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“RESTORING THE RULE OF LAW”

HEARING BEFORE THE CONSTITUTION SUBCOMMITTEE UNITED STATES SENATE COMMITTEE ON THE JUDICIARY

**Statement of
John W. Whitehead
President of The Rutherford Institute**

September 16, 2008

Senator Feingold, Ranking Member Brownback and Members of the Constitution Subcommittee, on behalf of The Rutherford Institute,¹ I thank you for the opportunity to testify on “Restoring the Rule of Law.”

Never before in American history has there been a more pressing need to abide by the rule of law, respect the separation of powers, and check governmental power and abuse. This is especially critical now, as the effects of the U.S. government’s ongoing war on terror continue to be felt at home and abroad. As constitutional attorney Bruce Fein, who served as Associate Deputy Attorney General under President Ronald Reagan, recognized: “the Founding Fathers understood that freedom was the rule, and government intervention to protect security and safety was the exception. There had to be a standard of need or urgency required in order to encroach on freedoms. The United States, post 9/11, has flipped that customary burden of proof.”²

The Rule of Law: Its Place in Our History

¹ The Rutherford Institute, a nonprofit legal and educational organization whose international headquarters are located in Charlottesville, Virginia, was established in 1982 by constitutional attorney John W. Whitehead. The Rutherford Institute is deeply committed to protecting the constitutional freedoms of every American and the integral human rights of all people. The Rutherford Institute is a prominent leader in the national dialogue on civil liberties and human rights and is a forthright champion of the United States Constitution.

² Bruce Fein, “Are Civil Liberties at Risk in the War on Terror?”, *Cato Policy Report* (September/October 2007), http://www.cato.org/pubs/policy_report/v29n5/cpr29n5-4.html.

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The origin of American law and constitutionalism was succinctly stated by Thomas Paine in 1776: "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."³

In the United States, the Constitution represents the law of our land and as such reigns supreme. The Constitution grants the government certain enumerated powers. When the government oversteps its constitutional authority, it operates outside the boundaries of the law and, therefore, outside the "rule of law."

The defining feature of the system of government in America is that it deliberately divides power and authority between three branches of government. Commonly referred to as the separation of powers, this means that the President, the courts, and Congress each share one third of the role of government. The importance of this division of powers cannot be overstated. It ensures that power does not become localized exclusively in a single branch of government and thereby prevents our country from becoming an authoritarian regime. As Thomas Jefferson, political philosopher and principal author of the Declaration of Independence, wrote: "An *elective despotism* was not the government we fought for, but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits without being effectually checked and restrained by the others."⁴

The doctrine of separation of powers is a fundamental aspect of the rule of law and is deeply embedded in American culture and government. The Framers were deeply devoted to securing a government committed to equal distribution of power. Fresh in their minds was the oppressive colonial rule of the British Empire. They understood well that if power was not shared and checked, a dictatorship would arise; in response, they conceived a system with three coequal branches of government.

Although the U.S. Constitution does not expressly mention the phrase "separation of powers," the document conspicuously reveals its influence. Article I establishes the legislative branch of government, housed in the U.S. Congress. Congress is to act as the voice of citizens, and primary among its duties is to make laws. Article II provides that the President shall act as the leader of the executive branch of government, which has the responsibility and duty to execute laws promulgated by Congress. And finally, Article III establishes the judicial branch of government, which is responsible for making sure that no law passed by Congress or act taken by the executive branch violates the Constitution or laws of the United States.

In short, there are three separate but equal branches of government that carry responsibility to oversee one another. In other words, the American form of government includes a mechanism

³ Thomas Paine, *Common Sense* (1776), Rt. Hon. Lord Bingham of Cornhill, House of Lords, Sixth Sir David Williams Lecture (Nov. 16, 2006),

http://www.cpl.law.cam.ac.uk/past_activities/the_rule_of_law_text_transcript.php.

⁴ Thomas Jefferson, *Notes on the State of Virginia* 129 (J Randolph 1853) (1781).

