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"Restoring the Rule of Law"

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Mr. Chairman and members of the Subcommittee, as a Professor of Public Law who has written extensively about issues related to the Rule of Law, the Law of War, and National Security Policy Post 9/11, I am very pleased to share with you perspectives on the separation of powers and national security policy as we prepare for a new Administration and Congress to take office in 2009.

I want to express my gratitude to you Senator Feingold and your colleagues on the Subcommittee on the Constitution for convening this hearing because I believe it is essential that the next Presidential Administration and the Congress restore the vital collaborative partnership which is essential in protecting our nation's security interests while preserving vital constitutional values that we developed over two hundred and twenty one years ago at the Constitutional Convention in Philadelphia.

Background

In January of 2009, a new President will take office and it will be of significant interest to see what changes will be evidenced with respect to national security policy, particularly as it relates to restoring the necessary checks and balances of Congress and the Executive in conducting the continuing war on terrorism.

Since September 11, 2001, the Bush Administration has pursued an expansive conception of presidential power that has relied upon minimal deliberation, unilateral action, and legalistic defense in its approach to the war on terror. It has been clearly manifested in the detention and trial of suspected terrorists held at Guantanamo Bay, and the use of wiretapping and secret surveillance, some of the details of which remain unavailable today, even to Congress.

It is evident that the closest advisers to the President maintained a common view that the principal obstacle to an aggressive forceful response to the devastating attacks of 9/11 were the laws enacted by Congress and the international treaties and conventions adopted that responded to the excesses of executive abuse of power during the Vietnam War and Watergate. It is the congressional reassertion of constitutional authority in the 1970's to the imperial presidency that the Bush Administration intended to reverse when it came to power. This position is demonstrated by President Bush's decision that al-Qaida and Taliban terrorists were not entitled

to, and could not receive, Geneva Convention protections, and that it could not be challenged by Congress or, for that matter, in a court of law. Additionally, any effort by Congress to regulate the interrogation of battlefield combatants would directly violate the President's sole authority as Commander-in-Chief, in Article II of the Constitution.

In March of 2003, John Yoo, a principal architect of the Bush Administration's policy on the capture, detention and interrogation of terrorist suspects held at Guantanamo Bay, Cuba, wrote a memorandum which contains a shocking view of the law that governed the Administration's conduct during the period that this document was in effect.

> In order to respect the President's inherent constitutional authority to direct a military campaign against al Qaeda and its allies, general criminal laws must be construed as not applying to interrogations undertaken pursuant to his Commander-in-Chief authority. Congress cannot interfere with the President's exercise of his authority as Commander-in-Chief to control the conduct of operations during a war.[1]

Yoo implies that Congress could not regulate in any way the President's ability in this critical area because it was vital to his role to regulate and direct troop movements on the battlefield. Furthermore, it was assumed that Congress wouldn't attempt to spark a constitutional confrontation with the executive branch in wartime because it would upset the separation of powers.[2] In reality, the actual text of the Constitution differs in several meaningful sections, yet the Yoo memo fails to recognize that Article I specifically assigns to Congress the power to make rules governing and regulating armed forces, as well as gives Congress the power to define and punish war crimes. The implication was that the Commander-in-Chief clause pre-empts Article I, Section 8 of the Constitution, as well as takes precedence over public law.

Perhaps the most severe example of unnecessary unilateralism exercised by President Bush was the controversy over the Foreign Intelligence Surveillance Act (FISA) and the terrorist-surveillance program (TSP). The Administration was convinced that FISA, enacted in 1978, was arcane and ineffective since it would prevent wiretaps on international calls involving terrorists. Therefore, the President claimed inherent constitutional authority to collect foreign intelligence on his say so alone, in direct contravention of the federal statute. The elaborate and sustained legal defense of the domestic wiretapping program advances the unprecedented contention that

FISA is an unconstitutional infringement upon the President's exclusive authority as Commander-in-Chief.

In the formal testimony presented to the Subcommittee on the Constitution by Walter Dellinger, on behalf of former attorneys in the Office of Legal Counsel (OLC), and by Harold Koh, Dean of Yale Law School, we see the same observations reinforced as it relates to the conduct of the unitary executive in national security policy post 9/11.

