Statement
by
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before
The Committee on the Judiciary
of
The House of Representatives
on Executive Powers and Its Constitutional Limits

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Chairman Conyers, members of the Committee, I thank you for the privilege of appearing before you on the issue of the Executive Power and its Constitutional Limitations. Having served on this Committee during the impeachment proceedings against President Richard Nixon, in the company I might add of your esteemed Chair, I want to express my enormous respect for this Committee and its critical role in preserving our democracy.

During my service on this Committee, I acquired a niche expertise on impeachment. This is frankly not expertise one would voluntarily seek. The issue of impeachment, after all, arises only when a president has abused the great trust placed in his hands, something that few people, despite party or political predilection, like to see happen. Looking back at the Nixon impeachment proceedings, I remember that, much as I disagreed with his policies, he was still my president, and it was painful and sobering to vote for his impeachment, a sentiment I believe all of my colleagues on the Committee shared, Democrat and Republican alike.

But sad as the responsibility to deal with impeachment is, it cannot be shrugged off. The framers put the power to hold presidents accountable in your hands. Our framers knew that unlimited power presented the greatest danger to our liberties, and that is why they added the power of impeachment to the constitution. They envisioned that there would be presidents who would seriously abuse the power of their office and put themselves above the rule of law. And they knew there had to be a way to protect against them, aside from waiting for them to leave office.

I will spell out briefly the grounds that I believe make out a prima facie case of impeachment for certain Administration officials. I have written about the grounds at greater length elsewhere, including in my book, co-authored with Cynthia Cooper, entitled The Impeachment of George W. Bush. If the Committee wishes, I would be pleased to provide additional details.

Before I go any further I want to issue a caveat. A prima facie case is just that. It doesn't mean than an impeachable offense has in fact been committed. Anyone accused must be given a full opportunity to rebut the charges and justify the questioned conduct. It is imperative that this principle be adhered to as it was in the Nixon impeachment process. It was precisely the fairness

of those proceedings to the President, not just the strong evidence of abuse of power, that persuaded the American people that impeachment was the appropriate remedy.

The abuses of power related to this Administration fall into several categories.

Systematic Refusal to Obey the Law

The first abuse of power has to do with the systematic refusal to obey the law. One of the key constitutional responsibilities of a president, as set forth in the constitution, is to implement the laws. The framers use an elegant term for this: a president must, in their words, "take care that the laws be faithfully executed." The responsibility is so serious that it is phrased almost redundantly: a president must "take care" and "faithfully" execute.

The principle is instilled in all of us as school children, where we learn at an early age that the Congress makes the laws and the president carries them out.

But has this principle that is enshrined in our constitution and the oath of office been adhered to? Let's consider these examples:

1. The Foreign Intelligence Surveillance Act.

This law was enacted partially in response to President Richard Nixon's illegal wiretapping where, falsely claiming national security, he wiretapped journalists and his own staffers. (This wiretapping was one of the many grounds for his impeachment). FISA was also enacted after disclosures of surveillance abuses by federal agencies. The 1978 law was designed to prevent these abuses by barring unilateral presidential wiretapping and requiring special court approval instead.

Starting in the fall of 2001, President Bush authorized wiretapping on at least 45 separate occasions without obtaining FISA court approval. He claimed that as Commander in Chief of the army and navy he was empowered to disregard FISA. But no president may simply override laws for this reason. The Supreme Court considered just this issue in Youngstown v. Ohio, where President Truman wanted to seize steel mills faced with a strike in order to ensure a continued supply of armaments for the Korean War. He claimed that as Commander in Chief he could do so. The Supreme Court rejected his position. In one of the most famous opinions in American jurisprudence, Justice Robert Jackson wrote: "No penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role.". Justice Jackson, the former chief US prosecutor at the Nuremberg trials, alluded to the excesses of executive power seen in totalitarian regimes and warned that if we allowed the president's Commander in Chief role to swallow up the checks and balances of our constitution, we would be starting down the road to military dictatorship.