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known as “checks and balances.” This is perhaps one of the most innovative ideas of the Framers: the power of each branch to check the others was intended to ensure freedom and prevent tyranny. Just as importantly, it prevents one branch of government from dominating the others.

This system of checks and balances can be witnessed in the interplay between the three branches. For instance, although the President has the power to appoint judges, Congress must approve his appointments. Similarly, even though Congress passes laws, the President has the power to veto them (although such vetoes can later be overridden by Congress). The courts are not excluded from this system. The judicial branch checks both Congress and the President by striking down any law or action that is in violation of the Constitution. However, if the President or Congress disagrees with a judicial decision, they may attempt to amend the Constitution.

By way of illustration, imagine a weighing scale. The objective of the Constitution is to have a perfectly balanced scale. When one side acquires more weight (power), the other side decreases in weight proportionately, resulting in an unbalanced scale—or, in recent years, an unbalanced government, as it has manifested itself.

For example, if the President is allowed unfettered discretion to set her own rules, bound neither by the Constitution nor the other branches of government, she is “above the law” and assumes the role of dictator, able to act in whatever way she pleases. She thus becomes the law⁵ – precisely what the Framers intended to prevent when they drafted the Constitution. The U.S. Supreme Court recently reinforced this bedrock principle. Speaking through (now former) Justice Sandra Day O’Connor, the Court restated the premise that:

We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens. Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake (it was “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”).⁶

This interpretation of the Constitution is consistent with early documents. For instance, the Declaration of Independence was a scathing indictment of a monarchy the Framers believed too powerful. Consequently, one of the chief concerns of the Framers when they created a constitutional system that included a separation of powers was to significantly limit the power of the President. In fact, many Americans of those early days feared the very existence of a chief

⁵ John W. Whitehead, *The Imperial President and the Breakdown of the Rule of Law* (Jan. 2, 2006), http://www.rutherford.org/articles_db/commentary.asp?record_id=380.

⁶ *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004), citing *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 426 (1934).

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executive. The executive branch was only created after the Articles of Confederation were changed and the Framers determined that a President was a necessary evil to balance out their proposed form of government. Even then, the office of President was given an extremely limited role.

Presidential Dissolution of the Rule of Law

Although George W. Bush is not the only President to award himself powers never contemplated by the Framers, during his two terms in office, he has managed to subvert the Constitution at almost every turn. In the process, he has assembled an assorted and impressive range of powers and has greatly increased the authority of the executive branch and the reach of the federal government—a legacy that future Presidents will most likely draw upon.

Claiming to possess the ‘inherent’ authority to suspend laws as he conducts his apparently endless war on terrorism, President Bush has assumed significantly greater powers in the wake of the 9/11 attacks. Over the course of the past seven years, Bush has expanded presidential power to allow government agents to, *inter alia*, open the private mail of American citizens, assume control of the federal government and declare martial law, as well as to secretly listen in on the telephone calls of American citizens and read our e-mails. Bush has also declared that if he disagrees with a law passed by Congress, he can disregard it. The Bush Administration has repeatedly placed itself above the rule of law in order to justify warrantless wiretapping, the detainment and torture of individuals captured in the war on terror, excessive government secrecy, and claims to executive privilege, among other egregious acts.

This increase in presidential power has been largely carried out under the Bush Administration by way of presidential directives, executive orders and stealth provisions used as a means to lay claim to a host of unprecedented powers. Executive orders remain extant and can be used by future Presidents. While executive orders can be challenged by lawsuits and repealed or modified by Congress or by a new executive order, seldom has any of this been done.

As noted above, George W. Bush’s routine efforts to circumvent the rule of law have been conveniently carried out under the guise of waging a never-ending war on terrorism. In fact, this President has laid claim to an expansive range of wartime powers – more than any other before him. Indeed, under a strict reading of the Constitution, President Bush has clearly exceeded the power bestowed upon his office.

