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Appearing before the

**Crime Subcommittee of the
House Committee on the Judiciary**

“The Executive Accountability Act of 2009”

July 27, 2009

Mr. Chairman, thank you for holding this hearing on “The Executive Accountability Act of 2009,” H.R. 743. The bill would apply criminal penalties to Presidents and executive officials who knowingly and willfully mislead Congress or the people of the United States for the purpose of gaining support for the use of U.S. armed forces.

Although H.R. 743 was introduced this year, it could have been introduced in 1789 and the framers would have been pleased with it. They knew the dangers of executive wars. They understood that executive military initiatives threaten the legislative powers of war and spending and undermine popular government. They concluded from a careful reading of history that executives promoted wars ruinous to their country, both in lives lost and treasures squandered. The framers believed that only one branch of the U.S. government — Congress — has authority to take the country from a state of peace to a state of war against another nation. In voting on a matter that serious, Members of Congress must have confidence in the information provided by Presidents and executive officials.

Checking Executive Wars

The views of the framers about foreign wars are reflected in the writings of John Jay, whose entire career up to 1787 had been in foreign affairs. If anyone might have been sympathetic to executive powers in national security, it would have been Jay. Often we recall what he wrote in Federalist No. 64, where he spoke about the Senate and the treaty power. He said: “It seldom happens in the negotiation of treaties, of whatever nature, but that perfect *secrecy* and immediate *dispatch* are sometimes requisite. There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery.”

Whatever discretion Jay would have entrusted to the President and the Senate in the negotiation of treaties, he was entirely opposed to executive-initiated wars. A warning about executive wars appears in Jay’s Federalist No. 4. He said it “is too true, however disgraceful it may be to human nature, that nations in general will make war whenever they have a prospect of getting any thing by it; nay, absolute monarchs will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans.” Those motivations and others, “which affect only the mind of the sovereign, often lead him to engage in wars not sanctified by justice or the voice and interests of his people.”

What Jay feared has come to pass. At least since the Mexican War of 1846, Presidents have a record of using misleading statements to justify wars (Appendix A.). The framers understood that government officials can deceive the nation about the need for war. In Federalist No. 3, Jay referred to the causes of war, “whether *real* or *pretended*.” In considering the use of military force, Members of Congress must receive

from the President and executive officials reliable and truthful information. Legislative deliberation on such a grave matter as war must be informed. There can be no justification for the executive branch to knowingly and willfully mislead Congress and the public about the need for war. Deception and false statements in *time of war* may be necessary, but H.R. 743 focuses on wars of choice in a democratic society.

Starting-Points

How should we begin to analyze H.R. 743? All of us have an initial orientation. Some values are foremost in our mind. I am an Institutionalists. I believe in strong political institutions capable of vigorously exercising checks and balances. I believe that individual rights and liberties and our system of democracy are protected by those checks. Ever since I became part of the staff of Congress in 1970 I have been involved in efforts to avoid the concentration of power — especially unchecked power — in the President and the Supreme Court. That is how I began to think about this bill. Of course there are other important values that deserve protection. Some helpful guidance comes from congressional action in 1995-96 on the False Statements Act.

Weighing Competing Values

H.R. 743 adopts language from the False Statements Act, Section 1001 of Title 18. The purpose of the bill and the statute is to identify the types of conduct that would merit prosecution of individuals who falsify, conceal, or make other misrepresentations. On May 15, 1995, the Supreme Court in *Hubbard v. United States* ruled that Section 1001 covered only false statements made to the executive branch, not to the judiciary or, by implication, to Congress.

Hubbard prompted Congress to rewrite Section 1001. A value widely (if not unanimously) shared was that it was unacceptable to have Section 1001 apply only to the executive branch but not to Congress. As Rep. Porter Goss noted: “So, in effect, we have a law on the books that says individuals cannot lie to the executive branch, but it is OK to make false statements to the legislative branch of the Government.” 142 Cong. Rec. 17232 (1996). Senator Arlen Specter urged that Section 1001 be revised “to safeguard the constitutional legislative and oversight roles of the Congress. . . . We are of equal standing with the executive and the dignitary injury to the standing of Congress done by *Hubbard* must be overturned promptly.” *Id.* at 19411-12.

During the House hearing on the bill to reverse *Hubbard*, Rep. William J. Martini testified that when Congress conducts oversight and legislates, “[w]e generally operate, and rightfully so, on the assumption that the testimony we receive from various Government officials is accurate and truthful. Many would suggest that it’s the enforcement mechanism provided by section 1001 of title 18 that ultimately protects the legislative branch from false statements.” “U.S. v. Hubbard: Prosecuting False Statements to Congress,” hearing before the Subcommittee on Crime of the House Committee on the Judiciary, 104th Cong., 1st Sess. 4 (1995). Similarly, Senator Specter said that Congress “relies on accurate information to legislate, to oversee, to direct public

policy,” and unless the information provided to Congress “is accurate, we are unable to fulfill our constitutional functions.” “False Statements After the Hubbard v. United States Decision,” hearing before the Senate Committee on the Judiciary, 104th Cong., 2d Sess. 2 (1996). Senator Specter added that rewriting Section 1001 “will restore to the law of the land the principle that one cannot knowingly and willfully lie about a material matter to Congress.” *Id.*