2. The Geneva Conventions, the Convention against Torture, the War Crimes Act of 1996 and the anti-Torture Act.

The Geneva Conventions and the Convention against Torture ban torture. As ratified treaties, they are the law of the land under the constitution. Further, the anti-Torture Act makes it a federal crime to engage in torture abroad. President Bush has repeatedly said we "don't do torture," but is this true? The US has recently admitted that water boarding was used against three detainees. Water boarding has been considered torture by most countries, including the United States itself under prior administrations. Just recently, a committee of the British Parliament determined that US denials about torture could no longer be credited.

In addition to water boarding, detainees were subjected to many other forms of serious abuse, as is clear from various reports done after the Abu Ghraib disclosures. That mistreatment has been further documented in a number of recent books, including The Dark Side, by Jane Mayer.

Apart from torture, the Geneva Conventions and the War Crimes Act of 1996 bar cruel and inhuman treatment of detainees. Thus, even assuming that water boarding, stress positions, threatening use of dogs, exposure to temperature extremes and other similar abuses did not constitute torture singly or in combination, these practices likely constituted cruel and inhuman treatment and thus violated the War Crimes Act. Although the Act was made retroactively inoperative in the fall of 2006 as part of the Military Commissions Act at the Administration's request, the law was still in effect up to that time.

The role of top Administration officials in detainee mistreatment has not been fully elucidated, but various investigations undertaken after the Abu Ghraib disclosures make it clear that the mistreatment was set into motion once the President decided, in February 2002, to remove all the protections of the Geneva Conventions from Al Qaeda, and some Geneva protections from the Taliban.

President Bush has recently acknowledged that he was aware of the actions of his Principals Committee, a group of National Security Council members who reportedly gathered to approve specific forms of mistreatment during the interrogation of various detainees. Did he know about and approve the techniques of interrogation mentioned above? If so, did that violate the anti-Torture statute and the War Crimes Act, and/or constitute a serious abuse of power and an impeachable offense?

Under the Geneva Conventions, the United States is required to bring to justice those who violate the Conventions. Pursuant to the duty to faithfully execute the laws, a president must take care that this mandate as well as relevant US statutes such as the anti-Torture and the War Crimes Act of 1996 are properly enforced. Yet, it appears that this requirement may not have been met. Former Secretary of Defense Donald Rumsfeld, who admitted to "ghosting" a detainee, which might have violated the Geneva Conventions and US war crimes statutes, was put in charge of the investigation. No higher ups were held responsible and the investigations did not cover top officials of the Administration.

The mistreatment of detainees is not just morally wrong and likely illegal, but it has brought disrepute to the United States and endangered our citizens and soldiers by inflaming

anti-American sentiment in Iraq, Afghanistan and elsewhere in the world and by setting a precedent for the mistreatment of captured US troops.

3. Signing Statements.

President Bush has issued at least 750 signing statements in connection with his signing certain bills into law. The statements indicate that the President will not be bound to carry out all or parts of the laws in question.

Under the constitution, once a bill becomes law, a president must implement the law under the "take care" clause. If a president does not like the bill, the president may veto it, but pursuant to the carefully calibrated system of checks and balances, once the bill is vetoed, Congress has the power to override the veto, thereby making the bill law despite the president's opposition.

Signing statements that are not acted upon create no serious constitutional issue. But, the General Accountability Office examined the signing statements of this Administration and reported that the Administration has in fact refused to enforce or implement laws in connection with which signing statements were issued.

The wholesale refusal to enforce duly enacted laws may well be viewed as a failure to carry out the constitutional "take care" duty. Signing statements coupled with the failure to implement the law might also be viewed as nullifying the veto provisions of the constitution and undermining the role of Congress in making the laws.

Misuse of Executive Privilege

Another area of possible Administration abuse of power has to do with the abuse of executive privilege.

Under the constitution, Congress has the power to inquire into executive branch operations in furtherance of its legislative powers. The improper claim of executive privilege subverts the legitimate operations of Congress and may rise to the level of an impeachable offense, as occurred in the Nixon proceedings.

