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Committee on the Judiciary

Subcommittee on Commercial and Administrative Law

U.S. House of Representatives

Hearing on "Ensuring Executive Branch Accountability"

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I. Introduction

The Brennan Center thanks the Subcommittee on Commercial and Administrative Law for holding this hearing on "Ensuring Executive Branch Accountability." I am especially grateful to have the chance to share with you my own experience with congressional oversight, as well as the Brennan Center's recent research and analysis of the proper Separation of Powers, as it pertains to this Subcommittee and to the House Judiciary Committee's important inquiries into the recent performance of the Justice Department.

The fundamental premises of my testimony are simple: The Constitution assigns Congress a necessary and vital role conducting oversight of the activities of the executive branch. Experience demonstrates this can be done even where there are issues of critical law enforcement or national security at stake. Experience also demonstrates that in the absence of congressional oversight, national security and law enforcement powers often are misused, either for partisan ends or in ways that harm innocent Americans and also national security.

The question of improper removals of United States Attorneys has been the focus of this subcommittee's investigation. But there is also a clear need for a much more searching inquiry into the Department of Justice, and in particular its strategic use of national security powers in improper ways. This Subcommittee and the Senate Judiciary Committee's inquiries these past weeks have been models of care and diligence worth emulating. I would urge though that you consider broader inquiry into the Justice Department's recent lapses, which encompass in particular the conduct of the Office of Legal Counsel and the Civil Rights Divisions. A carefully planned and responsibly managed congressional inquiry into the Department as a whole would be an important service to the rule of law today.

II. Background Experience

I am now Senior Counsel at the Brennan Center for Justice at New York University School of Law. I have been privileged to enjoy considerable experience as a lawyer in both private practice and in government service. Between 1975 and 1976, I served as Chief Counsel to the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activity (1975-1976), known as the Church Committee for its Chair, the late Senator Frank Church of Idaho. Subsequently, I served as Corporation Counsel for the City of New York under Mayor Edward I. Koch from 1982 to 1986. In 1989, I chaired the commission that revised New York City's charter. I currently chair the New York City Campaign Finance Board. For many years I was also a partner at a leading New York City corporate law firm.

In addition to being Chief Counsel for the Church Committee and running a large government law office, my most relevant experience to this hearing is as co-author (with Aziz Huq, a colleague at the Brennan Center) of *Unchecked and Unbalanced: Presidential Power in a Time of Terror*, published by the New Press and released last week. *Unchecked and Unbalanced* grapples with the problem of how to retain the Constitution's system of Checks and Balances – a system that was meant both to protect our liberties and to reduce the likelihood of foolish and foolhardy mistakes, even in times when the nation faces grave and undisputed threats. The book documents how the Justice Department has abetted the use of torture, the traducing of the 1949 Geneva Conventions and wholesale spying on Americans in the homeland. This, I believe, is the larger context against which this Subcommittee necessarily considers the matter of the removal of United States attorneys today.

III. Four Basic Principles of Oversight

As chief counsel to the Church Committee, I was responsible for helping to investigate the most sensitive parts of our national security apparatus. It is my conviction based on this experience that it is perfectly feasible to conduct meaningful oversight into alleged executive branch misuse of law enforcement and security related powers.

In summary, here are key principles I would draw from my experience:

- Congressional oversight is essential to ensuring the fair and effective deployment of law enforcement and national security powers. On matters as diverse as political corruption and counter-terrorism, Congress serves the nation best when it vigorously ensures that federal law is applied in a fair, just, and effective manner.

- Oversight, therefore, need not be a partisan matter. Neither Republicans nor Democrats want a system where prosecutors are fired on partisan grounds. No one wants the "national security" or the "executive privilege" label to be applied to obscure partisan goals or to hide abusive exercises of power. Oversight is a shared responsibility. And before facts are fully aired, nobody should prejudge the matter.

- Far too much information about governmental conduct is kept secret. There are, of course, legitimate secrets. They should be protected. But, as the Church Committee concluded thirty years ago, many secrecy stamps serve no national interest. Rather, they shield governmental mistakes and misdeeds from public sight. This no less true of assertions of "executive privilege," which should not be treated as having the talismanic effect of shutting down all inquiry. It is Congress's duty to sift responsibly claims of secrecy or privilege to determine the credible from the flawed.

- The Church Committee showed that Congress has several procedural means to handle secrecy claims. Even in the case where a presidential advisor can make a colorable claim that some of their testimony is covered by a privilege, Congress should proceed to secure testimony, and use the means deployed by the Church Committee to ensure a full airing of the matter under investigation.