Override Theory and Disabling Theory

The Commander-in-Chief Override Theory has vividly come into play by the Bush Administration.[3] This theory maintains that statutes otherwise purporting to limit the President's exercise of his war powers cannot do so without unconstitutionally infringing upon the Commander-in-Chief clause. An interesting question, however, arises where the constitutional authority of both Congress and the President overlap, which has been true in the war on terror post 9/11. To the extent that both the President and the Congress can claim constitutional authority in areas implicating the override, an assessment must be made as to which is to yield—the statute or the President.

Justice Tom Clark, in his concurring opinion in *Youngstown* [4] states the following:

> I conclude that where Congress has laid down specific procedures to deal with the type of crisis confronting the President, he must follow the procedure in meeting the crisis, but that in the absence of such action by Congress, the President's independent power to act depends upon the gravity of the situation confronting the nation. It cannot sustain the seizure in question because here. . . . Congress had prescribed methods to be followed by the President in meeting the emergency at hand.[5]

This conception of Congress's power is derived from the idea that Congress can disable a President from acting by enacting a statutory prohibition that is within its constitutional authority. In *Hamdan,*[6] Justice Kennedy suggested in his concurrence that the power to establish and impose both procedural and substantive requirements on military commissions is traced to Congress's Art. I § 8 cl 10 power to define and punish. . .offences against the law of nations, and added that,

> Respect for laws derived for the customary operation of the Executive and Legislative Branches gives some assurance of stability in time of crisis. The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment.[7]

Congress enacted two significant statutes authorizing several components of President Bush's response to September 11 in the immediate aftermath of the attacks. The Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001), and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No 107-56, 115 Stat. 272. However, for the next five years Congress remained principally on the sidelines as legal challenges worked their way through the courts. Major issues included the detention and trial of unlawful enemy combatants held at Guantanamo, as well as the domestic counter-surveillance initiatives, most notably the TSP which was exposed by the *New York Times* in 2005. Despite the existence of pre 9/11 laws, which arguably limited the President's authority even during a time of war, the Bush Administration in its formal legal response looked for authority to the language of the AUMF or inherent executive power.

<u>The Military Commissions Act, Protect America Act, FISA Amendments Act</u>

In September 2006, two months before the midterm elections, Congress passed the Military Commissions Act (MCA), which essentially authorized many components of the military commission that the Supreme Court had struck down in *Hamdan*.[8] The Military Commissions Act, as a policy measure, is the embodiment of the separation-of-powers principles that were at stake in *Hamdan*. The MCA permitted President Bush to accomplish in law what he had previously asserted to be his constitutional authority. Most importantly, it allowed the President or Secretary of Defense to decide unilaterally who was an enemy combatant; it precluded any oversight of the actions of the executive by the judiciary; it denied alien unlawful enemy combatants access to the courts for writs of habeas corpus; appeals that were permitted were strictly limited to issues concerning the constitutionality of the law itself and the Administration's compliance with it, but not the evidentiary basis for the detainee's imprisonment nor for that matter his treatment while in detention. Ratification of the President's

authority by Congress made it far more difficult for the Supreme Court to constrain the President's position, unless Congress's action was clearly unconstitutional.

In the closing weeks of its 2007-08 term, the United States Supreme Court handed down its decision in the consolidated cases, *Boumediene et al. v. Bush* and *Al-Odah et al. v. United States*.[9] In this sharply divided ruling, Justice Anthony Kennedy, writing for the majority, held that the petitioners detained at Guantanamo Bay as enemy combatants were entitled to the constitutional privilege of habeas corpus. In reaching this decision, the majority determined that the jurisdiction stripping provision in the Military Commission Act, enacted by Congress at the request of the President, was unconstitutional. Furthermore, the Court held that the procedures and processes in the Detainee Treatment Act for review of the detainees' status were not an adequate or effective substitute for habeas corpus. Despite the support from both political branches of government for the approach taken by the Executive, in this instance, the Supreme Court was the final arbiter in saying what the law is. It effectively overrode the Executive and disabled the Congress.