The following year, when the House amended Section 1001, the floor manager of the bill discussed a range of values that deserve protection. At the hearing held by the Crime Subcommittee of House Judiciary,

all of the witnesses agreed that law enforcement must have the ability to punish those who willfully mislead the Government. But they further agreed that such an ability must be weighed against our commitment to free speech, a balanced adversarial system of justice, and a genuine separation of power between the three branches of Government. The witnesses also counseled that we proceed with care. Certain legislative fixes may be unintentionally problematic over the long run. 142 Cong. Rec. 17228 (1996) (remarks by Rep. Bill McCollum, chairman of the Crime Subcommittee).

To safeguard those values, the Subcommittee’s bill included certain protections for the judicial and legislative branches. The bill did not apply to formal courtroom proceedings and to statements by counsel in court as part of those proceedings. As Rep. McCollum explained, a failure to establish this exception for the judicial function “would chill vigorous advocacy, and, as such, would have a substantial detrimental effect on the adversarial process.” *Id.*¹

The second exception covered certain legislative proceedings. The House Judiciary Committee wanted to avoid “creating an atmosphere which might so discourage the submission of information to Congress that it undermines the fact-gathering process which is indispensable to the legislative process.” H. Rept. No. 104-680, 104th Cong., 2d

¹ Initially, the bill provided penalties for individuals who lied or issued false statements “in the context of the administrative duties of the judiciary branch, not its litigation proceedings.” 142 Cong. Rec. 17230 (remarks by Rep. William J. Martini). In the course of the House hearing in 1995, Rep. Martini explained some of these administrative duties that would be subject to prosecution under Section 1001, such as the certification process of someone seeking admission to the bar. Among the requirements are letters of recommendation. He cited instances of individuals who had submitted false documents, had not taken the appropriate test, and practiced law illegally. Section 1001 would have covered those actions and other non-courtroom type of proceedings. “U.S. v. Hubbard: Prosecuting False Statements to Congress,” hearing before the Subcommittee on Crime of the House Committee on the Judiciary, 104th Cong., 1st Sess. 9-10 (1995). As enacted, however, the bill eliminated the language about “administrative duties” and kept the exclusion for judicial proceedings. The Justice Department testified that the distinction between administrative duties and adjudication was not clear and “very difficult to apply in practice.” “False Statements After the Hubbard v. United States Decision,” hearing before the Senate Committee on the Judiciary, 104th Cong., 2d Sess. 12 (1996) (statement by Robert S. Litt, Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice).

Sess. 4 (1996). As enacted, the bill applied only to administrative matters within Congress (such as a claim for payment) and any investigation or review conducted pursuant to the authority of any committee, subcommittee, commission, or office of the Congress, “consistent with applicable rules of the House or Senate.” 110 Stat. 3459 (1996).

In some respects, H.R. 743 raises fewer constitutional questions than the 1996 revision of Section 1001. At the hearing in 1995, a witness expressed concern that Section 1001 might cover accepted lobbying activities and the First Amendment’s guarantee of the right to petition government. “U.S. v. Hubbard: Prosecuting False Statements to Congress,” hearing before the Subcommittee on Crime of the House Committee on the Judiciary, 104th Cong., 1st Sess. 22 (1995) (statement by Timothy F. Flanigan). During House debate, Rep. Martini remarked: “Congress has always been the arena in which the American people have come to express their ideas and beliefs. We must ensure that we do not stifle public debate on the issues before this body.” 142 Cong. Rec. 17230 (1996). H.R. 743 covers only Presidents and executive officials, not private citizens. Of course H.R. 743, unlike Section 1001, has no application to the judicial branch.

A Bill of Attainder?

At what point would a congressional resolution under H.R. 743, directed against the President or an executive official, step over the line and become an unconstitutional bill of attainder — legislative punishment without judicial trial? Lawmakers often single out Presidents and executive officials for criticism, even harsh condemnation. Public officials and private parties who testify before congressional committees may have their integrity attacked, in full view of the television audience. Presidents, executive officials, lawmakers, and judges are possible targets of rebuke. Individuals who enter public office understand that they can be the subject of painful attacks, fair and unfair. What then constitutes a prohibited bill of attainder?

A prominent example of a bill of attainder dates from 1943 when the House of Representatives created a subcommittee to examine claims against federal employees and empowered it to hold hearings, call witnesses, subpoena documents, and report its results. The purpose was to determine whether the employees were unfit to remain in office because of their present or past association with organizations “whose aims or purposes are or have been subversive to the Government of the United States.” 89 Cong. Rec. 734 (1943). Subcommittee chairman John Kerr later acknowledged: “We discovered after organization the fact that there had never been declared judicially or by any legislative body what constituted subversive activities in respect to this Government.” *Id.* at 4582. Even if there were no judicial or legislative definitions of subversive, government employees so designated were at risk of losing not only their job but employment prospects elsewhere.

