Testimony of Ross C. “Rocky” Anderson,
Founder and President,
High Road for Human Rights Education Project
and High Road for Human Rights Advocacy Project

Regarding Illegal Conduct and Other Egregious Abuses by Members of the Administration and Possible Steps Toward Accountability, Deterrence, and Reform

Before the House Committee on the Judiciary
United States House of Representatives

Hearing on Executive Power and Its Constitutional Limitations

July 25, 2008

I am honored to address you today and am pleased that you are considering your solemn responsibility to ascertain and disclose to the American people the nature and scope of illegal conduct and other egregious abuses of power by the administration. Ascertaining and disclosing the truth about these matters is vital in order to restore our constitutional democracy, the rule of law,[1] and the crucial role Congress plays in a system of checks and balances that has been utterly emasculated by members of the administration.

Astoundingly, even after learning over 2 1/2 years ago that the American people were misled about the government purportedly obtaining a warrant for all electronic surveillance,[2] we still have no idea about the nature and scope of the felonious warrantless wiretapping program.[3] How many citizens' communications were illegally intercepted by our government? At this point, we don't know if it has been dozens, hundreds, thousands, or millions of Americans who were victims of the illegal spying initiative. Whose communications were intercepted, and for what purpose? Are those communications still maintained? If so, why and by whom? How were those communications used? Were my communications intercepted? Were yours? We, the American people, are entitled to know. The only way

we will learn the truth, and the only way we will know what needs to be done to prevent such outrages in the future, is through Congress aggressively ferreting out and disclosing the truth.

We have learned that US government agents have tortured detainees in blatant violation of fundamental treaty obligations[4] and statutory laws passed by Congress.[5] We have also learned that US agents have kidnapped, disappeared, and tortured (or caused others to torture) people around the world, including some who had no connection whatsoever to terrorism.[6] However, the American people have not learned how this unprecedented, blatantly illegal[7] program operated, by whom, whether it is continuing, or even how many people have been subjected to these monstrous human rights abuses. In our democracy, we are entitled to answers to these questions.

Because the courts have blindly accepted the perpetrators' invocation of the frighteningly over-broad "State Secrets" doctrine and summarily dismissed cases challenging these illegal, human-rights abusing practices, the American people will learn the truth only if Congress assumes its vital responsibilities of investigating, ascertaining, and disclosing the truth.

The administration has, with impunity and arrogant disregard of our long-treasured system of separation of powers among three branches of

government, engaged in heinous human rights violations, the most serious breaches of trust, abuses of power injurious to the nation, war crimes, crimes against peace,[8] misleading Congress and the American people about threats to our nation's security and the supposed case for war,[9] and grave violations of treaties, the Constitution, and domestic statutory law.

What are the potential remedies? First, there has never been a more compelling case for impeachment.[10] Nothing would speak so loudly regarding the principled, non-partisan commitment of our nation to the rule of law, to our jealous embrace of our constitutional democracy, and to fundamental morality.

There is much more that Congress can do to restore the rule of law at a time when administration officials assert unbridled, dictatorial power, even to the point of issuing signing statements, declaring that only the president has the last word as to the scope and applicability of the statutes.[11]

I urge the consideration by Congress of federal legislation that would (1) instruct the courts that they are not to consider signing statements when determining legislative history; (2) prohibit the President from issuing any statement that purports to limit any part of the legislation as being advisory or that purports to assert any authority by the President to determine the

scope or applicability of the legislation; and (3) provide that no one can rely upon signing statements as a defense for a violation of the law. I also urge Congress to seek a declaratory judgment as to the legal effect of many of the signing statements.

Some members of the administration appear to have been making a case for an attack against Iran. Threats by members of Congress to impeach in the event of a unilateral decision to attack or letters expressing concern are insufficient, particularly when dealing with administration officials who have claimed power to do as they please, regardless of the Constitution, federal statutes, or rulings of the courts. I urge Congress to reassert its vital constitutional role and forbid, by a criminal statute with severe penalties, any attack against Iran, except as permitted under the United Nations Charter and the Constitution, absent explicit authorization by Congress.

Special prosecutors should be authorized, designated and assigned to investigate and prosecute violations of the law by members of the administration, particularly for involvement in felonious warrantless wiretapping, torture, and kidnappings of people in the so-called "extraordinary rendition" program.

Legislation limiting the application of the State Secrets doctrine should be urgently considered in order that the courts will once again provide a meaningful check on abuses of power and violations of the law by members of the Executive Branch.

Legislation should be passed immediately providing for severe punishment for any government agent who engages in or authorizes torture, or cruel, inhuman, or degrading treatment of any person being detained, without exception.