Additionally, the executive branch disregarded federal statutory authority to violate a federal ban on torture by using presidential signing statements to obscure rather than clarify the law. The Bush Administration often claimed it simply was interpreting statutory requirements regardless of the fact that there appeared inconsistencies in the actual text and legislative intent of the provisions in law that were subject to such interpretation. If the President fails to notify Congress when he refuses to comply with a statutory requirement, Congress has little ability to effectively legislate because it doesn't know how the executive branch is implementing the law. Moreover, Congress has limited ability to monitor and oversee the executive branch's legal compliance. The testimony of both Walter Dellinger and Dean Harold Koh forcefully reinforced the points made here.

In August of 2007, just days before its recess, Congress enacted the Protect America Act of 2007, a temporary law of six months duration, which permitted the Director of National Intelligence and the Attorney General to authorize surveillance "directed at a person reasonably believed to be located outside the United States," whether or not that person is an agent of a foreign power. The role of FISC was diminished considerably because it only was permitted to

review the Attorney General's procedures for implementing the Act to determine whether they were "clearly erroneous."

By giving the Attorney General and Director of National Intelligence the power to approve international surveillance, rather than the special intelligence court, Congress essentially implicated the separation of powers by placing authority for scrutinizing case review of individuals being monitored under the jurisdiction of the executive branch of government, rather than the judicial branch of government where it properly belonged. The FISC had been overseeing such activities for the last three decades, and by effectively cutting it out of this process, the executive was left unchecked. While the Attorney General was directed to submit a report to FISC on the procedures of the new program, the law did not require him to explain how Americans' calls or e-mails were treated when they were intercepted. The Court was provided no authority to receive information about how extensive a breach of privacy existed, nor any authority to remedy it.

President Bush, in his 2008 State of the Union Address, emphasized the necessity for a new law to be enacted that provided retroactive immunity to all phone companies and other telecom providers that had given the government access to e-mails and phone calls linked to people in the United States. In subsequent communications from President Bush, his Attorney General Michael Mukasey, and National Intelligence Director Michael McConnell to congressional leaders, the Administration insisted that any attempt to bar such immunity by the Congress or to have the FISA court decide whether to grant immunity to telecom firms would be met with a presidential veto.[10] The President was using his bully pulpit to reinforce his power at the expense of the Congress or the courts.

On February 16, 2008, the Protect America Act formally expired, although its authority remained in effect until August 2008 because the directives pursuant to the Act, according to the Department of Justice, permitted continuation of surveillance.[11] Just prior to the Congressional recess of July 4th, the leaders of Congress announced that a compromise had been reached with the Administration to enact surveillance reform legislation. The bill agreed to effectively provide retroactive immunity from liability for the telecommunication companies that cooperated with the Executive to undertake the TSP post 9/11. Even though the question of immunity was to be

decided by a federal district court, the court would be instructed to make its decision based solely on whether the Bush Administration certified that the companies were told the spying was legal. The courts were essentially removed from resolving the pending lawsuits because the test in the Act is not whether the certifications were legal or constitutional, only whether they were issued. The President achieved his immediate objective with the passage of the FISA Amendments Act of 2008 while greatly reducing the role of judicial review as well as legislative oversight of electronic surveillance programs in the future.

The National Security Agency could have used existing authority under the Foreign Intelligence Surveillance Act (FISA) to track communications of terrorist organizations. Since Congress passed FISA in 1978, the court governing the law's use approved nearly 23,000 warrant applications and rejected only five. In an emergency the NSA or FBI could begin surveillance immediately and a FISA court order does not have to be obtained for three days.[12] If the FISA law, as written, was too cumbersome, or too narrow to permit the kind of surveillance considered essential to the Administration, President Bush could have requested that Congress amend the law, which it had done on over six separate occasions post 9/11. For six years the President preferred to ignore Congress and he secretly directed the NSA to conduct the surveillance, and when his actions were made public, rather than work with Congress, he initially maintained that he had the constitutional authority to ignore the law.