The subcommittee allowed federal employees accused of subversive activities to appear and defend themselves, but no one could understand the meaning of subversive.

The subcommittee drafted language to deny the use of federal appropriations to pay the salaries of three executive officials: Goodwin B. Watson, William E. Dodd, Jr., and Robert Morss Lovett. Emanuel Celler of the Judiciary Committee objected that Congress was attempting “to discharge certain men in the Government service because of their opinions. It is primarily just that.” *Id.* at 4546. Rep. John Coffee criticized lawmakers who wanted to sit “as judge, as jury, and as prosecutor.” *Id.* at 4548. To Rep. George Outland, the House action “smacks far more of the tactics of the Nazis and the Fascists, against whom we are fighting, than of the spirit of American justice and fair play.” *Id.* at 4547. For Rep. Samuel Hobbs, the subcommittee effort represented “a bill of pains and penalties within the meaning of the constitutional prohibition.” *Id.* at 4597. The subcommittee language passed the House, 318 to 62.

The Senate found the House amendment offensive, voting 69 to zero to delete it. When the language appeared in the conference report, the Senate voted 52 to 17 against it. But eventually the Senate acquiesced and the bill with the subcommittee amendment went to President Franklin D. Roosevelt. Objecting to the House language, he signed the bill because it contained urgently needed funds for the war effort. In his signing statement, he condemned the bill language for punishing federal employees for their “political opinions.” He found the language not only unwise and discriminatory but unconstitutional as a bill of attainder. Louis Fisher, *The Constitution and 9/11: Recurring Threats to America’s Freedoms* 141-42 (2008).

Watson, Dodd, and Lovett filed suit in federal court. The Court of Claims, without reaching the constitutional issue, ruled that they were entitled to recover the salaries they had lost. *Lovett v. United States*, 66 F.Supp. 142, 148 (Ct. Cl. 1945). On appeal, the Supreme Court went directly to the constitutional question, pointing out that the amendment “stigmatized their reputation and seriously impaired their chance to earn a living.” *United States v. Lovett*, 328 U.S. 303, 314 (1946). The Court pointed out that no record indicated how much of the subcommittee records or FBI files the subcommittee relied on consisted of untested allegations taken from anonymous and unreliable informants. *Id.* at 311.

More recent cases have involved the Bill of Attainder Clause. A case from 1965 found that a section of a 1959 statute making it a crime for a Communist Party member to serve as a member of the executive board of a labor organization violated the Clause. *United States v. Brown*, 381 U.S. 437 (1965). Another case from the 1980s raised issues of a bill of attainder, because a statute took aim at a particular person (Dorothy Blitz) who belonged to the Communist Workers Party. The statutory language was found unconstitutional on its face for penalizing mere advocacy of an idea without any evidence of violent action. *Blitz v. Donovan*, 538 F.Supp. 1119, 1125-26 (D.D.C. 1982). It was therefore invalid under the First Amendment without reaching the Bill of Attainder Clause. After Blitz was reinstated in her federal job, the Supreme Court vacated the district court judgment and remanded the case with instructions to dismiss the complaint

as moot. *Donovan v. Blitz*, 459 U.S. 1095 (1983). Following the remand, the district court granted attorney's fees to Blitz.²

I see nothing in H.R. 743 that represents a bill of attainder. Congress has every right to assure that the information it receives from the executive branch about the need for military action is not misleading and deceptive. The bill does not directly punish conduct by legislation. It prohibits conduct and establishes a procedure to refer that conduct to the executive branch and to the judiciary. If Congress passed a resolution and referred it to the Justice Department for possible prosecution, it acts within its constitutional authority. Whatever punishment might result would come from the combined efforts of prosecution by the executive branch and judgment by the courts. H.R. 743 has no relationship to the *Lovett* case.

A *Chadha* Problem?

Does the procedure in H.R. 743, using simple or concurrent resolutions to refer an action to the Attorney General, violate the Supreme Court's decision in *INS v. Chadha* (1983)? I don't think so. In *Chadha*, the Court struck down the "legislative veto" and held that whenever congressional action has the "purpose and effect of altering the legal rights, duties, and relations of persons" outside the legislative branch, Congress must act through both houses in a bill presented to the President, satisfying both bicameralism and the Presentment Clause. 462 U.S. 919, 952 (1983). The Court's decision eliminated one-house and two-house resolutions that controlled executive branch actions.

H.R. 743 does not attempt to control or compel the executive branch. It creates a procedure that authorizes one chamber by simple resolution or both chambers by concurrent resolution to refer a matter to the Attorney General. At that point the executive branch has full discretion to prosecute. The procedures in H.R. 743 are similar to those followed when Congress holds someone in contempt and refers the matter to the Justice Department. A similar procedure applied to the independent counsel statutes. For example, the House Judiciary Committee could hold hearings and prepare a report, to be submitted to the Attorney General, urging that an independent counsel be appointed. But it was up to the Attorney General to go to the special panel of judges to seek and obtain an independent counsel. Katy J. Harriger, *The Special Prosecutor in American Politics* 100-02 (2d ed. 2000). As with H.R. 743, Congress could encourage but not compel and therefore no *Chadha* issue arises.

