



Testimony of Sarah Dufendach,
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to the Senate Committee on the Judiciary,
Subcommittee on the Constitution

Restoring the Rule of Law

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Chairman Feingold, Ranking Member Brownback and members of the Subcommittee on the Constitution, Common Cause is pleased to submit this testimony as you consider what steps must be taken by Congress and the next President to reverse the erosion of the rule of law that the country has experienced in the past seven years.

The Administration of President George W. Bush has seized, consolidated, and wielded executive power to a degree unparalleled in modern American history. The abuses of power include disregard for fundamental principles of American democracy: separation of powers and our system of checks and balances; politicization of the justice system; grotesque acts of torture; disregard for international laws and institutions; and violation of fundamental civil rights and liberties at home and abroad.

While the President will soon leave the White House, those problems will remain. Now, and for the foreseeable future, we as a nation must fight to reclaim and preserve our fundamental principles of liberty and justice, and ensure that the unprecedented power grabs of the current Administration are not institutionalized as a precedent for the future. We must stop the assault on our Constitution and restore our core American values.

Restoring the Core Values of American Democracy

The growing constitutional crisis in America has brought Common Cause back to its roots. Common Cause was founded in 1970, during the turmoil of the Vietnam War and growing abuses of power by the Nixon Administration, to “build a true ‘citizens’ lobby’ – a lobby concerned not with the advancement of special interests but with the well-being of the nation.” We now have a 38-year track record of fighting to improve democracy at all levels, chapters in 35 states, and nearly 400,000 members and supporters across the country.

Common Cause began to refocus its attention on Executive Branch abuses of power in 2007, when we decried the politicization of the Justice Department and launched a campaign to impeach Attorney General Gonzales. In September, 2007, our

National Governing Board passed a resolution supporting an expeditious withdrawal from Iraq and formation of a commission to investigate abuses of power and corruption in the initiation and conduct of the Iraq war. Since then, we have backed the formation of the Webb-McCaskill Commission on Wartime Contracting to investigate fraud and abuse in the Iraq War effort, opposed immunity for telecommunication firms that cooperated with the Administration's illegal domestic surveillance program, and called for strengthening the War Powers Act.

On June 10, 2008, Common Cause convened a panel discussion at George Washington University, entitled "Abuse of Power: Forging a Path to Recovery," to explore strategies for righting our country and restoring the rule of law. The panel featured vigorous analysis and discussion by Stan Brand, Liz Holtzman, John Shattuck and Jonathan Turley. See attached transcript.

Most recently, Common Cause launched its new *Recapture the Flag* campaign to restore the core values of American democracy with a full-page ad in the *New York Times* on July 8, 2008. Although we have grave concerns about the lack of accountability for violations of the U.S. Constitution and law that have occurred in recent years, the campaign is forward looking and focuses on defining the principles that citizens should expect the next President and Congress to adhere to. To date, nearly 37,000 citizens have signed our *Recapture the Flag* pledge, and 204 congressional candidates have signed a parallel pledge to "Renew America's Promise."

Repeated abuses of power by the Bush Administration, and the failure of Congress to stand up as an institution to use or protect its powers, has damaged our democracy at home and tarnished our reputation abroad. As a result, America is less free *and* less secure.

In order to restore the core values of American democracy that have made us a beacon of hope to people around the world – freedom from tyranny, respect for individual liberty and human rights, and government based on the rule of law – we have called upon all who would serve as the next President or in the next Congress to abide by the following principles:

- To end torture, respect human rights and restore America's reputation in the world;
- To respect the rule of law and to fiercely challenge anyone who seeks to undermine the Constitution and the Bill of Rights;
- To root out corruption, special interest abuses and partisan prejudice in the administration of justice;
- To hold to account – without exception – anyone who breaks the law or violates the public trust; and
- To protect personal freedom by rejecting warrantless spying, stifling of dissent and other affronts to individual liberty.

Those principles encompass the steps needed to heal this country and reclaim our flag as the symbol of a democracy we can all be proud of. See attachments.

The Common Cause Reform Agenda

Clearly, Congress has a lot to do to repair the damage that has been done to our Constitution, our values, and our stature in the world. Congress must fulfill its constitutionally mandated role, as a coequal branch of government and an indispensable check on the excesses of the Executive Branch. But let there be no mistake about it: Congress has the *power* to do that. It is time for Congress to flex its muscles and regain its rightful place in our ingenious tripartite system of government. In this regard, the path for Congress is clear. The Legislative Branch must investigate and enact laws to correct abuses in (at least) the following areas:

Stop the inappropriate uses of the State Secrets Privilege.

Assertion of the State Secrets Privilege is a recognized and legitimate legal procedure designed to suppress information in a court proceeding where the release of the information would be a threat to national security. However, there have been numerous times during the past seven years when the Bush Administration has asserted the State Secrets Privilege in order to hide its own wrongdoing. Congress should investigate the recent inappropriate assertions of these privileges.

Common Cause also supports legislation currently being considered by the House Judiciary Committee, H.R. 5607, sponsored by Rep. Nadler (D-NY) and Rep. Petri (R-WI), to allow the courts much more power to decide when the State Secrets Privilege is appropriate and when it is not, thus providing a balance to executive branch claims.

Stop the abuse of presidential signing statements.