Recently, Attorney General Michael B. Mukasey announced that executive privilege was invoked to prevent the disclosure to the House Committee on Oversight and Government Reform of Vice President Cheney's interview with the FBI about the Valerie Plame affair. Executive privilege protects the confidentiality of advice given to a president by his advisors. But the document being shielded by this invocation of executive privilege was not confidential advice to the President, but rather a statement made by the Vice President to the FBI, a law enforcement agency. There was also no confidentiality in that statement because such statements are typically presented to prosecutors and the grand jury and may even be shared with the public, if a trial involving the contents of the document takes place. There is no colorable basis on which executive privilege can be asserted with respect to this document.

This claim is reminiscent of President Nixon's claims of executive privilege with respect to the illegal break in into the offices of Daniel Ellsberg's psychiatrist. The break in was designed to obtain materials to smear Ellsberg, a prominent opponent of the Vietnam War. President Nixon did not want this break in disclosed and used various false claims of national security and executive privilege to keep it from Congress and Watergate prosecutors. The break in and its concealment were part of the Nixon impeachment proceedings.

Ironically, the Plame matter, about which the House Committee was inquiring, also may have involved an effort to smear and retaliate against a war critic, in this case, former Ambassador Joseph Wilson, Plame's husband, for charging that President Bush had taken the country into the Iraq war on a basis of deception. Congress was clearly entitled to explore whether executive power was abused in the Plame matter.

Similar extreme claims of executive privilege have been made in connection with Congress' efforts to examine the so-called US Attorneys' scandal. In response to the invocation of executive privilege with respect to their testimony, former and present Administration officials, Harriet Miers, Joshua Bolten and Karl Rove, have refused even to appear before Congress in response to subpoenas seeking information about what role the White House may have played in the scandal. Congress has every right to inquire into whether federal prosecutors were fired to stymie politically harmful prosecutions or whether prosecutors were urged by top Administration officials to prosecute innocent persons.

As the Nixon impeachment process shows, assertions of executive privilege to shield improper or criminal conduct rather than to protect legitimate White House advice may constitute an impeachable offense.

Deceptions Leading to the Iraq War

The deceptions, exaggerations and misstatements made by high level Administration officials to drive the country into the tragically mistaken Iraq war subvert the constitution and may constitute an impeachable offense.

Hearings should have been held to determine what President Bush knew and when he knew it with respect to each and every claim he made as to why the country needed to go to war, but that regrettably was not done. Nonetheless, the latest report from the Senate Intelligence Committee concludes that one of the major claims made by top Administration officials to justify an attack on Iraq, a country that did not attack us--namely that Saddam Hussein was linked to 9/11--was not supported by intelligence. The Committee also found that the claim repeated by top Administration officials before the war that Saddam would hand off weapons of mass destruction to terrorists to attack us, thereby suggesting that Iraq posed a serious threat to the United States, was not supported by intelligence. It found a similar lack of support for a number of other pre-war Administration claims.

Although top Administration officials contended that Iraq's purchase of aluminum tubes and its alleged efforts to purchase Niger yellow cake were evidence of Iraq's efforts to

reconstitute its nuclear weapons program, there was more than enough information at high levels of the Administration to raise serious doubts about these contentions.

As I explain in my book, presidential deception of Congress in connection with war-making is an impeachable offense. This is so because the constitution contemplates that Congress will be at least an equal partner with the president on decisions to go to war (aside from emergency situations, which this was not). Deceiving Congress undermines its ability to play the deliberative role the framers intended. We know the tragic consequences for the country of this flawed decision-making process.

What is to be done?

The question before this Committee is how to respond to the assault on the constitution, the rule of law and our system of government resulting from actions taken by this Administration.

Doing nothing is not an option. The failure to act will further fuel the culture of impunity that has grown up around this Administration. The failure to act will send a strong message to future presidents that they need not obey the law, that they can deceive the country and the Congress into future wars and that they can treat Congress with contempt, obstructing legitimate efforts by Congress to exercise responsible oversight over the executive branch, without serious consequences for them.

What is to stop future presidents of either party from doing the same or going further?