Proposed Changes in H.R. 743:

A. The Need for Documentation

Because of the potential problem of a bill of attainder, or at least the appearance of unfair congressional damage to individual reputations, it is important under H.R. 743

² *Blitz v. Donovan*, 569 F.Supp. 58 (D.D.C. 1983). For more recent cases that discuss bills of attainder, see *SBC Communications, Inc. v. F.C.C.*, 154 F.3d 226 (5th Cir. 1998), cert. denied, 525 U.S. 1113 (1999); *Foretich v. United States*, 351 F.3d 1198 (D.C. Cir. 2003).

to assure that any decision by Congress to refer an action to the Attorney General for prosecution be accompanied by a legislative document providing detailed factual and analytical justification. The document would identify the statements by the Presidents or executive officials and why they knowingly and willfully misled Congress or the people of the United States about the use of military force. The report would explain why those statements violated one or more of the three paragraphs listed on lines 3 to 9 of page 2 of the bill. Language could be added to H.R. 743 to give specific guidance on these report requirements. The more credible the legislative document, the greater the likelihood of action by the Justice Department. Congress would want to provide individuals subject to H.R. 743 full opportunity to defend themselves: access to legal counsel, an ability to see and challenge assertions against them, and to submit documents and evidence in their defense.

B. Prosecuting the President

The principal means of acting against a President is impeachment. For that reason, I would have the House or Senate resolution contemplated in H.R. 743 be referred not just to the Justice Department but to the Judiciary Committees. Although there would be little expectation that the Justice Department would attempt to prosecute a President, in some situations there may be sufficient evidence already accumulated against a President to make the case for resignation. A congressional resolution referred to the Justice Department would give added weight to that option.

C. Giving Notice to Congress

As explained in Appendix A, the House Judiciary Committee in 1974 decided against reporting an Article of Impeachment regarding the concealment by President Nixon of his bombing campaign in Cambodia. The committee concluded that the Administration's decision to inform a few Members of Congress about the bombing constituted sufficient notice. Language could be added to H.R. 743 to clarify that it would not be permissible for the President and executive officials to knowingly and willfully mislead Congress and the people of the United States about military initiatives while telling the truth to a selected number of lawmakers.

Regular Oversight

In addition to floor action on simple resolutions and concurrent resolutions that charge certain individuals with knowingly and willfully misleading Congress and the American public on the use of military force, congressional committees can call executive officials to testify on why "facts" in a State Department document were not facts but errors, and why claims made in speeches were based on unreliable intelligence sources. Without regular and close congressional oversight, executive officials may conclude that whatever liberties they took with the truth while in public office will not be discovered until years after they have left government.

Appendix A: Misleading Justifications for War

It has been said that “[b]efore the 1960s, few could even imagine that a president would deliberately mislead them on matters so fundamental as war and peace.” Eric Alderman, *When Presidents Lie: A History of Official Deception and Its Consequences* 294 (2004). The record before the 1960s is not so benign. On a number of occasions Presidents and executive officials resorted to misleading statements to attract public and legislative support for military action.

Mexican War. In the spring of 1846, President James Polk ordered General Zachery Taylor to occupy disputed territory along the Texas-Mexico border. Polk later learned there had been a military clash between American and Mexican forces. Despite the legal uncertainties of the disputed land, on May 11, 1846, President Polk sent a message to Congress stating that the Mexican Government not only refused to receive a U.S. envoy to discuss a peaceful settlement of disputes between the two countries but “after a long-continued series of menaces have at last invaded our territory and shed the blood of our fellow-citizens on our own soil.” 5 *A Compilation of Messages and Papers by the Presidents* 2288 (James D. Richardson ed.).

On December 22, 1847, Rep. Abraham Lincoln introduced what is called the “Spot Resolutions.” In referring to the May 11, 1846 message by President Polk and a subsequent message from Polk of December 7, 1847, both of which claimed that American blood had been shed on American soil, Lincoln stated that the House was “desirous to obtain a full knowledge of all the facts which go to establish whether the particular spot on which the blood of our citizens was so shed was or was not at that time *our own soil.*” Eight resolutions sought additional information. The first: “Whether the spot on which the blood of our citizens was shed, as in his messages declared, was or was not within the territory of Spain, at least after the treaty of 1819, until the Mexican revolution.” The second: “Whether that spot is or is not within the territory which was wrested from Spain by the revolutionary Government of Mexico.” The other six resolutions inquired whether the territory on which the casualties occurred was ever under the government or laws of Texas or of the United States. *Cong. Globe*, 30th Cong., 1st Sess. 64 (1847).

In 1848, the House of Representatives passed a resolution censuring President Polk for “unnecessarily and unconstitutionally” beginning the war. The resolution passed by a vote of 85 to 81. During the course of this debate, several Members of Congress charged that there had been lies and deception on the part of President Polk.

