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before the
Subcommittee on the Constitution

Senate Committee on the Judiciary

"Restoring the Rule of Law"

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Mr. Chairman, thank you for inviting me to offer my views on ways to restore the rule of law. In previous periods of emergency and threats to national security, the rule of law has often taken a backseat to presidential initiatives and abuses. Although this pattern is a conspicuous part of American history, it is not necessary to repeat the same mistakes every time. Faced with genuine emergencies, there are legitimate methods of executive action that are consistent with constitutional values. There are good precedents from the past and a number of bad ones.

In response to the 9/11 terrorist attacks, the United States decided to largely adopt the bad ones. The responsibility for this damage to the Constitution lies primarily with the executive branch, but illegal and unconstitutional actions cannot occur and persist without an acquiescent Congress and a compliant judiciary. The Constitution's design, relying on checks and balances and the system of separation of powers, was repeatedly ignored after 9/11. There are a number of reasons for these constitutional violations. Understanding them is an essential first step in returning to, and safeguarding, the rule of law and constitutional government.

I. Making Emergency Actions Legal

The Constitution can be protected in times of crisis. If an emergency occurs and there is no opportunity for executive officers to seek legislative authority, the Executive may take action sometimes in the absence of law and sometimes against it — for the public good. This is called the "Lockean prerogative." John Locke advised that in the event of Executive abuse the primary remedy was an "appeal to Heaven."

A more secular and constitutional safeguard emerged under the American system. Unilateral presidential measures, at a time of an extraordinary crisis, must be followed promptly by congressional action — by the entire Congress, not some subgroup within it.[1] To preserve the constitutional order, the executive prerogative is subject to two conditions. The President must (1) acknowledge that the emergency actions are not legal or constitutional and (2) for that very reason come to the legislative branch and explain the actions taken, the reasons for the actions, and ask lawmakers to pass a bill making the illegal actions legal. (Under Article 48 of the Weimar Constitution, as implemented by the Nazi government, emergency powers were invoked without ever coming to the legislative body.)[2]

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[1] After 9/11, the Bush administration met only with the "Gang of Eight" to reveal what became known as the "Terrorist Surveillance Program." The Gang of Eight consists of four party leaders in the House and the Senate and the chair and ranking member of the two Intelligence Committees. The administration did not seek congressional authorization until after the program had been disclosed by the *New York Times* in December 2005.

[2] Joseph W. Bendersky, Carl Schmitt: Theorist for the Reich 195-98 (1983); John E. Finn, Constitutions in Crisis: Political Violence and the Rule of Law 146-78 (1991); Ingo Müller, Hitler's Justice: The Courts of the Third Reich 33-34, 46-47 (1991); Ellen Kennedy, Constitutional Failure: Carl Schmitt in Weimar 154-69 (2004).

The steps needed to maintain constitutional legitimacy are seen in the conduct by President Abraham Lincoln after the Civil War began. He took actions we are all familiar with, including withdrawing funds from the Treasury without an appropriation, calling up the troops, placing a blockade on the South, and suspending the writ of habeas corpus. In ordering those actions, Lincoln never claimed to be acting legally or constitutionally and never argued that Article II somehow allowed him to do what he did.

Instead, Lincoln admitted to exceeding the constitutional boundaries of his office and therefore needed the sanction of Congress. He told Congress that his actions, "whether strictly legal or not, were ventured upon under what appeared to be a popular demand and a public necessity, trusting then, as now, that Congress would readily ratify them." He explained that he used not only his Article II powers but the Article I powers of Congress, concluding that his actions were not "beyond the constitutional competency of Congress." He recognized that the superior lawmaking body was Congress, not the President. When an Executive acts in this manner, he invites two possible consequences: either support from the legislative branch or impeachment and removal from office. Congress, acting with the explicit understanding that Lincoln's actions were illegal, passed legislation retroactively approving and making valid all of his acts, proclamations, and orders.[3]

II. The Illusory Claim of "Inherent" Powers

President Lincoln acted at a time of the gravest emergency the United States has ever faced. What happened after 9/11 did not follow his model. Although President George W. Bush initially came to Congress to seek the Authorization for the Use of Military Force (AUMF), the USA Patriot Act, and the Iraq Resolution of 2002, increasingly the executive branch acted unilaterally and in secret by relying on powers and authorities considered "inherent" in the presidency.

