

**STATEMENT OF
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TO THE CONSTITUTION SUBCOMMITTEE
OF THE U.S. SENATE COMMITTEE ON THE JUDICIARY
ON RESTORING THE RULE OF LAW**

Senator Feingold and Members of the Subcommittee:

I am pleased to offer this statement in support of the subcommittee's inquiry into necessary steps to restore the rule of law in our federal government. From 1978 to 1981, I was a career attorney in the Justice Department's Office of Legal Counsel, serving under Assistant Attorney Generals John Harmon and Theodore B. Olson. For several months during this period, I was also detailed to serve as an Assistant General Counsel in the Office of Management and Budget. Since 1981, I have been a law teacher and scholar, specializing in constitutional and administrative law, with a special focus on separation of powers law. I am the lead author of what is still the only law school coursebook on separation of powers law, and have written roughly forty scholarly articles and book chapters on such topics as signing statements, presidential war powers, executive privilege, judicial independence, independent prosecutors, and legislative-executive relations. Your topic is one I address, therefore, as a concerned citizen, a separation of powers scholar, and a former government lawyer. I can hardly imagine a topic more important to the future of our governance.

Focusing on the Rule of Law

The rule of law in the United States stands compromised today by an accelerating trend since 1981 toward a philosophy of government I have called "presidentialism." The most aggressive presidentialists argue that the Constitution guarantees the President expansive powers in foreign and military affairs, in the exercise of which he is legally accountable to no one. They further argue that he has complete and unfettered authority to direct other members of the executive branch in how they exercise any and all policy making discretion that is vested in them through statutes enacted by Congress. This is a gross misreading of the Constitution. Unfortunately, however, because of the too frequent deference of both Congress and the judiciary to presidential initiative, recent chief executives have been able to behave as if they truly were invested with the constitutional powers that presidentialists advocate. This trend has reached unprecedented heights during the current Administration, which appears to believe in a version of the rule of law that requires nothing but the occasional rhetorical invocation of legal authority, often without plausibility.

Part of what advocates of this view of the presidency ignore is that, in operation, the ethos of executive entitlement is utterly corrosive of the rule of law. The ideological prism of presidentialism bends the light of the law so that nothing is seen other than the prerogatives of the sitting chief executive. It too frequently threatens to corrupt the processes of government lawyering that stand as the only means by which the law is actually brought to bear on government decision making. Most executive branch decisions are too low in visibility or too

diffuse in impact to elicit judicial review or congressional oversight as ways of monitoring legal compliance; if federal lawyers substitute extreme advocacy for careful, balanced advice, there will frequently be no one else effectively situated to do the job of assuring diligence in legal compliance. As we have seen in the Bush Administration's treatment of such issues as torture, warrantless surveillance, and the legal status of enemy combatants, government lawyers imbued with the ideology of presidentialism too easily abandon their professional obligations as advisers and too readily become ethically blinkered advocates for unchecked executive power. The rule of law depends, in part, on government lawyers' understanding that their "client" is the American people, and not the ephemeral roster of incumbent federal officer holders.

At its core, the rule of law is about accountability. It means that those in power cannot do what they want just because they want to do it, or because they have force on their side. The rule of law means they can do only what the law permits. But this simple idea must take account of two common facts. One is that public officials, even if conscientiously attentive to law, will often find the written law vague. The second fact is that, with regard to a great deal – perhaps most – government activity, the chances are remote that law can and will be enforced against nonconforming behavior. We thus need government officials to bear allegiance to a concept of the rule of law that applies even when law is uncertain and the prospects for sanction are remote.

Fifty years ago, Justice Frankfurter explained this idea beautifully:

[L]aw is not a code of fettering restraints, a litany of prohibitions and permissions. It is an enveloping and permeating habituation of behavior, reflecting the counsels of reason on the part of those entrusted with power in reconciling the pressures of conflicting interests. Once we conceive "the rule of law" as embracing the whole range of presuppositions on which government is conducted . . . , the relevant question is not, has it been achieved, but, is it conscientiously and systematically pursued.¹

In short, for the rule of law to have force, government officials and the lawyers who advise them must always embrace their accountability to others. They must be guided by reasons they would be willing to declare publicly, and these reasons must be consistent with the law they are charged with implementing. They must be mindful not only of what advances the political agenda of one party or another, but also of the needs and interests of the public more generally and of all the critical institutions of government. For this to happen, the written documents of law have to be buttressed by a set of norms, conventional expectations, and routine behaviors that lead officials to behave as if they truly are accountable to the public interest and to legitimate sources of legal and political authority at all times, even when the written rules are ambiguous and even when they could probably get away with merely self-serving behavior.

