engaging in an invasion and occupation of
19 choice, not fought in self-defense, and not launched in ac-
20 cordance with any timetable other than the President’s
21 choosing, President Bush sent U.S. troops into danger
22 without providing them with armor. This shortcoming has
23 been known for years, during which time, the President
24 has chosen to allow soldiers and marines to continue to

1 face unnecessary risk to life and limb rather than pro-
2 viding them with armor.

3 In all of these actions and decisions, President
4 George W. Bush has acted in a manner contrary to his
5 trust as President and Commander in Chief, and subver-
6 sive of constitutional government, to the prejudice of the
7 cause of law and justice and to the manifest injury of the
8 people of the United States. Wherefore, President George
9 W. Bush, by such conduct, is guilty of an impeachable
10 offense warranting removal from office.

11 ARTICLE X—FALSIFYING ACCOUNTS OF U.S. TROOP
12 DEATHS AND INJURIES FOR POLITICAL PURPOSES

13 In his conduct while President of the United States,
14 George W. Bush, in violation of his constitutional oath to
15 faithfully execute the office of President of the United
16 States and, to the best of his ability, preserve, protect,
17 and defend the Constitution of the United States, and in
18 violation of his constitutional duty under article II, section
19 3 of the Constitution “to take care that the laws be faith-
20 fully executed”, has both personally and acting through
21 his agents and subordinates, together with the Vice Presi-
22 dent, promoted false propaganda stories about members
23 of the United States military, including individuals both
24 dead and injured.

1 The White House and the Department of Defense
2 (DOD) in 2004 promoted a false account of the death of
3 Specialist Pat Tillman, reporting that he had died in a
4 hostile exchange, delaying release of the information that
5 he had died from friendly fire, shot in the forehead three
6 times in a manner that led investigating doctors to believe
7 he had been shot at close range.

8 A 2005 report by Brig. Gen. Gary M. Jones reported
9 that in the days immediately following Specialist Tillman's
10 death, U.S. Army investigators were aware that Specialist
11 Tillman was killed by friendly fire, shot three times to the
12 head, and that senior Army commanders, including Gen.
13 John Abizaid, knew of this fact within days of the shooting
14 but nevertheless approved the awarding of the Silver Star,
15 Purple Heart, and a posthumous promotion.

16 On April 24, 2007, Spe. Bryan O'Neal, the last sol-
17 dier to see Specialist Pat Tillman alive, testified before
18 the House Oversight and Government Reform Committee
19 that he was warned by superiors not to divulge informa-
20 tion that a fellow soldier killed Specialist Tillman, espe-
21 cially to the Tillman family. The White House refused to
22 provide requested documents to the committee, citing "ex-
23 ecutive branch confidentiality interests."

24 The White House and DOD in 2003 promoted a false
25 account of the injury of Jessica Dawn Lynch, reporting

1 that she had been captured in a hostile exchange and had
2 been dramatically rescued. On April 2, 2003, the DOD
3 released a video of the rescue and claimed that Lynch had
4 stab and bullet wounds, and that she had been slapped
5 about on her hospital bed and interrogated. Iraqi doctors
6 and nurses later interviewed, including Dr. Harith Al-
7 Houssona, a doctor in the Nasirya hospital, described
8 Lynch's injuries as "a broken arm, a broken thigh, and
9 a dislocated ankle." According to Al-Houssona, there was
10 no sign of gunshot or stab wounds, and Lynch's injuries
11 were consistent with those that would be suffered in a car
12 accident. Al-Houssona's claims were later confirmed in a
13 U.S. Army report leaked on July 10, 2003.

14 Lynch denied that she fought or was wounded fight-
15 ing, telling Diane Sawyer that the Pentagon "used me to
16 symbolize all this stuff. It's wrong. I don't know why they
17 filmed [my rescue] or why they say these things. . . . I
18 did not shoot, not a round, nothing. I went down praying
19 to my knees. And that's the last I remember." She re-
20 ported excellent treatment in Iraq, and that one person
21 in the hospital even sang to her to help her feel at home.

22 On April 24, 2007, Lynch testified before the House
23 Committee on Oversight and Government Reform:

24 "[Right after my capture], tales of great heroism
25 were being told. My parent's home in Wirt County was

1 under siege of the media all repeating the story of the
2 little girl Rambo from the hills who went down fighting.
3 It was not true. . . . I am still confused as to why they
4 chose to lie.”.

5 The White House had heavily promoted the false
6 story of Lynch’s rescue, including in a speech by President
7 Bush on April 28, 2003. After the fiction was exposed,
8 the President awarded Lynch the Bronze Star.

9 In all of these actions and decisions, President
10 George W. Bush has acted in a manner contrary to his
11 trust as President and Commander in Chief, and subver-
12 sive of constitutional government, to the prejudice of the
13 cause of law and justice and to the manifest injury of the
14 people of the United States. Wherefore, President George
15 W. Bush, by such conduct, is guilty of an impeachable
16 offense warranting removal from office.

17 ARTICLE XI—ESTABLISHMENT OF PERMANENT U.S.

18 MILITARY BASES IN IRAQ

19 In his conduct while President of the United States,
20 George W. Bush, in violation of his constitutional oath to
21 faithfully execute the office of President of the United
22 States and, to the best of his ability, preserve, protect,
23 and defend the Constitution of the United States, and in
24 violation of his constitutional duty under article II, section
25 3 of the Constitution “to take care that the laws be faith-

1 fully executed”, has violated an act of Congress that he
2 himself signed into law by using public funds to construct
3 permanent U.S. military bases in Iraq.

4 On January 28, 2008, President George W. Bush
5 signed into law the National Defense Authorization Act
6 for Fiscal Year 2008 (H.R. 4986). Noting that the Act
7 “authorizes funding for the defense of the United States
8 and its interests abroad, for military construction, and for
9 national security-related energy programs”, the president
10 added the following “signing statement”:

11 “Provisions of the Act, including sections 841, 846,
12 1079, and 1222, purport to impose requirements that
13 could inhibit the President’s ability to carry out his con-
14 stitutional obligations to take care that the laws be faith-
15 fully executed, to protect national security, to supervise
16 the executive branch, and to execute his authority as Com-
17 mander in Chief. The executive branch shall construe such
18 provisions in a manner consistent with the constitutional
19 authority of the President.”.

20 Section 1222 clearly prohibits the expenditure of
21 money for the purpose of establishing permanent U.S.
22 military bases in Iraq. The construction of over \$1 billion
23 in U.S. military bases in Iraq, including runways for air-
24 craft, continues despite congressional intent, as the Ad-

1 ministration intends to force upon the Iraqi Government
2 such terms which will assure the bases remain in Iraq.
3 Iraqi officials have informed Members of Congress in
4 May 2008 of the strong opposition within the Iraqi par-
5 liament and throughout Iraq to the agreement that the
6 administration is trying to negotiate with Iraqi Prime
7 Minister Nouri al-Maliki. The agreement seeks to assure
8 a long-term U.S. presence in Iraq of which military bases
9 are the most obvious, sufficient and necessary construct,
10 thus clearly defying Congressional intent as to the matter
11 and meaning of “permanency”.

12 In all of these actions and decisions, President
13 George W. Bush has acted in a manner contrary to his
14 trust as President and Commander in Chief, and subver-
15 sive of constitutional government, to the prejudice of the
16 cause of law and justice and to the manifest injury of the
17 people of the United States. Wherefore, President George
18 W. Bush, by such conduct, is guilty of an impeachable
19 offense warranting removal from office.

20 ARTICLE XII—INITIATING A WAR AGAINST IRAQ FOR
21 CONTROL OF THAT NATION’S NATURAL RESOURCES

22 In his conduct while President of the United States,
23 George W. Bush, in violation of his constitutional oath to
24 faithfully execute the office of President of the United
25 States and, to the best of his ability, preserve, protect,

1 and defend the Constitution of the United States, and in
2 violation of his constitutional duty under article II, section
3 3 of the Constitution “to take care that the laws be faith-
4 fully executed”, has both personally and acting through
5 his agents and subordinates, together with the Vice Presi-
6 dent, invaded and occupied a foreign nation for the pur-
7 pose, among other purposes, of seizing control of that na-
8 tion’s oil.

9 The White House and its representatives in Iraq
10 have, since the occupation of Baghdad began, attempted
11 to gain control of Iraqi oil. This effort has included pres-
12 suring the new Iraqi Government to pass a hydrocarbon
13 law. Within weeks of the fall of Saddam Hussein in 2003,
14 the U.S. Agency for International Development (USAid)
15 awarded a \$240 million contract to Bearing Point, a pri-
16 vate U.S. company. A Bearing Point employee, based in
17 the U.S. embassy in Baghdad, was hired to advise the
18 Iraqi Ministry of Oil on drawing up the new hydrocarbon
19 law. The draft law places executives of foreign oil compa-
20 nies on a council with the task of approving their own con-
21 tracts with Iraq; it denies the Iraqi National Oil Company
22 exclusive rights for the exploration, development, produc-
23 tion, transportation, and marketing of Iraqi oil, and allows
24 foreign companies to control Iraqi oil fields containing 80
25 percent of Iraqi oil for up to 35 years through contracts

1 that can remain secret for up to 2 months. The draft law
2 itself contains secret appendices.

3 President Bush provided unrelated reasons for the in-
4 vasion of Iraq to the public and Congress, but those rea-
5 sons have been established to have been categorically
6 fraudulent, as evidenced by the herein mentioned Articles
7 of Impeachment I, II, III, IV, VI, and VII.

8 Parallel to the development of plans for war against
9 Iraq, the U.S. State Department's Future of Iraq project,
10 begun as early as April 2002, involved meetings in Wash-
11 ington and London of 17 working groups, each composed
12 of 10 to 20 Iraqi exiles and international experts selected
13 by the State Department. The Oil and Energy working
14 group met four times between December 2002 and April
15 2003. Ibrahim Bahr al-Uloum, later the Iraqi Oil Min-
16 ister, was a member of the group, which concluded that
17 Iraq "should be opened to international oil companies as
18 quickly as possible after the war," and that, "the country
19 should establish a conducive business environment to at-
20 tract investment of oil and gas resources." The same
21 group recommended production-sharing agreements with
22 foreign oil companies, the same approach found in the
23 draft hydrocarbon law, and control over Iraq's oil re-
24 sources remains a prime objective of the Bush Administra-
25 tion.

1 Prior to his election as Vice President, Dick Cheney,
2 then-CEO of Halliburton, in a speech at the Institute of
3 Petroleum in 1999 demonstrated a keen awareness of the
4 sensitive economic and geopolitical role of Middle East oil
5 resources saying: “By 2010, we will need on the order of
6 an additional 50 million barrels a day. So where is the
7 oil going to come from? Governments and national oil com-
8 panies are obviously controlling about 90 percent of the
9 assets. Oil remains fundamentally a government business.
10 While many regions of the world offer great oil opportuni-
11 ties, the Middle East, with two-thirds of the world’s oil
12 and lowest cost, is still where the prize ultimately lies.
13 Even though companies are anxious for greater access
14 there, progress continues to be slow.”.

15 The Vice President led the work of a secret energy
16 task force, as described in article XXXII below, a task
17 force that focused on, among other things, the acquisition
18 of Iraqi oil through developing a controlling private cor-
19 porate interest in said oil.

20 In all of these actions and decisions, President
21 George W. Bush has acted in a manner contrary to his
22 trust as President and Commander in Chief, and subver-
23 sive of constitutional government, to the prejudice of the
24 cause of law and justice and to the manifest injury of the
25 people of the United States. Wherefore, President George

1 W. Bush, by such conduct, is guilty of an impeachable
2 offense warranting removal from office.

3 ARTICLE XIII—CREATING A SECRET TASK FORCE TO
4 DEVELOP ENERGY AND MILITARY POLICIES WITH
5 RESPECT TO IRAQ AND OTHER COUNTRIES

6 In his conduct while President of the United States,
7 George W. Bush, in violation of his constitutional oath to
8 faithfully execute the office of President of the United
9 States and, to the best of his ability, preserve, protect,
10 and defend the Constitution of the United States, and in
11 violation of his constitutional duty to take care that the
12 laws be faithfully executed, has both personally and acting
13 through his agents and subordinates, together with the
14 Vice President, created a secret task force to guide our
15 nation's energy policy and military policy, and undermined
16 Congress's ability to legislate by thwarting attempts to in-
17 vestigate the nature of that policy.

18 A Government Accountability Office (GAO) Report
19 on the Cheney Energy Task Force, in August 2003, de-
20 scribed the creation of this task force as follows:

21 “In a January 29, 2001, memorandum, the President
22 established NEPDG [the National Energy Policy Develop-
23 ment Group]—comprised of the Vice President, nine cabi-
24 net-level officials, and four other senior administration of-
25 ficials—to gather information, deliberate, and make rec-

1 ommendations to the President by the end of fiscal year
2 2001. The President called on the Vice President to chair
3 the group, direct its work and, as necessary, establish sub-
4 ordinate working groups to assist NEPDG.”.

5 The four “other senior administration officials” were
6 the Director of the Office of Management and Budget, the
7 Assistant to the President and Deputy Chief of Staff for
8 Policy, the Assistant to the President for Economic Policy,
9 and the Deputy Assistant to the President for Intergov-
10 ernmental Affairs.

11 The GAO report found that:

12 “In developing the National Energy Policy report, the
13 NEPDG Principals, Support Group, and participating
14 agency officials and staff met with, solicited input from,
15 or received information and advice from nonfederal energy
16 stakeholders, principally petroleum, coal, nuclear, natural
17 gas, and electricity industry representatives and lobbyists.
18 The extent to which submissions from any of these stake-
19 holders were solicited, influenced policy deliberations, or
20 were incorporated into the final report cannot be deter-
21 mined based on the limited information made available to
22 GAO. NEPDG met and conducted its work in two distinct
23 phases: the first phase culminated in a March 19, 2001,
24 briefing to the President on challenges relating to energy
25 supply and the resulting economic impact; the second

1 phase ended with the May 16, 2001, presentation of the
2 final report to the President. The Office of the Vice Presi-
3 dent's (OVP) unwillingness to provide the NEPDG
4 records or other related information precluded GAO from
5 fully achieving its objectives and substantially limited
6 GAO's ability to comprehensively analyze the NEPDG
7 process associated with that process.

8 "None of the key federal entities involved in the
9 NEPDG effort provided GAO with a complete accounting
10 of the costs that they incurred during the development of
11 the National Energy Policy report. The two federal enti-
12 ties responsible for funding the NEPDG effort—OVP and
13 the Department of Energy (DOE)—did not provide the
14 comprehensive cost information that GAO requested. OVP
15 provided GAO with 77 pages of information, two-thirds
16 of which contained no cost information while the remain-
17 ing one-third contained some miscellaneous information of
18 little to no usefulness. OVP stated that it would not pro-
19 vide any additional information. DOE, the Department of
20 the Interior, and the Environmental Protection Agency
21 (EPA) provided GAO with estimates of certain costs and
22 salaries associated with the NEPDG effort, but these esti-
23 mates, all calculated in different ways, were not com-
24 prehensive."

1 In 2003, the Commerce Department disclosed a par-
2 tial collection of materials from the NEPDG, including
3 documents, maps, and charts, dated March 2001, of
4 Iraq's, Saudi Arabia's and the United Arab Emirates' oil
5 fields, pipelines, refineries, tanker terminals, and develop-
6 ment projects.

7 On November 16, 2005, the Washington Post re-
8 ported on a White House document showing that oil com-
9 pany executives had met with the NEPDG, something that
10 some of those same executives had just that week denied
11 in Congressional testimony. The Bush Administration had
12 not corrected the inaccurate testimony.

13 On July 18, 2007, the Washington Post reported the
14 full list of names of those who had met with the NEPDG.

15 In 1998, Kenneth Derr, then chief executive of Chev-
16 ron, told a San Francisco audience, "Iraq possesses huge
17 reserves of oil and gas, reserves I'd love Chevron to have
18 access to." According to the GAO report, Chevron pro-
19 vided detailed advice to the NEPDG.

20 In March, 2001, the NEPDG recommended that the
21 United States Government support initiatives by Middle
22 Eastern countries "to open up areas of their energy sec-
23 tors to foreign investment." Following the invasion of
24 Iraq, the United States has pressured the new Iraqi par-
25 liament to pass a hydrocarbon law that would do exactly

1 that. The draft law, if passed, would take the majority
2 of Iraq's oil out of the exclusive hands of the Iraqi Govern-
3 ment and open it to international oil companies for a gen-
4 eration or more. The Bush administration hired Bearing
5 Point, a U.S. company, to help write the law in 2004. It
6 was submitted to the Iraqi Council of Representatives in
7 May 2007.

8 In all of these actions and decisions, President
9 George W. Bush has acted in a manner contrary to his
10 trust as President and Commander in Chief, and subver-
11 sive of constitutional government, to the prejudice of the
12 cause of law and justice and to the manifest injury of the
13 people of the United States. Wherefore, President George
14 W. Bush, by such conduct, is guilty of an impeachable
15 offense warranting removal from office.

16 ARTICLE XIV—MISPRISION OF A FELONY, MISUSE AND
17 EXPOSURE OF CLASSIFIED INFORMATION AND OB-
18 STRUCTION OF JUSTICE IN THE MATTER OF VAL-
19 ERIE PLAME WILSON, CLANDESTINE AGENT OF
20 THE CENTRAL INTELLIGENCE AGENCY

21 In his conduct while President of the United States,
22 George W. Bush, in violation of his constitutional oath to
23 faithfully execute the office of President of the United
24 States and, to the best of his ability, preserve, protect,
25 and defend the Constitution of the United States, and in

1 violation of his constitutional duty under article II, section
2 3 of the Constitution “to take care that the laws be faith-
3 fully executed”, has both personally and acting through
4 his agents and subordinates, together with the Vice Presi-
5 dent,

6 (1) suppressed material information;

7 (2) selectively declassified information for the
8 improper purposes of retaliating against a whistle-
9 blower and presenting a misleading picture of the al-
10 leged threat from Iraq;

11 (3) facilitated the exposure of the identity of
12 Valerie Plame Wilson who had theretofore been em-
13 ployed as a covert CIA operative;

14 (4) failed to investigate the improper leaks of
15 classified information from within his administra-
16 tion;

17 (5) failed to cooperate with an investigation
18 into possible federal violations resulting from this
19 activity; and

20 (6) finally, entirely undermined the prosecution
21 by commuting the sentence of Lewis Libby citing
22 false and insubstantial grounds, all in an effort to
23 prevent Congress and the citizens of the United
24 States from discovering the deceitful nature of the

1 President's claimed justifications for the invasion of
2 Iraq.

3 In facilitating this exposure of classified information
4 and the subsequent cover-up, in all of these actions and
5 decisions, President George W. Bush has acted in a man-
6 ner contrary to his trust as President, and subversive of
7 constitutional government, to the prejudice of the cause
8 of law and justice and to the manifest injury of the people
9 of the United States. Wherefore, President George W.
10 Bush, by such conduct, is guilty of an impeachable offense
11 warranting removal from office.

12 ARTICLE XV—PROVIDING IMMUNITY FROM
13 PROSECUTION FOR CRIMINAL CONTRACTORS IN IRAQ

14 In his conduct while President of the United States,
15 George W. Bush, in violation of his constitutional oath to
16 faithfully execute the office of President of the United
17 States and, to the best of his ability, preserve, protect,
18 and defend the Constitution of the United States, and in
19 violation of his constitutional duty under article II, section
20 3 of the Constitution “to take care that the laws be faith-
21 fully executed”, has both personally and acting through
22 his agents and subordinates, together with the Vice Presi-
23 dent, established policies granting United States Govern-
24 ment contractors and their employees in Iraq immunity
25 from Iraqi law, U.S. law, and international law.

1 Lewis Paul Bremer III, then-Director of Reconstruc-
2 tion and Humanitarian Assistance for post-war Iraq, on
3 June 27, 2004, issued Coalition Provisional Authority
4 Order Number 17, which granted members of the U.S.
5 military, U.S. mercenaries, and other U.S. contractor em-
6 ployees immunity from Iraqi law.

7 The Bush Administration has chosen not to apply the
8 Uniform Code of Military Justice or United States law
9 to mercenaries and other contractors employed by the
10 United States Government in Iraq.

11 Operating free of Iraqi or U.S. law, mercenaries have
12 killed many Iraqi civilians in a manner that observers have
13 described as aggression and not as self-defense. Many
14 U.S. contractors have also alleged that they have been the
15 victims of aggression (in several cases of rape) by their
16 fellow contract employees in Iraq. These charges have not
17 been brought to trial, and in several cases the contracting
18 companies and the U.S. State Department have worked
19 together in attempting to cover them up.