On several occasions the Supreme Court has described the federal government as one of enumerated powers. In 1995 it stated: "We start with first principles. The Constitution creates a Federal Government of enumerated powers."[4] It repeated that claim two years later.[5] In fact, it is incorrect to call the federal government one of enumerated powers. If that were true, the Court would have no power of judicial review, the President would have no power to remove department heads, and Congress would have no power to investigate. Those powers (and other powers routinely used) are not expressly stated in the Constitution.

The framers created a federal government of enumerated and implied powers. Express powers are clearly stated in the text of the Constitution; implied powers are those that can be reasonably drawn from express powers. "Inherent" is sometimes used as

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[3] 12 Stat. 326 (1861). See Louis Fisher, Presidential War Power 47-49 (2d ed. 2004).

[4] United States v. Lopez, 514 U.S. 549, 552 (1995).

[5] Boerne v. Flores, 521 U.S. 507, 516 (1997).

synonymous with "implied" but it is radically different. Inherent powers are not drawn from express powers. Inherent power has been defined in this manner: "An authority possessed without it being derived from another. . . . Powers over and beyond those explicitly granted in the Constitution or reasonably to be implied from express powers."[6]

The purpose of the U.S. Constitution is to specify and confine governmental powers in order to protect individual rights and liberties. Express and implied powers serve that principle. The Constitution is undermined by claims of open-ended authorities that cannot be located, defined, or circumscribed. What "inheres" in the President? The standard collegiate dictionary explains that "inherent" describes the "essential character of something: belonging by nature or habit."[7] How does one determine what is essential or part of nature? Those words are so nebulous that they invite political abuse, offer convenient justifications for illegal and unconstitutional actions, and endanger individual liberties.[8]

Whenever the executive branch justifies its actions on the basis of "inherent" powers, the rule of law is jeopardized. To preserve a constitutional system, executive officers must identify express or implied powers for their actions. They must do so reasonably and with appropriate respect for the duties of other branches and the rights and liberties of individuals.

It is sometimes argued that if the President functions on the basis of "inherent" powers drawn from Article II, Congress is powerless to pass legislation to limit his actions. Statutory powers, it is said, are necessarily subordinate to constitutional powers. There are several weaknesses with this argument. First, when the President says he is acting under "inherent" powers drawn from Article II, that is nothing more than a *claim* or an *assertion*. Congress is not prevented from acting legislatively because of executive claims and assertions. Neither are the courts. Second, if the President wants to claim that powers exist under Article II the door is fully open for Congress to pass legislation pursuant to Article I. Constitutional authority is not justified by presidential ipse dixits. The same can be said of congressional and judicial ipse dixits. When one branch claims a power the other two branches should not automatically acquiesce. Doing so eliminates the system of checks and balances that the framers provided.

III. Misunderstanding *Curtiss-Wright*

Of all the misconceived and poorly reasoned judicial decisions that have expanded presidential power in the field of national security, thereby weakening the rule of law and endangering individual rights, the *Curtiss-Wright* case of 1936 stands in a class by itself. It is frequently cited by courts and the executive branch for the existence

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[6] Black's Law Dictionary 703 (5th ed. 1979).

[7] Merriam Webster's Collegiate Dictionary 601 (10th ed. 1993).

[8] See Louis Fisher, "Invoking Inherent Powers: A Primer," 37 Pres. Stud. Q. 1 (2007), available at http://www.loc.gov/law/help/usconlaw/constitutional_law.html#agency

of "inherent" presidential power. In language that is plainly dicta and had no relevance to the issue before the Supreme Court, Justice George Sutherland wrote: "It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations — a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution."[9]

Justice Sutherland's distortion of the "sole organ" doctrine is examined in the next section. Here it is sufficient to point out that the case before the Court had absolutely nothing to do with presidential power. It concerned only the power of Congress. The constitutional dispute was whether Congress by joint resolution could delegate to the President *its* power, authorizing President Franklin D. Roosevelt to declare an arms embargo in a region in South America.[10] In imposing the embargo, President Roosevelt relied solely on this statutory — not inherent — authority. He acted "under and by virtue of the authority conferred in me by the said joint resolution of Congress."[11] President Roosevelt made no assertion of inherent, independent, exclusive, plenary, or extra-constitutional authority.

