Testimony of Jonathan F. Cohn[1] Before the House Judiciary Committee, Subcommittee on Crime, Terrorism, and Homeland Security

H.R. 743: Executive Accountability Act of 2009

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Mr. Chairman, Ranking Member Gohmert, and other members of the subcommittee, thank you for inviting me to offer my views on H.R. 743, the Executive Accountability Act.

Like other members of today's panel, I believe that communications between the executive branch and Congress should be truthful and candid. And I concur that Congress's need for complete and accurate information is particularly important when the country makes the grave decision to send its troops into harm's way. I also recognize the fundamental distinction between lying and mere nondisclosure that H.R. 743 appears to embrace. If an executive branch official is asked for classified information outside the established channels for sharing it with congressional committees, he should simply decline to provide it. He should not affirmatively mislead Congress as it wields its constitutional responsibilities.

That said, I am unconvinced that H.R. 743 is an appropriate way to mandate truthfulness and improve communications between the political branches. As an initial matter, the bill's effect would be constitutionally limited in three significant ways. *First*, the bill could not apply retroactively, so it could not be used to prosecute anyone in any previous administration – for the Iraq war or otherwise. *Second*, H.R. 743 likely would not be construed to cover statements that executive officials make to the press or the public, rather than to Congress, even if those statements indirectly affected congressional decisionmaking. And *third*, the bill could not be used to prosecute officials who merely decline to disclose classified information.

Further, even when permitted by the Constitution, using criminal prosecutions to enforce truth-telling between the political branches outside of a formal investigation or review may have unintended policy consequences. Even the most honest public servants must worry about damage to their reputations and livelihoods resulting from a criminal investigation. Such concerns are especially

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likely to arise when laws are ambiguous and lend themselves to subjective determinations of knowledge or intent in a politically charged environment.

At least two negative repercussions could flow from H.R. 743's expansion of criminal liability. *First*, the bill could distort the flow of information between the executive and legislative branches. It might discourage the White House from speaking to Congress as frequently as it otherwise would, and perhaps from seeking congressional authorization for the use of force at all. And when the President *does* seek authorization, H.R. 743 could lead officials to overdisclose sensitive information in order to avoid an investigation into whether the officials "conceal[ed]" a "material fact." *Second*, the bill practically invites prosecutors and courts to second-guess an ex-President's foreign policy judgments that have proved ill-fated or unpopular. Revisiting an administration's message and mistakes in the courtroom, rather than at the ballot box, would harm this country's healthy tradition of looking forward for political solutions, rather than backward for political retribution.

Constitutional Limitations on H.R. 743

H.R. 743 is not constitutionally objectionable on its face. It re-extends the prohibitions of 18 U.S.C. § 1001, also known as the False Statements Act, to communications between the executive branch and Congress regarding authorization for the use of force. For 40 years, a previous version of this law was construed to cover all statements made to the legislative branch on any topic by any party, including executive branch officials. *See United States v. Hubbard*, 514 U.S. 695 (1995), *United States v. Bramblett*, 348 U.S. 503 (1955). Federal courts upheld its validity in prosecutions stemming from the Iran-Contra scandal. *See United States v. Poindexter*, 951 F.2d 369 (D.C. Cir. 1991), *United States v. North*, 708 F. Supp. 380 (D.D.C. 1988). Nevertheless, H.R. 743 sits at the nexus of criminal law, separation-of-powers principles, and the communication of political ideas – a place where constitutional considerations loom large. Therefore, even though this legislation is not facially unconstitutional, courts would likely limit its application in three ways.

1. Retroactive Effect – Since 1798, the Supreme Court has interpreted the Constitution's Ex Post Facto Clause to prevent Congress from criminalizing conduct after the fact. *See Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798). It cannot punish activity that was lawful at the time, increase the punishment for activity that was already illegal, or make it easier for prosecutors to prove a previously established crime. *See Rogers v. Tennessee*, 532 U.S. 451, 456 (2001). Neither this bill nor any other could authorize the prosecution of executive branch officials for statements regarding authorization of the use of force in Iraq or Afghanistan during the last Administration or, for that matter, in Bosnia during the Clinton Administration. If enacted, H.R. 743 would only cover future

communications made to Congress by President Obama, subsequent presidents, and their staffs.

2. Communications to the Press and Public – Courts likely will read H.R. 743 to cover only direct communications by executive branch officials to Congress. As construed, the bill would not reach communications with the American people, the press, or foreign governments, even though such statements potentially could have the indirect effect of influencing Congress's decision to authorize the use of force. The False Statements Act, on which H.R. 743 is modeled, extended only to statements made to the government. *See Bramblett*, 348 U.S. 503. This was in keeping with the history of open and direct communication between the White House and the American people, dating back at least to George Washington's Farewell Address. No court is likely to interrupt this unbroken practice, which has grown so essential to our constitutional structure, by allowing the threat of criminal investigation and prosecution to hang over the executive branch when it speaks to the public or foreign officials. *Cf. Youngstown Steel Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring).

