

STATEMENT OF BRUCE FEIN
BEFORE THE HOUSE JUDICIARY COMMITTEE
RE: IMPEACHMENT

JULY 25, 2008

Dear Mr. Chairman and Members of the Committee:

If President George W. Bush had knocked to enter the constitutional convention in Philadelphia in 1787, presiding convention president George Washington would have denied him admission. Thereby hangs an alarming tale. The executive branch has vandalized the Constitution every bit as much the barbarians vandalized Rome in 410 A.D. The executive branch has destroyed the Constitution's time-honored checks and balances and raced the nation perilously close to executive despotism. The executive branch rejects the basic philosophical tenets of the United States. It does not accept that America was conceived in liberty and dedicated to the proposition that sovereignty in a republican form of government lies with the people; that there are no vassals or serfs in the Constitution's landscape; that every man or woman is a king or queen but no one wears a crown; and, that the rule of law is the nation's civic religion. The Founding Fathers fashioned impeachment as a remedy for attacks against the constitutional order.

I wish these words were hyperbole. But they are not.

The Declaration of Independence posits that all men and women are endowed with certain unalienable rights, including life, liberty, and the pursuit of happiness. Those rights are not at the sufferance of the executive branch, of Platonic Guardians, or of any government whatsoever.

The executive branch, however, has made our natural rights sport for its political ambitions and craving for power. After 9/11, the executive branch declared—with the endorsement or acquiescence of Congress and the American people—a state of permanent warfare with international terrorism, i.e., the war would not conclude until every actual or potential terrorist in the Milky Way were either killed or captured and the risk of an international terrorist incident had been reduced to zero. The executive branch further maintained without quarrel from Congress or the American people that since Osama bin Laden threatens to kill Americans at any time and in any location, the entire world, including all of the

United States, is an active battlefield where military force and military law may be employed at the discretion of the executive branch. For instance, the executive branch claims authority to employ the military for aerial bombardment of cities in the United States if it believes that Al Qaeda sleeper cells and are nesting there and are hidden among civilians with the same certitude that the executive branch knew Saddam Hussein possessed weapons of mass destruction. The innocent civilian deaths occasioned by the bombings would be no more than regrettable collateral damage in the war against international terrorism. Just ask the bereaving Iraqis and Afghans who witness indistinguishable collateral damage daily inflicted by the United States military.

If the executive branch decided to place the nation under military rule, unalienable rights to life, liberty, and the pursuit of happiness would be eviscerated. Citizens could be arrested and searched at random. Homes could be destroyed without just compensation if the executive branch asserted that they could serve as hiding places for Al Qaeda. Trials for alleged crimes would be by military commissions denuded of fundamental due process protections, for example, the right to confront adverse evidence.

It might be said in defense of the executive branch that it has not yet extended its claimed military power on a regular basis into the United States. The executive branch has directed United States forces to kill or kidnap persons it suspects have allegiance to Al Qaeda in foreign lands, for instance, Italy, Macedonia, or Yemen, but it has plucked only one United States resident, Ali Saleh Kahlah al-Marri, from his home for indefinite detention as a suspected enemy combatant. But if the executive branch's constitutional justification for its modest actions is not rebuked through impeachment or otherwise, a precedent of executive power will have been established that will lie around like a loaded weapon ready for use by any incumbent who claims an urgent need. Moreover, the Founding Fathers understood that mere claims to unchecked power warranted stern responses.

After the British Parliament repealed the 1765 Stamp Tax by the protesting American colonists waving the banner of “No Taxation Without Representation,” the Parliament responded with the Declaratory Act that insisted that it retained power to govern the colonies in all matters whatsoever irrespective of their absence of parliamentary representation. That theory of parliamentary omnipotence, simpliciter, awakened a colonial fury that culminated in the Declaration of Independence. The Constitution does not require Congress to await the executive branch’s actual imposition of martial law and the indiscriminate use of military force in the United States against American citizens before exercising the impeachment power against Administration officials who are unworthy stewards of the Constitution. Moreover, the executive branch has buttressed its claimed military omnipotence with the unitary executive theory. It posits, contrary to centuries of constitutional law and the original intent of the Founding Fathers, that any power than can be characterized as executive is shielded from review, inquiry, or checking by any other branch. For example, the power to wage war is an executive power. According to the executive branch, that means that Congress is powerless to regulate how the Commander in Chief seeks to attain victory in Iraq by prohibiting torture, invasions of Iran or Syria, limiting troop levels or permanent military bases, or otherwise.

The Declaration of Independence instructs that all just powers of government derive from the consent of the governed. And the core principle of self-government is that the people must know what their government is doing and why to intelligently adapt, shape, and direct their political loyalties or energies. James Madison, father of the Constitution, lectured that a people who mean to be their own governors must arm themselves with the power that knowledge gives. Democracy resting on popular or congressional ignorance is a farce. In addition, sunshine is the best disinfectant. The executive branch will be deterred from lawlessness, folly, or maladministration by the knowledge that its actions will be made known to the public or Congress in a timely fashion. The executive branch ceased authorizing torture once knowledge of the practice by the United States in the war against international terrorism

entered the public domain. A strong presumption favoring transparency in the executive branch is a constitutional imperative. The presumption is at its zenith in matters of war and peace, as Supreme Court Justice Hugo Black underscored in the Pentagon Papers case concerning the Vietnam War; otherwise, the executive branch will otherwise concoct reasons for initiating or maintaining war and cause deaths to heroic American soldiers as senseless as the Charge of the Light Brigade.