Congress should make clear what process must be followed before any US treaty obligations are violated or terminated by any member of the Executive Branch. Congress should also reaffirm its commitment to treaty obligations forbidding aggressive war and torture.

When Congress issues subpoenas, it should assert its power to enforce the subpoenas aggressively and without delay. If the Attorney General of the U.S. will not cooperate with Congress in enforcing subpoenas, Congress should terminate funding for the Office of the Attorney General until such cooperation is forthcoming.[12]

Vital to our constitutional democracy, and to our political and moral standing throughout the world, is a comprehensive consideration by Congress of what is to be done for the sake of democratic accountability,

and to ensure that the horrendous damage to our nation and to much of the rest of the world as a result of the illegal and abusive misconduct of administration officials is never again repeated.

In order to comprehensively determine the nature and extent of abuses by the administration and those who have worked in concert with it, and to prevent such misconduct in the future, a select committee, similar to the Church and Ervin Committees, should be appointed and charged with investigating the abuses and making recommendations concerning reforms that will aid in restoring the rule of law in our great nation, reasserting the crucial role of Congress, and making it clear to American citizens and people throughout the world that the rights and dignity of people will be honored and protected.

Pursuing these measures would be an important beginning to the restoration of the balance of power and system of checks and balances in our federal government, the restoration of the reputation of the United States among other nations, and to the restoration of our constitutional democracy, with the honor and respect it deserves.

[1] The rule of law, as a safeguard against arbitrary governance, was provided for in the Magna Carta in 1215, which made it clear that King John, who previously governed any way he saw fit, was constrained by rules that applied to everyone alike.

Our Constitution is the bedrock of our system of government. It is founded on the principle of the rule of law. It spells out the powers of each branch of government and limits what government and government officials can do.

Although the Constitution is a product of incredible brilliance that has served our nation well, it is only as solid as each generation's determination to uphold it. When government officials violate it, they must be brought to account or the Constitution becomes nothing more than a pretense and a piece of paper. For our constitutional form of government to survive, and for the rule of law to prevail over the rule of dictatorship, each branch of government must be constrained by the rule of law, and by the parameters of its constitutionally designated powers. Each branch of government must jealously protect against the other branches exceeding and abusing their power. That is the beauty, and the necessity, of the balance of power between the Executive, Legislative, and Judicial branches of our government.

Members of the administration have endeavored in a systematic and dangerous fashion to extend the powers of the president in abusive, dictatorial fashion, completely at odds with our Constitution and the rule of law.

Members of the administration have claimed extraordinary, unprecedented executive powers that they believe exempt the president from laws passed by Congress, from treaties to which the United States has bound itself, and from protections of our individual freedoms set forth in the Constitution. They have pursued such authoritarian power, completely at odds with the rule of law, by asserting what they call a "unitary executive" power and a supposed "inherent power" that allows the president to make up the rules, even when contrary to what Congress and our Constitution have required.

[2] During a rally to support the Patriot Act in 2004, a member of the administration told the public that "any time you hear the United States government talking about wiretap, it requires -- a wiretap requires a court order. Nothing has changed, by the way. When we're talking about chasing down terrorists, we're talking about getting a court order before we do so."

In mid-December 2005, we learned through news reports that a member of the administration, for five years had secretly ordered the National Security Agency to engage in wiretapping of American citizens' emails, phone calls, and other communications in blatant violation of the Constitution and the Foreign Intelligence Surveillance Act.

[3] After the abusive warrantless wiretapping by the Nixon administration was brought to light by the Church Committee, Congress passed the Foreign Intelligence Surveillance Act, unequivocally stating that a warrant must be obtained in order to engage in electronic surveillance and that the failure to do so is a federal felony, punishable by a fine of $10,000 and up to five years imprisonment.

[4] The Geneva Conventions proscribe cruel treatment, torture, and humiliating and degrading treatment. A violation of these and other safeguards described in the Geneva Conventions are, according to the Conventions, a "grave breach" and a war crime under international law. The International Covenant on Civil and Political Rights proscribes torture and cruel, inhuman, and degrading treatment. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment prohibits the infliction of "torture and other cruel, inhuman and degrading treatment or punishment" of prisoners to obtain information. The treaty, ratified by the United States Senate in 1994, provides: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other political emergency, may be invoked as a justification of torture."