President Bush has added signing statements to more bills than any president in history, and he has used them in ways that violate the constitutional separation of powers. Rather than veto bills with which he disagrees, this president has used signing statements to single out selected parts of bills he does not intend to enforce, thus circumventing the constitutionally defined legislative process.

Common Cause believes Congress must enact legislation to bring executive behavior into line with appropriate legislative procedures, constitutional limitations and restore the proper role of the veto and veto override process.

Common Cause supports legislation such as S. 1747, introduced by Senator Arlen Specter (R-PA), that would at least help mitigate the negative effects of President Bush's signing statements by prohibiting judges from considering signing statements when interpreting the law.

Require Executive Branch cooperation with congressional oversight.

When the House Judiciary Committee began investigating the politicization of the Justice Department and the firing of United States Attorneys, the Committee subpoenaed Harriet Miers, President Bush's former White House counsel, and Josh Bolten, his chief

of staff. By exerting overbroad Executive Privilege, the President refused to allow either to testify before the Committee. Common Cause viewed the president's action as obstructing the Congress's constitutionally mandated duty to conduct oversight of the executive branch. Because Congress is a co-equal branch of government, Executive Branch personnel may not be allowed to flout its procedures or ignore its authority. The right of Congress to subpoena witnesses and take testimony is a necessary precondition to its investigative activities in support of its legislative powers.

Common Cause supported the House vote to hold both Meirs and Bolten in Contempt of Congress, and welcomed the decision by Judge Bates rejecting the notion of absolute immunity and compelling their testimony before the Committee. Common Cause also supports the House Judiciary vote of contempt against Karl Rove, who also ignored a committee subpoena and would support further measures by the House to compel his testimony such as a full House vote of Contempt of Congress and employing their power of inherent contempt if necessary.

The next President should issue an Executive Order mandating federal agencies' complete cooperation with congressional investigations in the future.

Stop politicization of the Department of Justice.

The Department of Justice has been allowed to become the most blatantly partisan, political and ideological of agencies, rather than the nation's law firm, dedicated to the pursuit of justice and serving the interests of the American people. It has become abundantly clear from recent Inspector General's reports that the improper firings of U.S. Attorneys and improper hiring practices of Honors Program attorneys are just the tip of the iceberg.

Common Cause believes that whether by legislation or Executive Order, sanctions must be imposed upon any current or former Justice Department official who improperly used their office to pursue an agenda inconsistent with their oath.

Restore respect for human rights and international law.

The Conventions Against Torture, the Geneva Conventions, and U.S. law clearly prohibit torture. However, the Administration has chosen to evade the spirit of the law by employing a legalistic strategy that parses words about the definition of torture and masquerades obvious acts of torture under the title of "advanced interrogation techniques." While Congress has attempted to address this issue, its efforts have fallen short. And while it should not be necessary to pass a law in the United States explicitly banning torture and secret renditions, current circumstances dictate that we must. The well-publicized violations of domestic and international law and norms with respect to treatment of prisoners have undermined respect for the United States abroad, as well as at home. This conduct should be thoroughly investigated and those responsible, at the highest levels, held accountable.

Common Cause supports measures to reestablish our honor internationally by seeing that we are living up to the rule of law as spelled out in domestic and

international law. Common Cause supports legislation introduced by Congressman Bill Delahunt (D-MA), H.R. 6054, establishing a human rights commission to monitor U.S. compliance with all international human rights treaties to which the U.S. is a party. The commission would be made up of 18 members of Congress, nine from the House and nine from the Senate. It would also have subpoena power and report annually its findings to Congress.

Strengthen and clarify the War Powers Act.

Congress must pass legislation that clarifies the necessary and proper role of Congress in entering into military conflict. It is imperative that Congress have access to quality information and conduct a transparent public debate before performing its duty under the Constitution by making the decision to take the country into military conflict. Ambiguities in the current War Powers Resolution make it necessary for a new resolution that explicitly delineates each branch's responsibilities in these matters. We believe such action is especially urgent at this time due the current nature of conflict in the world and the actions of non state actors. Common Cause strongly supported the War Powers Act of 1973, and has consistently opposed any commitment of military forces that did not respect Congress's role as delineated by the War Powers Resolution and the Constitution.

Common Cause believes the best vehicle to address the ambiguities in the War Powers Resolution is legislation, H. J. Res. 53, introduced by Representative Walter Jones (R-NC), the "Constitutional War Powers Resolution." The legislation is based in part on the collaboration of a bipartisan panel of legal scholars organized by the Constitution Project to address the issues that have allowed presidents over the last several decades to ignore the role of Congress before entering into military conflict. We believe this is a particularly important issue to raise among policy makers and the news media now, especially as it relates to the potentially grave situation with Iran.

Common Cause would like to again thank the subcommittee for holding this hearing on Restoring the Rule of Law, and for inviting us to participate in the creation of a record of the abuses of power and violations of law committed by the Bush Administration. The work of the subcommittee in looking prospectively into how to advise the next Congress and Administration on how not to replicate past offences is very important. We hope we have been able to make some useful suggestions and recommendations as to what the legislature in particular needs to do to re-assert its role as a co-equal branch with the grave responsibility of keeping the Executive Branch from overreaching and abusing its power.