And this presidential "power to persuade" is not merely a historical gloss. Richard E. Neustadt, *Presidential Power and the Modern Presidents* 10–11, 30–32 (1990). The Constitution itself assigns the President inherent or implied authority to address his national constituency. *Cf. INS v. Chadha*, 462 U.S. 919, 948 (1983), *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982). Given the President's explicit constitutional authority to address the Congress, U.S. Const., Art. II, § 2, cl. 1 (Recommendations Clause), members of his administration, *id.* (Opinion in Writing Clause), and foreign governments, *id.*, Art. II, § 3 (Receive Ambassadors Clause), there surely exists implied authority to speak directly to the people. Congress cannot limit this authority through the threat of future prosecution without raising serious constitutional questions. *See* Peter W. Morgan, *The Undefined Crime of Lying to Congress: Ethics Reform and the Rule of Law*, 86 Nw. U. L. Rev. 177, 224–26 (1992) (noting separation of powers concerns inherent in criminalization of executive officials' speech); *cf.* William Van Alstyne, *Symposium, Foreign Affairs and the Constitution: The Roles of Congress, the President, and the Courts*, 43 U. Miami L. Rev. 17, 56–57 (1988) (conceding, in the course of defending congressional prerogative in foreign affairs, that "the Constitution, by its design, accepts" the "definite risk" that the President could mislead Congress).

The courts are likely to construe H.R. 743 to avoid these constitutional issues. It is well-established that, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the [Supreme] Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Const. Trades Council*, 485 U.S. 568, 575 (1988). This is

especially true in the criminal context, where "[t]he rule of lenity requires ambiguous . . . laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 128 S.Ct. 2020, 2025 (2008). As drafted, the bill could certainly be read as applying only to direct communications by executive branch officials to Congress, especially in light of the express requirement that the communications be "for the purpose of influencing a member of the Congress." Nothing in the bill suggests that this interpretation would be "plainly contrary to the intent of Congress," and thus courts would presumably adopt it, consistent with *DeBartolo* and *Santos*.

3. Concealment of Classified Information – H.R. 743's prohibition on "conceal[ing] . . . a material fact" from Congress likely would be found unconstitutional as applied to the nondisclosure of classified information by executive branch officials. The Supreme Court has recognized that the President has authority, as Commander in Chief, "to classify and control access to information bearing on national security" that "flows primarily from [the] constitutional investment of power in the President and exists quite apart from any explicit congressional grant." *Navy v. Egan*, 484 U.S. 518, 527–29 (1988); *see also Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (recognizing executive authority to act on secret information free of judicial intervention). To be sure, Congress's own constitutional authority in military and foreign affairs creates a corresponding need for classified information to inform the legislative process. But established practices, negotiated between the political branches, exist for communicating such data in a limited and secure way – for instance, through the Intelligence Committees – and the refusal of an executive branch official to reveal classified information outside those channels would accord with the President's prerogatives recognized in *Egan*.

As mentioned above, an official's refusal to answer a question that calls for classified information is preferable to a misleading answer. And if a nonanswer is necessary to safeguard classified data, a court is likely to excuse such nondisclosure on constitutional grounds, notwithstanding the prohibition on "conceal[ment]" in H.R. 743. This construction of H.R. 743 is made even more likely by the criminal law's rule of lenity and the canon of constitutional avoidance.

Policy Repercussions of Increasing the Threat of Prosecuting Executive Branch Officials

Despite the constitutional limitations explained above, H.R. 743 would implicate the majority of communications between the executive and legislative branches regarding the authorization of the use of force. The question thus becomes whether the bill, as so construed, should be enacted. For at least two reasons, it should not. Although I share the desire to promote truth-telling in Washington, H.R. 743 is more likely to impede interbranch cooperation than to facilitate it.

1. Chilling Effect on Interbranch Communications and Disincentive to Seek Authorization – H.R. 743 criminalizes only objectively false communications that an official makes knowingly and willfully. These limitations do much to protect a public servant, acting in good faith, from prosecution for innocent statements that later prove false. But they do not eliminate the fear of a criminal investigation or prosecution that could be brought by a future administration – a fear that can be expected to color communications between executive officials and Congress regarding sensitive and uncertain matters of national security.

If data turns out to be false, the official would have to defend against a number of subjective inquiries in the course of an investigation or prosecution, including: Did the official know the statement was false? Was the statement made to "influenc[e] a member of Congress to authorize the use of force"? Was it "material" to Congress's decision? What other motives did the official have? Moreover, it often may be unclear who actually "made" a false statement on behalf of the administration. Is a cabinet secretary absolved of H.R. 743 liability by sending a staffer to testify in his place? Does the willfulness of the secretary or of the staffer matter? If multiple officials contributed to a public announcement, as generally will be the case, prosecutors would enjoy enormous discretion regarding whom to charge.