[5] The War Crimes Act of 1996 defines as a "war crime" any conduct defined as a grave breach in any of the Geneva Conventions. In addition to the Senate ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, Congress passed a statute prohibiting U.S. officials, anywhere, from intentionally inflicting "severe physical or mental pain or suffering" upon anyone in their control. A violation would subject the perpetrator to a fine or imprisonment for up to twenty years. Any government official conspiring to abuse a prisoner is subject to the same penalties as the person who inflicts the abuse. 18 USC §2340.

[6] The following was stated at a press conference:

> **Q: Mr. President, can you explain why you've approved of an expanded the practice of what's called rendition, of transferring individuals out of U.S. custody to countries where human rights groups and your own State Department say torture is common for people under custody?**
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> **THE PRESIDENT: The post-9/11 world, the United States must make sure we protect our people and our friends from attack. That was the charge we have been given. And one way to do so is to arrest people and send them back to their country of origin with the promise they won't be tortured. That's the promise we receive. This country does not believe in torture. We do believe in protecting ourselves. We don't believe in torture.**
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> President Bush, Press Conference, March 16, 2005.

US agents have not "arrested" people to "send them back to their country of origin." They have kidnapped people, "disappeared" them, and sent them to secret prisons to be tortured.

For instance, Maher Arar, a Canadian citizen, was kidnapped by US officials at JFK Airport, where he was seeking to connect to a flight to Canada after a vacation in Tunisia. The Royal Canadian Mounted Police had provided the CIA unsubstantiated "evidence" that Arar was a supporter of al Qaeda. After he was kidnapped, he was flown by the CIA to Syria, where for ten months he was held in a three foot by six foot cell, seven feet high – "like a grave," according to Arar. He was coerced, through torture, into a false confession of being a supporter of al Qaeda. He was finally released. Syrian officials admitted there was no evidence against him.

The Canadian government paid Arar $9 million in compensation, plus $879,000 in legal fees. Also, Canadian Prime Minister Stephen Harmer formally apologized to Arar, saying, "We cannot go back and fix the injustice that occurred to Mr. Arar. However, we can make changes to lessen the likelihood that something like this will ever happen again." The administration has not issued an apology. In fact, then-Attorney General Alberto Gonzales downplayed the situation, saying simply that, "He was initially detained because his name appeared on terrorist lists, and he was deported according to our immigration laws." What Gonzales failed to note is that Arar was not sent to Canada, where he is a citizen, but he was kidnapped and sent to the torture chambers of Syria.

When Arar sought justice in the United States courts, his case was dismissed after the administration invoked the State Secrets doctrine, claiming that to allow the case to proceed would put vital secrets at risk.

[7] The Convention Against Torture explicitly prohibits the transportation of "a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, Article 3, Section 1. Congress made its support of that ban clear not only by Senate ratification of that Convention, but by providing in the Foreign Affairs Reform and Restructuring Act of 1998 the following provision: "It shall

be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States."

[8] The invasion and occupation of Iraq was and is a blatant violation of US treaty obligations and, hence, of the US Constitution. The United Nations Secretary General at the time of the invasion of Iraq, Kofi Annan, has declared unequivocally that the invasion of Iraq was "not in conformity with the UN charter" and that "it was illegal." Ewen MacAskill and Julian Borger, "Iraq war was illegal and breached UN charter, says Annan," *Guardian*, Setpember 16, 2004. Likewise, Boutros Boutros-Ghali, who served as UN Secretary General during the first Gulf War, stated that the invasion of Iraq violated international law. He also stressed that the invasion sets a dangerous example because "[o]ther countries may . . . intervene on the basis of this precedent." "Former UN head calls Iraq war 'illegal'," CBC News, March 19, 2003.

The Preamble to the United Nations Charter, provides, in part, as follows:

> We the peoples of the United Nations **determined to save succeeding generations from the scourge of war**, which twice in our lifetime has brought untold sorrow to mankind, and **to reaffirm faith in fundamental human rights**, in the dignity and worth of the human person, **in the equal rights** of men and women and **of nations large and small**, **and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained**, and to promote social progress and better standards of life in larger freedom, and for these **ends to practice tolerance and live together in peace with one another as good neighbors**, and to unite our strength **to maintain international peace and security**, **and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common**

> **interest**, and to employ international machinery for the promotion of the economic and social advancement of all peoples, have resolved to combine our efforts to accomplish these aims. (Emphasis added.)

Of course, the invasion and occupation of a nation that posed no imminent threat to the security of the United States was contrary to every basic precept of the UN Charter preamble. Further, members of the administration clearly violated the following specific provisions of the UN Charter, which is legally binding upon the US and its leaders:

> **Article 2, Sections 3, 4:**
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> **All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered**. . . . **[and] refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.** (Emphasis added.)

