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“EXECUTIVE POWER AND ITS  
CONSTITUTIONAL LIMITATIONS”

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Written Testimony of

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*Urging Congress to establish an investigatory Commission  
to determine what has gone wrong with our policies in  
confronting terrorism and to suggest solutions.*

**Testimony of Frederick A. O. Schwarz, Jr., before the Hearing on  
“Executive Power and Its Constitutional Limitations” by the Committee on the  
Judiciary of the House of Representatives on July 25, 2008.**<sup>1</sup>

I am grateful to have the chance to share with you some thoughts on measures aimed at restoring the proper constitutional balance between the branches of government, reinvigorating the separation of powers, and restoring respect for American values.<sup>2</sup>

We must resolve to confront our mistakes so that we do not repeat them. Throughout American history, in times of crisis, presidents have accumulated significant new powers, and the Executive Branch has often engaged in abusive conduct. These bursts of misconduct are often closely related to emergency circumstances. Crisis makes it tempting to ignore the wise restraints that both keep us free and reduce the likelihood of foolish mistakes. This nation has at times admirably set about correcting its course—realizing, as the dust settles, or as previously secret facts are revealed, that constitutional and legal norms have been breached. Our self-correcting mechanism is one of the great strengths of our democracy. It is time for such a searching assessment and self-correction again.

**I. An Investigatory Commission Should be Established.**

In this testimony, I urge that Congress and the next President pass a law establishing an investigatory Commission to determine what has gone wrong (and right) with our policies and practices in confronting terrorism since September 11, 2001, and to recommend solutions. There are many other points related to the subject matter of this hearing that I could make (see ns. 1 and 2, *supra*, and ns. 7 and 11 *infra*). But, I believe that the suggestion of a Commission needs to be emphasized in order to make it part of the current public dialogue.

**A. We Know Enough To Conclude There Is a Serious Problem.**

Based on what we know now—about torture, about extraordinary rendition to torture, about permanent detention, about warrantless wiretapping, and about the Administration’s “monarchical” theory of presidential power—it seems clear that the course we have chartered over the last seven years has in fact made us less safe, as well as less free:

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<sup>2</sup> Other thoughts are contained in *UNCHECKED AND UNBALANCED*, particularly in the addendum to the paperback revision (The New Press, 2008) and in the Brennan Center’s publication, *AZIZ HUQ, TWELVE STEPS TO RESTORE CHECKS AND BALANCES*, available at [http://www.brennancenter.org/content/resource/twelve\\_steps\\_to\\_restore\\_checks\\_and\\_balances/](http://www.brennancenter.org/content/resource/twelve_steps_to_restore_checks_and_balances/).

- We have squandered one of our greatest assets—respect for our values.
- We have given vicious terrorists like Bin Laden powerful recruiting tools by letting them, of all people, decry our tactics.
- And we have lost much of the support of our allies, as admiration for America has dropped substantially.<sup>3</sup>

Things have indeed gone wrong. For example, just on the subject of torture:

- Former Secretary of State Colin Powell warned that “The world is beginning to doubt the moral basis of our fight against terrorism.”<sup>4</sup>
- Attorney General Michael Mukasey cannot bring himself to bar waterboarding; and Vice President Dick Cheney positively embraces it, even though the United States prosecuted Japanese soldiers as war criminals for using waterboarding on American soldiers in World War II.
- President George W. Bush correctly states that “the values of this country are such that torture is not part of our soul and our being,” while at the same time he contradicts himself by insisting that the CIA should be permitted to use “enhanced interrogation techniques” that go far beyond what the American military believes is proper and which conflict with any fair reading of the torture treaties and laws to which we are subject.
- Similarly, President Bush and Secretary of State Condoleezza Rice defend sending prisoners to Egypt and Syria for questioning [“extraordinary rendition”], despite the fact that our State Department repeatedly issues human rights reports that condemn Egypt and Syria for using torture on prisoners. The excuse of the President and the Secretary: they promised not to torture “our prisoners.” Not believable. Particularly not believable given that there is proof that “our prisoners” have been tortured.<sup>5</sup>

For America to adopt tactics of the enemy—such as torture—saps our strength. It is all the worse when our leaders’ public positions appear to be hypocritical.