As a former prosecutor, I know that unless serious misconduct results in a correspondingly serious penalty, there is a grave likelihood that the misconduct will be repeated. The absence of a penalty breeds cynicism, disrespect for the law and suggests that the misconduct is not so bad, after all.

Congress needs to assert its constitutional prerogatives to check serious executive branch abuses, not because it craves power, but because our democracy depends on it. Our system counts on each branch of government to act as a counterweight to the other branches. If any branch fails to do its job and check the abuses of another branch, the system as a whole may fail, and our liberties will be endangered. Think of how far down this dark road of unchecked powers we have gone already: secret surveillance without judicial review, secret prisons, secret torture and mistreatment, secret executive orders and possible politicized prosecutions--not to mention a tragic war begun on a basis of deception and misstatement.

The options before Congress for response, at this late stage, are very limited--but Congress still has options.

The remedy the constitution provides, and the one most appropriate to the present situation, is an impeachment inquiry. It would send the clearest signal of the constitutional limits on abusive presidential power. It would also educate the public about the appropriate

limits of executive power and the importance of checks and balances in our constitutional system. That is what happened as a result of the impeachment process during Watergate.

I am not unrealistic, however. I understand the great time constraints and the virtual impossibility of completing a full-blown impeachment inquiry before this session of Congress is over. Nonetheless, there are compelling, pragmatic reasons--as well as a constitutional imperative--to commence an inquiry now, and pursue it in a meaningful and, constructive way over the few remaining months.

Even if an impeachment inquiry is not completed or does not result in an impeachment vote in the House or the Committee, it still should be undertaken. It is warranted and since impeachment inquiries cannot be evaded by citing executive privilege, initiating an inquiry now would accomplish several valuable purposes:

a) It would send a clear message to the American people and future presidents that the actions engaged in by top Administration officials are serious enough on their face to warrant an impeachment inquiry. It would create a precedent whereby executive privilege does not effectively vitiate a president's accountability to Congress, as this Administration has sought to do. This would create a deterrent to future administrations. So would the historic nature of impeachment. Opening an impeachment inquiry would put this Administration in a very small category along with only three others in US history that have been the subject of such an inquiry.

b) Because there is no executive privilege in an impeachment inquiry, pursing one would allow the Committee to obtain additional material on presidential and vice presidential conduct which the Administration has until now refused to provide. That material would disclose the details about Administration actions that are currently secret. Those details would better inform Congress about what the appropriate response to this Administration's actions should be. They would also better inform it about how to avert abuses of power by future presidents. That in itself would be an important outcome of new disclosures. Alternatively, if the Administration still refuses to provide the information and documents requested as part of an impeachment inquiry, that refusal would itself be an impeachable offense under the precedent established in the Nixon proceedings, with the bi-partisan adoption of the third article of impeachment holding that the refusal to respond to committee subpoenas in an impeachment proceeding was an impeachable offense; and

c) It would allow a serious, sober and respectful discussion, in the appropriate and constitutionally mandated forum, of whether or not specific Administration officials committed impeachable offenses. The discussion would include a full and fair airing of evidence and argument on both sides, both allegations and defenses. As I understand it, such a discussion cannot be fully and satisfactorily conducted under House rules without a real impeachment inquiry.

I therefore suggest that the Committee commence an inquiry and send to the President and Vice President relatively short and straightforward requests for information--consisting of some key questions and requests for key documents. The questions would be similar to what

lawyers call interrogatories, and document requests would be made at the same time. The Administration could be given until the end of the August recess to respond.

For example, in the area of abuse of executive privilege, the Committee could ask the President to direct the release to the Committee of the transcripts of both his and the Vice President's FBI interviews on the Valerie Plame matter, and if he refused, to provide his constitutional and legal justifications. Similarly, on the Iraq war, the President could be asked some questions such as: Given the Senate Intelligence Committee report that US intelligence agencies had no information to the effect that there were serious operational connections between Al Qaeda and Saddam Hussein, and given your Administration's claims otherwise to Congress and the American people, what information did you have and what was the source of any such information suggesting that there were such connections? On torture, since the President claims that we "do not do torture," he should be asked how he defines torture and the basis for that definition. He should also be asked if he approved of or authorized water boarding either before or after it was used on detainees. He should also be asked to provide copies of all authorizations for interrogations that he issued, including those to the CIA, and all legal documents that have not already been made public regarding his claimed authority to authorize interrogations that conflict with the constraints contained in the Geneva Conventions, the Convention against Torture and US law. Of course, information that affects national security or that is classified would have to be properly handled by the Committee.