Creating a Rule of Law Culture in Government

¹ Felix Frankfurter, *Address: John Marshall and the Judicial Function*, in GOVERNMENT UNDER LAW 28 (A. Sutherland ed. 1956).

If we see that the rule of law depends on habits of behavior, then it is obvious that what must buttress the rule of law is not just more law, but the creation of an institutional context in which rule of law behavior is more likely to occur. We must throw out presidentialism as an ethos of governance and replace it with a “rule of law culture” in government. Two interrelated factors are absolutely central to this goal. One is openness. The other is dialogue – assurance that critical policy making will follow only from vigorous and open debate within government as to what the public interest requires. To the extent government officials operate openly and with conspicuous exposure to the challenge of competing points of view, the prospects of adherence to law are maximized. If government officials know they can operate in secret, if they know that they can pursue their agendas without taking into account the views of those with whom they disagree, what will follow, ultimately, is lawlessness.

With these premises in mind, I offer the following suggestions for rebuilding the rule of law in the national government of the United States.

First, we must return to an ethos of open government by reversing virtually every information policy adopted unilaterally by the George W. Bush Administration. For example, Congress enacted an Open Government Act of 2007,¹ intended to enhance enforcement of the Freedom of Information Act, or FOIA. To increase public access to government records, the Act created an office of FOIA Ombudsman in the National Archives and Records Administration, an agency widely respected for its professionalism and political neutrality. President Bush relocated the office to the Justice Department, the agency charged with defending government decisions to withhold records from disclosure. The office should be moved back to NARA.

In a similar vein, the Bush Justice Department promised federal agencies that the Department would defend decisions not to disclose records upon public request whenever such decisions to keep records secret could be sustained by formal reliance on a statutory exemption from the rule of mandatory disclosure under FOIA. This reversed a policy of the Clinton Justice Department to defend agency failures to disclose only if they were defensible both on a legal basis and on a policy basis, that is, only if the agency not only had technical legal authority for withholding a document, but also a plausible explanation why making the document public would harm the public interest. A new Administration should go back to the Clinton policy.

A new Administration should revoke Bush’s Executive Order 13,233, which complicated the release of records from prior presidential administrations. The order should be rewritten to simplify the release of historical records under the Presidential Records Act. A new order should eliminate the prerogative for anyone other than a president or former president to claim executive privilege, and renounce the notion of vice-presidential privilege.

A comprehensive analysis should be undertaken of all government information withdrawn from the World Wide Web in the wake of September 11, and any information whose public disclosure does not pose a genuine risk to national security should be restored to easy public access. In a similar vein, the executive order on the classification of national security documents should be redrafted to restore the Clinton Administration’s insistence that equal priority be attached to the

¹ Pub. L. No. 110-175, 121 Stat. 2524 (2007).

declassification of documents whose confidentiality is unnecessary to American security. Vice presidential records should again be subject to mandatory declassification review by the National Archives and Records Administration.

The new Administration should catalogue and reexamine all agency practices of withholding unclassified information based upon categories of "sensitivity" not authorized by law. Such systems should be eliminated, unless they are fully in compliance with the Freedom of Information Act.

Both Congress and the President should emphatically renounce the constitutional theory of the "unitary executive." The President should repudiate the use of "signing statements" to reinterpret congressionally enacted statutes, except in those rare cases where statutory provisions may violate clearly established principles of constitutional law. Congress should consider enacting a statute providing that signing statements are not to be treated as legal authority.

The use of executive privilege should be curtailed. The President should pledge good faith negotiation with Congress regarding requests for executive branch information, to insure that Congress is able to conduct its legislative and oversight responsibilities effectively. The President should order the Justice Department to limit the invocation of the state secrets privilege to defeat judicial review only when actually necessary to protect the foreign policy or national security interests of the United States in specific cases. The President should support the independence and authority of agency inspectors general, and order agencies to cooperate fully with the investigative authority of the Government Accountability Office. Finally, the President should broaden consultation with Congress in the making of national policy within areas of shared constitutional responsibility, and candidly seek congressional authorization for any increased discretionary authority the executive branch may need to respond to national needs more effectively.