20 Under the Fourth Geneva Convention, to which the
21 United States is party, and which under article VI of the
22 U.S. Constitution is therefore the supreme law of the
23 United States, it is the responsibility of an occupying force
24 to ensure the protection and human rights of the civilian
25 population. The efforts of President Bush and his subordi-

1 nates to attempt to establish a lawless zone in Iraq are
2 in violation of the law.

3 In all of these actions and decisions, President
4 George W. Bush has acted in a manner contrary to his
5 trust as President and subversive of constitutional govern-
6 ment, to the prejudice of the cause of law and justice and
7 to the manifest injury of the people of the United States.
8 Wherefore, President George W. Bush, by such conduct,
9 is guilty of an impeachable offense warranting removal
10 from office.

11 ARTICLE XVI—RECKLESS MISSPENDING AND WASTE OF
12 U.S. TAX DOLLARS IN CONNECTION WITH IRAQ
13 CONTRACTORS

14 In his conduct while President of the United States,
15 George W. Bush, in violation of his constitutional oath to
16 faithfully execute the office of President of the United
17 States and, to the best of his ability, preserve, protect,
18 and defend the Constitution of the United States, and in
19 violation of his constitutional duty under article II, section
20 3 of the Constitution “to take care that the laws be faith-
21 fully executed”, has both personally and acting through
22 his agents and subordinates, together with the Vice Presi-
23 dent, recklessly wasted public funds on contracts awarded
24 to close associates, including companies guilty of defraud-
25 ing the government in the past, contracts awarded without

1 competitive bidding, “cost-plus” contracts designed to en-
2 courage cost overruns, and contracts not requiring satis-
3 factory completion of the work. These failures have been
4 the rule, not the exception, in the awarding of contracts
5 for work in the United States and abroad over the past
6 seven years. Repeated exposure of fraud and waste has
7 not been met by the president with correction of systemic
8 problems, but rather with retribution against whistle-
9 blowers.

10 The House Committee on Oversight and Government
11 Reform reported on Iraq reconstruction contracting:

12 “From the beginning, the Administration adopted a
13 flawed contracting approach in Iraq. Instead of maxi-
14 mizing competition, the Administration opted to award no-
15 bid, cost-plus contracts to politically connected contrac-
16 tors. Halliburton’s secret \$7 billion contract to restore
17 Iraq’s oil infrastructure is the prime example. Under this
18 no-bid, cost-plus contract, Halliburton was reimbursed for
19 its costs and then received an additional fee, which was
20 a percentage of its costs. This created an incentive for
21 Halliburton to run up its costs in order to increase its
22 potential profit.

23 “Even after the Administration claimed it was award-
24 ing Iraq contracts competitively in early 2004, real price
25 competition was missing. Iraq was divided geographically

1 and by economic sector into a handful of fiefdoms. Indi-
2 vidual contractors were then awarded monopoly contracts
3 for all of the work within given fiefdoms. Because these
4 monopoly contracts were awarded before specific projects
5 were identified, there was no actual price competition for
6 more than 2,000 projects.

7 “In the absence of price competition, rigorous govern-
8 ment oversight becomes essential for accountability. Yet
9 the Administration turned much of the contract oversight
10 work over to private companies with blatant conflicts of
11 interest. Oversight contractors oversaw their business
12 partners and, in some cases, were placed in a position to
13 assist their own construction work under separate monop-
14 oly construction contracts. . . .

15 “Under Halliburton’s two largest Iraq contracts,
16 Pentagon auditors found \$1 billion in ‘questioned’ costs
17 and over \$400 million in ‘unsupported’ costs. Former Hal-
18 liburton employees testified that the company charged \$45
19 for cases of soda, billed \$100 to clean 15-pound bags of
20 laundry, and insisted on housing its staff at the five-star
21 Kempinski hotel in Kuwait. Halliburton truck drivers tes-
22 tified that the company ‘torched’ brand new \$85,000
23 trucks rather than perform relatively minor repairs and
24 regular maintenance. Halliburton procurement officials
25 described the company’s informal motto in Iraq as ‘Don’t

1 worry about price. It's cost-plus.' A Halliburton manager
2 was indicted for 'major fraud against the United States'
3 for allegedly billing more than \$5.5 billion for work that
4 should have cost only \$685,000 in exchange for a \$1 mil-
5 lion kickback from a Kuwaiti subcontractor. . . .

6 "The Air Force found that another U.S. Government
7 contractor, Custer Battles, set up shell subcontractors to
8 inflate prices. Those overcharges were passed along to the
9 U.S. Government under the company's cost-plus contract
10 to provide security for Baghdad International Airport. In
11 one case, the company allegedly took Iraqi-owned forklifts,
12 re-painted them, and leased them to the U.S. Government.

13 "Despite the spending of billions of taxpayer dollars,
14 U.S. reconstruction efforts in key sectors of the Iraqi
15 economy are failing. Over two years after the U.S.-led in-
16 vasion of Iraq, oil and electricity production has fallen
17 below pre-war levels. The Administration has failed to
18 even measure how many Iraqis lack access to drinkable
19 water.".

20 "Constitution in Crisis", a book by Congressman
21 John Conyers, details the Bush Administration's response
22 when contract abuse is made public:

23 "Bunnatine Greenhouse was the chief contracting of-
24 ficer at the Army Corps of Engineers, the agency that has
25 managed much of the reconstruction work in Iraq. In Oc-

1 tober 2004, Ms. Greenhouse came forward and revealed
2 that top Pentagon officials showed improper favoritism to
3 Halliburton when awarding military contracts to Halli-
4 burton subsidiary Kellogg Brown & Root (KBR). Green-
5 house stated that when the Pentagon awarded Halliburton
6 a five-year \$7 billion contract, it pressured her to with-
7 draw her objections, actions which she claimed were un-
8 precedented in her experience.

9 “On June 27, 2005, Ms. Greenhouse testified before
10 Congress, detailing that the contract award process was
11 compromised by improper influence by political ap-
12 pointees, participation by Halliburton officials in meetings
13 where bidding requirements were discussed, and a lack of
14 competition. She stated that the Halliburton contracts
15 represented ‘the most blatant and improper contract abuse
16 I have witnessed during the course of my professional ca-
17 reer.’ Days before the hearing, the acting general counsel
18 of the Army Corps of Engineers paid Ms. Greenhouse a
19 visit and reportedly let it be known that it would not be
20 in her best interest to appear voluntarily.

21 “On August 27, 2005, the Army demoted Ms. Green-
22 house, removing her from the elite Senior Executive Serv-
23 ice and transferring her to a lesser job in the corps’ civil
24 works division. As Frank Rich of The New York Times
25 described the situation, ‘[H]er crime was not obstructing

1 justice but pursuing it by vehemently questioning irreg-
2 ularities in the awarding of some \$7 billion worth of no-
3 bid contracts in Iraq to the Halliburton subsidiary Kellogg
4 Brown Root.’ The demotion was in apparent retaliation
5 for her speaking out against the abuses, even though she
6 previously had stellar reviews and over 20 years of experi-
7 ence in military procurement.”.

8 The House Committee on Oversight and Government
9 Reform reports on domestic contracting:

10 “The Administration’s domestic contracting record is
11 no better than its record on Iraq. Waste, fraud, and abuse
12 appear to be the rule rather than the exception. . . .

13 “A Transportation Security Administration (TSA)
14 cost-plus contract with NCS Pearson, Inc., to hire Federal
15 airport screeners was plagued by poor management and
16 egregious waste. Pentagon auditors challenged \$303 mil-
17 lion (over 40 percent) of the \$741 million spent by Pear-
18 son under the contract. The auditors detailed numerous
19 concerns with the charges of Pearson and its subcontract-
20 tors, such as ‘\$20-an-hour temporary workers billed to the
21 government at \$48 per hour, subcontractors who signed
22 out \$5,000 in cash at a time with no supporting docu-
23 ments, \$377,273.75 in unsubstantiated long distance
24 phone calls, \$514,201 to rent tents that flooded in a rain-
25 storm, [and] \$4.4 million in “no show” fees for job can-

1 didates who did not appear for tests.’ A Pearson employee
2 who supervised Pearson’s hiring efforts at 43 sites in the
3 U.S. described the contract as ‘a waste of taxpayer’s
4 money.’ The CEO of one Pearson subcontractor paid her-
5 self \$5.4 million for nine months work and provided her-
6 self with a \$270,000 pension. . . .

7 “The Administration is spending \$239 million on the
8 Integrated Surveillance and Intelligence System, a no-bid
9 contract to provide thousands of cameras and sensors to
10 monitor activity on the Mexican and Canadian borders.
11 Auditors found that the contractor, International Micro-
12 wave Corp., billed for work it never did and charged for
13 equipment it never provided, ‘creat[ing] a potential for
14 overpayments of almost \$13 million.’ Moreover, the border
15 monitoring system reportedly does not work. . . .

16 “After spending more than \$4.5 billion on screening
17 equipment for the Nation’s entry points, the Department
18 of Homeland Security is now ‘moving to replace or alter
19 much of’ it because ‘it is ineffective, unreliable or too ex-
20 pensive to operate.’ For example, radiation monitors at
21 ports and borders reportedly could not ‘differentiate be-
22 tween radiation emitted by a nuclear bomb and naturally
23 occurring radiation from everyday material like cat litter
24 or ceramic tile’. . . .

1 “The TSA awarded Boeing a cost-plus contract to in-
2 stall over 1,000 explosive detection systems for airline pas-
3 senger luggage. After installation, the machines ‘began to
4 register false alarms’ and ‘[s]creeners were forced to open
5 and hand-check bags.’ To reduce the number of false
6 alarms, the sensitivity of the machines was lowered, which
7 reduced the effectiveness of the detectors. Despite these
8 serious problems, Boeing received an \$82 million profit
9 that the Inspector General determined to be ‘exces-
10 sive’. . . .

11 “The FBI spent \$170 million on a ‘Virtual Case File’
12 system that does not operate as required. After three years
13 of work under a cost-plus contract failed to produce a
14 functional system, the FBI scrapped the program and
15 began work on the new ‘Sentinel’ Case File System. . . .

16 “The Department of Homeland Security Inspector
17 General found that taxpayer dollars were being lavished
18 on perks for agency officials. One IG report found that
19 TSA spent over \$400,000 on its first leader’s executive
20 office suite. Another found that TSA spent \$350,000 on
21 a gold-plated gym. . . .

22 “According to news reports, Pentagon auditors . . .
23 examined a contract between the Transportation Security
24 Administration (TSA) and Unisys, a technology and con-
25 sulting company, for the upgrade of airport computer net-

1 works. Among other irregularities, government auditors
2 found that Unisys may have overbilled for as much as
3 171,000 hours of labor and overtime by charging for em-
4 ployees at up to twice their actual rate of compensation.
5 While the cost ceiling for the contract was set at \$1 billion,
6 Unisys has reportedly billed the Government \$940 million
7 with more than half of the seven-year contract remaining
8 and more than half of the TSA-monitored airports still
9 lacking upgraded networks.”.

10 In all of these actions and decisions, President
11 George W. Bush has acted in a manner contrary to his
12 trust as President and Commander in Chief, and subver-
13 sive of constitutional government, to the prejudice of the
14 cause of law and justice and to the manifest injury of the
15 people of the United States. Wherefore, President George
16 W. Bush, by such conduct, is guilty of an impeachable
17 offense warranting removal from office.

18 ARTICLE XVII—ILLEGAL DETENTION: DETAINING IN-
19 DEFINITELY AND WITHOUT CHARGE PERSONS
20 BOTH U.S. CITIZENS AND FOREIGN CAPTIVES

21 In his conduct while President of the United States,
22 George W. Bush, in violation of his constitutional oath to
23 faithfully execute the office of President of the United
24 States and, to the best of his ability, preserve, protect,
25 and defend the Constitution of the United States, and in

1 violation of his constitutional duty under article II, section
2 3 of the Constitution “to take care that the laws be faith-
3 fully executed”, has both personally and acting through
4 his agents and subordinates, together with the Vice Presi-
5 dent, violated United States and International Law and
6 the U.S. Constitution by illegally detaining indefinitely
7 and without charge persons both U.S. citizens and foreign
8 captives.

9 In a statement on February 7, 2002, President Bush
10 declared that in the U.S. fight against al Qaeda, “none
11 of the provisions of Geneva apply,” thus rejecting the Ge-
12 neva Conventions that protect captives in wars and other
13 conflicts. By that time, the administration was already
14 transporting captives from the war in Afghanistan, both
15 alleged al Qaeda members and supporters, and also Af-
16 ghans accused of being fighters in the army of the Taliban
17 government, to U.S.-run prisons in Afghanistan and to the
18 detention facility at Guantanamo Bay, Cuba. The round-
19 up and detention without charge of Muslim non-citizens
20 inside the U.S. began almost immediately after the Sep-
21 tember 11, 2001, attacks on the World Trade Center and
22 the Pentagon, with some being held as long as nine
23 months. The U.S., on orders of the president, began cap-
24 turing and detaining without charge alleged terror sus-

1 pects in other countries and detaining them abroad and
2 at the U.S. Naval base in Guantanamo.

3 Many of these detainees have been subjected to sys-
4 tematic abuse, including beatings, which have been subse-
5 quently documented by news reports, photographic evi-
6 dence, testimony in Congress, lawsuits, and in the case
7 of detainees in the U.S., by an investigation conducted by
8 the Justice Department's Office of the Inspector General.

9 In violation of U.S. law and the Geneva Conventions,
10 the Bush Administration instructed the Department of
11 Justice and the U.S. Department of Defense to refuse to
12 provide the identities or locations of these detainees, de-
13 spite requests from Congress and from attorneys for the
14 detainees. The president even declared the right to detain
15 U.S. citizens indefinitely, without charge and without pro-
16 viding them access to counsel or the courts, thus depriving
17 them of their constitutional and basic human rights. Sev-
18 eral of those U.S. citizens were held in military brigs in
19 solitary confinement for as long as three years before
20 being either released or transferred to civilian detention.

21 Detainees in U.S. custody in Iraq and Guantanamo
22 have, in violation of the Geneva Conventions, been hidden
23 from and denied visits by the International Red Cross or-
24 ganization, while thousands of others in Iraq, Guanta-
25 namo, Afghanistan, ships in foreign off-shore sites, and

1 an unknown number of so-called “black sites” around the
2 world have been denied any opportunity to challenge their
3 detentions. The president, acting on his own claimed au-
4 thority, has declared the hundreds of detainees at Guanta-
5 namo Bay to be “enemy combatants” not subject to U.S.
6 law and not even subject to military law, but nonetheless
7 potentially liable to the death penalty.

8 The detention of individuals without due process vio-
9 lates the 5th Amendment. While the Bush administration
10 has been rebuked in several court cases, most recently that
11 of Ali al-Marri, it continues to attempt to exceed constitu-
12 tional limits.

13 In all of these actions violating U.S. and Inter-
14 national law, President George W. Bush has acted in a
15 manner contrary to his trust as President and Commander
16 in Chief, and subversive of constitutional government, to
17 the prejudice of the cause of law and justice and to the
18 manifest injury of the people of the United States. Where-
19 fore, President George W. Bush, by such conduct, is guilty
20 of an impeachable offense warranting removal from office.

1 ARTICLE XVIII—TORTURE: SECRETLY AUTHORIZING,
2 AND ENCOURAGING THE USE OF TORTURE AGAINST
3 CAPTIVES IN AFGHANISTAN, IRAQ, AND OTHER
4 PLACES, AS A MATTER OF OFFICIAL POLICY

5 In his conduct while President of the United States,
6 George W. Bush, in violation of his constitutional oath to
7 faithfully execute the office of President of the United
8 States and, to the best of his ability, preserve, protect,
9 and defend the Constitution of the United States, and in
10 violation of his constitutional duty under article II, section
11 3 of the Constitution “to take care that the laws be faith-
12 fully executed”, has both personally and acting through
13 his agents and subordinates, together with the Vice Presi-
14 dent, violated United States and International Law and
15 the U.S. Constitution by secretly authorizing and encour-
16 aging the use of torture against captives in Afghanistan,
17 Iraq in connection with the so-called “war” on terror.

18 In violation of the Constitution, U.S. law, the Geneva
19 Conventions (to which the U.S. is a signatory), and in vio-
20 lation of basic human rights, torture has been authorized
21 by the President and his administration as official policy.
22 Water-boarding, beatings, faked executions, confinement
23 in extreme cold or extreme heat, prolonged enforcement
24 of painful stress positions, sleep deprivation, sexual humil-
25 iation, and the defiling of religious articles have been prac-

1 ticed and exposed as routine at Guantanamo, at Abu
2 Ghraib Prison and other U.S. detention sites in Iraq, and
3 at Bagram Air Base in Afghanistan. The president, be-
4 sides bearing responsibility for authorizing the use of tor-
5 ture, also as Commander in Chief, bears ultimate respon-
6 sibility for the failure to halt these practices and to punish
7 those responsible once they were exposed.

8 The administration has sought to claim the abuse of
9 captives is not torture, by redefining torture. An August
10 1, 2002, memorandum from the Administration's Office
11 of Legal Counsel Jay S. Bybee addressed to White House
12 Counsel Alberto R. Gonzales concluded that to constitute
13 torture, any pain inflicted must be akin to that accom-
14 panying "serious physical injury, such as organ failure,
15 impairment of bodily function, or even death." The memo-
16 randum went on to state that even should an act con-
17 stitute torture under that minimal definition, it might still
18 be permissible if applied to "interrogations undertaken
19 pursuant to the President's Commander-in-Chief powers."
20 The memorandum further asserted that "necessity or self-
21 defense could provide justifications that would eliminate
22 any criminal liability."

23 This effort to redefine torture by calling certain prac-
24 tices simply "enhanced interrogation techniques" flies in
25 the face of the Third Geneva Convention Relating to the

1 Treatment of Prisoners of War, which states that “No
2 physical or mental torture, nor any other form of coercion,
3 may be inflicted on prisoners of war to secure from them
4 information of any kind whatever. Prisoners of war who
5 refuse to answer may not be threatened, insulted, or ex-
6 posed to any unpleasant or disadvantageous treatment of
7 any kind.”

8 Torture is further prohibited by the Universal Dec-
9 laration of Human Rights, the paramount international
10 human rights statement adopted unanimously by the
11 United Nations General Assembly, including the United
12 States, in 1948. Torture and other cruel, inhuman or de-
13 grading treatment or punishment is also prohibited by
14 international treaties ratified by the United States: the
15 International Covenant on Civil and Political Rights
16 (ICCPR) and the Convention Against Torture and Other
17 Cruel Inhuman or Degrading Treatment or Punishment
18 (CAT).

19 When the Congress, in the Defense Authorization Act
20 of 2006, overwhelmingly passed a measure banning tor-
21 ture and sent it to the President’s desk for signature, the
22 President, who together with his vice president, had
23 fought hard to block passage of the amendment, signed
24 it, but then quietly appended a signing statement in which

1 he pointedly asserted that as Commander in Chief, he was
2 not bound to obey its strictures.

3 The administration's encouragement of and failure to
4 prevent torture of American captives in the wars in Iraq
5 and Afghanistan, and in the battle against terrorism, has
6 undermined the rule of law in the U.S. and in the U.S.
7 military, and has seriously damaged both the effort to
8 combat global terrorism, and more broadly, America's
9 image abroad. In his effort to hide torture by U.S. military
10 forces and the CIA, the president has defied Congress and
11 has lied to the American people, repeatedly claiming that
12 the U.S. "does not torture".

13 In all of these actions and decisions in violation of
14 U.S. and International law, President George W. Bush
15 has acted in a manner contrary to his trust as President
16 and Commander in Chief, and subversive of constitutional
17 government, to the prejudice of the cause of law and jus-
18 tice and to the manifest injury of the people of the United
19 States. Wherefore, President George W. Bush, by such
20 conduct, is guilty of an impeachable offense warranting
21 removal from office.

1 ARTICLE XIX—RENDITION: KIDNAPPING PEOPLE AND
2 TAKING THEM AGAINST THEIR WILL TO “BLACK
3 SITES” LOCATED IN OTHER NATIONS, INCLUDING
4 NATIONS KNOWN TO PRACTICE TORTURE

5 In his conduct while President of the United States,
6 George W. Bush, in violation of his constitutional oath to
7 faithfully execute the office of President of the United
8 States and, to the best of his ability, preserve, protect,
9 and defend the Constitution of the United States, and in
10 violation of his constitutional duty under article II, section
11 3 of the Constitution “to take care that the laws be faith-
12 fully executed”, has both personally and acting through
13 his agents and subordinates, together with the Vice Presi-
14 dent, violated United States and International Law and
15 the U.S. Constitution by kidnapping people and
16 renditioning them to “black sites” located in other na-
17 tions, including nations known to practice torture.