Litigation on his proclamation focused on legislative power because, in 1935, the Supreme Court twice struck down the delegation by Congress of *domestic* power to the President.[12] The issue in *Curtiss-Wright* was therefore whether Congress could delegate legislative power more broadly in international affairs than it could in domestic affairs. A district court held that the joint resolution impermissibly delegated legislative authority but said nothing about any reservoir of inherent or independent presidential power.[13] That decision was taken directly to the Supreme Court, None of the briefs on either side discussed the availability of inherent or independent presidential power. Regarding the issue of jurisdiction, the Justice Department advised that the question for the Court went to "the very power of Congress to delegate to the Executive authority to investigate and make findings in order to implement a legislative purpose."[14] The joint resolution passed by Congress, said the Department, contained adequate standards to guide the President

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[9] United States v. Curtiss-Wright Corp., 299 U.S. 304, 320 (1936).

[10] 48 Stat. 811, ch. 365 (1934).

[11] 48 Stat. 1745 (1934).

[12] Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); Schechter Corp. v. United States, 295 U.S. 495 (1935).

[13] United States v. Curtiss-Wright Export Corp., 14 F.Supp. 230 (S.D. N.Y. 1936).

[14] U.S. Justice Department, Statement as to Jurisdiction, United States v. Curtiss-Wright, No. 98, Supreme Court, October Term, 1936, at 7.

and did not fall prey to the "unfettered discretion" found by the Court in the two 1935 decisions.[15]

The brief for the private company, Curtiss-Wright, focused solely on the issue of delegated power and did not explore the availability of independent or inherent powers for the President.[16] A separate brief, prepared for other private parties, concentrated on the delegation of legislative power and did not attempt to locate any freestanding or freewheeling presidential authority.[17] Given President Roosevelt's stated dependence on statutory authority and the lack of anything in the briefs about inherent presidential power, there was no need for the Supreme Court to discuss independent sources for executive authority.

Anything along those lines would be dicta. The extraneous matter added by Justice Sutherland in his *Curtiss-Wright* opinion has been subjected to highly critical studies by scholars. One article regarded Sutherland's position on the existence of inherent presidential power to be "(1) contrary to American history, (2) violative of our political theory, (3) unconstitutional, and (4) unnecessary, undemocratic, and dangerous."[18] Other scholarly works find similar deficiencies with Sutherland's dicta.[19]

Federal courts repeatedly cite *Curtiss-Wright* to sustain delegations of legislative power to the President in the field of international affairs and at times to support the existence of inherent and independent presidential power for the President in foreign policy. Although some Justices of the Supreme Court have described the President's foreign relations power as "exclusive," the Court itself has not denied to Congress its constitutional authority to enter the field and reverse or modify presidential decisions in the area of national security and foreign affairs.[20]

IV. The False "Sole Organ" Doctrine

Another defective argument for inherent presidential power is Justice Sutherland's reference in *Curtiss-Wright* to a speech given by Rep. John Marshall on March 7, 1800: "The President is the sole organ of the nation in its external relations, and

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[15] Id. at 15.

[16] Brief for Appellees, United States v. Curtiss-Wright, No. 98, Supreme Court, October Term 1936, at 3.

[17] Brief for Appellees Allard, United States v. Curtiss-Wright, No. 98, Supreme Court, October Term, 1936.

[18] C. Perry Patterson, "*In re the United States v. the Curtiss-Wright Corporation*," 22 Texas L. Rev. 286, 297 (1944).

[19] Those works on summarized in Louis Fisher, "Presidential Inherent Power: The 'Sole Organ' Doctrine," 37 Pres. Stud. Q. 139, 149-50 (2007). For more detailed treatment of the sole-organ doctrine, see my August 2006 study for the Law Library. The article and the study are available at http://www.loc.gov/law/help/usconlaw/constitutional_law.html#agency

[20] See pp. 23-28 of the August 2006 study cited in Note 19.

its sole representatives with foreign nations."[21] When one reads Marshall's entire speech and understands it in the context of a House effort to either impeach or censure President John Adams, nothing said by Marshall gives any support to independent, exclusive, plenary, inherent, or extra-constitutional power for the President. Marshall's only objective was to defend the authority of President Adams to carry out an extradition treaty by turning over to England a British subject charged with murder. In that sense the President was not the sole organ in formulating the treaty. He was the sole organ in *implementing* it. Marshall was stating what should have been obvious. Under the express language of Article II it is the President's duty to "take Care that the Laws be faithfully executed." Under Article VI, all treaties made "shall be the supreme Law of the Land."