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<sup>3</sup> See, e.g., Pew Global Attitudes Project, *America’s Image Slips, But Allies Share U.S. Concerns Over Iran, Hamas* (June 13, 2006), available at: <http://pewglobal.org/reports/display.php?ReportID=252>.

<sup>4</sup> Letter Colin S. Powell to Senator John McCain, September 13, 2006.

<sup>5</sup> NYU Center for Human Rights and Global Justice, “Beyond Guantánamo: Transfers to Torture One Year After *Rasul v. Bush*” (2005) (“[E]xtraordinary renditions [by the CIA] have been carried out pursuant to a classified directive signed by President Bush a few days after September 11, 2001”). Scott Horton, *More on Maher Arar*, HARPER’S MAGAZINE, June 5, 2008.

The Administration's legal justification for its conduct is as troubling as the conduct itself. Other moments in history have seen abusive conduct. But the constitutional and legal theory under which this Administration has acted is unprecedented. It is remarkably troubling. It presents a theory of presidential power that flies in the face of the Revolution, is inconsistent with the language and history of the Constitution, ignores crucial Supreme Court decisions, and closes the door to checks and balances.

Thus, the Administration's post-9/11 position is that the President—like a seventeenth century British monarch—is above the law. Surprisingly, this theory was first raised twenty years ago by then-Congressman Dick Cheney when he dissented in 1987 from Congress's Iran-Contra Report by saying the President will “on occasion feel duty-bound to assert monarchical notions of prerogative that will permit him to exceed the laws.”<sup>6</sup> The attacks of 9/11 allowed the Vice President—supported by compliant lawyers in the Justice Department's Office of Legal Counsel—to put into effect this dangerous and erroneous reading of America's history and America's Constitution.<sup>7</sup>

The law also has been perverted to justify the invasion of Americans' constitutional privacy rights through warrantless surveillance. Most importantly, it has been perverted to advise the President that he need not comply with the law of the land. And the entire criminal law apparatus has been appropriated to serve petty partisan purposes.

In short, in the nearly eight years that have passed under the current Administration, and especially in the seven years since the tragedy of 9/11, the White House has arrogated to itself unprecedented powers of coercion, detention and surveillance. All the while, it has tried to use a patina of legal and constitutional excuses to disguise the degree to which it has abandoned the very ideals in whose defense these immoral tactics have been employed.

The result has been a distortion of the Constitution, an evisceration of the rights and liberties of individuals, and a perversion of American values. All of this has done grave harm to our nation's reputation and has reduced our security here and abroad. Thus:

- By abandoning our values and choosing instead to adopt tactics of the enemy, we have given enemy recruiters powerful tools to stir up passions in the Muslim world.
- We have undermined necessary cooperation from our closest allies. As Colin Powell said: “the world is beginning to doubt the moral basis of our fight against terrorism.”

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<sup>6</sup> *Report of the Congressional Committees Investigating the Iran-Contra Affair, with Supplemental, Minority, and Additional Views*, S. REP. NO. 100-216, H. REP. NO. 100-433, at 465 (1987).

<sup>7</sup> Chapter 7 [“Kings and Presidents”] of *Unchecked and Unbalanced*, debunks this monarchical theory. Chapter 8 [“The King's Counsel”] exposes the irresponsibility of the lawyers in the Justice Department's Office of Legal Counsel—although some other government lawyers (particularly in the military) have been exemplary in, for example, resisting torture.

- After the rush of support and emotional bonding with America immediately after 9/11, we are met with disappointment, caution and resistance even from our closest allies.
- A dramatic example of how the Administration's chosen tactics have hurt us comes from the United Kingdom, where British intelligence agencies are increasingly reluctant to share information with the United States for fear that it will be used in rendition operations.<sup>8</sup>

**B. Although A Lot is Known, This Country Still Needs An In-Depth Investigation To Learn the Whole Truth, and To Decide What Needs To Be Done To Remain True to Our Values and Better Protect Ourselves.**

Given that there will be a new administration on January 20, 2009, a question naturally arises: Why bother rehashing the past?