Congress, of course, will also be a critical actor in restoring the rule of law – whether in deploying its own independent powers, drafting legislation, or reestablishing informal norms of communication with the executive branch. For example, Congress needs to rethink its role in the appointments process. The Senate should take seriously its role not merely to consent, but to advise – and should give weight not only to the character and records of achievement of presidential nominees, but also to their commitment to implementing the law within their jurisdiction and their determination to operate in an open and accountable manner. With regard to judicial nominations, the members of the Senate Judiciary Committee should commit themselves to a merit-centered focus on lower court appointees, and should support presidential nominations that emanate from a process of independent review.

With regard to Supreme Court nominees, the Senate Judiciary Committee needs to rethink its hearing process from the bottom up. Members should appropriately concern themselves with both the merit of individual appointees and the representativeness of the Court as a whole. Unfortunately, the quality of committee questioning in recent hearings has too often been ineffective, with members either trying fruitlessly to “nail” a nominee on a controversial question of constitutional interpretation or to exact pledges of fidelity to law that are either so general as to be meaningless or simply oblivious to how the Justices’ judicial philosophies actually animate

their work. In this context, the Committee could usefully provide an extended period for questioning of the candidates led by litigators, some of whom might even be hired for the specific hearing. People who practice or teach constitutional law for a living would be helpful in framing questions that would be more revealing and harder to evade, and to follow up meaningfully when answers appear incomplete or ambiguous. The Committee should also remain committed to seeking external input through the American Bar Association Standing Committee on the Federal Judiciary, which has long provided a useful independent assessment of judicial nominees' qualifications.

In the wake of controversial dismissals of U.S. attorneys in politically questionable circumstances, Congress should rethink whether U.S. attorneys should be dischargeable by presidents at will. The public interest in nonpartisan law enforcement might be served better by U.S. attorneys appointed for four-year terms and removable only for good cause, such as malfeasance or an inability to discharge the responsibilities of office. Keeping terms relatively short would assure Presidents of a law enforcement apparatus philosophically compatible with the Justice Department's political leadership, but limiting the removal power to instances of "good cause" would protect the independence of prosecutorial decision making in sensitive cases.

Congress should also think systematically about its oversight powers. Although hearings to ferret out specific wrongdoing may occasionally be called for, priority should ordinarily be determined according to the potential of various inquiries to shed light on the need for new legislation. At this point, the need is urgent for a set of retrospective hearings on the separation of powers practices of the Bush Administration. The point should not be to assign blame for particular mistakes, but to clarify the nature of the controversies that persist between the branches and to determine specific areas where legislative reforms need to occur. As I have mentioned, Congress should consider whether a statute expressly limiting the legal effect of presidential signing statements is appropriate. A statutory process for the orderly resolution of interbranch executive privilege disputes might be in order. The State Secrets Protection Act proposed in 2008² to provide an orderly process for assessing in civil litigation whether invocations of the state secrets privilege are justified should be enacted. Congress should reconsider whether the trend towards deepening the levels of political agency management should be reconsidered, and the role of and protections for the career civil service instead be intensified.

In the area of military policy making, the War Powers Resolution, in its current form, has simply proven inadequate to discipline executive branch unilateralism. A "Use of Force Act," proposed in 1995 by Senator Joseph Biden of Delaware, remains the most promising reform proposal so far advanced.³ The Biden proposal would replace the War Powers Resolution with a more detailed and potentially more restrictive regulation of presidential power and, perhaps most significantly, institutionalize ongoing consultation between the President and key cabinet members with a statutorily designated bipartisan congressional leadership group to focus on

² S. 2533, 110th Cong., 2d Sess. (2008).

³ S. 564, 104th Cong., 1st Sess. (1995).

foreign and national security policy. It would represent a significant step forward in extending the rule of law to issues of military and foreign affairs.

To its credit, the Bush Administration did make one conspicuous attempt at promoting government openness – its so-called “electronic rulemaking” initiative, the public face of which is a web site called Regulation.Gov. The Administrative Procedure Act, of course, requires federal agencies to create opportunities for public comment before implementing most significant administrative rules.⁴ The process, though, can be notably arcane for Americans who are unaware of how rules are made or what rules are being considered at what time and by which agencies. The vision behind Regulations.Gov is a one-stop portal that would enable members of the public to identify quickly the rules on any subject that are being proposed and deliberated by any agency within government, and to take advantage of a simple online process for providing public input.