Generally, history has demonstrated that presidential powers have a constant ebb and flow. A President’s powers typically increase significantly during times of war and decrease thereafter. This pattern has had significant consequences throughout American history. For example, during the presidency of John Adams, James Madison came out of retirement in response to what he perceived to be an unconstitutional abuse of power. At issue were the Alien and Sedition Acts, which significantly curtailed the rights of foreigners and the press during a time of national crisis. Later, it was Lyndon Johnson who expanded the role and powers of the President. To escalate the war in Vietnam, Johnson assumed major war-making powers with little regard for

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the views of Congress, the judiciary or the general public. He dispersed U.S. forces throughout Vietnam well before Congress had even drafted the Gulf of Tonkin Resolution of 1964, which gave the President the power to resolve the conflict by any means necessary. Likewise, in 1990, George H. W. Bush sent 550,000 soldiers to the perimeter of Kuwait before agreeing to a “discussion” with Congress about the decision to wage war.

Despite the precedent to the contrary established over time, the Framers did not give the President a wide array of unilateral foreign policy powers. On the contrary, such powers have historically been claimed by the executive branch. As constitutional historian W. Taylor Reveley III notes: “If we could find a man in the state of nature and have him first scan the war-power provisions of the Constitution and then look at war-power practice since 1789, he would marvel at how much Presidents have spun out of so little.”⁷

While the Constitution reveals a clear tension between the legislative and executive branches regarding wartime powers, an objective reading demonstrates that Congress must, at the very least, be involved in wartime decisions made by a President. The Constitution is clear in its division of wartime responsibilities between the President and Congress. For instance, the President is charged with receiving diplomatic representatives of other nations, appointing (with the approval of the Senate) U.S. diplomats, negotiating treaties (subject to the ratification of the Senate), and serving as the commander-in-chief of the armed forces. Congress, on the other hand, is charged with the authority to declare war, raise military forces, provide funds for the military, and ratify or reject treaties. Thus, a reasoned review of the way in which wartime powers are to be distributed between Congress and the President reveals a bifurcation: the President is to be a liaison, spokesperson, and foremost diplomat, while Congress is to declare, and by extension wage, war.

The structure of the Constitution fails to support George Bush’s contention that the President has unfettered—or even more than slightly limited inherent—wartime powers. The language of the Constitution makes the President commander-in-chief of the military. However, it does not allow him to bypass domestic and foreign law, as this administration has.

Remedies for Restoring the Rule of Law

The American system of government cannot survive unless those elected understand their proper role and the role of the Constitution. However, Congress and the courts – particularly since 9/11 – have repeatedly surrendered their responsibilities as separate and independent branches of government. Both must reclaim their roles and their constitutional duty to act as the full equals of the executive branch. Above all, they must resist the temptation to defer to the President every time he invokes the recurring mantra of the war on terror, something both branches have singularly failed to do thus far during the Bush Administration.

⁷ W. Taylor Reveley III, *War Powers of the President and Congress* 29 (University Press of Virginia, 1981).

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It remains to be seen whether the next occupant of the Oval Office will restore our constitutional government. Will that person place the executive branch back on an equal footing with the other branches of government, relinquishing the powers that President Bush has amassed and in so doing restore the separation of powers? Presidents and rulers do not easily relinquish power.

The nature of governments is that they overreach. While government assaults on our civil liberties and the freedoms guaranteed by the Constitution have become far more invidious and blatant in the years following the 2001 terrorist attacks, what James Madison termed ‘experiments on our liberties’ began long before that – as early as the embryonic American republic, in fact. Indeed, the American government has been at war with the Bill of Rights virtually since its conception.

As the various branches of government overstep their authority, it is ultimately up to the people to hold them in check. Congress, as our appointed representative, is the first line of defense. In this regard, Congress has failed in its duty to hold the government—viz, the executive branch—in check. The Framers had the foresight to provide us with the structure and the necessary tools to maintain equilibrium among the three branches of government, in particular between the executive and legislative branches. If we have failed to do so, it has not been due to a lack of legislative resources, but to Congress’ tendency to play party politics rather than deal head-on with the issues before its members. Thus, if there is any hope for restoring the rule of law, it must begin with Congress.