The Founding Fathers were virtually unanimous that if permitted to be cloaked with secrecy the executive branch would distort facts and deceive the people and Congress by inflating foreign dangers manifold to justify resort to military force or war. As was related to erstwhile White House Press Secretary Scott McClellan, only war holds the prospect of crowning a President with fame and leaving his footprints in the sand of time by transforming the political globe or major regions. War also boosts a President's immediate popularity, heightens his control over information critical to his political fortunes, multiplies his opportunities to favor his political friends through appointments and government contracts, and justifies spying on war opponents as enemy combatants or potential traitors.

The executive branch, however, has routinely invoked executive privilege to conceal what the executive branch is doing and why in both national security and domestic matters. The executive branch has employed secrecy to communicate a suboptimal level of candor to the American people and Congress about foreign dangers and purported justifications for war. James Iredell, later appointed by President George Washington to the United States Supreme Court, advised the North Carolina ratification convention:

“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.”

The executive branch deceived the American people and Congress by concealing material evidence discrediting the claim that Saddam Hussein possessed weapons of mass destruction or was in cahoots with Al Qaeda, chief justifications for invading Iraq in March 2003. The executive branch misled the American people and Congress about the true danger of international terrorism to elicit their endorsements for a state of permanent war. The House Judiciary Committee voted an article of impeachment against President Richard M. Nixon based in part on his deceit to the American people about a bogus internal investigation of the Watergate cover-up.

The executive branch has invoked executive privilege to prevent Congress and the American people from knowing the prime features and the putative intelligence benefits of the Terrorist Surveillance Program undertaken in contravention of the Foreign Intelligence Surveillance Act of 1978, as amended.

On the domestic front, the executive branch has invoked the privilege to conceal from the American people and Congress Vice President Dick Cheney’s interview with special prosecutor Patrick Fitzgerald concerning the Valerie Wilson leak investigation. The privilege at its apex was never before thought to extend to vice presidential communications not intended for the president.

The privilege has been invoked to prevent former White House aides Karl Rove and Harriet Meirs from even appearing before Congress regarding the firing of United States attorneys and possible obstruction of justice or perjury, and to prevent White House chief of staff Joshua Bolten from responding to document production requests from Congress concerning the same. The executive

branch's counter-constitutional theory of executive privilege is that the President can prevent any current or former executive branch official from appearing before Congress to testify about communications that were aimed to reach the President or emanated from the Oval Office. That would sound the death knell of congressional oversight and the public's right to know what their government is doing and why. It would have permitted President Richard M. Nixon to muzzle former White House counsel John Dean from testifying about the Watergate cover-up before the Senate Watergate Committee by reciting Oval Office conversations whose disclosures engendered Nixon's resignation. No decision of the United States Supreme Court has sustained a presidential privilege to deny information to Congress. Its assumption that executive officials will shortchange candid advice to the President absent an iron-clad guarantee of confidentiality is counterfactual. Every important presidential adviser operates on the assumption that what is said in the Oval Office might through leaks or waivers of privilege later appear in major media outlets. Thus, former CIA Director George Tenet writes in At the Center of the Storm: "[T]here are no private conversations, even in the Oval Office."

The executive branch maintains that it is endowed with constitutional authority to gather foreign intelligence in any manner the executive branch wishes in contravention of statutory restraints imposed by Congress. The Constitution, however, obligates the executive branch to faithfully to execute the laws, not to sabotage them. The executive branch operated the Terrorist Surveillance Program to target American citizens on American soil for warrantless electronic surveillance on the executive branch's say so alone from 9/11-2007 in violation of FISA. The executive branch also claims power to torture, kidnap, open mail, or burglarize in violation of congressional limitations in the name of collecting foreign intelligence. The multiple victims of executive branch's authorization of torture, including waterboarding, are documented in Jane Mayer's recent book The Dark Side. The executive branch's lawlessness made the nation less safe by deterring expert FBI agents from participating in key

interrogations to avoid complicity in crime and alienating foreign allies like Italy whose sovereignty was violated by a CIA-orchestrated kidnapping of Egyptian cleric Abu Omar.

An American Bar Association Task Force on which I served issued a report delineating the constitutional evils of signing statements that I need not amplify at this time. It is another example of the executive branch's usurpation of legislative powers and scorn for the rule of law.

In Federalist 65, Alexander Hamilton explained that impeachments would proceed "from the misconduct of public men, or, in other words, from abuse of violation of some public trust. They are of a nature which may with peculiar propriety be dominated POLITICAL, as they relate chiefly to injuries done to society itself." There is no more important task for this Committee than restoring the constitutional equilibrium among the three branches that the Founding Fathers fashioned based on their unsurpassed insight into human nature and the inexorable degeneration of unchecked power into tyranny.