18 The president has publicly admitted that since the 9/
19 11 attacks in 2001, the U.S. has been kidnapping and
20 transporting against the will of the subject (renditioning)
21 in its so-called “war” on terror—even people captured by
22 U.S. personnel in friendly nations like Sweden, Germany,
23 Macedonia and Italy—and ferrying them to places like
24 Bagram Airbase in Afghanistan, and to prisons operated
25 in Eastern European countries, African countries and

1 Middle Eastern countries where security forces are known
2 to practice torture.

3 These people are captured and held indefinitely, with-
4 out any charges being filed, and are held without being
5 identified to the Red Cross, or to their families. Many are
6 clearly innocent, and several cases, including one in Can-
7 ada and one in Germany, have demonstrably been shown
8 subsequently to have been in error, because of a similarity
9 of names or because of misinformation provided to U.S.
10 authorities.

11 Such a policy is in clear violation of U.S. and Inter-
12 national Law, and has placed the United States in the
13 position of a pariah state. The CIA has no law enforce-
14 ment authority, and cannot legally arrest or detain any-
15 one. The program of “extraordinary rendition” authorized
16 by the president is the substantial equivalent of the poli-
17 cies of “disappearing” people, practices widely practiced
18 and universally condemned in the military dictatorships of
19 Latin America during the late 20th Century.

20 The administration has claimed that prior adminis-
21 trations have practiced extraordinary rendition, but, while
22 this is technically true, earlier renditions were used only
23 to capture people with outstanding arrest warrants or con-
24 victions who were outside in order to deliver them to stand
25 trial or serve their sentences in the U.S. The president

1 has refused to divulge how many people have been subject
2 to extraordinary rendition since September, 2001. It is
3 possible that some have died in captivity. As one U.S. offi-
4 cial has stated off the record, regarding the program, some
5 of those who were renditioned were later delivered to
6 Guantanamo, while others were sent there directly. An ex-
7 ample of this is the case of six Algerian Bosnians who,
8 immediately after being cleared by the Supreme Court of
9 Bosnia Herzegovina in January 2002 of allegedly plotting
10 to attack the U.S. and U.K. embassies, were captured,
11 bound and gagged by U.S. special forces and renditioned
12 to Guantanamo.

13 In perhaps the most egregious proven case of ren-
14 dition, Maher Arar, a Canadian citizen born in Syria, was
15 picked up in September 2002 while transiting through
16 New York's JFK airport on his way home to Canada. Im-
17 migration and FBI officials detained and interrogated him
18 for nearly two weeks, illegally denying him his rights to
19 access counsel, the Canadian consulate, and the courts.
20 Executive branch officials asked him if he would volunteer
21 to go to Syria, where he hadn't been in 15 years, and
22 Maher refused.

23 Maher was put on a private jet plane operated by the
24 CIA and sent to Jordan, where he was beaten for 8 hours,
25 and then delivered to Syria, where he was beaten and in-

1 interrogated for 18 hours a day for a couple of weeks. He
2 was whipped on his back and hands with a 2 inch thick
3 electric cable and asked questions similar to those he had
4 been asked in the United States. For over ten months
5 Maher was held in an underground grave-like cell—3 ×
6 6 × 7 feet—which was damp and cold, and in which the
7 only light came in through a hole in the ceiling. After a
8 year of this, Maher was released without any charges. He
9 is now back home in Canada with his family. Upon his
10 release, the Syrian Government announced he had no links
11 to al Qaeda, and the Canadian Government has also said
12 they've found no links to al Qaeda. The Canadian Govern-
13 ment launched a Commission of Inquiry into the Actions
14 of Canadian Officials in Relation to Maher Arar, to inves-
15 tigate the role of Canadian officials, but the Bush Admin-
16 istration has refused to cooperate with the Inquiry.

17 Hundreds of flights of CIA-chartered planes have
18 been documented as having passed through European
19 countries on extraordinary rendition missions like that in-
20 volving Maher Arar, but the administration refuses to
21 state how many people have been subjects of this illegal
22 program.

23 The same U.S. laws prohibiting aiding and abetting
24 torture also prohibit sending someone to a country where
25 there is a substantial likelihood they may be tortured. Ar-

1 ticle 3 of CAT prohibits forced return where there is a
2 “substantial likelihood” that an individual “may be in
3 danger of” torture, and has been implemented by Federal
4 statute. Article 7 of the ICCPR prohibits return to coun-
5 try of origin where individuals may be “at risk” of either
6 torture or cruel, inhuman or degrading treatment.

7 Under international Human Rights law, transferring
8 a POW to any nation where he or she is likely to be tor-
9 tured or inhumanely treated violates article 12 of the
10 Third Geneva Convention, and transferring any civilian
11 who is a protected person under the Fourth Geneva Con-
12 vention is a grave breach and a criminal act.

13 In situations of armed conflict, both international
14 human rights law and humanitarian law apply. A person
15 captured in the zone of military hostilities “must have
16 some status under international law; he is either a pris-
17 oner of war and, as such, covered by the Third Conven-
18 tion, [or] a civilian covered by the Fourth Conven-
19 tion. . . . There is no intermediate status; nobody in
20 enemy hands can be outside the law.” Although the state
21 is obligated to repatriate prisoners of war as soon as hos-
22 tilities cease, the ICRC’s commentary on the 1949 Con-
23 ventions states that prisoners should not be repatriated
24 where there are serious reasons for fearing that repa-
25 triating the individual would be contrary to general prin-

1 ciples of established international law for the protection
2 of human beings. Thus, all of the Guantanamo detainees
3 as well as renditioned captives are protected by inter-
4 national human rights protections and humanitarian law.

5 By his actions as outlined above, the President has
6 abused his power, broken the law, deceived the American
7 people, and placed American military personnel, and in-
8 deed all Americans—especially those who may travel or
9 live abroad—at risk of similar treatment. Furthermore, in
10 the eyes of the rest of the world, the President has made
11 the U.S., once a model of respect for human rights and
12 respect for the rule of law, into a state where international
13 law is neither respected nor upheld.

14 In all of these actions and decisions in violation of
15 United States and International law, President George W.
16 Bush has acted in a manner contrary to his trust as Presi-
17 dent and Commander in Chief, and subversive of constitu-
18 tional government, to the prejudice of the cause of law
19 and justice and to the manifest injury of the people of
20 the United States. Wherefore, President George W. Bush,
21 by such conduct, is guilty of an impeachable offense war-
22 ranting removal from office.

23 ARTICLE XX—IMPRISONING CHILDREN

24 In his conduct while President of the United States,
25 George W. Bush, in violation of his constitutional oath to

1 faithfully execute the office of President of the United
2 States and, to the best of his ability, preserve, protect,
3 and defend the Constitution of the United States, and in
4 violation of his constitutional duty under article II, section
5 3 of the Constitution “to take care that the laws be faith-
6 fully executed”, has both personally and acting through
7 his agents and subordinates, authorized or permitted the
8 arrest and detention of at least 2,500 children under the
9 age of 18 as “enemy combatants” in Iraq, Afghanistan,
10 and at Guantanamo Bay Naval Station in violation of the
11 Fourth Geneva Convention relating to the treatment of
12 “protected persons” and the Optional Protocol to the Ge-
13 neva Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, signed by the U.S.
14 in 2002. To wit:

16 In May 2008, the U.S. Government reported to the
17 United Nations that it has been holding upwards of 2,500
18 children under the age of 18 as “enemy combatants” at
19 detention centers in Iraq, Afghanistan and at Guanta-
20 namo Bay (where there was a special center, Camp Igua-
21 na, established just for holding children). The length of
22 these detentions has frequently exceeded a year, and in
23 some cases has stretched to five years. Some of these de-
24 tainees have reached adulthood in detention and are now

1 not being reported as child detainees because they are no
2 longer children.

3 In addition to detaining children as “enemy combat-
4 ants”, it has been widely reported in media reports that
5 the U.S. military in Iraq has, based upon Pentagon rules
6 of engagement, been treating boys as young as 14 years
7 of age as “potential combatants”, subject to arrest and
8 even to being killed. In Fallujah, in the days ahead of the
9 November 2004 all-out assault, Marines ringing the city
10 were reported to be turning back into the city men and
11 boys “of combat age” who were trying to flee the impend-
12 ing scene of battle—an act which in itself is a violation
13 of the Geneva Conventions, which require combatants to
14 permit anyone, combatants as well as civilians, to sur-
15 render, and to leave the scene of battle.

16 Under the Fourth Geneva Convention, to which the
17 United States has been a signatory since 1949, children
18 under the age of 15 captured in conflicts, even if they have
19 been fighting, are to be considered victims, not prisoners.
20 In 2002, the United States signed the Optional Protocol
21 to the Geneva Convention on the Rights of the Child on
22 the Involvement of children in Armed Conflict, which
23 raised this age for this category of “protected person” to
24 under 18.

1 The continued detention of such children, some as
2 young as 10, by the U.S. military is a violation of both
3 convention and protocol, and as such constitutes a war
4 crime for which the President, as Commander in Chief,
5 bears full responsibility.

6 In all of these actions and decisions, President
7 George W. Bush has acted in a manner contrary to his
8 trust as President and Commander in Chief, and subver-
9 sive of constitutional government, to the prejudice of the
10 cause of law and justice and to the manifest injury of the
11 people of the United States. Wherefore, President George
12 W. Bush, by such conduct, is guilty of an impeachable
13 offense warranting removal from office.

14 ARTICLE XXI—MISLEADING CONGRESS AND THE AMER-
15 ICAN PEOPLE ABOUT THREATS FROM IRAN, AND
16 SUPPORTING TERRORIST ORGANIZATIONS WITHIN
17 IRAN, WITH THE GOAL OF OVERTHROWING THE
18 IRANIAN GOVERNMENT

19 In his conduct while President of the United States,
20 George W. Bush, in violation of his constitutional oath to
21 faithfully execute the office of President of the United
22 States and, to the best of his ability, preserve, protect,
23 and defend the Constitution of the United States, and in
24 violation of his constitutional duty to take care that the
25 laws be faithfully executed, has both personally and acting

1 through his agents and subordinates misled the Congress
2 and the citizens of the United States about a threat of
3 nuclear attack from the nation of Iran.

4 The National Intelligence Estimate released to Con-
5 gress and the public on December 4, 2007, which con-
6 firmed that the government of the nation of Iran had
7 ceased any efforts to develop nuclear weapons, was com-
8 pleted in 2006. Yet, the president and his aides continued
9 to suggest during 2007 that such a nuclear threat was
10 developing and might already exist. National Security Ad-
11 viser Stephen Hadley stated at the time the National In-
12 telligence Estimate regarding Iran was released that the
13 president had been briefed on its findings “in the last few
14 months”. Hadley’s statement establishes a timeline that
15 shows the president knowingly sought to deceive Congress
16 and the American people about a nuclear threat that did
17 not exist.

18 Hadley has stated that the president “was basically
19 told: stand down” and, yet, the president and his aides
20 continued to make false claims about the prospect that
21 Iran was trying to “build a nuclear weapon” that could
22 lead to “World War III”.

23 This evidence establishes that the president actively
24 engaged in and had full knowledge of a campaign by his
25 administration to make a false “case” for an attack on

1 Iran, thus warping the national security debate at a crit-
2 ical juncture and creating the prospect of an illegal and
3 unnecessary attack on a sovereign nation.

4 Even after the National Intelligence Estimate was re-
5 leased to Congress and the American people, the president
6 stated that he did not believe anything had changed and
7 suggested that he and members of his administration
8 would continue to argue that Iran should be seen as posing
9 a threat to the United States. He did this despite the fact
10 that United States intelligence agencies had clearly and
11 officially stated that this was not the case.

12 Evidence suggests that the Bush Administration's at-
13 tempts to portray Iran as a threat are part of a broader
14 U.S. policy toward Iran. On September 30, 2001, then-
15 Secretary of Defense Donald Rumsfeld established an offi-
16 cial military objective of overturning the regime in Iran,
17 as well as those in Iraq, Syria, and four other countries
18 in the Middle East, according to a document quoted in
19 then-Undersecretary of Defense for Policy Douglas Feith's
20 book, "War and Decision".

21 General Wesley Clark, reports in his book "Winning
22 Modern Wars" being told by a friend in the Pentagon in
23 November 2001 that the list of governments that Rums-
24 feld and Deputy Secretary of Defense Paul Wolfowitz
25 planned to overthrow included Iraq, Iran, Syria, Libya,

1 Sudan, and Somalia. Clark writes that the list also in-
2 cluded Lebanon.

3 Journalist Gareth Porter reported in May 2008 ask-
4 ing Feith at a public event which of the six regimes on
5 the Clark list were included in the Rumsfeld paper, to
6 which Feith replied “All of them”.

7 Rumsfeld’s aides also drafted a second version of the
8 paper, as instructions to all military commanders in the
9 development of “campaign plans against terrorism”. The
10 paper called for military commanders to assist other gov-
11 ernment agencies “as directed” to “encourage populations
12 dominated by terrorist organizations or their supporters
13 to overthrow that domination”.

14 In January 2005, Seymour Hersh reported in the
15 New Yorker Magazine that the Bush Administration had
16 been conducting secret reconnaissance missions inside
17 Iran at least since the summer of 2004.

18 In June 2005 former United Nations weapons inspec-
19 tor Scott Ritter reported that United States security
20 forces had been sending members of the Mujahedeen-e
21 Khalq (MEK) into Iranian territory. The MEK has been
22 designated a terrorist organization by the United States,
23 the European Union, Canada, Iraq, and Iran. Ritter re-
24 ported that the United States Central Intelligence Agency

1 (CIA) had used the MEK to carry out remote bombings
2 in Iran.

3 In April 2006, Hersh reported in the New Yorker
4 Magazine that U.S. combat troops had entered and were
5 operating in Iran, where they were working with minority
6 groups including the Azeris, Baluchis, and Kurds.

7 Also in April 2006, Larisa Alexandrovna reported on
8 Raw Story that the U.S. Department of Defense (DOD)
9 was working with and training the MEK, or former mem-
10 bers of the MEK, sending them to commit acts of violence
11 in southern Iran in areas where recent attacks had left
12 many dead. Raw Story reported that the Pentagon had
13 adopted the policy of supporting MEK shortly after the
14 2003 invasion of Iraq, and in response to the influence
15 of Vice President Richard B. Cheney's office. Raw Story
16 subsequently reported that no Presidential finding, and no
17 Congressional oversight, existed on MEK operations.

18 In March 2007, Hersh reported in the New Yorker
19 Magazine that the Bush administration was attempting to
20 stem the growth of Shiite influence in the Middle East
21 (specifically the Iranian Government and Hezbollah in
22 Lebanon) by funding violent Sunni organizations, without
23 any Congressional authorization or oversight. Hersh said
24 funds had been given to "three Sunni jihadist groups . . .
25 connected to al Qaeda" that "want to take on Hezbollah".

1 In April 2008, the Los Angeles Times reported that
2 conflicts with insurgent groups along Iran's borders were
3 understood by the Iranian Government as a proxy war
4 with the United States and were leading Iran to support
5 its allies against the United States occupation force in
6 Iraq. Among the groups the U.S. DOD is supporting, ac-
7 cording to this report, is the Party for Free Life in
8 Kurdistan, known by its Kurdish acronym, PEJAK. The
9 United States has provided "foodstuffs, economic assist-
10 ance, medical supplies, and Russian military equipment,
11 some of it funneled through nonprofit groups".

12 In May 2008, Andrew Cockburn reported on Counter
13 Punch that President Bush, six weeks earlier had signed
14 a secret finding authorizing a covert offensive against the
15 Iranian regime. President Bush's secret directive covers
16 actions across an area stretching from Lebanon to Af-
17 ghanistan, and purports to sanction actions up to and in-
18 cluding the funding of organizations like the MEK and
19 the assassination of public officials.

20 All of these actions by the President and his agents
21 and subordinates exhibit a disregard for the truth and a
22 recklessness with regard to national security, nuclear pro-
23 liferation and the global role of the United States military
24 that is not merely unacceptable but dangerous in a com-
25 mander in chief.

1 In all of these actions and decisions, President
2 George W. Bush has acted in a manner contrary to his
3 trust as President and Commander in Chief, and subver-
4 sive of constitutional government, to the prejudice of the
5 cause of law and justice and to the manifest injury of the
6 people of the United States. Wherefore, President George
7 W. Bush, by such conduct, is guilty of an impeachable
8 offense warranting removal from office.

9 ARTICLE XXII—CREATING SECRET LAWS

10 In his conduct while President of the United States,
11 George W. Bush, in violation of his constitutional oath to
12 faithfully execute the office of President of the United
13 States and, to the best of his ability, preserve, protect,
14 and defend the Constitution of the United States, and in
15 violation of his constitutional duty under article II, section
16 3 of the Constitution “to take care that the laws be faith-
17 fully executed”, has both personally and acting through
18 his agents and subordinates, together with the Vice Presi-
19 dent, established a body of secret laws through the
20 issuance of legal opinions by the Department of Justice’s
21 Office of Legal Counsel (OLC).

22 The OLC’s March 14, 2003, interrogation memo-
23 randum (“Yoo Memorandum”) was declassified years
24 after it served as law for the executive branch. On April
25 29, 2008, House Judiciary Committee Chairman John

1 Conyers and Subcommittee on the Constitution, Civil
2 Rights and Civil Liberties Chairman Jerrold Nadler wrote
3 in a letter to Attorney General Michael Mukasey:
4 “It appears to us that there was never any legitimate
5 basis for the purely legal analysis contained in this docu-
6 ment to be classified in the first place. The Yoo Memo-
7 randum does not describe sources and methods of intel-
8 ligence gathering, or any specific facts regarding any in-
9 terrogation activities. Instead, it consists almost entirely
10 of the Department’s legal views, which are not properly
11 kept secret from Congress and the American people. J.
12 William Leonard, the Director of the National Archive’s
13 Office of Information Security Oversight Office, and a top
14 expert in this field concurs, commenting that ‘[t]he docu-
15 ment in question is purely a legal analysis’ that contains
16 ‘nothing which would justify classification’. In addition,
17 the Yoo Memorandum suggests an extraordinary breadth
18 and aggressiveness of OLC’s secret legal opinion-making.
19 Much attention has rightly been given to the statement
20 in footnote 10 in the March 14, 2003, memorandum that,
21 in an October 23, 2001, opinion, OLC concluded ‘that the
22 Fourth Amendment had no application to domestic mili-
23 tary operations’. As you know, we have requested a copy
24 of that memorandum on no less than four prior occasions

1 and we continue to demand access to this important docu-
2 ment.

3 “In addition to this opinion, however, the Yoo Memo-
4 randum references at least 10 other OLC opinions on
5 weighty matters of great interest to the American people
6 that also do not appear to have been released. These ap-
7 pear to cover matters such as the power of Congress to
8 regulate the conduct of military commissions, legal con-
9 straints on the ‘military detention of United States citi-
10 zens’, legal rules applicable to the boarding and searching
11 foreign ships, the President’s authority to render U.S. de-
12 tainees to the custody of foreign governments, and the
13 President’s authority to breach or suspend U.S. treaty ob-
14 ligations. Furthermore, it has been more than five years
15 since the Yoo Memorandum was authored, raising the
16 question how many other such memoranda and letters
17 have been secretly authored and utilized by the Adminis-
18 tration.

19 “Indeed, a recent court filing by the Department in
20 FOIA litigation involving the Central Intelligence Agency
21 identifies 8 additional secret OLC opinions, dating from
22 August 6, 2004, to February 18, 2007. Given that these
23 reflect only OLC memoranda identified in the files of the
24 CIA, and based on the sampling procedures under which
25 that listing was generated, it appears that these represent

1 only a small portion of the secret OLC memoranda gen-
2 erated during this time, with the true number almost cer-
3 tainly much higher.”.

4 Senator Russ Feingold, in a statement during an
5 April 30, 2008, Senate hearing stated:

6 “It is a basic tenet of democracy that the people have
7 a right to know the law. In keeping with this principle,
8 the laws passed by Congress and the case law of our courts
9 have historically been matters of public record. And when
10 it became apparent in the middle of the 20th century that
11 federal agencies were increasingly creating a body of non-
12 public administrative law, Congress passed several stat-
13 utes requiring this law to be made public, for the express
14 purpose of preventing a regime of ‘secret law’. That pur-
15 pose today is being thwarted. Congressional enactments
16 and agency regulations are for the most part still public.
17 But the law that applies in this country is determined not
18 only by statutes and regulations, but also by the control-
19 ling interpretations of courts and, in some cases, the exec-
20 utive branch. More and more, this body of executive and
21 judicial law is being kept secret from the public, and too
22 often from Congress as well. . . .