Congressional oversight. Unprecedented abuse of presidential powers presents a clear and present danger to our country. Each branch of government profits from scrutiny and questioning by the other branches. Because time is of the essence, the necessarily slow-moving judiciary impels Congress to take the lead as the only branch able to hold the executive directly accountable. The rule of law cannot be restored without open and transparent government. Thus, it falls to Congress to check the executive branch when it overreaches its authority. At the least, Congress should immediately move to rescind all executive orders that undermine the rule of law, first by resolution and then by the passage of legislation. Congress should also immediately declare that signing statements such as those used by the Bush Administration to circumvent the law are to be regarded as nothing more than executive commentary and not, as has been the case, as policy.

No single legislative act will substitute for constant vigilance by our congressional leaders. Toward this end, the President should be required to face direct and public questioning from members of Congress on a regular basis,⁸ not unlike the practice employed weekly in the British House of Commons, wherein the Prime Minister is called upon to respond to questions from Members of Parliament on any issue. This would serve to hold the President and government to account in a visible way, while acting as a constant reminder that the President is both a citizen

⁸ David Folkenflik, *McCain Proposes Q&A Sessions with Congress, All Things Considered*, July 25, 2008, <http://www.npr.org/templates/story/story.php?storyId=92918928>.

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and a temporary occupant of office. At a minimum, the President should meet with congressional leadership from key committees on a regular basis. The executive branch must not be permitted to exercise arbitrary authority under the pretext of national security, as has been the Bush Administration's practice. It is especially important that congressional leaders be fully briefed on matters of national security: government by stealth is incompatible with the rule of law.

Constitutional literacy. If and when a weak Congress fails to uphold the balance of powers necessary to maintaining the republic, it then falls to the American people to hold their elected representatives accountable through protest, petition, and in the final instance at the ballot box. In order for this to be an effective safeguard, however, Americans must have a clear understanding of their history, the workings of their government, and a thorough knowledge of the Constitution.

Unfortunately, many Americans are increasingly apathetic about the state of this nation. Ignorant of their freedoms and uncertain about their ability to effect change in their communities, as well as their local, state, and federal governments, they are unable to mobilize as an effective political force. Equally alarming is the degree to which government officials, including elected public officials, fail to take to heart their oath to uphold and protect the Constitution. If those taking such an oath have only vague ideas about what the Constitution actually requires, such a pledge amounts to nothing more than an empty promise to serve.

Studies consistently show that American citizens lack even rudimentary knowledge about the Constitution. For example, only one in four Americans can name more than one of the freedoms guaranteed by the First Amendment, although more than half can name at least two members of the popular *Simpsons* cartoon family.⁹ According to a study conducted in 2006 by the McCormick Tribune Freedom Museum, only one of the 1,000 people surveyed could name all five First Amendment freedoms.¹⁰ On the other hand, 38 percent of those surveyed believed that the First Amendment protected their right to avoid self-incrimination.¹¹ According to another 2007 survey, 25 percent of the 1,003 respondents questioned believed that the First Amendment "goes too far in the rights it guarantees."¹² As a 2003 *CBS News* article observed: "In daily life, it's a lack of understanding about government that prompts people to call Congress when they want the dog catcher, or to complain to a local council member about a federal tax change. Over time, it can add up to disenfranchised and apathetic citizens."¹³

While the American revolutionary spirit that beat back the over-bearing British Empire and gave us the Constitution and the Bill of Rights has not died out altogether, ignorance about rights may

⁹ Associated Press, *More Know Simpsons than Constitution*, March 1, 2006, <http://www.msnbc.msn.com/id/11611015/>.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² <http://www.firstamendmentcenter.org/news.aspx?id=19031>.

¹³ CBS News, *Ignorance of History Is No Joke*, July 3, 2003, <http://www.cbsnews.com/stories/2003/07/03/politics/main561525.shtml>.