Far from being an argument for inherent or plenary power, Marshall was relying on the express constitutional duty of the President to carry out the law. He emphasized that President Adams was not attempting to make foreign policy single-handedly. He was carrying out a policy made jointly by the President and the Senate (for treaties). On other occasions the President might be charged with carrying out a policy made by statute. In that sense, the President was the sole organ in implementing national policy as decided by the two branches.

Even in carrying out a treaty, Marshall said, the President could be restrained by a subsequent statute. Congress "may prescribe the mode" of carrying out a treaty.[22] For example, legislation later provided that in all cases of treaties of extradition between the United States and another country, federal and state judges were authorized to determine whether the evidence was sufficient to sustain the charge against the individual to be extradited.[23]

In his capacity as Chief Justice of the Supreme Court, Marshall held firm to his position that the making of foreign policy is a joint exercise by the executive and legislative branches, through treaties and statutes, and not a unilateral or exclusive authority of the President. With the war power he looked solely to Congress — not to the President — for constitutional authority to take the country to war. He had no difficulty in identifying the branch that possessed the war power: "The whole powers of war being, by the constitutional of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this enquiry."[24] When a presidential proclamation issued in time of war conflicted with a statute enacted by Congress, Marshall ruled that the statute prevailed.[25]

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[21] 299 U.S. at 320.

[22] 10 Annals of Cong. 614 (1800).

[23] 9 Stat. 320 (1846), upheld in In re Kaine, 55 U.S. 103, 111-14 (1852).

[24] Talbot v. Seeman, 5 U.S. 1, 28 (1801).

[25] Little v. Barreme, 2 Cr. (6 U.S.) 170, 179 (1804).

Despite this clear meaning of Marshall's meaning of "sole organ," the Justice Department repeatedly cites *Curtiss-Wright* as authority for inherent presidential power, as it did on January 19, 2006 in offering a legal defense for the NSA surveillance program. The Department associated the sole-organ doctrine with inherent power, pointing to "the President's well-recognized inherent constitutional authority as Commander in Chief and sole organ for the Nation in foreign affairs."[26] Later in this analysis the Department stated: "the President's role as sole organ for the Nation in foreign affairs has long been recognized as carrying with it preeminent authority in the field of national security and foreign intelligence."[27] Only by relying on the misconceptions of the dicta by Justice Sutherland in *Curtiss-Wright* could language like that be used. Nothing in Marshall's speech offers any support for inherent or preeminent authority of the President.

V. Usurping the War Power

Beginning with President Harry Truman's war against North Korea in 1950, Presidents over the last half century have claimed the constitutional authority to take the country to war without seeking either a declaration of war or statutory authorization from Congress. Nothing is more destructive to the rule of law than allowing Presidents to claim that the Commander in Chief Clause empowers them to initiate war. With that single step all other rights, freedoms, and procedural safeguards are diminished and sometimes extinguished.

I have dealt with this issue in previous testimony and in my writings, so will merely summarize the argument for congressional dominance in matters of going to war. Congress, and only Congress, is the branch of government authorized to decide whether to initiate war. That constitutional principle was bedrock to the framers. They broke cleanly and crisply with the British model that allowed kings to control everything abroad, including wars. The framers created a Constitution dedicated to popular control through elected representatives. They dreaded placing the war power in the hands of a single person. They distrusted human nature, especially executives who possessed a natural appetite for war, fame, and military glory. Contrary to the July 2008 Baker-Christopher war powers report, the Constitution is not "ambiguous" about placing the war power with Congress.[28]

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[26] Office of Legal Counsel, U.S. Department of Justice, "Legal Authorities Supporting the Activities of the National Security Agency Described by the President," January 19, 2006, at 1.

[27] Id. at 30.