The invasion and occupation of Iraq, costing hundreds of thousands of lives, causing hundreds of thousands of grievous injuries, and resulting in the dislocation of hundreds of thousands of men, women, and children, violated, and continues to violate, Article 2, Sections 3 and 4 quoted above. The violations were made all the more clear by President Bush's disregard of calls from UN Security Council members for a peaceful resolution.

> **Article 39:**
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> **The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken** in accordance

with Articles 41 and 42, to maintain or restore international peace and security. (Emphasis added.)

Article 40:

In order to prevent an aggravation of the situation, **the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable**…. (Emphasis added.)

Article 41:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures…..

Under Articles 39-50 of the UN Charter, no Member may use military force against another country without the UN Security Council determining that there has been a material breach of the UN Resolution and all nonmilitary and peaceful options to enforce the Resolution must be fully exhausted. Once the criteria for military action have been met, only the UN Security Council can authorize the use of military force. The orders to invade and occupy Iraq without meeting the criteria for military action, and without the approval of the UN Security Council, clearly violated the UN Charter. Members of the administration failed to take the issue to the Council, as they were required by law to do, because they certainly knew that a resolution to use force against Iraq would not be passed.

If there is any hope for the United Nations and international law to protect against aggressive wars, these provisions of the UN Charter must be honored. To permit

members of the administration to be unaccountable for the contemptuous disregard of the UN Charter would not only undermine the rule of law, but would set a disastrous precedent destroying the very essence of the UN Charter – to provide for the peaceful resolution of disputes between nations.

Article 51:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take any time such action as it deems necessary in order to maintain or restore international peace and security.

Article 51 is intended to permit self-defense, but only until the Security Council is able to act to restore peace. The administration can find no solace in the self-defense provision of Article 51. Iraq had not attacked the US and there was no evidence whatsoever indicating that it was about to do so.

The Kellogg-Briand Pact of 1928

The Kellogg-Briand treaty, ratified by the United States in 1929, is as clear in its legal mandate today as it was during the war crimes trials in Nuremberg. A failure to hold members of the administration accountable under that treaty would be a hypocritical repudiation of the international law principles to which the US and several other nations have committed. Very simply, all disputes must be resolved peacefully. The treaty specifically prohibits war as an instrument of foreign policy. In 1945, the Chief

Prosecutor for Great Britain and Northern Ireland, Sir Hartley Shawcross, stated at the trial of German major war criminals in Nuremberg, Germany, as follows:

> The Chief Prosecutor for the United States of America referred in his opening speech before this Tribunal to the weighty pronouncement of Mr. Stimson, the Secretary of War, in which, in 1932, he gave expression to the drastic change brought about in International Law by the Pact of Paris, and it is perhaps convenient to quote the relevant passage in full:
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> **"War between nations was renounced by the signatories of the Briand-Kellogg Pact. This means that it has become illegal throughout practically the entire world.** It is no longer to be the source and subject of rights. It is no longer to be the principle around which the duties, the conduct, and the rights of nations revolve**. It is an illegal thing. Hereafter, when two nations engage in armed conflict, either one or both of them must be wrongdoers – violators of this general treaty law.** We no longer draw a circle about them and treat them with the punctilios of the duellist's code. Instead **we denounce them as lawbreakers**."
>
> And nearly ten years later, when numerous independent States lay prostrate, shattered or menaced in their very existence before the impact of the war machine of the Nazi State, the Attorney General of the United States, subsequently a distinguished member of the highest tribunal of that great country, gave significant expression to the change which had been effected in the law as the result of the General Treaty for the Renunciation of War, in a speech for which the freedom-loving peoples of the world will always be grateful. On the 27th March, 1941 – and I mention it now not as merely being the speech of a statesman, although it was certainly that, but as being the considered opinion of a distinguished lawyer – he said this:

"**The Kellogg-Briand Pact Of 1928**, in which Germany, Italy and Japan covenanted with us, as well as with other nations, to renounce war as an instrument of policy, **made definite the outlawry of war** and of necessity altered the dependent concept of neutral obligations.

The Treaty for the Renunciation of War and the Argentine Anti-War Treaty deprived their signatories of the right of war as an instrument of national policy or aggression, and rendered unlawful wars undertaken in violation of their provisions. . . .

* * *

In flagrant cases of aggression where the facts speak so unambiguously that world opinion takes what may be the equivalent of judicial notice, **we may not stymie International Law and allow these great treaties to become dead letter**.

The Trial of German Major War Criminals Sitting at Nuremberg, Germany Vol. 2 Session 12 Page 45-59.