The initial purpose of the resolution, debated on January 3, 1848, was to extricate the United States from a war that had become increasingly burdensome financially and in lives lost. The resolution directed that a committee of five Senators and five

Representatives meet with President Polk “to advise and consult upon the best mode of terminating the existing war with Mexico in a manner honorable and just to both belligerents.” Cong. Globe, 30th Cong., 1st Sess., at 94. Rep. Ashmun offered to amend the resolution by adding the words “in a war unnecessarily and unconstitutionally begun by the President of the United States.” Debate was not in order on this amendment. His amendment passed, 85 to 81. Reference to a war “unnecessarily” begun could mean several things, including (1) a President who sought to initiate war on the basis of information that was accurate but nonetheless fell short of necessity, or (2) a President who sought to initiate war on the basis of information that was misleading and therefore short of necessity. Since the amendment was accepted without debate, it is not clear which interpretation has greater merit. On the following day, January 4, 1848, the Senate debated this language:

Resolved, That to conquer Mexico and to hold it, either as a province or to incorporate it into the Union, would be inconsistent with the avowed object for which the war has been prosecuted; a departure from the settled policy of the Government; in conflict with its character and genius; and in the end subversive of our free and popular institutions.

Resolved, That no line of policy in the further prosecution of the war should be adopted which may lead to consequences so disastrous. *Id.* at 96.

In debating these two resolutions, Senator John Calhoun explained why he had opposed the war from the beginning, in part because President Polk chose to put U.S. troops into disputed territory, leading to hostilities, and that Polk had not properly explained the facts to Congress when he asked it to declare war:

I opposed the war then, not only because I considered it unnecessary, and that it might have been easily avoided; not only because I thought the President had no authority to order a portion of the territory in dispute and in possession of the Mexicans, to be occupied by our troops; not only because I believed the allegations upon which it was sanctioned by Congress, were unfounded in truth; but from high considerations of reason and policy, because I believed it would lead to great and serious evils to the country, and greatly endanger its free institutions. *Id.*

On January 12, 1848, Rep. Lincoln explained why he voted for the amendment declaring that the war with Mexico had been “unnecessarily and unconstitutionally commenced” by President Polk. Lincoln called attention to Polk’s claim that in the hostilities that began in disputed territory, American blood had been shed on American soil. As Lincoln noted, President Polk had stated that

hostilities were commenced, or blood was shed — American blood was shed on American soil. And of so much importance did the President deem the declaration that the place, the very spot where blood was first spilled was our own soil, that he followed it up, and repeated that

declaration in almost the same language in every successive message, certainly in every annual message since. The President seemed to attach great importance to the assumed fact that the soil was our own where hostilities commenced. *Id.* at 155.

Lincoln remarked that in Polk's annual message in December 1846, "he came forward with a string of proof on that point." Polk "made an issue which was a false issue." Polk had stated: "But there are those who, conceding all this to be true, assume the ground that the true western boundary of Texas is the Nueces instead of the Rio Grande; and that, therefore, in marching our army to the east bank of the latter river, we passed the Texas line, and invaded the territory of Mexico."

Lincoln proceeded to dispute Polk's argument that American blood had been shed on American soil. He said he had proposed that Polk talk to the House of Representatives "on this point, which he seemed exceedingly anxious to avoid." If Polk came forward "frankly and give them facts, not arguments," Lincoln said he would be "most happy to reverse his vote." Without such facts, Lincoln was "fully convinced, of what he more than suspected, that the President was deeply conscious of being in the wrong in this matter; that he felt the blood of this war, like the blood of Abel, was crying from the ground against him; that originally he must have had some strong motive — what it was he would not now stop to inquire — for involving the two countries in war; that, having that motive, he had trusted to avoid the scrutiny of his own conduct by directing the attention of the nation, by fixing the public eye upon military glory — that rainbow that rises in showers of blood — that serpent's eye that charms but to destroy; and thus calculating, had plunged into this war, until disappointed as to the ease by which Mexico could be subdued, he found himself at last he knew not where." *Id.* at 156.

Lincoln added that whoever "carefully examined" Polk's message "would find that, like one in the half insane excitement of a fevered dream," that Polk had made a number of inconsistent arguments in favor of the war. "He talked like an insane man." *Id.*

Spanish-American War. On February 15, 1898, the American battleship *Maine* was destroyed while sitting in the Havana harbor. The explosion killed 260 officers and crew. President William McKinley, after ordering an investigation to determine the cause of the blast, reported to Congress on April 11 that a naval court of inquiry had concluded unanimously that the destruction of the ship "was caused by an exterior explosion — that of a submarine mine." He said the board "did not assume to place the responsibility. That remains to be fixed." 13 *A Compilation of the Messages and Papers of the Presidents* 6290. On April 20, Congress passed a joint resolution demanding the withdrawal of Spanish armed forces from Cuba and directing the President to use military force to carry out that policy. 30 Stat. 738 (1898).