23 “A legal interpretation by the Justice Department’s
24 Office of Legal Counsel . . . binds the entire executive
25 branch, just like a regulation or the ruling of a court. In

1 the words of former OLC head Jack Goldsmith, ‘These
2 executive branch precedents are “law” for the executive
3 branch’. The Yoo memorandum was, for a nine-month pe-
4 riod in 2003 until it was withdrawn by Mr. Goldsmith,
5 the law that this Administration followed when it came
6 to matters of torture. And of course, that law was essen-
7 tially a declaration that few if any laws applied. . . .

8 “Another body of secret law is the controlling inter-
9 pretations of the Foreign Intelligence Surveillance Act
10 that are issued by the Foreign Intelligence Surveillance
11 Court. FISA, of course, is the law that governs the Gov-
12 ernment’s ability in intelligence investigations to conduct
13 wiretaps and search the homes of people in the United
14 States. Under that statute, the FISA Court is directed
15 to evaluate wiretap and search warrant applications and
16 decide whether the standard for issuing a warrant has
17 been met—a largely factual evaluation that is properly
18 done behind closed doors. But with the evolution of tech-
19 nology and with this Administration’s efforts to get the
20 Court’s blessing for its illegal wiretapping activities, we
21 now know that the Court’s role is broader, and that it
22 is very much engaged in substantive interpretations of the
23 governing statute. These interpretations are as much a
24 part of this country’s surveillance law as the statute itself.
25 Without access to them, it is impossible for Congress or

1 the public to have an informed debate on matters that
2 deeply affect the privacy and civil liberties of all
3 Americans . . .

4 “The Administration’s shroud of secrecy extends to
5 agency rules and executive pronouncements, such as Exe-
6 cutive Orders, that carry the force of law. Through the dili-
7 gent efforts of my colleague Senator Whitehouse, we have
8 learned that OLC has taken the position that a President
9 can ‘waive’ or ‘modify’ a published Executive Order with-
10 out any notice to the public or Congress—simply by not
11 following it.”.

12 In all of these actions and decisions, President
13 George W. Bush has acted in a manner contrary to his
14 trust as President and Commander in Chief, and subver-
15 sive of constitutional government, to the prejudice of the
16 cause of law and justice and to the manifest injury of the
17 people of the United States. Wherefore, President George
18 W. Bush, by such conduct, is guilty of an impeachable
19 offense warranting removal from office.

20 In all of these actions and decisions, President
21 George W. Bush has acted in a manner contrary to his
22 trust as President, and subversive of constitutional gov-
23 ernment, to the prejudice of the cause of law and justice
24 and to the manifest injury of the people of the United
25 States. Wherefore, President George W. Bush, by such

1 conduct, is guilty of an impeachable offense warranting
2 removal from office.

3 ARTICLE XXIII—VIOLATION OF THE POSSE COMITATUS
4 ACT

5 In his conduct while President of the United States,
6 George W. Bush, in violation of his constitutional oath to
7 faithfully execute the office of President of the United
8 States and, to the best of his ability, preserve, protect,
9 and defend the Constitution of the United States, and in
10 violation of his constitutional duty under article II, section
11 3 of the Constitution “to take care that the laws be faith-
12 fully executed”, has both personally and acting through
13 his agents and subordinates, repeatedly and illegally estab-
14 lished programs to appropriate the power of the military
15 for use in law enforcement. Specifically, he has con-
16 travened U.S.C. title 18, section 1385, originally enacted
17 in 1878, subsequently amended as “Use of Army and Air
18 Force as Posse Comitatus” and commonly known as the
19 Posse Comitatus Act.

20 The Act states:

21 “Whoever, except in cases and under circumstances
22 expressly authorized by the Constitution or Act of Con-
23 gress, willfully uses any part of the Army or the Air Force
24 as a posse comitatus or otherwise to execute the laws shall

1 be fined under this title or imprisoned not more than two
2 years, or both.”.

3 The Posse Comitatus Act is designed to prevent the
4 military from becoming a national police force.

5 The Declaration of Independence states as a specific
6 grievance against the British that the King had “kept
7 among us, in times of peace, Standing Armies without the
8 consent of our legislatures,” had “affected to render the
9 Military independent of and superior to the civil power,”
10 and had “quarter[ed] large bodies of armed troops among
11 us . . . protecting them, by a mock trial, from punishment
12 for any murders which they should commit on the inhab-
13 itants of these States”.

14 Despite the Posse Comitatus Act’s intent, and in con-
15 travention of the law, President Bush—

16 (1) has used military forces for law enforcement
17 purposes on U.S. border patrol;

18 (2) has established a program to use military
19 personnel for surveillance and information on crimi-
20 nal activities;

21 (3) is using military espionage equipment to
22 collect intelligence information for law enforcement
23 use on civilians within the United States; and

1 (4) employs active duty military personnel in
2 surveillance agencies, including the Central Intel-
3 ligence Agency (CIA).

4 In June 2006, President Bush ordered National
5 Guard troops deployed to the border shared by Mexico
6 with Arizona, Texas, and California. This deployment,
7 which by 2007 reached a maximum of 6,000 troops, had
8 orders to “conduct surveillance and operate detection
9 equipment, work with border entry identification teams,
10 analyze information, assist with communications and give
11 administrative support to the Border Patrol” and con-
12 cerned “. . . providing intelligence . . . inspecting cargo,
13 and conducting surveillance”.

14 The Air Force’s “Eagle Eyes” program encourages
15 Air Force military staff to gather evidence on American
16 citizens. Eagle Eyes instructs Air Force personnel to en-
17 gage in surveillance and then advises them to “alert local
18 authorities”, asking military staff to surveil and gather
19 evidence on public citizens. This contravenes DoD Direc-
20 tive 5525.5 “SUBJECT: DoD Cooperation with Civilian
21 Law Enforcement” which limits such activities.

22 President Bush has implemented a program to use
23 imagery from military satellites for domestic law enforce-
24 ment through the National Applications Office.

1 President Bush has assigned numerous active duty
2 military personnel to civilian institutions such as the CIA
3 and the Department of Homeland Security, both of which
4 have responsibilities for law enforcement and intelligence.

5 In addition, on May 9, 2007, President Bush released
6 “National Security Presidential Directive/NSPD 51”,
7 which effectively gives the president unchecked power to
8 control the entire government and to define that govern-
9 ment in time of an emergency, as well as the power to
10 determine whether there is an emergency. The document
11 also contains “classified Continuity Annexes”. In July
12 2007, and again in August 2007, Rep. Peter DeFazio, a
13 senior member of the House Homeland Security Com-
14 mittee, sought access to the classified annexes. DeFazio
15 and other leaders of the Homeland Security Committee,
16 including Chairman Bennie Thompson, have been denied
17 a review of the Continuity of Government classified an-
18 nexes.

19 In all of these actions and decisions, President
20 George W. Bush has acted in a manner contrary to his
21 trust as President and Commander in Chief, and subver-
22 sive of constitutional government, to the prejudice of the
23 cause of law and justice and to the manifest injury of the
24 people of the United States. Wherefore, President George

1 W. Bush, by such conduct, is guilty of an impeachable
2 offense warranting removal from office.

3 ARTICLE XXIV—SPYING ON AMERICAN CITIZENS,
4 WITHOUT A COURT-ORDERED WARRANT, IN VIOLA-
5 TION OF THE LAW AND THE FOURTH AMENDMENT

6 In his conduct while President of the United States,
7 George W. Bush, in violation of his constitutional oath to
8 faithfully execute the office of President of the United
9 States and, to the best of his ability, preserve, protect,
10 and defend the Constitution of the United States, and in
11 violation of his constitutional duty under article II, section
12 3 of the Constitution “to take care that the laws be faith-
13 fully executed”, has both personally and acting through
14 his agents and subordinates, knowingly violated the
15 Fourth Amendment to the Constitution and the Foreign
16 Intelligence Service Act of 1978 (FISA) by authorizing
17 warrantless electronic surveillance of American citizens to
18 wit:

19 (1) The President was aware of the FISA Law
20 requiring a court order for any wiretap as evidenced
21 by the following:

22 (A) “Now, by the way, any time you hear
23 the United States Government talking about
24 wiretap, it requires—a wiretap requires a court
25 order. Nothing has changed, by the way. When

1 we're talking about chasing down terrorists,
2 we're talking about getting a court order before
3 we do so." White House Press conference on
4 April 20, 2004. [White House Transcript]

5 (B) "Law enforcement officers need a Fed-
6 eral judge's permission to wiretap a foreign ter-
7 rorist's phone, or to track his calls, or to search
8 his property. Officers must meet strict stand-
9 ards to use any of the tools we're talking
10 about." President Bush's speech in Baltimore,
11 Maryland, on July 20th, 2005. [White House
12 Transcript]

13 (2) The President repeatedly ordered the NSA
14 to place wiretaps on American citizens without re-
15 questing a warrant from FISA as evidenced by the
16 following:

17 (A) "Months after the Sept. 11 attacks,
18 President Bush secretly authorized the National
19 Security Agency to eavesdrop on Americans and
20 others inside the United States to search for
21 evidence of terrorist activity without the court-
22 approved warrants ordinarily required for do-
23 mestic spying, according to government offi-
24 cials." New York Times article by James Risen

1 and Eric Lichtblau on December 12, 2005.
2 [NYTimes]

3 (B) The President admits to authorizing
4 the program by stating “I have reauthorized
5 this program more than 30 times since the Sep-
6 tember the 11th attacks, and I intend to do so
7 for as long as our nation faces a continuing
8 threat from al Qaeda and related groups. The
9 NSA’s activities under this authorization are
10 thoroughly reviewed by the Justice Department
11 and NSA’s top legal officials, including NSA’s
12 general counsel and inspector general. Leaders
13 in Congress have been briefed more than a
14 dozen times on this authorization and the ac-
15 tivities conducted under it.” Radio Address
16 from the White House on December 17, 2005.
17 [White House Transcript]

18 (C) In a December 19th, 2005 press con-
19 ference the President publicly admitted to using
20 a combination of surveillance techniques includ-
21 ing some with permission from the FISA courts
22 and some without permission from FISA.

23 Reporter: It was, why did you skip the basic safe-
24 guards of asking courts for permission for the intercepts?

1 THE PRESIDENT: . . . We use FISA still—you're
2 referring to the FISA court in your question—of course,
3 we use FISAs. But FISA is for long-term monitoring.
4 What is needed in order to protect the American people
5 is the ability to move quickly to detect. Now, having sug-
6 gested this idea, I then, obviously, went to the question,
7 is it legal to do so? I am—I swore to uphold the laws.
8 Do I have the legal authority to do this? And the answer
9 is, absolutely. As I mentioned in my remarks, the legal
10 authority is derived from the Constitution, as well as the
11 authorization of force by the United States Congress.
12 [White House Transcript]

13 (D) Mike McConnell, the Director of Na-
14 tional Intelligence, in a letter to Senator Arlen
15 Specter, acknowledged that Bush's Executive
16 Order in 2001 authorized a series of secret sur-
17 veillance activities and included undisclosed ac-
18 tivities beyond the warrantless surveillance of e-
19 mails and phone calls that Bush confirmed in
20 December 2005. "NSA Spying Part of Broader
21 Effort" by Dan Eggen, Washington Post, 8/1/
22 07.

23 (3) The President ordered the surveillance to be
24 conducted in a way that would spy upon private
25 communications between American citizens located

1 within the United States borders as evidenced by the
2 following:

3 (A) Mark Klein, a retired AT&T commu-
4 nications technician, submitted an affidavit in
5 support of the Electronic Frontier Foundation's
6 EFF's lawsuit against AT&T. He testified that
7 in 2003 he connected a "splitter" that sent a
8 copy of Internet traffic and phone calls to a se-
9 cure room that was operated by the NSA in the
10 San Francisco office of AT&T. He heard from
11 a co-worker that similar rooms were being con-
12 structed in other cities, including Seattle, San
13 Jose, Los Angeles, and San Diego. From
14 "Whistle-Blower Outs NSA Spy Room", Wired
15 News, 4/7/06. [Wired] [EFF Case]

16 (4) The President asserted an inherent author-
17 ity to conduct electronic surveillance based on the
18 Constitution and the "Authorization to use Military
19 Force in Iraq" (AUMF) that was not legally valid
20 as evidenced by the following:

21 (A) In a December 19th, 2005 Press
22 Briefing General Alberto Gonzales admitted
23 that the surveillance authorized by the Presi-
24 dent was not only done without FISA warrants,
25 but that the nature of the surveillance was so

1 far removed from what FISA can approve that
2 FISA could not even be amended to allow it.
3 Gonzales stated “We have had discussions with
4 Congress in the past—certain members of Con-
5 gress—as to whether or not FISA could be
6 amended to allow us to adequately deal with
7 this kind of threat, and we were advised that
8 that would be difficult, if not impossible.”.

9 (B) The fourth amendment to the United
10 States Constitution states “The right of the
11 people to be secure in their persons, houses, pa-
12 pers, and effects, against unreasonable searches
13 and seizures, shall not be violated, and no War-
14 rants shall issue, but upon probable cause, sup-
15 ported by Oath or affirmation, and particularly
16 describing the place to be searched, and the
17 persons or things to be seized.”.

18 (C) “The Foreign Intelligence Surveillance
19 Act of 1978 unambiguously limits warrantless
20 domestic electronic surveillance, even in a con-
21 gressionally declared war, to the first 15 days
22 of that war; criminalizes any such electronic
23 surveillance not authorized by statute; and ex-
24 pressly establishes FISA and two chapters of
25 the federal criminal code, governing wiretaps

1 for intelligence purposes and for criminal inves-
2 tigation, respectively, as the ‘exclusive means by
3 which electronic surveillance . . . and the inter-
4 ception of domestic wire, oral, and electronic
5 communications may be conducted.’. 50 U.S.C.
6 1811, 1809, 18 U.S.C. 2511(2)(f).” Letter
7 from Harvard Law Professor Lawrence Tribe
8 to John Conyers on 1/6/06.

9 (D) In a December 19th, 2005 Press
10 Briefing Attorney General Alberto Gonzales
11 stated “Our position is, is that the authoriza-
12 tion to use force, which was passed by the Con-
13 gress in the days following September 11th,
14 constitutes that other authorization, that other
15 statute by Congress, to engage in this kind of
16 signals intelligence.”.

17 (E) The “Authorization to use Military
18 Force in Iraq” does not give any explicit au-
19 thorization related to electronic surveillance.
20 [H.J. Res. 114]

21 (F) “From the foregoing analysis, it ap-
22 pears unlikely that a court would hold that
23 Congress has expressly or impliedly authorized
24 the NSA electronic surveillance operations here
25 under discussion, and it would likewise appear

1 that, to the extent that those surveillances fall
2 within the definition of ‘electronic surveillance’
3 within the meaning of FISA or any activity reg-
4 ulated under title III, Congress intended to
5 cover the entire field with these statutes.”.
6 From the “Presidential Authority to Conduct
7 Warrantless Electronic Surveillance to Gather
8 Foreign Intelligence Information” by the Con-
9 gressional Research Service on January 5,
10 2006.

11 (G) “The inescapable conclusion is that the
12 AUMF did not implicitly authorize what the
13 FISA expressly prohibited. It follows that the
14 presidential program of surveillance at issue
15 here is a violation of the separation of powers—
16 as grave an abuse of executive authority as I
17 can recall ever having studied.” Letter from
18 Harvard Law Professor Lawrence Tribe to
19 John Conyers on 1/6/06.

20 (H) On August 17, 2006, Judge Anna
21 Diggs Taylor of the United States District
22 Court in Detroit, in *ACLU v. NSA*, ruled that
23 the “NSA program to wiretap the international
24 communications of some Americans without a
25 court warrant violated the Constitution. . . .

1 Judge Taylor ruled that the program violated
2 both the Fourth Amendment and a 1978 law
3 that requires warrants from a secret court for
4 intelligence wiretaps involving people in the
5 United States. She rejected the administration's
6 repeated assertions that a 2001 Congressional
7 authorization and the president's constitutional
8 authority allowed the program." From a New
9 York Times article "Judge Finds Wiretap Ac-
10 tions Violate the Law" 8/18/06 and the Memo-
11 randum Opinion.

12 (I) In July 2007, the Sixth Circuit Court
13 of Appeals dismissed the case, ruling the plain-
14 tiffs had no standing to sue because, given the
15 secretive nature of the surveillance, they could
16 not state with certainty that they have been
17 wiretapped by the NSA. This ruling did not ad-
18 dress the legality of the surveillance so Judge
19 Taylor's decision is the only ruling on that
20 issue. [ACLU Legal Documents]

21 In all of these actions and decisions, President
22 George W. Bush has acted in a manner contrary to his
23 trust as President and Commander in Chief, and subver-
24 sive of constitutional government, to the prejudice of the
25 cause of law and justice and to the manifest injury of the

1 people of the United States. Wherefore, President George
2 W. Bush, by such conduct, is guilty of an impeachable
3 offense warranting removal from office.

4 ARTICLE XXV—DIRECTING TELECOMMUNICATIONS
5 COMPANIES TO CREATE AN ILLEGAL AND UNCON-
6 STITUTIONAL DATABASE OF THE PRIVATE TELE-
7 PHONE NUMBERS AND EMAILS OF AMERICAN CITI-
8 ZENS

9 In his conduct while President of the United States,
10 George W. Bush, in violation of his constitutional oath to
11 faithfully execute the office of President of the United
12 States and, to the best of his ability, preserve, protect,
13 and defend the Constitution of the United States, and in
14 violation of his constitutional duty under article II, section
15 3 of the Constitution “to take care that the laws be faith-
16 fully executed”, has both personally and acting through
17 his agents and subordinates, violated the Stored Commu-
18 nications Act of 1986 and the Telecommunications Act of
19 1996 by creating of a very large database containing infor-
20 mation related to the private telephone calls and emails
21 of American citizens, to wit:

22 The President requested that telecommunication
23 companies release customer phone records to the Govern-
24 ment illegally as evidenced by the following:

1 “The Stored Communications Act of 1986 (SCA)
2 prohibits the knowing disclosure of customer telephone
3 records to the government unless pursuant to subpoena,
4 warrant or a National Security Letter (or other Adminis-
5 trative subpoena); with the customers lawful consent; or
6 there is a business necessity; or an emergency involving
7 the danger of death or serious physical injury. None of
8 these exceptions apply to the circumstance described in the
9 USA Today story.” From page 169, “George W Bush
10 versus the U.S. Constitution.”. Compiled at the direction
11 of Representative John Conyers.

12 According to a May 11, 2006, article in USA Today
13 by Lesley Cauley, “The National Security Agency has
14 been secretly collecting the phone call records of tens of
15 millions of Americans, using data provided by AT&T,
16 Verizon, and BellSouth.” An unidentified source said
17 “The agency’s goal is to ‘create a database of every call
18 ever made’ within the nation’s borders.”.

19 In early 2001, Qwest CEO Joseph Nacchio rejected
20 a request from the NSA to turn over customers records
21 of phone calls, emails and other Internet activity. Nacchio
22 believed that complying with the request would violate the
23 Telecommunications Act of 1996. From National Journal,
24 November 2, 2007.

1 In all of these actions and decisions, President
2 George W. Bush has acted in a manner contrary to his
3 trust as President and Commander in Chief, and subver-
4 sive of constitutional government, to the prejudice of the
5 cause of law and justice and to the manifest injury of the
6 people of the United States. Wherefore, President George
7 W. Bush, by such conduct, is guilty of an impeachable
8 offense warranting removal from office.

9 ARTICLE XXVI—ANNOUNCING THE INTENT TO VIO-
10 LATE LAWS WITH SIGNING STATEMENTS, AND VIO-
11 LATING THOSE LAWS

12 In his conduct while President of the United States,
13 George W. Bush, in violation of his constitutional oath to
14 faithfully execute the office of President of the United
15 States and, to the best of his ability, preserve, protect,
16 and defend the Constitution of the United States, and in
17 violation of his constitutional duty under article II, section
18 3 of the Constitution “to take care that the laws be faith-
19 fully executed”, has used signing statements to claim the
20 right to violate acts of Congress even as he signs them
21 into law.

22 In June 2007, the Government Accountability Office
23 reported that in a sample of Bush signing statements the
24 office had studied, for 30 percent of them the Bush ad-

1 ministration had already proceeded to violate the laws the
2 statements claimed the right to violate.

3 In all of these actions and decisions, President
4 George W. Bush has acted in a manner contrary to his
5 trust as President and Commander in Chief, and subver-
6 sive of constitutional government, to the prejudice of the
7 cause of law and justice and to the manifest injury of the
8 people of the United States. Wherefore, President George
9 W. Bush, by such conduct, is guilty of an impeachable
10 offense warranting removal from office.