In the context of a rapidly developing foreign crisis and incomplete information, these questions could be very difficult to answer; even more so as time passes. And if information comes to light suggesting that the official should have known that his statement was false, it may be difficult for him to disprove the allegations and inferences against him. This is especially true if the prior administration's position has become unpopular and the new administration is more interested in attacking its political enemies than addressing the country's needs. Even if the investigation is eventually dropped or the official is ultimately exonerated, he will have had to endure the expense and disruption of defending against the public accusation.

The fear of potential criminal prosecution will exact its toll on executive branch officials. Indeed, the Supreme Court has recognized that the threat of mere monetary liability deters an official's "willingness to execute his office with the decisiveness and the judgment required by the public good," *Scheuer v. Rhodes*, 416 U.S. 232, 239-40 (1974), and discourages "able citizens from acceptance of public office," *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). These concerns are all the more significant when the penalty is not just money damages but ten years in federal prison.

The results are not ones that Congress should encourage. For instance, H.R. 743 would create an incentive for the White House not to seek authorization for the use of force in the first place. The degree to which congressional approval is a

necessary condition for war-making is a controversial and unresolved debate in Washington, and there is no need to rehash it today. Suffice it to say, to the extent that executive branch officials are cognizant of their criminal exposure in the course of lobbying Congress to approve the use of force, they will be correspondingly less likely – or at least less eager – to bring Congress on board as a full partner in the decision to deploy troops.

Moreover, when the administration *does* communicate with Congress, staffers fearful of punishment for concealing material information may convey too much information. Aside from the obvious risk to confidentiality when information is disseminated broadly, Congress's job could grow more difficult and inefficient as it is forced to separate the data that the executive believes is actually material from that which is immaterial but offered only to avoid the risk of prosecution.

Finally, Congress already has the means to protect itself and to gather truthful information before authorizing the use of force. If Congress wants to ensure that executive branch officials do not mislead anyone in the legislative branch, Congress can take testimony under oath or conduct an "investigation or review," as contemplated by § 1001(c)(2). Any misstatements in those contexts could give rise to criminal punishment under the perjury statute, 18 U.S.C. § 1621, the False Statements Act, id. § 1001, and possibly the obstruction of justice statute, id. § 1505. There is thus little or no need to extend criminal liability to the many informal interbranch communications that occur on a daily basis in real time – an extension which may well inhibit rather than improve the flow of information from the administration to Congress.

Congress recognized this very risk when it passed the current version of the False Statements Act in 1996. This Committee observed that a "broad application" of 18 U.S.C. § 1001 would create an "intimidating atmosphere" and "undermine the fact-gathering process that is so indispensable to the legislative process." For this reason, the Committee inserted into the statute the "legislative function exception" that protects congressional advocacy, outside the context of an official investigation, from false statement liability today. *See* H.R. Rep. 104-680, at 3–5 (1996). And the House Report explicitly noted that the perjury, obstruction, and contempt of Congress statutes "continue[d] to provide possible means of punishing those who would willfully mislead Congress." *Id.* Accordingly, Congress stopped short of enacting a statute that would thwart interbranch communications like H.R. 743. With respect, Congress should not now disrupt the balance that it previously struck.

2. <u>Invitation to Look to the Past and the Courtroom, Not Ahead to the Ballot Box</u> – My final comment on H.R. 743 relates to its overarching focus rather than to any single provision. Unlike many nations, the United States has been blessed with a propensity to look forward rather than backward as a polity. From the first

peaceful transition of power to the Jeffersonian Democrats by the Federalists, to the efforts to stitch together a nation torn by Civil War, to the decision to pardon a disgraced former president, this country has been well-served by moving forward rather than dwelling on past grievances. This is especially important with respect to foreign policy, given the need for the leaders of all political parties to speak with one voice abroad.

If a President or his administration is perceived to have misled Congress or the public into war, his opponents are very capable of extracting a political price at the ballot box. For two reasons, this approach is far superior to a resort to the courts. First, elections distribute responsibility to the winners rather than retribution to the vanquished. Rather than focusing the nation's energy on the political wounds of the past, its attention shifts to overcoming substantive obstacles as we move forward. Second, courts are ill-suited to resolve controversies regarding American foreign policy. *See, e.g.*, *Chicago & Southern Air Lines*, 333 U.S. at 111. H.R. 743 would invite a judge and jury, often lacking clear and reviewable standards, to decide what facts were objectively false, what facts were known to be false, and what facts were material to Congress's decision. This may be the preferred course in the banana republics of the past, but it should not be the United States's path in the 21st century.

Thank you, Mr. Chairman and Ranking Member Gohmert. Although I do not support the changes envisioned by H.R. 743, I share the desire to improve honesty in government, and I look forward to answering any questions you may have.