The short answer is that when we fail to fully understand what went wrong and why we strayed so far, we risk repetition.

To avoid repeating history requires understanding history. As the Framers recognized, openness and transparency in government is a prerequisite to democratic legitimacy and to lawful government. As James Madison observed, "[a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."<sup>9</sup>

While some of our recent history has dribbled or leaked out, the Government itself has denied a free people knowledge of many of the actions it has taken in their names. Excessive secrecy smothers popular power.

Many details of the programs we know about have been suppressed, or glossed over with generalities, or misrepresented. Other programs may still remain unknown. In addition, we do not know the extent to which the Administration was told (or understood) how a departure from America's ideals actually risked undermining the battle against terrorism.<sup>10</sup> The executive branch insists the truth about what it has done—and how it decided what to do—must remain secret. But without access to these facts,

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<sup>8</sup> Britain's Intelligence and Security Committee, *Rendition Report* (2007). See also the conclusions of the Foreign Affairs Committee of the British House of Commons that the U.K. "can no longer rely on U.S. assurances that it doesn't use torture." *British Panel Doubts U.S. on Torture*, N.Y. TIMES, July 21, 2008 at A11. Due to similar fears, Sweden has determined that foreign agents may not participate in prisoner transfers or body searches. Victor L. Simpson, *U.S. Allies Resist Secret Deportations*, ASSOC. PRESS, June 19, 2005. And Italy and Germany have indicted American officials for participation in rendition operations on their soil.

<sup>9</sup> Letter from James Madison to W.T. Barry (Aug. 4, 1822), reprinted in 1 THE FOUNDERS' CONSTITUTION 690 (Philip B. Kurland & Ralph Lerner eds., 1987).

<sup>10</sup> *Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities*, 1 S. REP. NO. 94-755, at 156 (1976).

even for those with security clearance, the public can never know the full story and judge whether the United States conducted itself appropriately.

The fundamental message of my testimony is this: The abuses that have taken place must be accounted for. We need to know who is responsible for what has gone wrong, and how it has harmed us. When there are allegations that ultimately are proven wrong, they should be aired and names cleared. When the United States has conducted its anti-terrorism policy forthrightly and wisely, it should be commended for doing so. But especially given the ample evidence that policy is out of balance, it is far more likely that the greatest need is institutional repair and restoration of the rule of law. It is imperative that Congress and the next President take steps not only to rectify the damage done, but to put in place measures to prevent similar damage in the future.

A Commission would serve several important functions. It would reveal the many as-yet-unknown aspects of what our government has done and how it evaluated or rationalized its actions. We still do not know, for example, the legal justifications advanced for the so-called “extraordinary rendition” or “terrorist surveillance” programs. (Incidentally, as former Attorney General Nicholas deB. Katzenbach and I have argued elsewhere, in a country whose government is premised on the rule of law, there is never a justification for keeping binding legal decisions secret.<sup>11</sup> The next president should promptly release all Justice Department opinions to the public.) We do not know with sufficient detail who was responsible for advocating and implementing the troubling policies based on these legal opinions. Nor do we know whether there are other secret programs that have not yet been revealed.

Documenting violations of the public commitments that the United States has made also fulfills a moral imperative. Officially, our leaders have made statements that renounce the use of torture and degrading treatment.<sup>12</sup> In practice, they have not lived up to this pledge. Renewing that commitment by confronting and acknowledging our recent failings gives substance to our national moral commitment, and thus can begin to restore our international reputation.

The findings of a Commission also would play the important role of holding accountable those who are responsible for wrongdoing and for legal and constitutional violations. Justice is not served when our leaders piously wash their hands and blame those at the bottom. Democratic government demands that public officials—particularly those at the highest level—are held accountable for their actions. Aiming to avoid accountability, government officials who authorized and carried out improper or illegal actions attempt to ensure that their deeds remain forever secret. The public revelations made by a Commission would lodge accountability for those deeds where it belongs and serve as a warning for future government officials that they should take no action for which they would not like to be held publicly responsible.