11 ARTICLE XXVII—FAILING TO COMPLY WITH CONGRES-
12 SIONAL SUBPOENAS AND INSTRUCTING FORMER
13 EMPLOYEES NOT TO COMPLY

14 In his conduct while President of the United States,
15 George W. Bush, in violation of his constitutional oath to
16 faithfully execute the office of President of the United
17 States and, to the best of his ability, preserve, protect,
18 and defend the Constitution of the United States, and in
19 violation of his constitutional duty under article II, section
20 3 of the Constitution “to take care that the laws be faith-
21 fully executed”, has both personally and acting through
22 his agents and subordinates, refused to comply with Con-
23 gressional subpoenas, and instructed former employees not
24 to comply with subpoenas.

25 Subpoenas not complied with include:

1 A House Judiciary Committee subpoena for
2 Justice Department papers and Emails, issued April
3 10, 2007;

4 A House Oversight and Government Reform
5 Committee subpoena for the testimony of the Sec-
6 retary of State, issued April 25, 2007;

7 A House Judiciary Committee subpoena for the
8 testimony of former White House Counsel Harriet
9 Miers and documents, issued June 13, 2007;

10 A Senate Judiciary Committee subpoena for
11 documents and testimony of White House Chief of
12 Staff Joshua Bolten, issued June 13, 2007;

13 A Senate Judiciary Committee subpoena for
14 documents and testimony of White House Political
15 Director Sara Taylor, issued June 13, 2007 (Taylor
16 appeared but refused to answer questions);

17 A Senate Judiciary Committee subpoena for
18 documents and testimony of White House Deputy
19 Chief of Staff Karl Rove, issued June 26, 2007;

20 A Senate Judiciary Committee subpoena for
21 documents and testimony of White House Deputy
22 Political Director J. Scott Jennings, issued June 26,
23 2007 (Jennings appeared but refused to answer
24 questions);

1 A Senate Judiciary Committee subpoena for
2 legal analysis and other documents concerning the
3 NSA warrantless wiretapping program from the
4 White House, Vice President Richard Cheney, The
5 Department of Justice, and the National Security
6 Council. If the documents are not produced, the sub-
7 poena requires the testimony of White House chief
8 of staff Josh Bolten, Attorney General Alberto
9 Gonzales, Cheney chief of staff David Addington,
10 National Security Council executive director V. Philip
11 Lago, issued June 27, 2007; and

12 A House Oversight and Government Reform
13 Committee subpoena for Lt. General Kensinger.

14 In all of these actions and decisions, President
15 George W. Bush has acted in a manner contrary to his
16 trust as President and Commander in Chief, and subver-
17 sive of constitutional government, to the prejudice of the
18 cause of law and justice and to the manifest injury of the
19 people of the United States. Wherefore, President George
20 W. Bush, by such conduct, is guilty of an impeachable
21 offense warranting removal from office.

1 ARTICLE XXVIII—TAMPERING WITH FREE AND FAIR
2 ELECTIONS, CORRUPTION OF THE ADMINISTRATION
3 OF JUSTICE

4 In his conduct while President of the United States,
5 George W. Bush, in violation of his constitutional oath to
6 faithfully execute the office of President of the United
7 States and, to the best of his ability, preserve, protect,
8 and defend the Constitution of the United States, and in
9 violation of his constitutional duty under article II, section
10 3 of the Constitution “to take care that the laws be faith-
11 fully executed”, has both personally and acting through
12 his agents and subordinates, conspired to undermine and
13 tamper with the conduct of free and fair elections, and
14 to corrupt the administration of justice by United States
15 Attorneys and other employees of the Department of Jus-
16 tice, through abuse of the appointment power.

17 Toward this end, the President and Vice President,
18 both personally and through their agents, did:

19 Engage in a program of manufacturing false al-
20 legations of voting fraud in targeted jurisdictions
21 where the Democratic Party enjoyed an advantage
22 in electoral performance or otherwise was problem-
23 atic for the President’s Republican Party, in order
24 that public confidence in election results favorable to
25 the Democratic Party be undermined;

1 Direct United States Attorneys to launch and
2 announce investigations of certain leaders, can-
3 didates and elected officials affiliated with the
4 Democratic Party at times calculated to cause the
5 most political damage and confusion, most often in
6 the weeks immediately preceding an election, in
7 order that public confidence in the suitability for of-
8 fice of Democratic Party leaders, candidates and
9 elected officials be undermined;

10 Direct United States Attorneys to terminate or
11 scale back existing investigations of certain Repub-
12 lican Party leaders, candidates and elected officials
13 allied with the George W. Bush administration, and
14 to refuse to pursue new or proposed investigations of
15 certain Republican Party leaders, candidates and
16 elected officials allied with the George W. Bush ad-
17 ministration, in order that public confidence in the
18 suitability of such Republican Party leaders, can-
19 didates and elected officials be bolstered or restored;
20 and

21 Threaten to terminate the employment of the
22 following United States Attorneys who refused to
23 comply with such directives and purposes;

24 David C. Iglesias as U.S. Attorney for the
25 District of New Mexico;

1 Kevin V. Ryan as U.S. Attorney for the
2 Northern District of California;

3 John L. McKay as U.S. Attorney for the
4 Western District of Washington;

5 Paul K. Charlton as U.S. Attorney for the
6 District of Arizona;

7 Carol C. Lam as U.S. Attorney for the
8 Southern District of California;

9 Daniel G. Bogden as U.S. Attorney for the
10 District of Nevada;

11 Margaret M. Chiara as U.S. Attorney for
12 the Western District of Michigan;

13 Todd Graves as U.S. Attorney for the
14 Western District of Missouri;

15 Harry E. "Bud" Cummins, III as U.S. At-
16 torney for the Eastern District of Arkansas;

17 Thomas M. DiBiagio as U.S. Attorney for
18 the District of Maryland; and

19 Kasey Warner as U.S. Attorney for the
20 Southern District of West Virginia.

21 Further, George W. Bush has both personally and
22 acting through his agents and subordinates, together with
23 the Vice President conspired to obstruct the lawful Con-
24 gressional investigation of these dismissals of United
25 States Attorneys and the related scheme to undermine and

1 tamper with the conduct of free and fair elections, and
2 to corrupt the administration of justice.

3 Contrary to his oath faithfully to execute the office
4 of President of the United States and, to the best of his
5 ability, preserve, protect, and defend the Constitution of
6 the United States, and in violation of his constitutional
7 duty to take care that the laws be faithfully executed,
8 George W. Bush has without lawful cause or excuse di-
9 rected not to appear before the Committee on the Judici-
10 ary of the House of Representatives certain witnesses
11 summoned by duly authorized subpoenas issued by that
12 Committee on June 13, 2007.

13 In refusing to permit the testimony of these witnesses
14 George W. Bush, substituting his judgment as to what tes-
15 timony was necessary for the inquiry, interposed the pow-
16 ers of the Presidency against the lawful subpoenas of the
17 House of Representatives, thereby assuming to himself
18 functions and judgments necessary to the exercise of the
19 checking and balancing power of oversight vested in the
20 House of Representatives.

21 Further, the President has both personally and acting
22 through his agents and subordinates, together with the
23 Vice President directed the United States Attorney for the
24 District of Columbia to decline to prosecute for contempt
25 of Congress the aforementioned witnesses, Joshua B.

1 Bolten and Harriet E. Miers, despite the obligation to do
2 so as established by statute (2 U.S.C. 194) and pursuant
3 to the direction of the United States House of Representa-
4 tives as embodied in its resolution (H. Res. 982) of Feb-
5 ruary 14, 2008.

6 In all of these actions and decisions, President
7 George W. Bush has acted in a manner contrary to his
8 trust as President and Commander in Chief, and subver-
9 sive of constitutional government, to the prejudice of the
10 cause of law and justice and to the manifest injury of the
11 people of the United States. Wherefore, President George
12 W. Bush, by such conduct, is guilty of an impeachable
13 offense warranting removal from office.

14 ARTICLE XXIX—CONSPIRACY TO VIOLATE THE VOTING
15 RIGHTS ACT OF 1965

16 In his conduct while President of the United States,
17 George W. Bush, in violation of his constitutional oath to
18 faithfully execute the office of President of the United
19 States and, to the best of his ability, preserve, protect,
20 and defend the Constitution of the United States, and in
21 violation of his constitutional duty under article II, section
22 3 of the Constitution “to take care that the laws be faith-
23 fully executed”, has both personally and acting through
24 his agents and subordinates, has willfully corrupted and
25 manipulated the electoral process of the United States for

1 his personal gain and the personal gain of his co-conspira-
2 tors and allies; has violated the United States Constitution
3 and law by failing to protect the civil rights of African-
4 American voters and others in the 2004 Election, and has
5 impeded the right of the people to vote and have their vote
6 properly and accurately counted, in that—

7 (1) on November 5, 2002, and prior thereto,
8 James Tobin, while serving as the regional director
9 of the National Republican Senatorial Campaign
10 Committee and as the New England Chairman of
11 Bush-Cheney '04 Inc., did, at the direction of the
12 White House under the administration of George W.
13 Bush, along with other agents both known and un-
14 known, commit unlawful acts by aiding and abetting
15 a scheme to use computerized hang-up calls to jam
16 phone lines set up by the New Hampshire Demo-
17 cratic Party and the Manchester firefighters' union
18 on Election Day;

19 (2) an investigation by the Democratic staff of
20 the House Judiciary Committee into the voting pro-
21 cedures in Ohio during the 2004 election found
22 “widespread instances of intimidation and misin-
23 formation in violation of the Voting Rights Act, the
24 Civil Rights Act of 1968, Equal Protection, Due
25 Process and the Ohio right to vote”;

1 (3) the 14th Amendment Equal Protection
2 Clause guarantees that no minority group will suffer
3 disparate treatment in a Federal, State, or local
4 election in stating that: “No State shall make or en-
5 force any law which shall abridge the privileges or
6 immunities of citizens of the United States; nor shall
7 any State deprive any person of life, liberty, or prop-
8 erty, without due process of law; nor deny to any
9 person within its jurisdiction the equal protection of
10 the laws.”. However, during and at various times of
11 the year 2004, John Kenneth Blackwell, then serv-
12 ing as the Secretary of State for the State of Ohio
13 and also serving simultaneously as Co-Chairman of
14 the Committee to Re-Elect George W. Bush in the
15 State of Ohio, did, at the direction of the White
16 House under the administration of George W. Bush,
17 along with other agents both known and unknown,
18 commit unlawful acts in violation of the Equal Pro-
19 tection Clause of the 14th Amendment to the United
20 States Constitution by failing to protect the voting
21 rights of African-American citizens in Ohio and fur-
22 ther, John Kenneth Blackwell did disenfranchise Af-
23 rican-American voters under color of law, by—
24 (A) willfully denying certain neighborhoods
25 in the cities of Cleveland, Ohio, and Columbus,

1 Ohio, along with other urban areas in the State
2 of Ohio, an adequate number of electronic vot-
3 ing machines and provisional paper ballots,
4 thereby unlawfully impeding duly registered vot-
5 ers from the act of voting and thus violating
6 the civil rights of an unknown number of
7 United States citizens;

8 (i) in Franklin County, George W.
9 Bush and his agent, Ohio Secretary of
10 State John Kenneth Blackwell, Co-Chair of
11 the Bush-Cheney Re-election Campaign,
12 failed to protect the rights of African-
13 American voters by not properly inves-
14 tigating the withholding of 125 electronic
15 voting machines assigned to the city of Co-
16 lumbus;

17 (ii) forty-two African-American pre-
18 cinets in Columbus were each missing one
19 voting machine that had been present in
20 the 2004 primary; and

21 (iii) African-American voters in the
22 city of Columbus were forced to wait three
23 to seven hours to vote in the 2004 presi-
24 dential election;

1 (B) willfully issuing unclear and conflicting
2 rules regarding the methods and manner of be-
3 coming a legally registered voter in the State of
4 Ohio, and willfully issuing unclear and unneces-
5 sary edicts regarding the weight of paper reg-
6 istration forms legally acceptable to the State of
7 Ohio, thereby creating confusion for both voters
8 and voting officials and thus impeding the right
9 of an unknown number of United States citi-
10 zens to register and vote;

11 (i) Ohio Secretary of State John Ken-
12 neth Blackwell directed through Advisory
13 2004–31 that voter registration forms,
14 which were greatest in urban minority
15 areas, should not be accepted and should
16 be returned unless submitted on 80 bond
17 paper weight. Blackwell’s own office was
18 found to be using 60 bond paper weight;

19 (C) willfully permitted and encouraged
20 election officials in Cleveland, Cincinnati, and
21 Toledo to conduct a massive partisan purge of
22 registered voter rolls, eventually expunging
23 more than 300,000 voters, many of whom were
24 duly registered voters, and who were thus de-
25 prived of their constitutional right to vote;

1 (i) between the 2000 and 2004 Ohio
2 presidential elections, 24.93 percent of the
3 voters in the city of Cleveland, a city with
4 a majority of African-American citizens,
5 were purged from the voting rolls;

6 (ii) in that same period, the Ohio
7 county of Miami, with census data indi-
8 cating a 98 percent Caucasian population,
9 refused to purge any voters from its rolls.
10 Miami County “merged” voters from other
11 surrounding counties into its voting rolls
12 and even allowed voters from other states
13 to vote; and

14 (iii) in Toledo, Ohio, an urban city
15 with a high African-American concentra-
16 tion, 28,000 voters were purged from the
17 voting rolls in August of 2004, just prior
18 to the presidential election. This purge was
19 conducted under the control and direction
20 of George W. Bush’s agent, Ohio Secretary
21 of State John Kenneth Blackwell outside
22 of the regularly established cycle of purg-
23 ing voters in odd-numbered years;

24 (D) willfully allowing Ohio Secretary of
25 State John Kenneth Blackwell, acting under

1 color of law and as an agent of George W.
2 Bush, to issue a directive that no votes would
3 be counted unless cast in the right precinct, re-
4 versing Ohio's long-standing practice of count-
5 ing votes for president if cast in the right coun-
6 ty;

7 (E) willfully allowing his agent, Ohio Sec-
8 retary of State John Kenneth Blackwell, the
9 Co-Chair of the Bush-Cheney Re-election Cam-
10 paign, to do nothing to assure the voting rights
11 of 10,000 people in the city of Cleveland when
12 a computer error by the private vendor Diebold
13 Election Systems, Inc. incorrectly disenfran-
14 chised 10,000 voters;

15 (F) willfully allowing his agent, Ohio Sec-
16 retary of State John Kenneth Blackwell, the
17 Co-Chair of the Bush-Cheney Re-election Cam-
18 paign, to ensure that uncounted and provisional
19 ballots in Ohio's 2004 presidential election
20 would be disproportionately concentrated in
21 urban African-American districts;

22 (i) in Ohio's Lucas County, which in-
23 cludes Toledo, 3,122 or 41.13 percent of
24 the provisional ballots went uncounted
25 under the direction of George W. Bush's

1 agent, the Secretary of State of Ohio, John
2 Kenneth Blackwell, Co-Chair of the Com-
3 mittee to Re-Elect Bush/Cheney in Ohio;
4 (ii) in Ohio's Cuyahoga County, which
5 includes Cleveland, 8,559 or 32.82 percent
6 of the provisional ballots went uncounted;
7 (iii) in Ohio's Hamilton County, which
8 includes Cincinnati, 3,529 or 24.23 percent
9 of the provisional ballots went uncounted;
10 and
11 (iv) Statewide, the provisional ballot
12 rejection rate was 9 percent as compared
13 to the greater figures in the urban areas;
14 (4) the Department of Justice, charged with en-
15 forcing the Voting Rights Act of 1965, the 14th
16 Amendment's Equal Protection Clause, and other
17 voting rights laws in the United States of America,
18 under the direction and Administration of George
19 W. Bush did willfully and purposely obstruct and
20 stonewall legitimate criminal investigations into myr-
21 iad cases of reported electoral fraud and suppression
22 in the State of Ohio. Such activities, carried out by
23 the department on behalf of George W. Bush in
24 counties such as Franklin and Knox by persons such
25 as John K. Tanner and others, were meant to con-

1 found and whitewash legitimate legal criminal inves-
2 tigations into the suppression of massive numbers of
3 legally registered voters and the removal of their
4 right to cast a ballot fairly and freely in the State
5 of Ohio, which was crucial to the certified electoral
6 victory of George W. Bush in 2004;

7 (5) on or about November 1, 2006, members of
8 the United States Department of Justice, under the
9 control and direction of the Administration of
10 George W. Bush, brought indictments for voter reg-
11 istration fraud within days of an election, in order
12 to directly effect the outcome of that election for
13 partisan purposes, and in doing so, thereby violated
14 the Justice Department's own rules against filing
15 election-related indictments close to an election;

16 (6) emails have been obtained showing that the
17 Republican National Committee and members of
18 Bush-Cheney '04 Inc., did, at the direction of the
19 White House under the Administration of George W.
20 Bush, engage in voter suppression in five states by
21 a method know as "vote caging", an illegal voter
22 suppression technique;

23 (7) agents of George W. Bush, including Mark
24 F. "Thor" Hearn, the national general counsel of
25 Bush/Cheney '04, Inc., did, at the behest of George

1 W. Bush, as members of a criminal front group, dis-
2 tribute known false information and propaganda in
3 the hopes of forwarding legislation and other actions
4 that would result in the disenfranchisement of
5 Democratic voters for partisan purposes. The
6 scheme, run under the auspices of an organization
7 known as “The American Center for Voting Rights”
8 (ACVR), was funded by agents of George W. Bush
9 in violation of laws governing tax exempt 501(c)3 or-
10 ganizations and in violation of federal laws forbid-
11 ding the distribution of such propaganda by the
12 Federal Government and agents working on its be-
13 half;

14 (8) members of the United States Department
15 of Justice, under the control and direction of the
16 Administration of George W. Bush, did, for partisan
17 reasons, illegally and with malice aforethought block
18 career attorneys and other officials in the Depart-
19 ment of Justice from filing three lawsuits charging
20 local and county governments with violating the vot-
21 ing rights of African-Americans and other minori-
22 ties, according to seven former senior United States
23 Justice Department employees;

24 (9) members of the United States Department
25 of Justice, under the control and direction of the

1 Administration of George W. Bush, did illegally and
2 with malice aforethought derail at least two inves-
3 tigations into possible voter discrimination, accord-
4 ing to a letter sent to the Senate Rules and Admini-
5 stration Committee and written by former employ-
6 ees of the United States Department of Justice, Vot-
7 ing Rights Section; and

8 (10) members of the United States Election As-
9 sistance Commission (EAC), under the control and
10 direction of the Administration of George W. Bush,
11 have purposefully and willfully misled the public, in
12 violation of several laws, by;

13 (A) withholding from the public and then
14 altering a legally mandated report on the true
15 measure and threat of Voter Fraud, as commis-
16 sioned by the EAC and completed in June
17 2006, prior to the 2006 mid-term election, but
18 withheld from release prior to that election
19 when its information would have been useful in
20 the administration of elections across the coun-
21 try, because the results of the statutorily re-
22 quired and tax-payer funded report did not con-
23 form with the illegal, partisan propaganda ef-
24 forts and politicized agenda of the Bush Admin-
25 istration;

1 (B) withholding from the public a legally
2 mandated report on the disenfranchising effect
3 of Photo Identification laws at the polling place,
4 shown to disproportionately disenfranchise vot-
5 ers not of George W. Bush's political party.
6 The report was commissioned by the EAC and
7 completed in June 2006, prior to the 2006 mid-
8 term election, but withheld from release prior to
9 that election when its information would have
10 been useful in the administration of elections
11 across the country; and

12 (C) withholding from the public a legally
13 mandated report on the effectiveness of Provi-
14 sional Voting as commissioned by the EAC and
15 completed in June 2006, prior to the 2006 mid-
16 term election, but withheld from release prior to
17 that election when its information would have
18 been useful in the administration of elections
19 across the country, and keeping that report
20 unreleased for more than a year until it was re-
21 vealed by independent media outlets.

22 For directly harming the rights and manner of suf-
23 frage, for suffering to make them secret and unknowable,
24 for overseeing and participating in the disenfranchisement
25 of legal voters, for instituting debates and doubts about

1 the true nature of elections, all against the will and con-
2 sent of local voters affected, and forced through threats
3 of litigation by agents and agencies overseen by George
4 W. Bush, the actions of Mr. Bush to do the opposite of
5 securing and guaranteeing the right of the people to alter
6 or abolish their government via the electoral process, being
7 a violation of an inalienable right, and an immediate
8 threat to Liberty.