In addition to the treaty obligations described above, the Nuremberg Tribunal Charter, to which the US committed itself, provides as follows:

Principle VI: The crimes hereinafter set out are punishable as crimes under international law:

(a) Crimes against peace;

(i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties.

(ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

The Nuremberg Tribunal Charter, to which the United States is a party, established that a war of aggression against a nation posing no imminent threat to the aggressor is a "crime against peace." There can be no question that ordering and presiding over an unjustified and illegal invasion and occupation of Iraq was, and continues to be, in violation of international law, the US Constitution, and domestic law. No greater cause for impeachment has ever been existed.

Members of the administration have blatantly violated every relevant treaty and constitutional provision in leading the US to a so-called "pre-emptive" war against Iraq, without any justification in law or in fact. Those responsible must be held accountable, through impeachment and removal from office.

Article VI, Clause 2 of the United States Constitution

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and **all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land**; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. (Emphasis added.)

Ordering the commencement of the invasion of Iraq violated Article VI of the Constitution. The same is true of the continuation of armed warfare in violation of US commitments under the treaty provisions described above. The failure of Congress to hold those responsible accountable for their many violations of law, domestic and international, is an ongoing violation of its members' oath to "support and defend the Constitution."

9

The Fraud Concerning the Supposed Imminent Nuclear Threat Posed by Iraq

An honest assessment of the threats posed to the US by Iraq had been provided by then-National Security Adviser Condeleezza Rice and then-Secretary of State Colin Powell, *before* administration officials engaged in a campaign to mislead Congress and the American people in support of the illegal invasion and occupation of Iraq. Before 9/11, and before the campaign to drum up support for war began, Colin Powell stated as follows:

> **"He [Saddam Hussein] has not developed any significant capability with respect to weapons of mass destruction. He is unable to project conventional power against his neighbors."** (Emphasis added.)

Statement of Colin Powell, Cairo, Egypt, February 24, 2001. (www.state.gov/secretary/former/powell/remarks/2001/933.htm.)

On July 29, 2001, Condoleezza Rice, appearing on *CNN Late Edition With Wolf Blitzer*, stated, **"We are able to keep arms from him [Saddam Hussein]. His military forces have not been rebuilt."** (Emphasis added.) (http://transcripts.cnn.com/TRANSCRIPTS/0107/29/le.00.html.)

On September 7, 2002, British Prime Minister Tony Blair and President Bush met with members of the press at Camp David. President Bush referred to a "new" report from the International Atomic Energy Agency allegedly stating, according to President Bush, that Iraq was "six months away" from building a nuclear weapon. "I don't know what more evidence we need," stated the President. (Remarks by the President and Prime Minister Tony Blair, Camp David, Maryland, September 7, 2002. www.whitehouse.gov/news/releases/2002/09/20020907-2.html.) There was no such report. In fact, numerous IAEA reports consistently denied any indication that Iraq had

any nuclear capability, and the IAEA's chief spokesperson stated that no such report had been issued by the IAEA.

One news article described the false claim about an IAEA report, and the response of an IAEA spokesman, as follows:

> The International Atomic Energy Agency says that a report cited by President Bush as evidence that Iraq in 1998 was "six months away" from developing a nuclear weapon does not exist.
>
> "There's never been a report like that issued from this agency," Mark Gwozdecky, the IAEA's chief spokesman, said yesterday in a telephone interview from the agency's headquarters in Vienna, Austria.
>
> "We've never put a time frame on how long it might take Iraq to construct a nuclear weapon in 1998," said the spokesman of the agency charged with assessing Iraq's nuclear capability for the United Nations.
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> In a Sept. 7 news conference with British Prime Minister Tony Blair, Mr. Bush said: "I would remind you that when the inspectors first went into Iraq and were denied – finally denied access [in 1998], a report came out of the Atomic – the IAEA that they were six months away from developing a weapon.
>
> "I don't know what more evidence we need," said the president, defending his administration's case that Iraqi leader Saddam Hussein was building weapons of mass destruction.
>
> The White House says Mr. Bush was referring to an earlier IAEA report.
>
> "He's referring to 1991 there," said Deputy Press Secretary Scott McClellan. "In '91, there was a report saying that after the war they found out they were about six months away."
>
> Mr. Gwozdecky said no such report was ever issued by the IAEA in 1991.

Joseph Curl, "Agency Disavows Report on Iraq Arms," *Washington Times*, September 27, 2002.