[28] Louis Fisher, "When the Shooting Starts: Not Even an Elite Commission Can Take Away Congress' Exclusive Power to Authorize War," Legal Times, July 28, 2008, at 44-45. For my testimony and other articles on the war power, see http://www.loc.gov/law/help/usconlaw/constitutional_law.html#agency

VI. Hazards of State Secrets

Especially in recent years, the executive branch has invoked the "state secrets privilege" to prevent litigants from challenging actions that appear to be illegal and unconstitutional. These civil cases include the extraordinary rendition lawsuits of Maher Arar and Khaled El-Masri and the NSA surveillance cases brought against the administration and telecoms. The rule of law is threatened if judges accept the standards of "deference" or "utmost deference" when evaluating executive claims. Assertions of "national security" documents are only that: assertions. When judges fail to assert their independence in these cases, it is possible for an administration to violate statutes, treaties, and the Constitution without any effective challenge in court.

Congress has full authority to act legislatively to redress this problem. The House and the Senate have in the past year held hearings on this issue and on August 1, 2008 the Senate Judiciary Committee reported its bill.[29] The Justice Department relies on the Supreme Court's decision in *United States* v. *Reynolds* (1953), the first time that the Court recognized the state secrets privilege. The history of that litigation makes plain that the executive branch misled the courts about the presence of "state secrets" in the document sought by the plaintiffs. When the document, an Air Force accident report, was declassified and made public, it is evident that the report contained no state secrets.[30]

VII. Secret Law

Increasingly, the executive branch operates on the basis of secret executive orders, memoranda, directives, and legal memos. On March 31, 2008, the administration declassified and released a Justice Department legal memo prepared five years earlier on military interrogation of alien unlawful combatants outside the United States. Other legal memos remain secret. A society cannot remain faithful to the rule of law when governed by secret law, especially policies that promote broad and unchecked presidential power. If legal memos contain sensitive information, items can be redacted and the balance of the document made public. No plausible case can be made for withholding legal reasoning. Secret policy means that the rule of law is not statute or treaty, enacted in public, but confidential executive policies unknown to citizens or even members of Congress. The public and executive agencies cannot comply with secret law. Lawmakers are unable to review and amend legal interpretations never released by the executive branch.[31]

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[29] S. Rept. No. 110-442, 110th Cong., 2d Sess. (2008).

[30] Louis Fisher, In the Name of National Security: Unchecked Presidential Power and the *Reynolds* Case (2006). Articles and testimony are available at the Web site listed in Note 28.

[31] The issue of secret legal memos was explored at a hearing on April 30, 2008, before the Senate Judiciary Committee. See also Louis Fisher, "Why Classify Legal Memos?," National Law Journal, July 14, 2008, available at the Web site listed in Note 28.

VIII. Signing Statements

A form of secret law appeared in a signing statement by President Bush on December 30, 2005. Congress, responding to criticism of abusive interrogations of detainees, passed legislation prohibiting cruel, inhuman, or degrading treatment or punishment of persons held in U.S. custody.[32] In signing the bill, President Bush stated that the provision would be interpreted "in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief."[33] References to the unitary executive theory and the Commander in Chief Clause are far too general to understand either the nature of the objection or the scope of the claimed presidential authority. Other signing statements are generally impossible to comprehend and analyze because they are couched in such abstract references as the Appointments Clause, the Presentment Clause, the Recommendations Clause, and other shortcut citations.[34] Constitutional concerns deepen when Presidents raise objections at the time they sign a bill and proceed to adopt policies — as with the interrogation of detainees — unknown to the country or to Congress.

Signing statements encourage the belief that the law is not what Congress places in a bill but what Presidents say about the language. In 1971, President Richard Nixon signed a bill that included a provision calling for the withdrawal of U.S. troops from Southeast Asia. The signing statement expressed the view that the provision "does not represent the policies of the Administration."[35] A year later, a federal district court instructed President Nixon that the law was what he signed, not what he said about it.[36] When he signed the bill it established U.S. policy "to the exclusion of any different executive or administration policy, and had binding force and effect on every officer of the Government, no matter what their private judgments on that policy, and illegalized the pursuit of an inconsistent executive or administration policy."[37] No executive statement, including that of the President, "denying efficacy to the legislation could have either validity or effect."[38]

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[32] Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680, 2739 (2005), codified at 42 U.S.C.A. § 2000dd (West Supp. 2007).