9 In all of these actions and decisions, President
10 George W. Bush has acted in a manner contrary to his
11 trust as President and Commander in Chief, and subver-
12 sive of constitutional government, to the prejudice of the
13 cause of law and justice and to the manifest injury of the
14 people of the United States. Wherefore, President George
15 W. Bush, by such conduct, is guilty of an impeachable
16 offense warranting removal from office.

17 ARTICLE XXX—MISLEADING CONGRESS AND THE
18 AMERICAN PEOPLE IN AN ATTEMPT TO DESTROY
19 MEDICARE

20 In his conduct while President of the United States,
21 George W. Bush, in violation of his constitutional oath to
22 faithfully execute the office of President of the United
23 States and, to the best of his ability, preserve, protect,
24 and defend the Constitution of the United States, and in
25 violation of his constitutional duty under article II, section

1 3 of the Constitution “to take care that the laws be faith-
2 fully executed”, has both personally and acting through
3 his agents and subordinates, together with the Vice Presi-
4 dent, pursued policies which deliberately drained the fiscal
5 resources of Medicare by forcing it to compete with sub-
6 sidized private insurance plans which are allowed to arbi-
7 trarily select or not select those they will cover; failing to
8 provide reasonable levels of reimbursements to Medicare
9 providers, thereby discouraging providers from partici-
10 pating in the program, and designing a Medicare Part D
11 benefit without cost controls which allowed pharmaceutical
12 companies to gouge the American taxpayers for the price
13 of prescription drugs.

14 The President created, manipulated, and dissemi-
15 nated information given to the citizens and Congress of
16 the United States in support of his prescription drug plan
17 for Medicare that enriched drug companies while failing
18 to save beneficiaries sufficient money on their prescription
19 drugs. He misled Congress and the American people into
20 thinking the cost of the benefit was \$400 billion. It was
21 widely understood that if the cost exceeded that amount,
22 the bill would not pass due to concerns about fiscal irre-
23 sponsibility.

24 A Medicare Actuary who possessed information re-
25 garding the true cost of the plan, \$539 billion, was in-

1 structed by the Medicare Administrator to deny Congress-
2 sional requests for it. The Actuary was threatened with
3 sanctions if the information was disclosed to Congress,
4 which, unaware of the information, approved the bill. De-
5 spite the fact that official cost estimates far exceeded \$400
6 billion, President Bush offered assurances to Congress
7 that the cost was \$400 billion, when his office had infor-
8 mation to the contrary. In the House of Representatives,
9 the bill passed by a single vote and the Conference Report
10 passed by only 5 votes. The White House knew the actual
11 cost of the drug benefit was high enough to prevent its
12 passage. Yet the White House concealed the truth and im-
13 peded an investigation into its culpability.

14 In all of these actions and decisions, President
15 George W. Bush has acted in a manner contrary to his
16 trust as President and Commander in Chief, and subver-
17 sive of constitutional government, to the prejudice of the
18 cause of law and justice and to the manifest injury of the
19 people of the United States. Wherefore, President George
20 W. Bush, by such conduct, is guilty of an impeachable
21 offense warranting removal from office.

1 ARTICLE XXXI—KATRINA: FAILURE TO PLAN FOR THE
2 PREDICTED DISASTER OF HURRICANE KATRINA,
3 FAILURE TO RESPOND TO A CIVIL EMERGENCY

4 In his conduct while President of the United States,
5 George W. Bush, in violation of his constitutional oath to
6 faithfully execute the office of President of the United
7 States and, to the best of his ability, preserve, protect,
8 and defend the Constitution of the United States, and in
9 violation of his constitutional duty under article II, section
10 3 of the Constitution “to take care that the laws be faith-
11 fully executed”, has both personally and acting through
12 his agents and subordinates, failed to take sufficient ac-
13 tion to protect life and property prior to and in the face
14 of Hurricane Katrina in 2005, given decades of foreknowl-
15 edge of the dangers of storms to New Orleans and specific
16 forewarning in the days prior to the storm. The President
17 failed to prepare for predictable and predicted disasters,
18 failed to respond to an immediate need of which he was
19 informed, and has subsequently failed to rebuild the sec-
20 tion of our nation that was destroyed.

21 Hurricane Katrina killed at least 1,282 people, with
22 2 million more displaced. 302,000 housing units were de-
23 stroyed or damaged by the hurricane, 71 percent of these
24 were low-income units. More than 500 sewage plants were
25 destroyed, more than 170 point-source leakages of gaso-

1 line, oil, or natural gas, more than 2,000 gas stations sub-
2 merged, several chemical plants, 8 oil refineries, and a
3 superfund site was submerged. 8 million gallons of oil were
4 spilled. Toxic materials seeped into floodwaters and spread
5 through much of the city and surrounding areas.

6 The predictable increased strength of hurricanes such
7 as Katrina has been identified by scientists for years, and
8 yet the Bush Administration has denied this science and
9 restricted such information from official reports, publica-
10 tions, and the National Oceanic and Atmospheric Agency's
11 website. Donald Kennedy, editor-in-chief of Science, wrote
12 in 2006 that "hurricane intensity has increased with oce-
13 anic surface temperatures over the past 30 years. The
14 physics of hurricane intensity growth . . . has clarified
15 and explained the thermodynamic basis for these observa-
16 tions. [Kerry] Emanuel has tested this relationship and
17 presented convincing evidence."

18 FEMA's 2001 list of the top three most likely and
19 most devastating disasters were a San Francisco earth-
20 quake, a terrorist attack on New York, and a Category
21 4 hurricane hitting New Orleans, with New Orleans being
22 the number one item on that list. FEMA conducted a five-
23 day hurricane simulation exercise in 2004, "Hurricane
24 Pam", mimicking a Katrina-like event. This exercise com-
25 bined the National Weather Service, the U.S. Army Corps

1 of Engineers, the LSU Hurricane Center and other state
2 and federal agencies, resulting in the development of emer-
3 gency response plans. The exercise demonstrated, among
4 other things, that thousands of mainly indigent New Orle-
5 ans residents would be unable to evacuate on their own.
6 They would need substantial government assistance.
7 These plans, however, were not implemented in part due
8 to the President's slashing of funds for protection. In the
9 year before Hurricane Katrina hit, the President contin-
10 ued to cut budgets and deny grants to the Gulf Coast.
11 In June of 2004, the Army Corps of Engineers levee budg-
12 et for New Orleans was cut, and it was cut again in June
13 of 2005, this time by \$71.2 million or a whopping 44 per-
14 cent of the budget. As a result, ACE was forced to sus-
15 pend any repair work on the levees. In 2004 FEMA denied
16 a Louisiana disaster mitigation grant request.

17 The President was given multiple warnings that Hur-
18 ricane Katrina had a high likelihood of causing serious
19 damage to New Orleans and the Gulf Coast. At 10 a.m.
20 on Sunday, August 28, 2005, the day before the storm
21 hit, the National Weather Service published an alert titled
22 "DEVASTATING DAMAGE EXPECTED". Printed in
23 all capital letters, the alert stated that "MOST OF THE
24 AREA WILL BE UNINHABITABLE FOR WEEKS
25 . . . PERHAPS LONGER. AT LEAST ONE HALF OF

1 WELL CONSTRUCTED HOMES WILL HAVE ROOF
2 AND WALL FAILURE. . . . POWER OUTAGES
3 WILL LAST FOR WEEKS. . . . WATER SHORT-
4 AGES WILL MAKE HUMAN SUFFERING INCRED-
5 IBLE BY MODERN STANDARDS.”.

6 The Homeland Security Department also briefed the
7 President on the scenario, warning of levee breaches and
8 severe flooding. According to the New York Times, “a
9 Homeland Security Department report submitted to the
10 White House at 1:47 a.m. on August 29, hours before the
11 storm hit, said, ‘Any storm rated Category 4 or greater
12 will likely lead to severe flooding and/or levee breaching.’”
13 These warnings clearly contradict the statements made by
14 President Bush immediately after the storm that such
15 devastation could not have been predicted. On September
16 1, 2005, the President said, “I don’t think anyone antici-
17 pated the breach of the levees.”.

18 The President’s response to Katrina via FEMA and
19 DHS was criminally delayed, indifferent, and inept. The
20 only FEMA employee posted in New Orleans in the imme-
21 diate aftermath of Hurricane Katrina, Marty Bahamonde,
22 emailed head of FEMA Michael Brown from his Black-
23 berry device on August 31, 2005, regarding the conditions.
24 The email was urgent and detailed and indicated that
25 “The situation is past critical. . . . Estimates are many

1 will die within hours.”. Brown’s reply was emblematic of
2 the administration’s entire response to the catastrophe:
3 “Thanks for the update. Anything specific I need to do
4 or tweak?”. The Secretary of Homeland Security, Michael
5 Chertoff, did not declare an emergency, did not mobilize
6 the Federal resources, and seemed to not even know what
7 was happening on the ground until reporters told him.

8 On Friday, August 26, 2005, Governor Kathleen
9 Blanco declared a State of Emergency in Louisiana and
10 Governor Haley Barbour of Mississippi followed suit the
11 next day. Also on that Saturday, Governor Blanco asked
12 the President to declare a Federal State of Emergency,
13 and on August 28, 2005, the Sunday before the storm
14 hit, Mayor Nagin declared a State of Emergency in New
15 Orleans. This shows that the local authorities, responding
16 to federal warnings, knew how bad the destruction was
17 going to be and anticipated being overwhelmed. Failure
18 to act under these circumstances demonstrates gross neg-
19 ligence.

20 In all of these actions and decisions, President
21 George W. Bush has acted in a manner contrary to his
22 trust as President and Commander in Chief, and subver-
23 sive of constitutional government, to the prejudice of the
24 cause of law and justice and to the manifest injury of the
25 people of the United States. Wherefore, President George

1 W. Bush, by such conduct, is guilty of an impeachable
2 offense warranting removal from office.

3 ARTICLE XXXII—MISLEADING CONGRESS AND THE
4 AMERICAN PEOPLE, SYSTEMATICALLY UNDER-
5 MINING EFFORTS TO ADDRESS GLOBAL CLIMATE
6 CHANGE

7 In his conduct while President of the United States,
8 George W. Bush, in violation of his constitutional oath to
9 faithfully execute the office of President of the United
10 States and, to the best of his ability, preserve, protect,
11 and defend the Constitution of the United States, and in
12 violation of his constitutional duty under article II, section
13 3 of the Constitution “to take care that the laws be faith-
14 fully executed”, has both personally and acting through
15 his agents and subordinates, together with the Vice Presi-
16 dent, ignored the peril to life and property posed by global
17 climate change, manipulated scientific information and
18 mishandled protective policy, constituting nonfeasance and
19 malfeasance in office, abuse of power, dereliction of duty,
20 and deception of Congress and the American people.

21 President Bush knew the expected effects of climate
22 change and the role of human activities in driving climate
23 change. This knowledge preceded his first Presidential
24 term.

1 (1) During his 2000 Presidential campaign, he
2 promised to regulate carbon dioxide emissions.

3 (2) In 2001, the Intergovernmental Panel on
4 Climate Change, a global body of hundreds of the
5 world's foremost experts on climate change, con-
6 cluded that "most of observed warming over last 50
7 years (is) likely due to increases in greenhouse gas
8 concentrations due to human activities." The Third
9 Assessment Report projected several effects of cli-
10 mate change such as continued "widespread retreat"
11 of glaciers, an "increase threats to human health,
12 particularly in lower income populations, predomi-
13 nantly within tropical/subtropical countries", and
14 "water shortages".

15 (3) The grave danger to national security posed
16 by global climate change was recognized by the Pen-
17 tagon's Defense Advanced Planning Research
18 Projects Agency in October of 2003. An agency-com-
19 missioned report "explores how such an abrupt cli-
20 mate change scenario could potentially de-stabilize
21 the geo-political environment, leading to skirmishes,
22 battles, and even war due to resource constraints
23 such as: 1) Food shortages due to decreases in net
24 global agricultural production, 2) Decreased avail-
25 ability and quality of fresh water in key regions due

1 to shifted precipitation patterns, causing more fre-
2 quent floods and droughts, 3) Disrupted access to
3 energy supplies due to extensive sea ice and stormi-
4 ness.”.

5 (4) A December 2004 paper in Science reviewed
6 928 studies published in peer reviewed journals to
7 determine the number providing evidence against the
8 existence of a link between anthropogenic emissions
9 of carbon dioxide and climate change. “Remarkably,
10 none of the papers disagreed with the consensus po-
11 sition.”.

12 (5) The November 2007 Inter-Governmental
13 Panel on Climate Change (IPCC) Fourth Assess-
14 ment Report showed that global anthropogenic emis-
15 sions of greenhouse gasses have increased 70 percent
16 between 1970 and 2004, and anthropogenic emis-
17 sions are very likely the cause of global climate
18 change. The report concluded that global climate
19 change could cause the extinction of 20 to 30 per-
20 cent of species in unique ecosystems such as the
21 polar areas and biodiversity hotspots, increase ex-
22 treme weather events especially in the developing
23 world, and have adverse effects on food production
24 and fresh water availability.

1 The President has done little to address this most
2 serious of problems, thus constituting an abuse of power
3 and criminal neglect. He has also actively endeavored to
4 undermine efforts by the Federal Government, States, and
5 other nations to take action on their own.

6 (1) In March 2001, President Bush announced
7 the U.S. would not be pursuing ratification of the
8 Kyoto Protocol, an international effort to reduce
9 greenhouse gasses. The United States is the only in-
10 dustrialized nation that has failed to ratify the ac-
11 cord.

12 (2) In March of 2008, Representative Henry
13 Waxman wrote to EPA Administrator Stephen
14 Johnson: “In August 2003, the Bush Administration
15 denied a petition to regulate CO₂ emissions from
16 motor vehicles by deciding that CO₂ was not a pol-
17 lutant under the Clean Air Act. In April 2007, the
18 U.S. Supreme Court overruled that determination in
19 Massachusetts v. EPA. The Supreme Court wrote
20 that ‘If EPA makes a finding of endangerment, the
21 Clean Air Act requires the agency to regulate emis-
22 sions of the deleterious pollutant from new motor ve-
23 hicles.’ The EPA then conducted an extensive inves-
24 tigation involving 60–70 staff who concluded that
25 ‘CO₂ emissions endanger both human health and

1 welfare.’. These findings were submitted to the
2 White House, after which work on the findings and
3 the required regulations was halted.”.

4 (3) A Memo to Members of the Committee on
5 Oversight and Government Reform on May 19,
6 2008, stated, “The record before the Committee
7 shows: (1) the career staff at EPA unanimously sup-
8 ported granting California’s petition (to be allowed
9 to regulate greenhouse gas emissions from cars and
10 trucks, consistent with California state law); (2) Ste-
11 phen Johnson, the Administrator of EPA, also sup-
12 ported granting California’s petition at least in part;
13 and (3) Administrator Johnson reversed his position
14 after communications with officials in the White
15 House.”.

16 The President has suppressed the release of scientific
17 information related to global climate change, an action
18 which undermines Congress’s ability to legislate and pro-
19 vide oversight, and which has thwarted efforts to prevent
20 global climate change despite the serious threat that it
21 poses.

22 (1) In February, 2001, ExxonMobil wrote a
23 memo to the White House outlining ways to influ-
24 ence the outcome of the Third Assessment report by
25 the Intergovernmental Panel on Climate Change.

1 The memo opposed the reelection of Dr. Robert
2 Watson as the IPCC Chair. The White House then
3 supported an opposition candidate, who was subse-
4 quently elected to replace Dr. Watson.

5 (2) The New York Times on January 29, 2006,
6 reported that James Hansen, NASA's senior climate
7 scientist was warned of "dire consequences" if he
8 continued to speak out about global climate change
9 and the need for reducing emissions of associated
10 gasses. The Times also reported that: "At climate
11 laboratories of the National Oceanic and Atmos-
12 pheric Administration, for example, many scientists
13 who routinely took calls from reporters five years
14 ago can now do so only if the interview is approved
15 by administration officials in Washington, and then
16 only if a public affairs officer is present or on the
17 phone.".

18 (3) In December of 2007, the House Committee
19 on Oversight and Government Reform issued a re-
20 port based on 16 months of investigation and 27,000
21 pages of documentation. According to the summary:
22 "The evidence before the Committee leads to one in-
23 escapable conclusion: the Bush Administration has
24 engaged in a systematic effort to manipulate climate
25 change science and mislead policy makers and the

1 public about the dangers of global warming.” The
2 report described how the White House appointed
3 former petroleum industry lobbyist Phil Cooney as
4 head of the Council on Environmental Quality. The
5 report states “There was a systematic White House
6 effort to minimize the significance of climate change
7 by editing climate change reports. CEQ Chief of
8 Staff Phil Cooney and other CEQ officials made at
9 least 294 edits to the Administration’s Strategic
10 Plan of the Climate Change Science Program to ex-
11 aggerate or emphasize scientific uncertainties or to
12 de-emphasize or diminish the importance of the
13 human role in global warming.”.

14 (4) On April 23, 2008, Representative Henry
15 Waxman wrote a letter to EPA Administrator Ste-
16 phen L. Johnson. In it he reported: “Almost 1,600
17 EPA scientists completed the Union of Concerned
18 Scientists survey questionnaire. Over 22 percent of
19 these scientists reported that ‘selective or incomplete
20 use of data to justify a specific regulatory outcome’
21 occurred ‘frequently’ or ‘occasionally’ at EPA. Nine-
22 ty-four EPA scientists reported being frequently or
23 occasionally directed to inappropriately exclude or
24 alter technical information from an EPA scientific
25 document. Nearly 200 EPA scientists said that they

1 have frequently or occasionally been in situations in
2 which scientists have actively objected to, resigned
3 from or removed themselves from a project because
4 of pressure to change scientific findings.”.

5 In all of these actions and decisions, President
6 George W. Bush has acted in a manner contrary to his
7 trust as President and subversive of constitutional govern-
8 ment, to the prejudice of the cause of law and justice and
9 to the manifest injury of the people of the United States.
10 Wherefore, President George W. Bush, by such conduct,
11 is guilty of an impeachable offense warranting removal
12 from office.

13 ARTICLE XXXIII—REPEATEDLY IGNORED AND FAILED
14 TO RESPOND TO HIGH LEVEL INTELLIGENCE
15 WARNINGS OF PLANNED TERRORIST ATTACKS IN
16 THE U.S., PRIOR TO 9/11

17 In his conduct while President of the United States,
18 George W. Bush, in violation of his constitutional oath to
19 faithfully execute the office of President of the United
20 States and, to the best of his ability, preserve, protect,
21 and defend the Constitution of the United States, and in
22 violation of his constitutional duty under article II, section
23 3 of the Constitution “to take care that the laws be faith-
24 fully executed”, has both personally and acting through
25 his agents and subordinates, together with the Vice Presi-

1 dent, failed in his Constitutional duties to take proper
2 steps to protect the nation prior to September 11, 2001.

3 The White House's top counter-terrorism adviser,
4 Richard A. Clarke, has testified that from the beginning
5 of George W. Bush's presidency until September 11, 2001,
6 Clarke attempted unsuccessfully to persuade President
7 Bush to take steps to protect the nation against terrorism.
8 Clarke sent a memorandum to then-National Security Ad-
9 visor Condoleezza Rice on January 24, 2001, "urgently"
10 but unsuccessfully requesting "a Cabinet-level meeting to
11 deal with the impending al Qaeda attack."

12 In April 2001, Clarke was finally granted a meeting,
13 but only with second-in-command department representa-
14 tives, including Deputy Secretary of Defense Paul
15 Wolfowitz, who made light of Clarke's concerns.

16 Clarke confirms that in June, July, and August
17 2001, the Central Intelligence Agency (CIA) warned the
18 president in daily briefings of unprecedented indications
19 that a major al Qaeda attack was going to happen against
20 the United States somewhere in the world in the weeks
21 and months ahead. Yet, Clarke was still unable to convene
22 a cabinet-level meeting to address the issue.

23 Condoleezza Rice has testified that George Tenet met
24 with the president 40 times to warn him that a major al
25 Qaeda attack was going to take place, and that in response

1 the president did not convene any meetings of top officials.
2 At such meetings, the FBI could have shared information
3 on possible terrorists enrolled at flight schools. Among the
4 many preventive steps that could have been taken, the
5 Federal Aviation Administration, airlines, and airports
6 might have been put on full alert.

7 According to Condoleezza Rice, the first and only
8 cabinet-level meeting prior to 9/11 to discuss the threat
9 of terrorist attacks took place on September 4, 2001, one
10 week before the attacks in New York and Washington.