The Outrageously Misleading Accusation That Iraq Had Sought to Purchase Uranium From an African Nation

Our nation, as well as much of the rest of the world, had been traumatized by the events of 9/11. Many nations rallied to support the United States and looked to America for moral leadership in this time of crisis. We relied upon our top officials in the administration for protection and for an honest assessment of the threats we were facing. That tremendous trust was betrayed by misleading us and our Congress by instilling in many of us the fear that Saddam Hussein was seeking to purchase nuclear materials from an African nation. In fact, however, much of the US intelligence community disagreed. Just as an issuer of stock defrauds investors by withholding material information about a corporation, so too did members of the administration defraud our Congress, our country, and much of the international community by failing to disclose information that was provided them and which was contrary to their representations about Hussein's supposed efforts to build nuclear weapons.

In the January 28, 2003, State of the Union message, President Bush stated: "The British government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa."

In an October 2002 National Intelligence Estimate (NIE), presented at a White House background briefing on weapons of mass destruction in Iraq, "Key Judgments" included an assessment "that Saddam does not yet have nuclear weapons or sufficient material to make any." That assessment was not disclosed to Congress and the American people. To make matters worse, there was no disclosure of the State Department's Bureau of Intelligence and Research (INR) conclusion in the October 2002 NIE, that:

> [T]he claims of Iraqi pursuit of natural uranium in Africa are, in INR's assessment, highly dubious.

The failure to disclose that conclusion to Congress and to the American people rendered the statement about Hussein seeking to purchase uranium from an African country materially misleading. Under these circumstances, that is clearly an impeachable offense.

The calculated fraud and nondisclosures about the Niger uranium claims were compounded when there was also a failure to disclose that, upon request for an authoritative judgment by the Pentagon, the National Intelligence Council, a coordinating body for the 15 agencies that constituted the US intelligence community, reported in a January 2003 memo that the Niger story was baseless. Barton Gellman and Dafna Linzer, "A "Concerted Effort' to Discredit Bush Critic," *Washington Post*, April 9, 2006. ("[T]he Pentagon asked for an authoritative judgment from the National Intelligence Council, the senior coordinating body for the 15 agencies that then constituted the U.S. intelligence community. Did Iraq and Niger discuss a uranium sale, or not? If they had, the Pentagon would need to reconsider its ties with Niger. The council's reply, drafted in a January 2003 memo by the national intelligence officer for Africa, was unequivocal: The Niger story was baseless and should be laid to rest.")

The Dishonest Claim That Saddam Was Purchasing Aluminum Tubes to Make Nuclear Weapons

The fraud about Hussein building up a nuclear capability did not stop with the phony Niger story. During September 2002, officials of the administration represented to the public that Hussein was purchasing aluminum tubes to enrich uranium for a nuclear weapon. The next month, a National Intelligence Estimate (NIE) was delivered to the President. That document virtually screams out the view of various intelligence agencies that the tubes were of no use in a nuclear program.

Included in the NIE are the following statements, none of which were mentioned to Congress, the American people, or the international community as top members of the administration were touting the aluminum tubes as proof of Iraq's nuclear program:

> **DOE (Department of Energy) agrees that reconstitution of the nuclear program is underway but assesses that the tubes probably are not part of the program. (**Emphasis added.)
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> * * *
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> **State/INR** (State Department's Bureau of Intelligence and Research) **Alternative View of Iraq's Nuclear Program**
>
> The Assistant Secretary of State for Intelligence and Research (INR) believes that Saddam continues to want nuclear weapons and that available evidence indicates that Baghdad is pursuing at least a limited effort to maintain and acquire nuclear weapon-related capabilities. **The activities we have detected do not, however, add up to a compelling case that Iraq is currently pursuing what INR would consider to be an integrated and comprehensive approach to acquire nuclear weapons.** Iraq may be doing so, but INR considers the available evidence inadequate so support such a judgment. **Lacking persuasive evidence that Baghdad has launched a coherent effort to reconstitute its nuclear weapons program,** INR is unwilling to speculate that such an effort began soon after the departure of UN inspectors or to project a timeline for the completion of activities it does not now see happening. As a result, INR is unable to predict when Iraq could acquire a nuclear device or weapon.
>
> **In INR's view Iraq's efforts to acquire aluminum tubes is central to the argument that Baghdad is reconstituting its nuclear weapons program, but INR is not persuaded that the tubes in question are intended for use as centrifuge rotors. INR accepts the judgment of technical experts at the U.S.**

> **Department of Energy (DOE) who have concluded that the tubes Iraq seeks to acquire are poorly suited for use in gas centrifuges to be used for uranium enrichment and finds unpersuasive the arguments advanced by others to make the case that they are intended for that purpose.** INR considers it far more likely that the tubes are intended for another purpose, most likely the production of artillery rockets. The very large quantities being sought, the way the tubes were tested by the Iraqis, and the atypical lack of attention to operational security in the procurement efforts are among the factors, in addition to the DOE assessment, that lead **INR to conclude that the tubes are not intended for use in Iraq's nuclear weapon program.** (Emphasis added.)