[33] 41 Weekly Comp. Pres. Doc. 1919 (2005); see Elizabeth Bumiller, "For President, Final say on a Bill Sometimes Comes After the Signing," New York Times, January 16, 2006, at A11.

[34] "Presidential Signing Statements," Findings of the Subcommittee on Oversight and Investigations, House Armed Services Committee, August 18, 2008, available at http://www.fas.org/sgp/congress/2008/signing.pdf

[35] Public Papers of the Presidents, 1971, at 1114.

[36] DaCosta v. Nixon, 55 F.R.D. 145 (E.D.N.Y. 1972).

[37] Id. at 146.

[38] Id. See also Louis Fisher, "Signing Statements: Constitutional and Practical Limits," 16 Wm. & Mary Bill of Rights J. 183 (2007).

IX. "Authorizing" What Is Illegal

To provide assurance to the public and other branches, administrations will often announce that what it has done is fully authorized. That pattern was illustrated when the Bush administration, having violated the FISA statute by not seeking approval from the FISA Court, publicly stated that its Terrorist Surveillance Program was "authorized," regularly "reauthorized," and was "legal" and "lawful." Those words implied that the administration was acting in compliance with the rule of law, or "consistent" with the law, when it was in fact operating squarely against it and doing so in secret.[39]

Legislation passed by Congress on July 10, 2008 compounds the problem by giving retroactive immunity to the telecoms that assisted the administration with the surveillance program. Civil actions in federal or state court may be dismissed if the Attorney General certifies to the court that the activity was "authorized by the President" and "determined to be lawful."[40] Through this procedure, what was illegal under FISA becomes legal if the President "authorized" it and someone, for whatever reason, determined that the action was "lawful."

What counts under this procedure is not the law, as enacted by Congress, but independent and contradictory executive operations. Justice Robert Jackson reminded us what is meant by the rule of law: "With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberation."[41]

X. Misuse of Executive Privilege

In the past, the executive branch recognized that the President should not invoke executive privilege to undermine the rule of law. In particular, it was improper to block congressional access to information when "wrongdoing" had been committed by executive officials. The Supreme Court has noted that the power of Congress to conduct investigations "comprehends probes into departments of the Federal Government to expose corruption, inefficiency, or waste."[42] Attorney General William Rogers told a Senate committee in 1958 that the withholding of documents from Congress "can never be justified as a means of covering mistakes, avoiding embarrassment, or for political,

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[39] Louis Fisher, The Constitution and 9/11: Recurring Threats to America's Freedoms 291-98, 300-02 (2008).

[40] Pub. L. 110-261, 122 Stat. 2469 (2008). See Edward C. Liu, Legislative Attorney, American Law Division, Congressional Research Service, "Retroactive Immunity Provided by the FISA Amendments Act of 2008," RL 34600 (July 25, 2008).

[41] Youngstown Co. v. Sawyer, 343 U.S. 579, 655 (1952).

[42] Watkins v. United States, 354 U.S. 178, 187 (1957).

personal, or pecuniary reasons."[43] In 1982, Attorney General William French Smith said he would not try "to shield [from Congress] documents which contain evidence of criminal or unethical conduct by agency officials from proper review."[44] During a news conference in 1983, President Ronald Reagan remarked: "We will never invoke executive privilege to cover up wrongdoing."[45] In a memo of September 28, 1994, White House Counsel Lloyd Cutler stated that executive privilege would not be asserted with regard to communications "relating to investigations of personal wrongdoing by government officials," either in judicial proceedings or in congressional investigations and hearings.[46]

Those statements promote a basic principle. A privilege exerted by the executive branch should not be used to conceal corruption, criminal or unethical conduct, or wrongdoing by executive officials. A privilege should not be used to shield government officials who violate the law. Yet in the last two years, when Congress attempted to investigate several activities within the Justice Department, including the firings of U.S. Attorneys, the administration decided that a privilege would attach to top White House officials, both past and present. That interpretation provided those individuals with total immunity against any congressional investigation. Legislative efforts to exercise the power of contempt against those officials would be ineffective. Under this policy, the U.S. attorney who is required under law to take a contempt citation to a grand jury to investigate possible wrongdoing, is prohibited from discharging that statutory duty. Through this policy the investigative power of Congress to probe agency corruption is neutralized. Existing checks would come only from the executive department investigating itself.