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<sup>11</sup> Nicholas de B. Katzenbach & Frederick A.O. Schwarz Jr., “Release Justice’s Secrets,” *New York Times*, Nov. 20, 2007, at A23 (“Opinions that narrowly define what constitutes torture; or open the door to sending prisoners for questioning to Egypt and Syria, which regularly use torture; or rule the president has some ‘inherent power’ to ignore laws are all of concern to Congress and the public whether one agrees or disagrees with the legal analysis.”); see also Louis Fisher, *Why classify legal memos?*, NAT’L L.J., July 14, 2008.

<sup>12</sup> E.g., Convention Against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100.20, 1465 U.N.T.S. 85; 18 U.S.C. §§ 2340-2340A..

Finally, and perhaps most importantly, the Commission's work would play an instrumental role in preventing future abuses. Its findings would form the factual basis for informed public debate on the role of governmental activities in a free society during an extended time of crisis. Charting a new course is impossible without knowing first how we found ourselves where we are now. Rather than dooming ourselves to the repetition of past mistakes, we must studiously act to avoid doing so. Determining what legislative and executive action is appropriate to prevent the recurrence of past abuses requires an understanding of how those abuses came about.

While the revelations of a new Commission charged with rooting out the truth of this most recent period of government failures might prove embarrassing to some individuals and perhaps even to the country as a whole, as the Church Committee concluded, that embarrassment is a price that must be paid: "We must remain a people who confront our mistakes and resolve not to repeat them. If we do not, we will decline; but if we do, our future will be worthy of the best of our past."<sup>13</sup>

## **II. Essential Qualities of a Commission**<sup>14</sup>

To accomplish this, I urge Congress and the next President to establish by law an Investigatory Commission, which would document what went wrong—the abuses of power; the violations of law; the distortions of the Constitutional structure, including the sweeping assertions of executive power and the undermining of checks and balances—as well as who was responsible, and how it has harmed us. It could then make recommendations for reform within both the executive and legislative branches to prevent similar abuses in the future.

A successful Commission must be independent, bi-partisan in membership and non-partisan in approach. Its members should understand our Constitution and how our government works. It must handle secrecy issues responsibly. It should be as open as possible. Its investigation must be comprehensive. It must have access to all relevant information in all agencies and the White House—obtained by agreement if possible and by subpoena if necessary.

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<sup>13</sup> *Interim Report of the Select Committee to Study Governmental Preparations with Respect to Intelligence Activities*, S. REP. NO. 94-465, at 285 (1975), [hereinafter *Interim Report*]. While this thought was in the Interim Report, it pervaded all the Church Committee's work.

<sup>14</sup> These thoughts are based on my experience as Chief Counsel of the Church Committee. The Committee conducted a comprehensive and non-partisan investigation into abuses carried out by the intelligence agencies during the Cold War era. It also covered the failures of presidential leadership in the six presidencies from Roosevelt through Nixon. (See also Loch Johnson, *A Season of Inquiry: The Senate Intelligence Investigation* (University Press of Kentucky, 1985); Frank John Smist, *Congress Oversees the United States Intelligence Community, 1947-1994* (University of Tennessee Press, 1994), at pp. 25-81; and LeRoy Ashby and Rod Gramer, *Fighting the Odds: The Life of Senator Frank Church* (Washington State University Press, 1994), at pp. 453, 468-92.)

More recently I have summarized some of the lessons from the Church Committee in Chapter 3 ["The Church Committee Then and Now"] of *U.S. National Security, Intelligence and Democracy: From the Church Committee to the War on Terror* (Russell A. Miller, Editor) (Routledge Research, 2008). (The relevant pages on how the Church Committee operated are pp. 27-31.)

All of these points are elaborated elsewhere (*see n. 14*). Here, I want to make only two more detailed points:

First, without facts, oversight and investigation will necessarily be empty. Only with a record that is detailed and covers a wide range can one be sure that one understands patterns, be confident of conclusions, or make a powerful and convincing case for change. Without detailed facts, it is simply not possible to make a creditable case that something is wrong and needs fixing.