When the Committee obtains the President's responses, or if it becomes clear that the White House will not comply with its requests, then the Committee can determine what further steps it needs to take. Those could include a report by the Committee to the House on the results of the inquiry, a decision to refer the matter to the next Congress, or even a vote of impeachment if the President stonewalls the Committee's requests.

The other options for checking executive abuses are less appealing.

Censure for example is not a constitutional remedy. But even if censure is the course Congress takes, before it is adopted, the targets of any censure resolution should be given the opportunity to justify and explain their actions. The Congress must be seen to be both respectful and fair whether it acts in an impeachment inquiry or votes on censure.

Some have advocated reforming statutes, and that may be useful. But, I want to emphasize to the Committee that presidents intent on putting themselves above the law will not obey a new statute any more than they would obey an old one. Statutes cannot constrain a president who will not be constrained.

Criminal prosecutions alone are also not a sufficiently satisfactory answer to checking abuses of executive power. Leaving the treatment of these abuses to prosecutors to resolve is simply passing the buck. Congress must exercise its own powers to check the executive. Prosecutors vindicate criminal laws; it is only Congress that can vindicate the constitution against a president who abuses the power of his office. And some of the most serious abuses may not even be crimes, such as deceiving Congress and the public in connection with the war in Iraq. In the Nixon impeachment, one of the impeachment articles dealt with abuses of power,

including the misuse of federal agencies and the creation of an enemies list of war opponents for the purpose of targeting harassing IRS audits against them. It is not clear that Nixon could have been prosecuted for many of those acts, but they were nevertheless among the articles of impeachment, and rightly so.

That said, prosecutions may play some role in checking those abuses of executive power that are violations of the criminal law. The anti-Torture statute, for example, makes torture a federal crime and when death results there is no statute of limitations. This means that any Administration officials involved in authorizing or carrying out torture where death resulted could be liable to prosecution for the rest of their lives.

The same was true of the War Crimes Act of 1996. That act had a lower standard of liability than the anti-Torture act and criminalized cruel and inhuman treatment of detainees. Similarly there was no statute of limitations for prosecutions under that Act if death resulted. Concerns about criminal prosecution under the War Crimes Act were pressing enough to be brought to the attention of President Bush by White House Counsel Alberto Gonzales in his memo to the President of January 2002. To avoid those prosecutions, Mr. Gonzales recommended making the Geneva Conventions inapplicable to Al Qaida and Taliban detainees, a recommendation that was partially accepted.

Thus, while certain Administration officials may argue that water boarding is not torture, there is little doubt that water boarding would meet the test of cruel and inhuman treatment and would likely violate the War Crimes Act as originally adopted. It may have been for that very reason that the Administration, in October 2006, persuaded Congress, as part of the Military Commission Act, to make the War Crimes Act retroactively inoperative. But Congress could overturn that inoperability provision and restore the full operability of the Act. Allowing Administration officials to be held liable under the War Crimes Act would go far towards re-establishing respect for the rule of law among high Administration officials, both now and in the future.

Even if Congress chooses the path of statutory reform and/or prosecution, those efforts, to be optimally well-informed and effective, would need to take into account the kind of disclosures that would be obtained through an impeachment inquiry because it operates outside the constraints of executive privilege. Administration actions on their face fully warrant such an inquiry. Once begun, the inquiry would both compel substantive disclosure by the Administration on critical issues and provide a constitutionally appropriate forum for full and civil discussion in which the Administration may answer the serious allegations raised. Neither of these things would be accomplished without an impeachment inquiry, and both are important to defending the constitution, upholding the rule of law and preventing abuses of power by future presidents.

Thank you for your consideration of these views.