On July 31, 2008, District Judge John D. Bates rejected a number of Justice Department arguments that were used to block the House contempt votes. Most importantly, he rejected the claim of absolute immunity from compelled congressional process for senior presidential aides. He found clear precedent and persuasive policy reasons to conclude that "the Executive cannot be the judge of its own privilege."[47]

This case did not concern matters of national security, an area where the executive branch frequently claims special and exclusive privileges to keep documents from

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[43] "Freedom of Information and Secrecy in Government," hearing before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 85th Cong., 2d Sess. 5 (1958).

[44] Letter of November 30, 1982, to Congressman John Dingell, reprinted in H. Rept. No. 698, 97th Cong., 2d Sess. 41 (1982).

[45] Public Papers of the Presidents, 1983, I, at 239.

[46] Memorandum for all Executive Department and Agency General Counsels from Lloyd N. Cutler, Special Counsel to the President, "Congressional Requests to Departments and Agencies for Documents Protected by Executive Privilege," September 28, 1994, at 1. See Louis Fisher, The Politics of Executive Privilege 49-51, 111-34, 199-27 (2004).

[47] Committee on the Judiciary, U.S. House of Representatives v. Harriet Miers, Civil Action No. 08-0409 (JDB), (D.D.C. July 31, 2008), at 91.

Congress and the judiciary. The Justice Department relies heavily on the Supreme Court's 1988 decision in *Egan*. The Court acknowledged the President's responsibilities to protect documents bearing on national security.[48] Yet, as noted by District Judge Vaughn R. Walker in a recent ruling, the Court in *Egan* specifically said that presidential power is broad "unless Congress specifically has provided otherwise."[49] To Judge Walker, the Court's decision in *Egan* "recognizes that the authority to protect national security information is neither exclusive nor absolute in the executive branch."[50]

XI. Consultation is Not Law-Making

However valuable and useful interbranch consultation can be, it is never a substitute for legislation that specifically authorizes a presidential action. Lawmaking is the action of the full Congress, not subgroups like the "Gang of Eight." The decision to make law is set aside for each member of Congress, from the Speaker of the House and the Senate Majority Leader to the newly elected lawmaker. A President and his executive aides should not be able to co-opt a small group of lawmakers, who might "sign off" on a military or financial commitment and thereby pledge House and Senate report. A recent attempt to confer power on a "Consultative Committee" is the Baker-Christopher War Powers Commission report released in July 2008.[51]

XII. Depending on Structural Checks

The framers did not pin their hopes on the President or federal courts to protect individual rights and liberties. They distrusted human nature and chose to place their faith in a system of checks and balances and separated powers. The rule of law finds protection when political power is not concentrated in a single branch and when all three branches exercise the powers assigned them, including the duty to resist encroachments of another branch. The rule of law is always at risk when Congress and the judiciary defer to claims and assertions by executive authorities. That is the lesson of the last two centuries and particularly of the past seven years. James Madison looked to a political system where ambition would counteract ambition. With Congress (and the judiciary) there is often a lack of ambition to assert and defend institutional powers and duties.

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[48] Department of the Navy v. Egan, 484 U.S. 518 (1988).

[49] Id. at 530.

[50] In re: National Security Agency Telecommunications Records Litigation, MDL Docket No. 06-1791 VRW (D. Cal. July 2, 2008), at 22. For additional analysis of *Egan* and why Congress has access to sensitive and classified documents, see Louis Fisher, "Congressional Access to National Security Information," 45 Harv. J. Legis. 219 (2008), available at the Web cite listed in Note 28. For example, *Egan* was a matter of statutory construction, not constitutional interpretation.

[51] James A. Baker III and Warren Christopher, "Put War Powers Back Where They Belong," New York Times, July 8, 2009, at A23; Louis Fisher, "When the Shooting Starts: Not Even an Elite Commission Can Take Away Congress' Exclusive Power to Authorize War," Legal Times, July 28, 2008, at 44-45.

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 at a number of universities and law schools.

He is the author of eighteen books, including *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), *Nazi Saboteurs on Trial: A Military Tribunal and American Law* (2003), and, most recently, *The Constitution and 9/11: Recurring Threats to America's Freedoms* (2008). He has received four book awards.

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