Subsequent studies concluded that the *Maine* was accidentally destroyed not from the outside (presumably by Spain or by agents of Spain) but by an internal explosion. Inadequate ventilation within the ship led to a fire that set off nearby gunpowder. Lewis

L. Gould, *the Spanish-American War and President McKinley* 35 (1982). From 1895 to 1898, 13 other American ships had fires associated with spontaneous combustion. John L. Offner, *An Unwanted War: The Diplomacy of the United States and Spain Over Cuba, 1895-1898*, at 123 (1992).

World War I. Upon the outbreak of the European war in 1914, President Woodrow Wilson issued proclamations of neutrality. This policy of neutrality gave way gradually to a preference for England over Germany. In an address delivered to Congress on December 7, 1915, he recommended an increase in the size of the army, acceleration of shipbuilding, and a strengthening of the merchant marine. 16 *A Compilation of the Messages and Papers of the Presidents* 8106-10. Nevertheless, his reelection campaign in 1916 relied heavily on a promise to keep America out of war. His renomination at the Democratic convention was accompanied by shouts of “He Kept Us Out of War.” On the eve of the election, on October 31, 1916, he announced: “I am not expecting this country to get into war.” Harry A. DeWeerd, *President Wilson Fights His War: World War I and the American Intervention* 21 (1968).

1964, Tonkin Gulf. On August 3, 1964, President Lyndon B. Johnson ordered the Navy to take retaliatory actions against the North Vietnamese for their attacks in the Gulf of Tonkin. He acted following an attack on the U.S. destroyer *Maddox* by Communist PT boats. His August 4 radio and television report to the American public offered further details on the incident and described a second attack, this one against two American destroyers. The first attack did not provide grounds for a major military commitment. Questions were raised as to whether there was a second attack, but Congress proceeded to pass the Gulf of Tonkin Resolution, approving and supporting the determination of the President, as Commander in Chief, to take “all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression.”

On August 4, a U.S. naval commander in the area cabled that review of the second action “makes many recorded contacts and torpedoes fired appear doubtful. Freak weather effects and over-eager sonarman may have accounted for many reports. No actual visual sightings by *Maddox*. Suggest complete evaluation before any further action.” “The Gulf of Tonkin, The 1964 Incidents,” hearing before the Senate Foreign Relations Committee, 90th Cong., 2d Sess. 54 (1968). In 1964, Secretary of Defense Robert McNamara had no doubts about the second attack. After a trip to Vietnam in 1995, he announced that he was “absolutely positive” the second attack never took place. Keith B. Richburg, “Mission to Hanoi,” *Washington Post*, November 11, 1995, at A21, A25. A study published in 1996 concluded on the basis of documents and interviews that the second attack never occurred. Edwin E. Moïse, *Tonkin Gulf and the Escalation of the Vietnam War* (1996).

In 2005, the National Security Agency released documents dated February 24, 1998 that explain that the “second attack” was actually late signals coming from the

first.³ Did President Johnson and other top officials in his administration knowingly and willingly mislead Congress and the American people? At what point between August 1964 and February 24, 1998 did NSA know that the claim of a second attack was false? Staff members of the Senate Foreign Relations Committee had evidence in the 1960s that a second attack did not happen. J. Norville Jones, letter to the New York Times, November 23, 1995, at A22.

Free World Forces, 1966-70. After President Johnson escalated the war in Vietnam, beginning in February 1965, he attempted to build support for the military commitment by pointing to allies who had offered their assistance. In September 1966 he expressed his “deep admiration as well as that of the American people for the action recently taken by the Philippines to send a civic action group of 2,000 men to assist the Vietnamese in resisting aggression and rebuilding their country.” Public Papers of the Presidents, 1966, II, at 1029. Other announcements from the White House created the false impression that the commitment by the Philippines was matched by voluntary contributions from Thailand, South Korea, and other members of what the administration called the “Free World Forces.”

Hearings by Senator Stuart Symington in 1969 and 1970 discovered a number of secret agreements between the Johnson administration and the Free World Forces. The administration had offered sizeable subsidies to those countries to encourage their assistance: river patrol craft, engineering equipment, a special overseas allowance for the soldiers they sent to Vietnam, and hundreds of millions of dollars. Louis Fisher, *Presidential War Power* 135-37 (2d ed. 2005).

1974, Cambodia. On July 30, 1974, the House Judiciary Committee considered a proposed Article of Impeachment dealing with President Nixon's unauthorized bombing of Cambodia and the concealment of that bombing from Congress. It read:

In his conduct of the office of President of the United States, Richard M. Nixon in violation of his constitutional oath faithfully to execute the office of President of the United States and, to the best of his ability, preserve, protect, and defend the Constitution of the United States, and in disregard of his constitutional duty to take care that the laws be faithfully executed, on and subsequent to March 17, 1969, authorized, ordered, and ratified the concealment from the Congress of the facts and the submission to the Congress of false and misleading statements concerning the existence, scope and nature of American bombing operations in Cambodia in derogation of the power of the Congress to declare war, to make appropriations and to raise and support armies, and by such conduct warrants impeachment and trial and removal from office.