At issue is not whether there existed a serious threat from terrorism or whether the executive should be able to warrantless surveille American citizens. It may or may not be beneficial to adopt such surveillance policy to combat terrorism, and that must be considered on its own merits. The constitutional process for making such policy decisions involves the legislature as well as the judicial branch of government. President Bush consistently insisted that despite the laws enacted by Congress, and signed by previous presidents, he had the override authority to ignore them to establish the TSP. That goes to the very heart of checks and balances in the American constitutional process.

Recommended Actions for Congress and the Executive

A successful separation of powers system depends upon interbranch norms of mutual accommodation and respect as well as each branch's ability, readiness, and willingness to use its inherent constitutional prerogatives and political powers where and when appropriate. After 9/11 the Bush Administration viewed national security law and policy to be the exclusive province of the executive branch of government. As a result, law became subservient to policy with respect to the status and treatment of individuals captured and detained at Guantanamo, the development of processes and procedures for the use of military commissions, and the use of the National Security Agency to conduct domestic surveillance.

The dubious legal opinions produced from senior levels of the executive branch undermined the legitimacy of the most critical national security decisions and many of them were subsequently invalidated because of their defective legal foundations.

The separation of powers system breaks down when the executive branch determines not to faithfully execute enacted laws, or interprets them in such a way as to deny constitutional legitimacy to a co-equal partner in the policymaking process. When one branch, Congress, acquiesces and fails to respond, the other branch, the Executive, effectively sets the precedent which is passed along to subsequent generations of policy makers. That is essentially what has happened with respect to executive claims of war power post 9/11 even though history reminds us all too well that war is a shared responsibility.

Congress has failed to demonstrate a leadership role in the war on terrorism. It has facilitated presidential actions by approving most directives introduced by the Bush Administration, and generally it has stood on the sidelines when the President claimed his powers to act were pursuant to the Commander-in-Chief Clause or were available under inherent authority in Article II of the Constitution.

A lesson in how not to legislate was the adoption of the Military Commissions Act of 2006, the Protect America Act of 2007 and the FISA Amendments Act of 2008. In each instance Congress provided sweeping authority to the Executive at the expense of the other two branches of government. Congress was wrong to eliminate the great writ of habeas corpus permanently for any non-citizen determined to be an enemy combatant, or even awaiting such a determination.

Congress was wrong to delegate unilateral authority to the President to interpret the meaning and application of the Geneva Conventions without congressional or judicial oversight. Congress was wrong to eviscerate checks and balances under the Foreign Intelligence Surveillance Act while seriously threatening legitimate privacy rights and civil liberties of law abiding American citizens. Regrettably, Congress squandered opportunities to write balanced laws which set enforceable guidelines for fighting the war on terror without sacrificing basic legal and human rights. Congress failed to heed the words of Benjamin Franklin, who memorably warned that those who would give up an essential liberty for temporary security deserved neither liberty or security.

Seven years after the deadliest attack on American soil in its history, Congress has barely begun to consider what its own role should be with respect to setting rules for surveillance, or the proper procedures for military commissions. It is only quite recently that Congress has even demonstrated an interest in reexamining the legal responses of the fall of 2001.

It is incumbent upon Congress to restore a badly damaged oversight process and to reestablish executive accountability as policies and procedures are developed that effectively address continuing threats from global terrorism. While it is essential to support the monitoring of communications of suspected terrorists, it must be done lawfully, and with adequate checks and balances to prevent abuses. Congress, as the President's decision making partner in the war on terrorism, needs to perform its critical role in reviewing, debating and ultimately deciding what further changes are justified, and it should do so in an environment free from election cycle politics.

The Military Commissions Act has removed a vital check that the American legal system provides against the Executive arbitrarily detaining people indefinitely without charge, and it may well have made limits against torture and cruel and inhuman treatment unenforceable. This is contrary to the rule of law, the rights codified in the Constitution, and international treaties and covenants to which the nation subscribes. It is essential that Congress step up and develop a sound legal framework and process that addresses these concerns.