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well be Americans' ultimate shortcoming. For this reason, constitutional literacy on the part of the American people, whether or not they are public servants, must be an integral part of the remedy if we are to restore the rule of law in this country. Senator Robert C. Byrd (D-W.Va.), who has been a staunch advocate of constitutional literacy, included a rider in the 2005 Appropriations Bill designating September 17th as 'Constitution Day.' The bill requires the head of each federal agency and department to provide new employees with educational materials on the United States Constitution as part of their orientation and to provide every employee with such materials on September 17th of each year. The law also requires that every public school hold appropriate educational programs in observance of Constitution Day. Congress should ensure that the next President actively complies with this federal legislation and ensure that his administration understands basic constitutional precepts. In this respect, there is no dearth of information about the United States Constitution.¹⁴

Speak truth to power. It is understandable that many Americans feel overwhelmed, powerless, and discouraged in the face of the government's expansive powers, seemingly endless resources, and military might. Even so, that is no excuse for standing silently on the sidelines. American citizens remain our final hope for freedom. As I explain in *The Change Manifesto*,¹⁵ there are things that every American can do to resist authoritarianism and seek corrective measures, and there is no better time to act than the present. Fear, apathy, and escapism will not carry the day. It is within our power to attempt (in a nonviolent way) to make a difference. To this end, Americans must be willing, if need be, to dissent and in so doing speak truth to power. Such citizen participation has often been discouraged, either directly or indirectly, by the Bush Administration. However, Congress should encourage such efforts by way of resolution and/or legislation where necessary.

Conclusion

We are not helpless. We have a rich history. We often forget, as we have become complacent and apathetic, that America was born from the seeds of revolution. The freedoms which we often take for granted did not come about through happenstance. They were hard won through the determination, suffering, and sacrifice of thousands of patriotic Americans who not only believed in the cause of liberty, but who acted on that belief.

Americans fought the War of Independence to escape being governed or ruled by a monarch who was immune from their influence or control. To them, this status quo was nothing short of tyranny. Yet the colonists stood their ground. They knew they had rights. After those rights had been repeatedly violated, they decided to resist. That resistance came at a high price, but early

¹⁴ See, for example, The National Archives site: <http://www.archives.gov/national-archives-experience/charters/constitution.html>; The National Constitution Center site: <http://www.constitutioncenter.org/explore/TheU.S.Constitution/index.shtml>; The National Center for Constitutional Studies site: <http://www.nccs.net/index.html>.

¹⁵ John W. Whitehead, *The Change Manifesto: Join the Block by Block Movement to Remake America* (Sourcebooks, 2008).

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Americans knew that if they did not stand up against oppression and injustice, tyranny would triumph.

How best to stop tyranny from triumphing was the central question informing the Constitution and the Bill of Rights. The colonists knew that winning the War of Independence was only the first step in fighting tyranny. They needed a written constitution and a clear statement of rights to protect them, and future generations of Americans, from the government. Their response was the Constitution and the Bill of Rights, which, along with the fortitude to stand up for what one believes, are the necessary tools by which we can maintain our freedoms against the present government onslaught.

The Constitution provides us with the blueprint for maintaining a balanced republic, and it must always be the starting point. However, each of us, from public officials to citizens, has an affirmative duty to hold our government accountable. It is here that the media has a vital role to play. With its ability to monitor government activity and report to the people, the media serves a crucial role as watchdog in helping to safeguard against abuses of power. Unfortunately, White House briefings and presidential news conferences have become increasingly scripted, ritualized, and lacking in substance.¹⁶ Yet these and other evasive tactics do not absolve the members of the Fourth Estate from doing their jobs, just as entertainment distractions, a dismal economy, and threats of terrorist attack should not keep us from playing our part, as citizens and as public officials.

We must remember that despite the incredible powers the President has claimed, the U.S. Supreme Court has the power to overrule the Chief Executive. And Congress, if it exercises constitutional oversight, can limit both presidential actions and Supreme Court decisions. However, in the end, it is still the people who hold the ultimate power, and with it the concomitant responsibility, to maintain our freedoms. We can afford to remain silent no longer.

¹⁶ Jack Shafer, *Screw You, Mr. President: Helen Thomas used to ask questions in press briefings. Now she makes speeches*, Slate.com, March 12, 2003, <http://www.slate.com/id/2080034/>.