Statement
By
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Submitted to
The Subcommittee on the Constitution
of
The Senate Committee on the Judiciary
In Connection with its Hearing
On
Restoring the Rule of Law
On September 16, 2008

Chairman Feingold, Members of the Subcommittee:

I very much appreciate the opportunity to submit this statement to you.

During his term of office, President George W. Bush systematically engaged in serious and dangerous abuses of power in defiance of the Constitution, his oath of office and various statutes and treaties. The abuses included: deceiving and misleading Congress and the American people about the need to invade Iraq, refusing to adhere to the requirements of the Foreign Intelligence Surveillance Act with respect to obtaining court approval for wiretaps and other invasions of personal privacy, refusing to adhere to the prescriptions of the War Crimes Act of 1996 and the anti-torture act that prohibit the mistreatment and torture of detainees, refusing to implement the Geneva Conventions with respect both to the mistreatment of detainees and to bringing to justice those responsible for the mistreatment, refusing to enforce bills signed into law (the so-called "signing statements" issue ) and abusing claims of executive privilege, particularly with respect to Congress' right to investigate whether the President and his team had tried to secure political prosecutions to influence the outcome of elections.

These presidential abuses have deprived American citizens and others of important constitutional rights, incalculably harmed the country by forcing us into a tragically mistaken war at the cost of more than 4,000 American killed, more than 30,000 wounded, untold numbers of Iraqis killed and wounded and hundreds of billions if not trillions of dollars, desperately needed here at home. The mistreatment of detainees has also endangered Americans and American troops by triggering extreme anti-American sentiment abroad and producing recruits for Al Qaeda.

The prime remedy created by the framers for vindicating the rule of law and protecting the democracy against the systematic abuse of power by high government officials is impeachment. The impeachment proceedings during Watergate succeeded in holding President Richard Nixon accountable for his misdeeds; it forced his resignation and created an indelible and comprehensive historical record of wrongdoing. Just as important, the proceedings educated Congress and the American people about the system of checks and balances, the proper limits on executive power and the harm to our democracy that results when presidents put themselves

above the law. The impeachment proceedings against President Nixon, because they were conducted fairly and responsibly an with bipartisan support, and were based on substantial evidence, united our country in a renewed commitment to the principle that more important than a president or party was the preservation of the rule of law.

Regrettably, no such action was commenced against President Bush and other top officials in the Administration against whom there is a clear, prima facie case of impeachable offenses.

While there is nothing comparable to impeachment that would hold President Bush accountable, restore the constitution and the rule of law, educate the public and send a clear warning signal to future presidents, there are still actions that can undo some of the damage.

Here are some key recommendations:

1) The full scope of President Bush's abuse of power must be documented. This means a comprehensive investigation should be undertaken of the Administration's constitutional misdeeds, including the deceptions that drove the country into the Iraq war, the orders for and the nature of the torture and mistreatment of detainees, the scope and nature of the violations of FISAl, the signing statements, the US attorneys' scandal and the President's and Vice-President's role in the Libby matter.

2) Prosecutions where laws have been violated must be undertaken. It should be noted that some of the abuses of power may not be crimes, such as war deceptions, the refusals to enforce the law (signing statements) and the abuses of executive privilege.

3) Where appropriate, laws should be revised and new ones added to curb executive branch abuses. But here a cautionary note is in order. Given President Bush's repeated flouting of the law and his view that a president may ignore laws, particularly those affecting his powers as commander in chief, simply rewriting laws will not stop a future president bent on violating them. They may simply refuse to obey the law, following the precedent set by President Bush. Nonetheless, federal legislation should be considered that would revive the former independent prosecutor law (with substantial modifications to avoid past abuses), toll statutes of limitations with respect to any criminal statutes violated by a president or vice-president during their term of office and narrow the state secrets privilege as formulated by the Administration.

Rather than spelling out how the investigations should be carried out and the prosecutions should be handled and all the laws that need revisions, I want to focus on one particular change that is central.

As the former District Attorney of Brooklyn, New York, the country's fourth largest office, I know the price society pays for a doctrine of impunity. When crimes go unpunished, a clear message is sent that the misdeeds are trivial and not serious enough to warrant prosecution. This encourages the commission of more of these crimes. The same holds true of political abuses—the failure to hold those who engaged in them accountable condones those actions and helps create a climate in which their repetition is far too likely.

Not surprisingly, impunity for political leaders who violate the law is a key feature of dictatorships and authoritarian regimes. It has no place in a country that cherishes the rule of law or that considers itself a democracy.

