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Member of Congress, 1995-2003

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THROUGH CHECKS AND BALANCES AND THE
SEPARATION OF POWERS
TESTIMONY
BEFORE THE HOUSE JUDICIARY COMMITTEE
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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.