11 On August 6, 2001, President Bush was presented
12 a President's Daily Brief (PDB) article titled "Bin Laden
13 Determined to Strike in U.S.". The lead sentence of that
14 PDB article indicated that Bin Laden and his followers
15 wanted to "follow the example of World Trade Center
16 bomber Ramzi Yousef and 'bring the fighting to Amer-
17 ica' ". The article warned: "Al-Qa'ida members—including
18 some who are U.S. citizens—have resided in or traveled
19 to the U.S. for years, and the group apparently maintains
20 a support structure that could aid attacks.".

21 The article cited a "more sensational threat reporting
22 that Bin Laden wanted to hijack a U.S. aircraft", but in-
23 dicated that the CIA had not been able to corroborate such
24 reporting. The PDB item included information from the
25 FBI indicating "patterns of suspicious activity in this

1 country consistent with preparations for hijackings or
2 other types of attacks, including recent surveillance of
3 Federal buildings in New York”. The article also noted
4 that the CIA and FBI were investigating “a call to our
5 embassy in the UAE in May saying that a group of Bin
6 Laden supporters was in the U.S. planning attacks with
7 explosives”.

8 The president spent the rest of August 6, and almost
9 all the rest of August 2001 on vacation. There is no evi-
10 dence that he called any meetings of his advisers to discuss
11 this alarming report. When the title and substance of this
12 PDB article were later reported in the press, then-Na-
13 tional Security Adviser Condoleezza Rice began a sus-
14 tained campaign to play down its significance, until the
15 actual text was eventually released by the White House.

16 New York Times writer Douglas Jehl, put it this way:
17 “In a single 17-sentence document, the intelligence brief-
18 ing delivered to President Bush in August 2001 spells out
19 the who, hints at the what and points towards the where
20 of the terrorist attacks on New York and Washington that
21 followed 36 days later.”.

22 Eleanor Hill, Executive Director of the joint congres-
23 sional committee investigating the performance of the
24 U.S. intelligence community before September 11, 2001,
25 reported in mid-September 2002 that intelligence reports

1 a year earlier “reiterated a consistent and constant theme:
2 Osama bin Laden’s intent to launch terrorist attacks in-
3 side the United States”.

4 That joint inquiry revealed that just two months be-
5 fore September 11, an intelligence briefing for “senior
6 government officials” predicted a terrorist attack with
7 these words: “The attack will be spectacular and designed
8 to inflict mass casualties against U.S. facilities or inter-
9 ests. Attack preparations have been made. Attack will
10 occur with little or no warning.”.

11 Given the White House’s insistence on secrecy with
12 regard to what intelligence was given to President Bush,
13 the joint-inquiry report does not divulge whether he took
14 part in that briefing. Even if he did not, it strains credu-
15 lity to suppose that those “senior government officials”
16 would have kept its alarming substance from the presi-
17 dent.

18 Again, there is no evidence that the president held
19 any meetings or took any action to deal with the threats
20 of such attacks.

21 In all of these actions and decisions, President
22 George W. Bush has acted in a manner contrary to his
23 trust as President, and subversive of constitutional gov-
24 ernment, to the prejudice of the cause of law and justice
25 and to the manifest injury of the people of the United

1 States. Wherefore, President George W. Bush, by such
2 conduct, is guilty of an impeachable offense warranting
3 removal from office.

4 ARTICLE XXXIV—OBSTRUCTION OF INVESTIGATION
5 INTO THE ATTACKS OF SEPTEMBER 11, 2001

6 In his conduct while President of the United States,
7 George W. Bush, in violation of his constitutional oath to
8 faithfully execute the office of President of the United
9 States and, to the best of his ability, preserve, protect,
10 and defend the Constitution of the United States, and in
11 violation of his constitutional duty under article II, section
12 3 of the Constitution “to take care that the laws be faith-
13 fully executed”, has both personally and acting through
14 his agents and subordinates, together with the Vice Presi-
15 dent, obstructed investigations into the attacks on the
16 World Trade Center and Pentagon on September 11,
17 2001.

18 Following September 11, 2001, President Bush and
19 Vice President Cheney took strong steps to thwart any
20 and all proposals that the circumstances of the attack be
21 addressed. Then-Secretary of State Colin Powell was
22 forced to renege on his public promise on September 23
23 that a “White Paper” would be issued to explain the cir-
24 cumstances. Less than two weeks after that promise, Pow-
25 ell apologized for his “unfortunate choice of words”, and

1 explained that Americans would have to rely on “informa-
2 tion coming out in the press and in other ways”.

3 On September 26, 2001, President Bush drove to
4 Central Intelligence Agency (CIA) headquarters in Lang-
5 ley, Virginia, stood with Director of Central Intelligence
6 George Tenet and said: “My report to the nation is, we’ve
7 got the best intelligence we can possibly have thanks to
8 the men and women of the C.I.A.” George Tenet subse-
9 quently and falsely claimed not to have visited the presi-
10 dent personally between the start of Bush’s long Crawford
11 vacation and September 11, 2001.

12 Testifying before the 9/11 Commission on April 14,
13 2004, Tenet answered a question from Commission mem-
14 ber Timothy Roemer by referring to the president’s vaca-
15 tion (July 29–August 30) in Crawford and insisting that
16 he did not see the president at all in August 2001. “You
17 never talked with him?” Roemer asked. “No”, Tenet re-
18 plied, explaining that for much of August he too was “on
19 leave”. An Agency spokesman called reporters that same
20 evening to say Tenet had misspoken, and that Tenet had
21 briefed Bush on August 17 and 31. The spokesman ex-
22 plained that the second briefing took place after the presi-
23 dent had returned to Washington, and played down the
24 first one, in Crawford, as uneventful.

1 In his book, *At the Center of the Storm* (2007),
2 Tenet refers to what is almost certainly his August 17 visit
3 to Crawford as a follow-up to the “Bin Laden Determined
4 to Strike in the U.S.” article in the CIA-prepared Presi-
5 dent’s Daily Brief of August 6. That briefing was immor-
6 talized in a *Time* Magazine photo capturing Harriet Myers
7 holding the PDB open for the president, as two CIA offi-
8 cers sit by. It is the same briefing to which the president
9 reportedly reacted by telling the CIA briefer, “All right,
10 you’ve covered your ass now.” (Ron Suskind, *The One-*
11 *Percent Doctrine*, p. 2, 2006). In *At the Center of the*
12 *Storm*, Tenet writes: “A few weeks after the August 6
13 PDB was delivered, I followed it to Crawford to make sure
14 that the president stayed current on events.”.

15 A White House press release suggests Tenet was also
16 there a week later, on August 24. According to the August
17 25, 2001, release, President Bush, addressing a group of
18 visitors to Crawford on August 25, told them: “George
19 Tenet and I, yesterday, we piled in the new nominees for
20 the Chairman of the Joint Chiefs, the Vice Chairman and
21 their wives and went right up the canyon.”.

22 In early February 2002, Vice President Dick Cheney
23 warned then-Senate Majority Leader Tom Daschle that
24 if Congress went ahead with an investigation, administra-
25 tion officials might not show up to testify. As pressure

1 grew for an investigation, the president and vice president
2 agreed to the establishment of a congressional joint com-
3 mittee to conduct a “Joint Inquiry”. Eleanor Hill, Execu-
4 tive Director of the Inquiry, opened the Joint Inquiry’s
5 final public hearing in mid-September 2002 with the fol-
6 lowing disclaimer: “I need to report that, according to the
7 White House and the Director of Central Intelligence, the
8 president’s knowledge of intelligence information relevant
9 to this inquiry remains classified, even when the substance
10 of the intelligence information has been declassified.”.

11 The National Commission on Terrorist Attacks, also
12 known as the 9/11 Commission, was created on November
13 27, 2002, following the passage of congressional legisla-
14 tion signed into law by President Bush. The President was
15 asked to testify before the Commission. He refused to tes-
16 tify except for one hour in private with only two Commis-
17 sion members, with no oath administered, with no record-
18 ing or note taking, and with the Vice President at his side.
19 Commission Co-Chair Lee Hamilton has written that he
20 believes the commission was set up to fail, was under-
21 funded, was rushed, and did not receive proper coopera-
22 tion and access to information.

23 A December 2007 review of classified documents by
24 former members of the Commission found that the com-
25 mission had made repeated and detailed requests to the

1 CIA in 2003 and 2004 for documents and other informa-
2 tion about the interrogation of operatives of l Qaeda, and
3 had been told falsely by a top CIA official that the agency
4 had “produced or made available for review” everything
5 that had been requested.

6 In all of these actions and decisions, President
7 George W. Bush has acted in a manner contrary to his
8 trust as President, and subversive of constitutional gov-
9 ernment, to the prejudice of the cause of law and justice
10 and to the manifest injury of the people of the United
11 States. Wherefore, President George W. Bush, by such
12 conduct, is guilty of an impeachable offense warranting
13 removal from office.

14 ARTICLE XXXV—ENDANGERING THE HEALTH OF 9/11
15 FIRST RESPONDERS

16 In his conduct while President of the United States,
17 George W. Bush, in violation of his constitutional oath to
18 faithfully execute the office of President of the United
19 States and, to the best of his ability, preserve, protect,
20 and defend the Constitution of the United States, and in
21 violation of his constitutional duty under article II, section
22 3 of the Constitution “to take care that the laws be faith-
23 fully executed”, has both personally and acting through
24 his agents and subordinates, together with the Vice Presi-
25 dent, recklessly endangered the health of first responders,

1 residents, and workers at and near the former location of
2 the World Trade Center in New York City.

3 The Inspector General of the Environmental Protec-
4 tion Agency (EPA) August 21, 2003, report numbered
5 2003-P-00012 and entitled “EPA’s Response to the
6 World Trade Center Collapse: Challenges, Successes, and
7 Areas for Improvement”, includes the following findings:

8 “[W]hen EPA made a September 18 announce-
9 ment that the air was ‘safe’ to breathe, it did not
10 have sufficient data and analyses to make such a
11 blanket statement. At that time, air monitoring data
12 was lacking for several pollutants of concern, includ-
13 ing particulate matter and polychlorinated biphenyls
14 (PCBs). Furthermore, The White House Council on
15 Environmental Quality (CEQ) influenced, through
16 the collaboration process, the information that EPA
17 communicated to the public through its early press
18 releases when it convinced EPA to add reassuring
19 statements and delete cautionary ones.”. . .

20 “As a result of the White House CEQ’s influ-
21 ence, guidance for cleaning indoor spaces and infor-
22 mation about the potential health effects from WTC
23 debris were not included in EPA-issued press re-
24 leases. In addition, based on CEQ’s influence, reas-
25 suring information was added to at least one press

1 release and cautionary information was deleted from
2 EPA's draft version of that press release. . . .
3 [T]he White House's role in EPA's public commu-
4 nications about WTC environmental conditions was
5 described in a September 12, 2001, e-mail from the
6 EPA Deputy Administrator's Chief of Staff to sen-
7 ior EPA officials:

8 “‘All statements to the media should be
9 cleared through the NSC [National Security
10 Council] before they are released.’

11 “According to the EPA Chief of Staff, one par-
12 ticular CEQ official was designated to work with
13 EPA to ensure that clearance was obtained through
14 NSC. The Associate Administrator for the EPA Of-
15 fice of Communications, Education, and Media Rela-
16 tions (OCEMR)³ said that no press release could be
17 issued for a 3- to 4-week period after September 11
18 without approval from the CEQ contact.”.

19 Acting EPA Administrator Marianne Horinko, who
20 sat in on EPA meetings with the White House, has said
21 in an interview that the White House played a coordi-
22 nating role. The National Security Council played the key
23 role, filtering incoming data on ground zero air and water,
24 Horinko said: “I think that the thinking was, these are

1 experts in WMD (weapons of mass destruction), so they
2 should have the coordinating role.”.

3 In the cleanup of the Pentagon following September
4 11, 2001, Occupational Safety and Health Administration
5 laws were enforced, and no workers became ill. At the
6 World Trade Center site, the same laws were not enforced.

7 In the years since the release of the EPA Inspector
8 General’s above-cited report, the Bush Administration has
9 still not effected a clean-up of the indoor air in apartments
10 and workspaces near the site.

11 Screenings conducted at the Mount Sinai Medical
12 Center and released in the September 10, 2004, Morbidity
13 and Mortality Weekly Report (MMWR) of the Federal
14 Centers For Disease Control and Prevention (CDC), pro-
15 duced the following results:

16 “Both upper and lower respiratory problems
17 and mental health difficulties are widespread among
18 rescue and recovery workers who dug through the
19 ruins of the World Trade Center in the days fol-
20 lowing its destruction in the attack of September 11,
21 2001.

22 “An analysis of the screenings of 1,138 workers
23 and volunteers who responded to the World Trade
24 Center disaster found that nearly three-quarters of
25 them experienced new or worsened upper respiratory

1 problems at some point while working at Ground
2 Zero. And half of those examined had upper and/or
3 lower respiratory symptoms that persisted up to the
4 time of their examinations, an average of eight
5 months after their WTC efforts ended.”.

6 A larger study released in 2006 found that roughly
7 70 percent of nearly 10,000 workers tested at Mount Sinai
8 from 2002 to 2004 reported that they had new or substan-
9 tially worsened respiratory problems while or after work-
10 ing at ground zero. This study showed that many of the
11 respiratory ailments, including sinusitis and asthma, and
12 gastrointestinal problems related to them, initially re-
13 ported by ground zero workers persisted or grew worse
14 over time. Most of the ground zero workers in the study
15 who reported trouble breathing while working there were
16 still having those problems two and a half years later, an
17 indication of chronic illness unlikely to improve over time.

18 In all of these actions and decisions, President
19 George W. Bush has acted in a manner contrary to his
20 trust as President, and subversive of constitutional gov-
21 ernment, to the prejudice of the cause of law and justice
22 and to the manifest injury of the people of the United
23 States. Wherefore, President George W. Bush, by such

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- 1 conduct, is guilty of an impeachable offense warranting
- 2 removal from office.

○

110TH CONGRESS
2D SESSION

H. RES. 1345

Impeaching George W. Bush, President of the United States, of high crimes
and misdemeanors.

IN THE HOUSE OF REPRESENTATIVES

JULY 15, 2008

Mr. KUCINICH submitted the following resolution

JULY 15, 2008

By motion of the House, referred to the Committee on the Judiciary

RESOLUTION

Impeaching George W. Bush, President of the United States,
of high crimes and misdemeanors.

1 *Resolved*, That President George W. Bush be im-
2 peached for high crimes and misdemeanors, and that the
3 following Article of Impeachment be exhibited to the
4 United States Senate:

5 An Article of Impeachment exhibited by the House
6 of Representatives of the United States of America in the
7 name of itself and the people of the United States of
8 America, in maintenance and support of its impeachment

1 against President George W. Bush for high crimes and
2 misdemeanors.

3 ARTICLE ONE—DECEIVING CONGRESS WITH FAB-
4 RICATED THREATS OF IRAQ WMDs TO FRAUDU-
5 LENTLY OBTAIN SUPPORT FOR AN AUTHORIZATION
6 OF THE USE OF MILITARY FORCE AGAINST IRAQ

7 In his conduct while President of the United States,
8 George W. Bush, in violation of his constitutional oath to
9 faithfully execute the Office of President of the United
10 States, and to the best of his ability, preserve, protect,
11 and defend the Constitution of the United States, and in
12 violation of his constitutional duty under article II, section
13 3 of the Constitution “to take care that the laws be faith-
14 fully executed,” deceived Congress with fabricated threats
15 of Iraq Weapons of Mass Destruction to fraudulently ob-
16 tain support for an authorization for the use of force
17 against Iraq and used that fraudulently obtained author-
18 ization, then acting in his capacity under article II, section
19 2 of the Constitution as Commander in Chief, to commit
20 U.S. troops to combat in Iraq.

21 To gain congressional support for the passage of the
22 Joint Resolution to Authorize the Use of United States
23 Armed Forces Against Iraq, the President made the fol-
24 lowing material representations to the Congress in S.J.
25 Res. 45:

1 1. That Iraq was “continuing to possess and
2 develop a significant chemical and biological weapons
3 capability. . . .”

4 2. That Iraq was “actively seeking a nuclear
5 weapons capability. . . .”

6 3. That Iraq was “continuing to threaten the
7 national security interests of the United States and
8 international peace and security.”

9 4. That Iraq has demonstrated a “willingness
10 to attack, the United States. . . .”

11 5. That “members of al Qaeda, an organization
12 bearing responsibility for attacks on the United
13 States, its citizens and interests, including the at-
14 tacks that occurred on September 11, 2001, are
15 known to be in Iraq. . . .”

16 6. The “attacks on the United States of Sep-
17 tember 11, 2001, underscored the gravity of the
18 threat that Iraq will transfer weapons of mass de-
19 struction to international terrorist organiza-
20 tions. . . .”

21 7. That Iraq “will either employ those weapons
22 to launch a surprise attack against the United
23 States or its Armed Forces or provide them to inter-
24 national terrorists who would do so. . . .”

1 8. That an “extreme magnitude of harm that
2 would result to the United States and its citizens
3 from such an attack. . . .”

4 9. That the aforementioned threats “justify ac-
5 tion by the United States to defend itself. . . .”

6 10. The enactment clause of section 2 of S.J.
7 Res. 45, the Authorization of the Use of the United
8 States Armed Forces authorizes the President to
9 “defend the national security interests of the United
10 States against the threat posed by Iraq. . . .”

11 Each consequential representation made by the Presi-
12 dent to the Congress in S.J. Res. 45 in subsequent
13 iterations and the final version was unsupported by evi-
14 dence which was in the control of the White House.

15 To wit:

16 1. Iraq was not “continuing to possess and de-
17 velop a significant chemical and biological weapons
18 capability. . . .”

19 “A substantial amount of Iraq’s chemical
20 warfare agents, precursors, munitions and pro-
21 duction equipment were destroyed between
22 1991 and 1998 as a result of Operation Desert
23 Storm and United Nations Special Commission
24 (UNSCOM) actions. There is no reliable infor-
25 mation on whether Iraq is producing and stock-

1 piling chemical weapons or whether Iraq has or
2 will establish its chemical warfare agent produc-
3 tion facilities.”

4 The source of this information is the De-
5 fense Intelligence Agency, a report called,
6 “Iraq—Key WMD Facilities—An Operational
7 Support Study,” September 2002.

8 “Statements by the President and Vice
9 President prior to the October 2002 National
10 Intelligence Estimate regarding Iraq’s chemical
11 weapons production capability and activities did
12 not reflect the intelligence community’s uncer-
13 tainties as to whether such production was on-
14 going.”

15 The source of this information is the Sen-
16 ate Select Committee on Intelligence, a report
17 entitled “Report on Whether Public Statements
18 Regarding Iraq By U.S. Government Officials
19 Were Substantiated By Intelligence Informa-
20 tion.” June 5, 2008.

21 “In April and early May 2003, military
22 forces found mobile trailers in Iraq. Although
23 intelligence experts disputed the purpose of the
24 trailers, administration officials repeatedly as-
25 serted that they were mobile biological weapons

1 laboratories. In total, President Bush, Vice
2 President Cheney, Secretary Rumsfeld, Sec-
3 retary Powell, and National Security Advisor
4 Rice made 34 misleading statements about the
5 trailers in 27 separate public appearances.
6 Shortly after the mobile trailers were found, the
7 Central Intelligence Agency and the Defense In-
8 telligence Agency issued an unclassified white
9 paper evaluating the trailers. The white paper
10 was released without coordination with other
11 members of the intelligence community, how-
12 ever. It was later disclosed that engineers from
13 the Defense Intelligence Agency who examined
14 the trailers concluded that they were most likely
15 used to produce hydrogen for artillery weather
16 balloons. A former senior intelligence official re-
17 ported that ‘only one of 15 intelligence analysts
18 assembled from three agencies to discuss the
19 issue in June endorsed the white paper conclu-
20 sion.’”

21 The source of this information is the
22 House Committee on Government Reform, mi-
23 nority staff, “Iraq on the Record: Bush Admin-
24 istration’s Public Statements about Chemical
25 and Biological Weapons.” March 16, 2004.

1 Former chief of CIA covert operations in
2 Europe, Tyler Drumheller, has said that the
3 CIA had credible sources discounting weapons
4 of mass destruction claims, including the pri-
5 mary source of biological weapons claims, an in-
6 formant who the Germans code-named
7 “Curveball” whom the Germans had informed
8 the Bush administration was a likely fabricator
9 of information including that concerning the
10 Niger yellowcake forgery. Two other former
11 CIA officers confirmed Drumheller’s account to
12 Sidney Blumenthal who reported the story at
13 Salon.com on September 6, 2007, which in fact
14 is the media source of this information.