³ Robert J. Hanyok, “Skunks, Bogies, Silent Hounds, and the Flying Fish: The Gulf of Tonkin Mystery, 2-4 August 1964,” *Cryptologic Quarterly*, declassified by the NSA on November 3, 2005. See Scott Shane, “Doubts Cast on Vietnam Incident, But Secret Study Stays Classified,” *New York Times*, October 31, 2005, at A1.

The committee voted 26 to 12 in deciding not to report this proposed Article to the House. The committee report provided details about the bombing. On February 11, 1969, President Nixon received from his military advisors the initial request to institute the bombing. On March 17, 1969, after several National Security Council meetings, he approved the request and directed that the operation be undertaken under tight security. On March 18, 1969, the bombing of Cambodia began with B-52 strikes and continued until May 16, 1970, almost one month after the American incursion into Cambodia. The operational reports prepared after each mission falsely stated that the air strikes had taken place in South Vietnam rather than in Cambodia.

Between April 24 and May 24, 1970, American planes carried out tactical air strikes in Cambodia. No operational reports were made with respect to those bombings. Before June 30, 1970, an unspecified number of air strikes took place in various parts of Cambodia. No regular reports were prepared. On May 14, 1970, a one-day series of air strikes were conducted, with operational reports stating that they had occurred in Laos rather than Cambodia. Some tactical air sorties were correctly reported as having occurred in Cambodia.

On July 1, 1973, Congress enacted P.L. 93-50 and P.L. 93-52, ordering the cessation of all bombing in Cambodia by August 15, 1973. During hearings before the Senate Armed Services Committee, military and Administration witnesses testified that the bombing was not publicly acknowledged because of what was considered a delicate diplomatic and military situation in Southeast Asia before the U.S. incursion into Cambodia. These witnesses stated that it was their understanding that Cambodia's ruler, Prince Sihanouk, had privately agreed to the bombing of Cambodia before his overthrow. Their testimony stated that certain Members of Congress had been informed of the military action and that this provided sufficient notice to Congress of the President's military decision. The witnesses said that the submission of false data to Congress resulted from the highly classified nature of the accurate bombing statistics.

The House Judiciary Committee analyzed the views of those who advocated this Article of Impeachment. Supporters argued that the Constitution vests the power to make war in Congress and implicitly prohibits the President from waging an undeclared war. They said that President Nixon, by issuing false and misleading statements, failed to provide Congress with complete and accurate information and prevented Congress from responsibly exercising its powers to declare war, raise and support armies, and make appropriations. They further stated that informing a few selected Members of Congress about the Cambodian bombing did not constitute the constitutionally required notice, particularly in view of Nixon's contemporaneous public statements that were contrary to the facts. The supporters of the Article argued that the selected lawmakers were committed to a course of military action that did not represent the views of a substantial portion of American citizens. They stated that Congress had not ratified Nixon's conduct through inaction or by its 1973 limitation on bombing because Congress did not know of the bombing until after it had voted on the authorization. Lastly, they asserted that the technicalities or merits of war in Southeast Asia, congressional acquiescence, positions taken by Prince Sihanouk, and past conduct by U.S. Presidents were not relevant to

whether President Nixon had unconstitutionally usurped Congress' war-making and appropriations powers.

For several reasons, the House Judiciary Committee decided not to report the Article to the House. The committee concluded that President was performing his constitutional duties when he ordered the bombings and Congress had been given sufficient notice of the bombings. Several Members stated that Nixon as Commander-in-Chief was acting to protect American troops and that previous Presidents had engaged in similar military activities without seeking or obtaining prior congressional consent. Rep. John Seiberling (D-Ohio) stated that because of Nixon's decision not to declassify certain materials, that evidence could not be made public or be discussed during the committee's consideration of the Article. Seiberling said that this prevented the public use of certain documents that tied Nixon to acts of concealment. Examining the bombing of Cambodia from the perspective of congressional responsibility, opponents of this Article concluded that even if President Nixon had usurped congressional power, Congress shared the blame by acquiescing or ratifying his actions. They stated that Nixon had provided sufficient notice of the military actions by informing selected Members and that passage of the War Powers Resolution of 1973 mooted the questions raised by the Article. Source: "Impeachment of Richard M. Nixon, President of the United States," report of the House Committee on the Judiciary, 93d Cong., 2d Sess., Report No. 93-1305, August 20, 1974, at 217-19.

Iran-Contra. On November 3, 1986, a Lebanese periodical, *El Shiraa*, disclosed a secret U.S. program of selling arms to Iran. Funds from those sales were used to assist the Contra rebels in Nicaragua, in violation of a congressional statute that prohibited military assistance to the Contras. A special committee of Congress in each house filed a joint report, concluding that senior executive officials "misled Congress, withheld information, or failed to speak up when they knew others were giving incorrect testimony." "Iran-Contra Affair," H. Rept. No. 100-433, S. Rept. No. 100-216, 100th Cong., 1st Sess. 381 (November 1987).