The doctrine of impunity suggests, too, that there is a dual system of justice in America—one for powerful officials and the other for ordinary Americans. Because the concept of equal justice under law is the foundation of democracy, impunity for high officials who abuse power or commit crimes in office will ultimately erode our democracy itself.

We dare not see impunity enshrined as an operative principle in our country. That is why prosecutions are essential for violations of the law, no matter how high an official the law breaker is.

But the Administration succeeded in shielding itself from the most likely vehicle for the prosecution of a number of top officials, the War Crimes Act of 1996. That shield must be removed and the statute restored to life.

The War Crimes Act, which was intended to implement the Geneva Conventions, made it a crime to subject detainees to cruel and inhuman treatment. Plainly, many of the forms of mistreatment of detainees ordered by this Administration, whether singly or in combination--water boarding, sexual abuse, the threatening use of dogs, exposure to extremes of cold and heat, stress positions--would clearly meet the cruel and inhuman standard.

President Bush and his minions have repeatedly contended that they do not do torture; implying that water boarding, which they concede occurred, is not torture. Even Attorney General Mukasy has pirouetted around the question of whether water boarding is torture. These denials and obfuscations are obviously an effort to avoid criminal liability under the anti-torture statute. That definitional issue would not arise under the War Crimes Act. There can be no question that water boarding (as well as many of the other forms of mistreatment described above) is cruel and inhuman and therefore prosecutable. That is undoubtedly why there has been such consternation in the Administration about the War Crimes Act.

Violation of the War Crimes Act is felony; and it carries the death penalty if mistreatment results in the death of the detainee. Under federal law, when the death penalty applies, there is no statute of limitations. This means that those who violated the Act, where the violations resulted in death, could face the threat of prosecution for the rest of their lives. As we know, there are a number of cases in which detainee mistreatment resulted in death.

White House Counsel, Alberto Gonzales, who later became Attorney General, was so worried about the prospect of future prosecutions under the War Crimes Act that he suggested to President Bush, in a January 2002 memo, that the US opt out of the Geneva Conventions as a way of reducing the likelihood of War Crimes Act prosecutions.

Gonzales' "reasoning" was that since the War Crimes Act carried out the Geneva Conventions, if the US opted out of the Conventions then the Geneva Conventions would not

apply and the War Crimes Act would not apply. In response to Gonzales' recommendation, President Bush declared that the Geneva Conventions would not apply to members of Al Qaeda, and would only partially apply to the Taliban. That they thought would preclude prosecutions under the War Crimes Act. But when the US Supreme Court ruled in the summer of 2006 in the Hamdan case that the Geneva Conventions still applied to detainees, the Administration panicked. Under Gonzales' reasoning, once the Geneva Conventions applied to detainees, the War Crimes Act would apply to the mistreatment of detainees. Afraid of prosecution, the Bush Administration slipped into the Military Commissions Act in the fall of 2006 a provision making the War Crimes Act retroactively inoperative to the date of its initial enactment.

In one fell swoop, it erased 10 years of possible criminal conduct.

This was one of the most cynical acts of the Administration with respect to the rule of law. In essence, the Administration issued a blanket pardon to anyone who had violated the War Crimes Act, including the President and Vice-President. There was no examination of the facts of any particular case. The violations--whether egregious or minor, whether done out of sadism or misguided patriotism--were treated alike: swept under the rug. No one was ever to be called to account. The crimes were made to disappear, as if they never happened--pouf.

Making the War Crimes Act retroactively inoperative is one of the worst embodiments of the doctrine of impunity for high government officials in US history. It cannot be allowed to stand.

Fortunately, the inoperative feature of the law can be undone and the law resurrected without running afoul of either the Constitution's ban on ex post facto laws or its requirement of due process. There is no ex post facto issue because cruel and inhuman treatment of detainees was already a crime when the misconduct took place. There is no due process issue, among other things, because of the relatively short period of time that the Act was rendered inoperative.

Once the War Crimes Act is restored to its former state, questions of whether and how to prosecute under it can be made in a thoughtful and deliberative manner. Even if no prosecutions are ever brought under the Act, the example will not stand for all to see that a criminal statute was retroactively decriminalized after crimes were committed to protect persons in high office.

Restoring the Act will send the clearest signal that crimes cannot be ordered in secret, committed in secret and essentially pardoned in secret. Restoring the Act will be the clearest attack on the doctrine of impunity and it will be the clearest signal that the rule of law is still alive and well.

Dated: September 12, 2008