Prepared Testimony of Congressman Brad Miller to the House Committee on the Judiciary

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Thank you for the invitation to testify this morning.

Our constitutional system of checks and balances assumes a certain jostling between the President and Congress, but the Bush Administration's refusal to provide information to Congress or to the American people is more dangerous and more sinister than just an extravagantly ambitious claim to executive branch powers. Control of information stifles dissent and insulates an administration from challenge, either by Congress or by critics. Control of information is incompatible with democracy. Informed criticism, as annoying as it is for many in power, is the stuff of democracy.

Democracy dies behind closed doors. It is Congress' duty to throw the doors open and keep them open in future administrations, Democratic and Republican alike. A great American political scientist, Woodrow Wilson, said that it is "the proper duty" of Congress "to look into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents."

The many disputes between the Bush Administration and Congress will not be moot if not resolved before the election in November or the inauguration in January. Congress must continue the effort next year to learn how the Bush Administration used the powers of government. And we must restore the balance of powers between Congress and the President, regardless of who is president and which party is in the majority in Congress.

I have introduced one bill to restore Congress' checks on presidential power, especially the power to act in impregnable secrecy, and I expect to introduce another shortly.

The first bill, HR 6508, would allow the House to ask a court to appoint a special prosecutor for a criminal contempt of congress charge where the United States Attorney refuses to present the case to the grand jury. In recent history, Congress has enforced our authority to take evidence by referring contempt charges to the U.S. Attorney under an 1857 criminal statute. There's not a lot of wriggle room in the statute: the House or Senate may submit contempt charges to the U.S. Attorney, "whose duty it shall be to bring the matter before the grand jury for its action." Despite that unequivocal statutory requirement, when Congress referred criminal contempt charges against Josh Bolton and Harriet Miers, Attorney General Mukasey refused to allow the U.S. Attorney to present the charges to the grand jury. He argued that criminal prosecution is exclusively an executive branch power, and Congress cannot compel the executive branch to bring a criminal prosecution regardless of what the statute said.

In a 1987 decision, the Supreme Court held that a trial court could appoint a private prosecutor to bring a contempt of court proceeding where "the appropriate prosecuting authority" denied the court's request to prosecute. The Supreme Court held that the trial

court's power to appoint a private prosecutor was based on the trial court's "inherent power of self-protection." "If the Judiciary were completely dependent on the Executive Branch to redress direct affronts to its authority," the Supreme Court said, "it would be powerless to protect itself if that Branch declined prosecution."

Congress cannot depend entirely on the executive branch to redress affronts to Congress' authority any more than the courts can, especially where the affront is by the executive branch itself.

Second, the U.S. Justice Department's Office of Legal Counsel is little known to the public, but exercises remarkable power. The Bush Administration has fully realized the potential for the abuse of the OLC's power. Instead of seeking disinterested legal opinions, the Bush Administration has demanded and gotten exactly the opinions it wanted from the OLC. And the Bush Administration has received and acted on the OLC's opinions in secret, placing the opinions beyond challenge, even when the OLC obligingly advised that the Bush Administration could simply ignore statutory requirements. The Bush Administration asserts no exigent circumstances, no practical necessity for the breathtaking claim that the OLC can secretly excuse the administration from legal requirements. It is simply a calculated expansion of presidential power at the expense of Congress and the courts.

I am now working with Senator Feingold on legislation to require the OLC to report opinions to Congress, especially where the OLC decides that the executive branch can just ignore statutory requirements.

According to James Madison, the founders of our republic provided against the usurpation of power by providing each branch of government "the necessary constitutional means and personal motives to resist encroachments of the others." Madison wrote that "the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other - that the private interest of every individual may be a sentinel of the public rights."

The Bush Administration's claim that the president alone decides - in his own unreviewable discretion - what to tell Congress and the American people is an encroachment we must resist. And by jealously asserting our powers under the Constitution, we defend the public rights.