Lawrence E. Walsh was appointed Independent Counsel to investigate the Iran-Contra Affair. He prosecuted many executive branch officials for testifying falsely to congressional committees. Several individuals within the National Security Council, including John Poindexter, Robert McFarlane, and Oliver North, were forced to resign and faced prosecution, as did other executive officials in the State Department, Defense Department, and the Central Intelligence Agency. Some of those prosecutions were blocked in December 1992 when President George H. W. Bush issued six pardons to Iran-Contra figures. Three were CIA officials (Duane Clarridge, Alan Fiers, and Clair George). The other three were former Secretary of Defense Caspar Weinberger, Assistant Secretary of State Elliott Abrams, and McFarlane. A number of private citizens who participated in the illegal assistance to the Contras were also prosecuted and convicted. Several convictions were reversed by an appellate court because of immunity granted by Congress. Lawrence E. Walsh, *Firewall: The Iran-Contra Conspiracy and Cover-Up* (1997).

2002-03, Uranium Ore Claim. On December 19, 2002, the State Department released a “Fact Sheet” (prepared jointly with the CIA) that criticized a “declaration” issued by Iraq about weapons of mass destruction. According to the department, the declaration “ignores efforts to procure uranium from Niger. *Why is the Iraqi regime hiding their uranium procurement?*” U.S. Department of State, “Illustrative Examples of Omissions From the Iraqi Declaration to the United Nations Security Council,” Fact Sheet, December 19, 2002 (emphasis in original).

In his State of the Union address in January 2003, President George W. Bush told Congress that the “British Government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa.” One might wonder why a President would rely on British intelligence instead of American intelligence, but the assertions by the State Department and President Bush were later discredited when it was discovered that the key piece of evidence on Iraq seeking uranium ore from Africa was fabricated. On July 7, 2003, the Bush administration conceded that the President should not have included in the State of the Union address the claim that Iraq tried to buy uranium in Africa. Walter Pincus, “White House Backs off Claim on Iraqi Buy,” July 8, 2003, at A1; David E. Sanger, “Bush Claim on Iraq Had Flawed Origin, White House Says,” New York Times, July 8, 2003, at A1.

On July 11, 2003, CIA Director George Tenet took personal responsibility for the assertion being included in the State of the Union address. He explained that agency officials, in approving the President’s address, “concurred that the text in the speech was factually correct — i.e., that the British government report said that Iraq sought uranium from Africa.” But he said it was a mistake to clear a presidential address on that ground: “This did not rise to the level of certainty which should be required for presidential speeches, and C.I.A. should have ensured that it was removed.” David E. Sanger and James Risen, “C.I.A. Chief Takes Blame in Assertion on Iraqi Uranium,” New York Times, July 12, 2003, at A1, A5. What other executive officials were involved in preparing and distributing this misleading information?

2003, Powell Presentation. When Secretary of State Colin Powell appeared before the UN Security Council on February 5, 2003, making the case for war against Iraq, he said that “every statement I make today is backed up by sources, solid sources. These are not assertions. What we’re giving you are facts and conclusions based on solid intelligence.” Transcript as printed in the New York Times, February 6, 2003, at A14. As Powell, Congress, and the American public would learn, what he presented to the UN (and to the world) were not facts but assertions, and the assertions were not grounded on solid intelligence. The Senate Intelligence Committee concluded that much of the information provided or cleared by the CIA to be included in Powell’s speech to the UN “was overstated, misleading, or incorrect.” “U.S. Intelligence Community’s Prewar Intelligence Assessments on Iraq,” Report of the Senate Committee on Intelligence, S. Report 108-301, 108th Cong., 2d Sess. (2004), at 253.

Biosketch

Louis Fisher is Specialist in Constitutional Law with the Law Library of the Library of Congress. The views expressed here are personal, not institutional. Earlier in his career at the Library of Congress, Fisher worked for the Congressional Research Service from 1970 to March 3, 2006. During his service with CRS he was Senior Specialist in Separation of Powers and research director of the House Iran-Contra Committee in 1987, writing major sections of the final report. Fisher received his doctorate in political science from the New School for Social Research and has taught in a number of universities and law schools.

He is the author of nineteen books, including *The Constitution and 9/11: Recurring Threats to America's Freedoms* (2008), *In the Name of National Security: Unchecked Presidential Power and the Reynolds Case* (2006), *Presidential War Power* (2d ed. 2004), *American Constitutional Law* (with Katy J. Harriger, 8th ed. 2009), *Constitutional Conflicts between Congress and the Presidency* (5th ed. 2005), and *Political Dynamics of Constitutional Law* (with Neal Devins, 4th ed. 2006). He has received four book awards.

Fisher has been invited to testify before Congress on such issues as CIA whistleblowing, war powers, state secrets, covert spending, NSA surveillance, restoring the rule of law, executive privilege, executive spending discretion, presidential reorganization authority, Congress and the Constitution, the legislative veto, the item veto, the pocket veto, recess appointments, the budget process, the Gramm-Rudman-Hollings Act, the balanced budget amendment, biennial budgeting, presidential impoundment powers, and executive lobbying