Those strong opinions from the State Department intelligence agency and the Department of Energy did not prevent the statement, without qualification, in a major speech the next month that "Iraq has attempted to purchase high-strength aluminum tubes and other equipment needed for gas centrifuges, which are used to enrich uranium for nuclear weapons." (Speech by President George W. Bush in Cincinnati, Ohio, October 7, 2002.)

In a January 9, 2003 report to the UN Security Council, the IAEA reported that the aluminum tubes were not directly suitable for the manufacture of centrifuges. Again, not allowing the findings of the IAEA or of various US intelligence agencies to get in the way of the fraud upon Congress and the American people, a representation was made in the State of the Union Message on January 28, 2003 that "Our intelligence sources tell us that [Saddam] has attempted to purchase high-strength aluminum tubes suitable for nuclear weapons production." No greater cause for impeachment can be imagined than misleading our Congress and misleading the American people about whether we are facing a nuclear threat while leading our nation to a tragic, illegal war of aggression.

The fraud was dramatically compounded when a so-called summary of the NIE was distributed to Congress, stating, misleadingly, as follows: "**All intelligence experts**

agree that Iraq is seeking nuclear weapons and that these tubes could be used in a centrifuge enrichment program." (Emphasis added.) Clearly, that statement was false. The DOE and INR dissents, which expressed the accurate situation, were omitted. That omission also rendered the representation to Congress, and to the public, false and misleading – a fraud clearly meriting impeachment and removal from office.

[10] Abuses of power, undermining the separation of powers among the three branches of government, violations of our Constitution, statutory law, and treaty obligations, and dishonesty to Congress and to the American people are each grounds for impeachment if injury to our nation results from such wrongdoing. Impeachment need not be based on a violation of criminal law. In fact, it usually is not.

> Less than one-third of the eighty-three articles the House has adopted have explicitly charged the violation of a criminal statute or used the word "criminal" or "crime" to describe the conduct alleged, and ten of the articles that do were those involving the Tenure of Office Act in the impeachment of President Andrew Johnson. (Citation omitted.)
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> Thus, the contention that articles of impeachment must be drawn in terms of indictable offenses cannot be supported.
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> Clearly charges of constitutional violations and gross abuse of power for illegitimate purposes should be included as impeachable offenses regardless of the offender's office.
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> Although frequently debated, and the negative advocated by some high authorities, it is now, we believe, considered that impeachment is not confined alone to acts which are forbidden by the Constitution or Federal statutes. The better sustained and modern view is that the provision for impeachment in the Constitution applies not only to high crimes and

> misdemeanors as those words were understood at common law but also acts which are not defined as criminal and made subject to indictment, and also to those which affect the public welfare. Thus an official may be impeached for offenses of a political character and for gross betrayal of public interests. Also for abuses or betrayal of trusts, for inexcusable negligence of duty, for the tyrannical abuse of power, or, as one writer puts it, for "a breach of official duties . . ." (The House Committee on the Judiciary, H.R. Rep. No 653, 69th Cong., 1st Sess. At 10 (1926).)

Ed Firmage, "The Substantive Law of Presidential Impeachment," 1973 Utah Law Review 681 (1973), at 696-98.

James Iredell argued in the North Carolina ratifying convention that the withholding of material information from Congress in a matter that causes injury to the nation would be an impeachable offense:

> **The President must certainly be punishable for giving false information to the Senate.** He is to regulate all intercourse with foreign powers, **and it is his duty to impart to the Senate every material intelligence he receives. If it should appear that he has not given them full information, but has concealed important intelligence which he ought to have communicated, and by that means induced them to enter into measures injurious to their country, and which they would not have consented to had the true state of things been disclosed to them**,--in this case, I ask whether, upon an impeachment for a misdemeanor upon such an account, the Senate would probably favor him. With respect to the impeachability of the Senate, that is a matter of doubt. (Emphasis added.)