Testimony is important, often essential, and can be dramatic. Documents often form the best key to the truth and to developing good testimony. A good investigatory commission involves much time and hard work.

Second, investigating secret government programs requires access to secrets. It forces analysis of the overuse of secrecy stamps, and of the harm caused by excessive secrecy.<sup>15</sup> Ultimately, it may require the describing and revealing of secrets. Nonetheless, obviously, there are legitimate secrets. Oversight, or an investigation that is heedless of that, is doomed, as well as irresponsible.

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The Church Committee's and the 9/11 Commission's investigations remain a model for how comprehensive investigations can clarify what has gone wrong and provide guidance going forward.

Throughout the history of the nation, commissions have been used to serve these purposes: President Washington appointed a commission to investigate the causes of the Whiskey Rebellion in 1794.<sup>16</sup> There have been many commissions since, some successful, some not so. The 9/11 Commission (a success) sought to determine how we found ourselves so unprepared for the events of that day and how to reduce the likelihood of its recurrence.<sup>17</sup>

You will note that I urge the creation of a commission, rather than establishing a congressional committee (such as the Church Committee). Of course, if the newly elected president resists a commission, Congress could go ahead with its own investigation. In the past, in fact, I have suggested the value of such a congressional probe. Upon further reflection, I believe that an independent panel is preferable. Unlike the time when the Church Committee was established, we now have standing committees on intelligence (and longstanding committees such as Judiciary have been strengthened). Congress will have huge responsibilities in myriad policy areas, including relating to terrorism, difficult topics that undoubtedly will take time. An independent commission would free up Congress from responsibility for an in depth, time-consuming analysis of

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<sup>15</sup> I know from my own experience with the Church Committee that secrecy stamps are often used to cover up and conceal embarrassment and illegality. As the experience of the recent 9/11 Commission and the Church Committee shows, responsible investigative committees or commissions handle secrecy issues appropriately.

<sup>16</sup> Jonathan Simon, *Parrhesiastic Accountability: Investigatory Commissions and Executive Power in an Age of Terror*, 114 YALE L.J. 1419, 1428 (2005).

<sup>17</sup> THE 9/11 COMMISSION REPORT xv (2004).

the past. It is worth noting, too, that an independent panel would be free to touch on Congress and its role in ways that might prove uncomfortable for a sitting committee.

### III. Conclusion

We must remember that the conduct which has undermined our values and sapped our strength arose in the context of seeking to protect the country from further attacks. But, as Justice Louis Brandeis warned in a somewhat different context, at times “the greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.”<sup>18</sup>

Today we address issues that transcend partisanship. They are far more important than the controversies that divide us. Instead, understanding these issues should bring all Americans together. The development of novel and erroneous constitutional theories has led to conduct that is contrary to American values. We will spend many years remedying the harms, both foreign and domestic, that these ill-advised policies have caused.

Again, the Church Committee’s words are no less true today than they were three decades ago:

The United States must not adopt the tactics of the enemy. Means are as important as ends. Crisis makes it tempting to ignore the wise restraints that make [us] free. But each time we do so, each time the means we use are wrong, our inner strength, the strength which makes [us] free, is lessened.<sup>19</sup>

Despite the abuses and failings that they documented, both the Church Committee and the 9/11 Commission remained hopeful, with “great faith in this country”<sup>20</sup> and its ability “to reconcile its view on how to balance humanity and security with our nation’s commitment to these same goals.”<sup>21</sup> I, too, continue to believe that, when properly respected, our constitutional structure and our core fundamental values can, as they have for so many years, provide “the people of this country and of the world the hope for a better, fuller, fairer life.”<sup>22</sup>

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<sup>18</sup> *Olmstead v. United States*, 277 U.S. 438, 479 (1928).

<sup>19</sup> *Interim Report*, *supra* note \_\_, at 285.

<sup>20</sup> *Id.*

<sup>21</sup> THE 9/11 COMMISSION REPORT 379 (2004).

<sup>22</sup> *Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities*, Book II, S. REP. NO. 94-755, at v (1976).