15 “In practical terms, with the destruction of
16 the al Hakam facility, Iraq abandoned its ambi-
17 tion to obtain advanced biological weapons
18 quickly. The Iraq Survey Group (ISG) found no
19 direct evidence that Iraq, after 1996, had plans
20 for a new biological weapons program or was
21 conducting biological weapons-specific work for
22 military purposes. Indeed, from the mid-1990s,
23 despite evidence of continuing interest in nu-
24 clear and chemical weapons, there appears to be
25 a complete absence of discussion or even inter-

1 est in biological weapons at the Presidential
2 level. In spite of exhaustive investigation, the
3 Iraq Survey Group found no evidence that Iraq
4 possessed, or was developing, biological weapon
5 agent production systems mounted on road ve-
6 hicles or railway wagons. The Iraq Survey
7 Group harbors severe doubts about the source's
8 credibility in regards to the breakout program."
9 That's a direct quote from the "Comprehensive
10 Report of the Special Advisor to the Director of
11 Central Intelligence on Iraq's WMD," com-
12 monly known as the Duelfer report by Charles
13 Duelfer.

14 "While a small number of old, abandoned
15 chemical munitions have been discovered, the
16 Iraq Survey Group judges that Iraq unilaterally
17 destroyed its undeclared chemical weapons
18 stockpile in 1991. There are no credible indica-
19 tions that Baghdad resumed production of
20 chemical munitions thereafter, a policy the Iraq
21 Survey Group attributes to Baghdad's desire to
22 see sanctions lifted, or rendered ineffectual, or
23 its fear of force against it should WMD be dis-
24 covered."

1 The source of this information, the “Com-
2 prehensive Report of the Special Advisor to the
3 Director of Central Intelligence on Iraq’s
4 WMD,” Charles Duelfer.

5 2. Iraq was not “actively seeking a nuclear
6 weapons capability.”

7 The key finding of the Iraq Survey
8 Group’s report to the Director of Central Intel-
9 ligence found that “Iraq’s ability to reconstitute
10 a nuclear weapons program progressively de-
11 cayed after that date. Saddam Husayn (sic)
12 ended the nuclear program in 1991 following
13 the Gulf War. Iraq Survey Group found no evi-
14 dence to suggest concerted efforts to restart the
15 program.”

16 The source of this information, the “Com-
17 prehensive Report of the Special Advisor to the
18 Director of Central Intelligence on Iraq’s
19 WMD,” Charles Duelfer.

20 Claims that Iraq was purchasing uranium
21 from Niger were not supported by the State
22 Department’s Bureau of Intelligence and Re-
23 search in the National Intelligence Estimate of
24 October 2002.

1 The CIA had warned the British Govern-
2 ment not to claim Iraq was purchasing uranium
3 from Niger prior to the British statement that
4 was later cited by President Bush, this accord-
5 ing to George Tenet of the Central Intelligence
6 Agency on July 11, 2003.

7 Mohamed ElBaradei, the Director General
8 of the International Atomic Energy Agency, in
9 a “Statement to the United Nations Security
10 Council on The Status of Nuclear Inspections
11 in Iraq: An Update” on March 7, 2003, said as
12 follows:

13 “One, there is no indication of resumed
14 nuclear activities in those buildings that were
15 identified through the use of satellite imagery
16 as being reconstructed or newly erected since
17 1998, nor any indication of nuclear-related pro-
18 hibited activities at any inspected sites. Second,
19 there is no indication that Iraq has attempted
20 to import uranium since 1990. Three, there is
21 no indication that Iraq has attempted to import
22 aluminum tubes for use in centrifuge enrich-
23 ment. Moreover, even had Iraq pursued such a
24 plan, it would have been—it would have en-
25 countered practical difficulties in manufacturing

1 centrifuges out of the aluminum tubes in ques-
2 tion. Fourthly, although we are still reviewing
3 issues related to magnets and magnet produc-
4 tion, there is no indication to date that Iraq im-
5 ported magnets for use in a centrifuge enrich-
6 ment program. As I stated above, the IAEA
7 (International Atomic Energy Agency) will nat-
8 urally continue to further scrutinize and inves-
9 tigate all of the above issues.”

10 3. Iraq was not “continuing to threaten the na-
11 tional security interests of the United States.”

12 “Let me be clear: analysts differed on sev-
13 eral important aspects of [Iraq’s biological,
14 chemical, and nuclear] programs and those de-
15 bates were spelled out in the Estimate. They
16 never said there was an ‘imminent’ threat.”

17 George Tenet, who was Director of the
18 CIA, said this in Prepared Remarks for Deliv-
19 ery at Georgetown University on February 5,
20 2004.

21 “We have been able to keep weapons from
22 going into Iraq. We have been able to keep the
23 sanctions in place to the extent that items that
24 might support weapons of mass destruction
25 have had some controls on them. It’s been quite

1 a success for 10 years.” The source of this
2 statement, Colin Powell, Secretary of State, in
3 an interview with Face the Nation, February
4 11, 2001.

5 On July 23, 2002, a communication from
6 the Private Secretary to Prime Minister Tony
7 Blair, “Memo to British Ambassador David
8 Manning” reads as follows: “British Secret In-
9 telligence Service Chief Sir Richard Billing
10 Dearlove reported on his recent talks in Wash-
11 ington. There was a perceptible shift in atti-
12 tude. Military action was now seen as inevi-
13 table. Bush wanted to remove Saddam through
14 military action, justified by the conjunction of
15 terrorism and WMD. But the intelligence and
16 facts were being fixed around the policy. The
17 NSC had no patience with the U.N. route and
18 no enthusiasm for publishing material on the
19 Iraqi regime’s record. There was little discus-
20 sion in Washington of the aftermath after mili-
21 tary action. The Foreign Secretary said he
22 would discuss this with Colin Powell this week.
23 It seemed clear that Bush had made up his
24 mind to take military action, even if the timing
25 was not yet decided. But the case was thin.

1 Saddam Hussein was not threatening his neigh-
2 bors, and his WMD capability was less than
3 that of Libya, North Korea or Iran. We should
4 work up a plan for an ultimatum to Saddam to
5 allow back in the U.N. weapons inspectors. This
6 would also help with the legal justification for
7 the use of force.”

8 4. Iraq did not have the “willingness to attack,
9 the United States.”

10 “The fact of the matter is that both bas-
11 kets, the U.N. basket and what we and other
12 allies have been doing in the region, have suc-
13 ceeded in containing Saddam Hussein and his
14 ambitions. His forces are about one-third their
15 original size. They really don’t possess the ca-
16 pability to attack their neighbors the way they
17 did 10 years ago.” The source of this quote,
18 Colin Powell, Secretary of State, in a transcript
19 of remarks made to German Foreign Minister
20 Joschka Fischer in February 2001.

21 The October 2002 National Intelligence
22 Estimate concluded that “Baghdad for now ap-
23 pears to be drawing a line short of conducting
24 terrorist attacks with conventional or chemical
25 or biological weapons against the United States,

1 fearing that exposure of Iraqi involvement
2 would provide Washington a stronger case for
3 making war.”

4 5. Iraq had no connection with the attacks of
5 9/11 or with al Qaeda’s role in 9/11.

6 “The report of the Senate Select Com-
7 mittee on Intelligence documents significant in-
8 stances in which the administration went be-
9 yond what the intelligence community knew or
10 believed in making public claims, most notably
11 on the false assertion that Iraq and al Qaeda
12 had an operational partnership and joint in-
13 volvement in carrying out the attacks of Sep-
14 tember 11.” This is a quote from Senator John
15 D. Rockefeller, IV, the chairman of the Senate
16 Select Committee on Intelligence entitled “Ad-
17 ditional Views of Chairman John D. Rocke-
18 feller, IV” on page 90.

19 Continuing from Senator Rockefeller:

20 “The President and his advisors undertook
21 a relentless public campaign in the aftermath of
22 the attacks to use the war against al Qaeda as
23 a justification for overthrowing Saddam Hus-
24 sein. Representing to the American people that
25 the two had an operational partnership and

1 posed a single, indistinguishable threat was fun-
2 damentally misleading and led the Nation to
3 war on false premises.” Senator Rockefeller.

4 Richard Clarke, a National Security Advi-
5 sor, in a memo of September 18, 2001, titled
6 “Survey of Intelligence Information on Any
7 Iraq Involvement in the September 11 Attacks”
8 found no “compelling case” that Iraq had either
9 planned or perpetrated the attacks, and that
10 there was no confirmed reporting on Saddam
11 cooperating with bin Laden on unconventional
12 weapons.

13 On September 17, 2003, President Bush
14 said: “No, we’ve got no evidence that Saddam
15 Hussein was involved with September 11. What
16 the Vice President said was is that he (Sad-
17 dam) has been involved with al Qaeda.”

18 On June 16, 2004, a staff report from the
19 9/11 Commission stated: “There have been re-
20 ports that contacts between Iraq and al Qaeda
21 also occurred after bin Laden had returned to
22 Afghanistan in 1996, but they do not appear to
23 have resulted in a collaborative relationship.
24 Two senior bin Laden associates have ada-
25 mantly denied that any ties existed between al

1 Qaeda and Iraq. We have no credible evidence
2 that Iraq and al Qaeda cooperated on attacks
3 against the United States.”

4 “Intelligence provided by former Undersec-
5 retary of Defense Douglas J. Feith to buttress
6 the White House case for invading Iraq in-
7 cluded ‘reporting of dubious quality or reli-
8 ability’ that supported the political views of sen-
9 ior administration officials rather than the con-
10 clusions of the intelligence community, this ac-
11 cording to a report by the Pentagon Inspector
12 General.

13 “Feith’s office ‘was predisposed to finding
14 a significant relationship between Iraq and al
15 Qaeda,’ according to portions of the report re-
16 leased by Senator Carl Levin. The Inspector
17 General described Feith’s activities as ‘an alter-
18 native intelligence assessment process.’” The
19 source of this information is a report in the
20 Washington Post dated February 9, 2007, page
21 A-1, an article by Walter Pineus and Jeffrey
22 Smith entitled “Official’s Key Report on Iraq is
23 Faulted, ‘Dubious’ Intelligence Fueled Push for
24 War.”

1 6. Iraq possessed no weapons of mass destruc-
2 tion to transfer to anyone.

3 Iraq possessed no weapons of mass de-
4 struction to transfer. Furthermore, available in-
5 telligence information found that the Iraq re-
6 gime would probably only transfer weapons of
7 mass destruction to terrorist organizations if
8 under threat of attack by the United States.

9 According to information in the October
10 2002 National Intelligence Estimate (NIE) on
11 Iraq that was available to the administration at
12 the time that they were seeking congressional
13 support for the authorization of use of force
14 against Iraq, the Iraq regime would probably
15 only transfer weapons to a terrorist organiza-
16 tion if “sufficiently desperate” because it feared
17 that “an attack that threatened the survival of
18 the regime were imminent or unavoidable.”

19 “The Iraqi Intelligence Service (IIS) prob-
20 ably has been directed to conduct clandestine
21 attacks against the United States and Allied in-
22 terests in the Middle East in the event the
23 United States takes action against Iraq. The
24 IIS probably would be the primary means by
25 which Iraq would attempt to conduct any chem-

1 ical and biological weapon attacks on the U.S.
2 homeland, although we have no specific intel-
3 ligence information that Saddam's regime has
4 directed attacks against U.S. territory."

5 7. Iraq had no weapons of mass destruction and
6 therefore had no capability of launching a surprise
7 attack against the United States or its Armed
8 Forces and no capability to provide them to inter-
9 national terrorists who would do so.

10 Iraq possessed no weapons of mass de-
11 struction to transfer. Furthermore, available in-
12 telligence information found that the Iraq re-
13 gime would probably only transfer weapons of
14 mass destruction to terrorist organizations if
15 under severe threat of attack by the United
16 States.

17 According to information in the October
18 2002 National Intelligence Estimate on Iraq
19 that was available to the administration at the
20 time they were seeking congressional support
21 for the authorization of the use of force against
22 Iraq, the Iraqi regime would probably only
23 transfer weapons to a terrorist organization if
24 "sufficiently desperate" because it feared that
25 "an attack that threatened the survival of the

1 regime were imminent or unavoidable.” That,
2 again, from the October 2002 National Intel-
3 ligence Estimate on Iraq.

4 “The Iraqi Intelligence Service probably
5 has been directed to conduct clandestine attacks
6 against U.S. and Allied interests in the Middle
7 East in the event the United States takes ac-
8 tion against Iraq. The Iraq Intelligence Service
9 probably would be the primary means by which
10 Iraq would attempt to conduct any chemical or
11 biological weapons attacks on the U.S. home-
12 land, although we have no specific intelligence
13 information that Saddam’s regime has directed
14 attacks against U.S. territory.”

15 As reported in the Washington Post on
16 March 1, 2003, in 1995, Saddam Hussein’s
17 son-in-law, Hussein Kamel, had informed U.S.
18 and British intelligence officers that “all weap-
19 ons—biological, chemical, missile, nuclear—
20 were destroyed.” That from the Washington
21 Post, March 1, 2003, page A15, an article enti-
22 tled “Iraqi Defector Claimed Arms Were De-
23 stroyed By 1995,” by Colum Lynch.

24 The Defense Intelligence Agency, in a re-
25 port called “Iraq—Key WMD Facilities—An

1 Operational Report Study” in September 2002,
2 said this:

3 “A substantial amount of Iraq’s chemical
4 warfare agents, precursors, munitions and pro-
5 duction equipment were destroyed between
6 1991 and 1998 as a result of Operation Desert
7 Storm and United Nations Special Commission
8 (UNSCOM) actions. There is no reliable infor-
9 mation on whether Iraq is producing and stock-
10 piling chemical weapons or whether Iraq has or
11 will establish its chemical warfare agent produc-
12 tion facilities.”

13 8. There was not a real risk of an “extreme
14 magnitude of harm that would result to the United
15 States and its citizens from such an attack” because
16 Iraq had no capability of attacking the United
17 States.

18 Here’s what Colin Powell said at the time:
19 “Containment has been a successful policy, and
20 I think we should make sure that we continue
21 it until such time as Saddam Hussein comes
22 into compliance with the agreements he made
23 at the end of the Gulf War.” Speaking of Iraq,
24 Secretary of State Powell said, “Iraq is not
25 threatening America.”

1 9. The aforementioned evidence did not “justify
2 the use of force by the United States to defend
3 itself” because Iraq did not have weapons of mass
4 destruction, or have the intention or capability of
5 using nonexistent WMDs against the United States.

6 10. Since there was no threat posed by Iraq to
7 the United States, the enactment clause of the Sen-
8 ate Joint Resolution 45 was predicated on
9 misstatements to Congress.

10 Congress relied on the information provided to it by
11 the President of the United States. Congress provided the
12 President with the authorization to use military force that
13 he requested. As a consequence of the fraudulent represen-
14 tations made to Congress, the United States Armed
15 Forces, under the direction of George Bush as Com-
16 mander in Chief, pursuant to section 3 of the Authoriza-
17 tion for the Use of Force which President Bush requested,
18 invaded Iraq and occupies it to this day, at the cost of
19 4,116 lives of servicemen and -women, injuries to over
20 30,000 of our troops, the deaths of over 1 million innocent
21 Iraqi civilians, the destruction of Iraq, and a long-term
22 cost of over \$3 trillion.

23 President Bush’s misrepresentations to Congress to
24 induce passage of a use of force resolution is subversive
25 of the constitutional system of checks and balances, de-

1 structive of Congress's sole prerogative to declare war
2 under article I, section 8 of the Constitution, and is there-
3 fore a High Crime. An even greater offense by the Presi-
4 dent of the United States occurs in his capacity as Com-
5 mander in Chief, because he knowingly placed the men
6 and women of the United States Armed Forces in harm's
7 way, jeopardizing their lives and their families' future, for
8 reasons that to this date have not been established in fact.

9 In all of these actions and decisions, President
10 George W. Bush has acted in a manner contrary to his
11 trust as President and Commander in Chief, and subver-
12 sive of constitutional government, to the prejudice of the
13 cause of law and justice and to the manifest injury of the
14 people of the United States and of those members of the
15 Armed Forces who put their lives on the line pursuant
16 to the falsehoods of the President.

17 Wherefore, President George W. Bush, by such con-
18 duct, is guilty of an impeachable offense warranting re-
19 moval from office.

○

110TH CONGRESS
1ST SESSION

H. R. 264

To prevent the President from encroaching upon the Congressional prerogative to make laws, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 5, 2007

Ms. JACKSON-LEE of Texas introduced the following bill; which was referred to the Committee on Oversight and Government Reform

A BILL

To prevent the President from encroaching upon the Congressional prerogative to make laws, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Congressional Law-
5 making Authority Protection Act of 2007”.

6 **SEC. 2. FINDINGS AND PURPOSES.**

7 (a) FINDINGS.—The Congress makes the following
8 findings:

9 (1) The Framers of the Constitution under-
10 stood that the power to make laws is such an awe-

1 some power that they intended it to be exercised by
2 the most democratic branch of government.

3 (2) To ensure that the lawmaking power would
4 be exercised by the branch of government that is the
5 closest and most accountable to the people the Con-
6 stitution provides that “All legislative power herein
7 granted shall be vested in a Congress of the United
8 States, which shall consist of a Senate and House of
9 Representatives.”.

10 (3) The Constitution limits the role of the
11 President in the lawmaking process to—

12 (A) giving Congress information on the
13 State of the Union;

14 (B) recommending to Congress for consid-
15 eration such measures as the President deems
16 necessary and expedient; and

17 (C) approving or vetoing bills and joint
18 resolutions presented to him for signature.

19 (4) Statements made by the President contem-
20 poraneously with the signing of a bill or joint resolu-
21 tion that express the President’s interpretation of
22 the scope, constitutionality, and intent of Congress
23 in enacting the bill or joint resolution presented for
24 signature encroach upon the power to make laws
25 that the Framers vested solely in the Congress.

1 (5) According to a May 5, 2006, editorial in the
2 New York Times, the current President of the
3 United States has issued more than 750 “presidential
4 signing statements” declaring he would not
5 do what the laws required, the most notorious example
6 of which is the signing statement issued by the
7 President asserting he was not bound by the Congressional
8 ban on the torture of prisoners.

9 (6) On June 5, 2006, the American Bar Association
10 created a 10-member Blue-Ribbon “Task
11 Force on Presidential Signing Statements and the
12 Separation of Powers Doctrine” to take a balanced,
13 scholarly look at the use and implications of signing
14 statements, and to propose appropriate ABA policy
15 consistent with the ABA’s commitment to safeguarding
16 the rule of law and the separation of powers
17 in our system of government.

18 (7) On July 24, 2006, the Task Force determined
19 that signing statements that signal the president’s
20 intent to disregard laws adopted by Congress
21 undermine the separation of powers by depriving
22 Congress of the opportunity to override a veto, and
23 by shutting off policy debate between the two
24 branches of government. According to the Task
25 Force, such presidential signing statements operate

1 as a “line item veto,” which the U.S. Supreme Court
2 has ruled unconstitutional. The Task Force strongly
3 recommended the Congress to enact appropriate leg-
4 islation to ensure that such presidential signing
5 statements do not undermine the rule of law and the
6 constitutional system of separation of powers.

7 (b) PURPOSES.—The purposes of this Act are—

8 (1) to preserve the separation of powers in-
9 tended by the Framers by preventing the President
10 from encroaching upon the Congressional preroga-
11 tive to make law; and

12 (2) to ensure that no Federal or State executive
13 or independent agency, and no Federal or State
14 judge, can attach legal significance to any presi-
15 dential signing statement when construing any law
16 enacted by the Congress.

17 **SEC. 3. LIMITATION ON USE OF FUNDS.**

18 (a) LIMITATION ON USE OF FUNDS.—None of the
19 funds made available to the Executive Office of the Presi-
20 dent, or to any Executive agency (as defined in section
21 105 of title 5 of the United States Code), from any source
22 may be used to produce, publish, or disseminate any state-
23 ment made by the President contemporaneously with the
24 signing of any bill or joint resolution presented for signing
25 by the President.

1 (b) APPLICATION OF LIMITATION.—Subsection (a)
2 shall apply only to statements made by the President re-
3 garding the bill or joint resolution presented for signing
4 that contradict, or are inconsistent with, the intent of Con-
5 gress in enacting the bill or joint resolution or that other-
6 wise encroach upon the Congressional prerogative to make
7 laws.

8 **SEC. 4. CONSTRUCTION AND APPLICATION OF ACTS OF**
9 **CONGRESS.**

10 For purposes of construing or applying any Act en-
11 acted by the Congress, a governmental entity shall not
12 take into consideration any statement made by the Presi-
13 dent contemporaneously with the President's signing of
14 the bill or joint resolution that becomes such Act.

○

○