3 J. Elliott, The Debates in the Several State Conventions 127 (1937).

[11] Under Article II, Section 3 of the Constitution, the president must "take care that the laws be faithfully executed." Members of the administration, in complete dereliction and contempt of that duty, disregarded statutory laws, treaty obligations, and the Constitution. The administration has even claimed in hundreds of signing statements that the president has the authority, as head of the "unitary executive" branch, to determine the scope, effect, and applicability of laws passed by Congress. According to the American Bar Association, the use of signing statements has been "contrary to the rule of law and our constitutional system of separation of powers." (http://www.abanet.org/media/releases/news072406.html)

At least three times during the Bush administration, Congress passed laws forbidding U.S. troops from engaging in combat in Colombia. "After signing each bill into law, Bush used a signing statement to inform the military that he need not obey any of the Colombia restrictions because he was commander in chief. The combat ban and troop cap, he declared, would be interpreted merely 'as advisory in nature.' " Charlie Savage, *Takeover – The Return of the Imperial Presidency and the Subversion of American Democracy* (Little, Brown and Company: New York, Boston and London, 2007), at 237.

In 2004, Congress passed an intelligence bill that required the Justice Department to inform Congress about the FBI's use of special national-security wiretaps in the United States. President Bush issued a signing statement asserting that he could disregard the law and withhold all the information sought by Congress. *Id.* at 239.

When President Bush signed the Foreign Relations Authorization Act for Fiscal Year 2003, he issued a signing statement which said that he would treat Congress's statutory mandate as being only a recommendation to him. In short, he was saying that he did not need to follow the law and, instead of vetoing legislation, he said he will just disregard parts of it, similar to the line item vetoes previously held to be unconstitutional by the Supreme Court (except dissimilar to the extent Congress has no opportunity to

"override" the President's disregard of legislation, as it would have in the case of a veto).

When Congress was considering renewal of parts of the initial USA PATRIOT Act surveillance powers, an agreement, reflected in the new legislation, was reached between Congress and Bush administration officials pursuant to which the President was to provide Congress more details on how the powers were being used. However, after his White House signing ceremony on March 9, 2006, President Bush issued a signing statement, decreeing that, contrary to the terms of the law earlier negotiated between Congress and the Bush administration, he was entitled to withhold information as he saw fit. He stated that he would interpret any provision in the law obliging him to provide information to Congress "in a manner consistent with the president's constitutional authority to supervise the unitary executive branch and to withhold information." In short, he alone decides the law. In the administration's view, checks and balances are simply an archaic relic, no longer applicable to a president, at least during his undeclared so-called war against terrorism.

That utter contempt for Congress, for the rule of law, and for the separation of powers was on display when a signing statement was issued in connection with the Detainee Treatment Act of 2005. The administration had been unsuccessful in convincing Congress to allow the administration to continue having detainees tortured, so a signing statement was issued when the president signed the legislation, saying that the prohibition of cruel, inhuman and degrading treatment of detainees would be construed as the president saw fit. That signing statement is a chilling reminder not only of the administration's support of torture, but of its view that the president can ignore Congress's laws whenever he wants. The signing statement said, in effect, that regardless of the law passed by Congress, the president would order or permit torture as he deemed appropriate. (For excellent discussions about the assertion of the power to pick and choose what laws the president will follow, as reflected in his signing statements, see Savage, at 236-249; Frederick A.O. Schwarz Jr. and Aziz Z. Huq,

Unchecked and Unbalanced, The New Press: New York and London; Brennan Center for Justice: New York, 2007), at 91-92.)

Thomas Paine wrote in Common Sense, “In America the law is king. For as in absolute governments the King is law, so in free countries the law ought to be king; and there ought to be no other.” The “unitary executive” excuse for an imperial presidency, an assertion of the right to ignore laws as the president wishes, is subversive to the most fundamental principles of our constitution. The hundreds of applications by the administration of that theory to place the president above the law, and to allow him to decide when and under what circumstances he will follow the law, is abundant reason for impeachment.

[12] Compliance by the Attorney General with the demands of Congress has previously been accomplished by a threat to cut off funding for the Attorney General’s Office.

> In 1984, Congress passed a bill called the Competition in Contracting Act. President Reagan signed the bill but issued a signing statement telling the executive branch that a section of it was unconstitutional, and he directed agencies not to obey the statute created by that section. A losing bidder who would have won a contract if the section had been obeyed sued the government, and a federal judge ruled in March 1985 that the Reagan administration had to obey all of the act’s provisions. But Attorney General Ed Meese, insisting that the executive branch had independent power to interpret the Constitution, declared that the government would refuse to comply with the ruling. An appeals court upheld the ruling, chastising the Reagan administration for trying to seize a kind of line-item veto power for itself, and the House Judiciary Committee voted to cut off funding for Meese’s office unless the executive branch obeyed the courts. In June 1985, Meese backed down.

Savage, at 231-32.