It is therefore essential, that as a minimum, the new Congress and the new President in 2009 revisit the controversial and hastily enacted flawed FISA Amendments Act of 2008 as well as the

principal deficiencies that exist in the Military Commissions Act of 2006. The Supreme Court in the 2006 decision in *Hamdan,* and its 2008 ruling in *Boumediene,* recognized the vital role for the political branches to play in formulating national security policy. Congress should definitively address habeas actions by legislation to streamline the process effectively even though it will ultimately be up to the Supreme Court to determine what the constitutional right to habeas requires. This position was well articulated by Patrick Philbin as well as Suzanne Spaulding in their separate testimony provided to the Subcommittee.

In its most recent opinion addressing national security policy as it relates to the legal rights of unlawful enemy combatants, the Supreme Court recognized the fact that terrorism continues to pose a serious threat to the nation, and will most probably do so for years to come. The President and Congress, consistent with their duties and responsibilities, are critical actors in the debate about how best to preserve constitutional values while protecting the nation's security. As well, the Court performs a legitimate role in this process since the laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled within the framework of the law.[13]

Biosketch

Dr. Leonard Cutler is Professor of Public Law in the Political Science Department of Siena College in Loudonville, New York. His areas of expertise include Criminal Law and Procedure, Constitutional Law, and International Law. His research has appeared in edited volumes and journals including the *Journal of Criminal Justice,* and *Criminal Law Review.* His study, *The Rule of Law and Law of War: Military Commissions and Enemy Combatants Post 9/11*, was published by Edwin Mellen Press in 2005, and was awarded the Adele Mellen Prize for Distinguished Contribution to Scholarship. In January of 2008, Dr. Cutler's article "Human Rights Guarantees, Constitutional Law and the Military Commissions Act of 2006," was published in *Peace and Change*, a Journal of Peace Research. In the fall of 2008 Dr. Cutler's most recent book, *Developments in the National Security Policy of the United States Since 9/11: The Separate Roles of the President, the Congress, and the Supreme Court*, was published by Edwin Mellen Press.

Notes

[1] Unclassified Memorandum for William J. Haynes II, General Counsel of the Department of Defense, March 14, 2003, at 13. A similar memorandum was written for the CIA in August 2002. It boldly concluded that "any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution's sole resting of the Commander-in-Chief authority in the President." Both memos were subsequently rescinded by the head of the Office of Legal Counsel, Jack Goldsmith in December 2003.

[2] *Id.*

[3] For a full discussion of the use and defense of the override theory, *see* U.S. Dept. of Justice, Legal Authorities Supporting the Activity of the National Security Agency Prescribed by the President (Jan. 19, 2006) [NSA White Paper].

[4] *Youngstown Sheet & Tube Co. v. Sawyer* 343 U.S. 579, (1952).

[5] *Id.* 343 U.S. 660 (1952) (Clark J. concurring in the judgment).

[6] *Hamdan v. Rumsfeld*, 126 S. Ct. 2786 (2006).

[7] *Hamdan v. Rumsfeld* 126 S. Ct. 2749, 2799 (2006) (Kennedy J. concurring in part).

[8] Military Commissions Act of 2006, Pub. L. No. 109-366, Stat. 2600.

[9] 128 S. Ct. 2229 (2008).

[10] "Bush to veto surveillance bill without telecom immunity, Mukasey letter," *available at* http://jurist.law.pitt.edu/paperchase/2008/02/bush-to-veto-surveillance-bill-without.php. (February 2008).

[11] *See,* Jay Rockefeller, Patrick Leahy, Silvestre Reyes, John Conyers, "Scare Tactics and Our Surveillance Bill," Commentary, *Washington Post*, February 25, 2008; A15.

[12] *Id.* In a United States Department of Justice Report for 2007, the Foreign Intelligence Surveillance Court approved 2,370 warrants targeting people in the United States believed to be linked to international terror organizations. The court denied three warrant applications and partially denied one. Eighty six times judges sent requests back to the government for changes before approving them. *See,* http://www.chicagotribune.com/ news/nationworld/sns-ap-domestic-spying,0,4632886.story.

[13] *Boumediene et al. v. Bush* (Kennedy, J.) 128 S. Ct. 2229 (2008).