Unfortunately, the initiative has not reached its potential because Congress never provided it with sufficient appropriations or a sound governance structure. Instead, design of this potentially powerful tool for pluralistic dialogue has become enmeshed in a seemingly endless process of push-and-pull among various agencies, typically resisting OMB efforts to force uniformity of practice on agencies with very different regulatory missions and cultures. If Congress wants to empower Americans through the Internet to participate more meaningfully in a pluralistic policy dialogue within the executive branch, it will have to provide the project a clear legislative mandate and adequate financial and personnel resources. Increasing the openness of federal regulatory processes should help to foster greater agency accountability to law.

Congress should go even further to make the executive branch transparent to the public. Presidents have long claimed that “predecisional documents,” memoranda that reveal the substance of policy-oriented discussions within government that precede public administrative initiatives such as the promulgation of a regulation, are presumptively immune from mandatory disclosure whether in court, Congress, or any other forum. As written, the federal Freedom of Information Act currently permits the executive branch to implement that position with regard to everyday public requests for information, although the need for such secrecy is questionable.⁵ Congress should reconsider the range of decision making documents that the executive branch is entitled to withhold from the public under the Freedom of Information Act. A strong presumption against secrecy should prevail whenever release of a document has no implications for military affairs, foreign policy, or criminal law enforcement.

Of course, empowering citizen input into representative government through enhanced transparency is not a strategy that ought be limited to the executive branch. Sunshine in the legislative branch would also enhance the government’s “rule of law” culture. Congressional practices that disguise the responsibility of individual legislators, such as the process in the Senate of secret “holds” on nominations, should be categorically abolished. Congress also needs to attend to the imperative of opening up its own deliberations. A Library of Congress web site

⁴ 5 U.S.C. § 553.

⁵ 5 U.S.C. § 552(b)(5).

currently provides free and comprehensive access to information about pending legislation, committee proceedings (including full text reports), and the Congressional Record.⁶ But users need to know a lot about Congress in advance in order to take real advantage of the web site. And, of equal importance, the site fails to offer “one-stop shopping” for citizens interested in the legislative process. It offers nothing, for example, about Members’ position statements and voting records.

Of the three branches, the judiciary has the least capacity to participate in an aggressive and systematic way in a recalibration of checks and balances and a taming of presidentialism. That is because courts cannot determine for themselves which questions and controversies will be brought before them for resolution, and uniformity of judicial response can be achieved only through decisions of the United States Supreme Court, which in recent years has decided fewer than one hundred cases per term.

Nonetheless, it is relatively easy to spot one area of public law doctrine where the evolution of a new approach (or resuscitation of an old one) would help advance the cause of pluralism and keep checks and balances healthy. The Supreme Court should affirm, on the earliest relevant occasion, that presidential signing statements have no jurisprudential weight in determining the meaning of statutes enacted by Congress. Congress, not the President, is the legislative branch, and the Court should simply reject at its earliest opportunity the proposition that the scope of a law’s impact may be authoritatively altered through presidential interpretation.

Nearly all the reforms I have thus far recommended would operate fairly directly either to intensify interbranch accountability directly or to animate the rule of law governance by increasing openness and elevating the importance of pluralistic democratic deliberation. To endure, however, and to be maximally effective, these changes should be reinforced by other structural reforms in our systems of politics and political communication that will promote shifting coalitions and vigorous debate and discussion, while precluding a hardening of factions.

I suspect that cataloguing such reforms would go beyond the immediate concerns of your subcommittee. But I deeply believe that there is an intimate relationship between the vitality of the rule of law and the health of our democratic system. James Madison and his colleagues believed, in 1787, that provisions on parchment for the disciplining of government could not succeed without a citizenry dedicated to the ideals of what they called “republicanism.” The restoration of the rule of law should reflect a national conviction that a “government of laws, and not of men” remains an effective operating philosophy for American democracy in the twenty-first century – a philosophy that public vigilance and participation are essential to sustaining.

Thank you for the opportunity to share these views with you.⁷

⁶ The web site, called Thomas (for President Jefferson), appears at <http://thomas.loc.gov>.

⁷ Portions of this statement are excerpted from the forthcoming book, PETER M. SHANE, *MADISON’S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY* (University of Chicago Press, 2009).