Applying these principles, Congress has the power and the capacity to conduct effective oversight not only of the prosecutors' removal, but also of the broader gamut of issues thrown up by recent Justice Department conduct. There is no question that oversight must be careful and scrupulously fair as well as diligent. But there is no question in my mind that a fuller inquiry is today both feasible and necessary.

IV. The Experience of the Church Committee

a. The Difficulties Facing Congressional Oversight

Conscientious and responsible congressional oversight is an essential part of America's experiment in constitutional government.[1] This task, however, is complicated by the realities of modern executive branch administration. For the first century and a half of American life, Congress dwarfed the executive branch in manpower and administrative capacity and the Departments dwarfed the White House.[2] Only after the 1936 Brownlow Committee did presidential staff begin to grow by leaps and bounds.[3] The president (and the vice president) now wield an enormous staff of policy-makers and executors, from White House Counsels to National Security Advisors. In many instances, these officers have more power than department heads subject to Article II Advice and Consent requirements. The balance of administrative power, in short, has shifted from Article I to Article II and from the Departments to the White House, shifts with pronounced consequences especially in the secretive national security arena. That presidential advisors should be the focus of intense congressional scrutiny today, therefore, ought not to be at all surprising.

Oversight in sensitive areas of law enforcement and national security faces heightened difficulties. Because the Church Committee was the first post-war body to conduct a thorough investigation into the conduct of American intelligence agencies, and the consequences of that conduct, it confronted those difficulties directly.

Until the 1970s, informed debate on the proper role of intelligence agencies, and their control by presidents and other high executive branch officials, was rare. Senate and House Committees on the CIA had no written records. They asked no tough questions. And they often indicated that they preferred *not* to know what was being done. The FBI also got a free ride. The lack of congressional oversight, however, permitted grave harms to Americans' constitutional liberties and permitted foolish uses of

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[1] The Supreme Court has affirmed the constitutionally committed breadth of congressional inquiry power on numerous occasions. *See, e.g., Eastland v. United States Servicemen's Fund*, 421 US 491, 509 (1975) ("The scope of [Congress'] power of inquiry . . . is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."); *McGrain v. Daugherty*, 273 U.S. 135 (1927); *Watkins v. United States*, 178, 187 (1957) (holding that: "The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.").

[2] "As late as the 1930s, White House staff could barely be described in the plural." Andrew Rudalevige, THE NEW IMPERIAL PRESIDENCY: RENEWING PRESIDENTIAL POWER AFTER WATERGATE 43 (2006). The Brownlow Commission, formally known as the President's Committee on Administrative Management, looked at the president's capacity to manage the executive branch and recommended expansion of the White Staff and increased presidential control over departmental structure and civil servants. *Ibid.*

[3] *Ibid.*; *see also* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2274-75 (2001)

American power overseas that were inconsistent with Jefferson's wisdom in the Declaration of Independence that we show a decent respect for the opinions of mankind.[4] It was not until the Church Committee's extensive investigations that the extent of this harm was revealed.[5]

More important than the findings of the Church Committee today are the procedures and techniques deployed to ensure a full airing of the facts without any compromise of legitimate secrecy claims.

b. Lessons from the Church Committee

The Church Committee's inquiry has numerous parallels with today's inquiries. It too took place again the backdrop of a global confrontation with a dangerous enemy. At that time, as now, we were embroiled in a difficult foreign war. Then as now, there was mounting evidence of the abuse of national security powers at home, often for partisan reasons.

In my view, the most relevant lessons are the following.

i. Oversight is not a partisan matter: The Church Committee demonstrates that congressional oversight is not a partisan matter. That body brought both Republicans and Democrats together and was able to pursue inquiries into Administrations of both stripes. Some of the most important findings of the Church

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[4] *See* Frank J. Smist, CONGRESS OVERSEES THE UNITED STATES INTELLIGENCE COMMUNITY, 1947-1989 (1990).

[5] The Church Committee's investigations revealed the following (among many other abuses of intelligence and law enforcement powers):

- Secret intelligence action was used to harass, disrupt, and even destroy law-abiding domestic groups and citizens.
- Too many people were spied on with excessively intrusive, and often knowingly illegal, techniques.
- Intelligence agencies conducted secret surveillance and infiltration of entirely lawful groups.
- Mail was illegally opened.
- Without their knowledge, Americans were given dangerous, even fatal, drugs to test techniques being developed to combat the Soviets.
- Congress was given incomplete or misleading intelligence on subjects of national concern, such as whether the civil rights movement or anti-Vietnam War protests were controlled from overseas.
- Presidents solicited intelligence agencies to spy on political opponents.
- Among other assassination plots, the CIA attempted for years to assassinate Fidel Castro, even enlisting the Mafia in its efforts.

For a complete account of these abuses, see Frederick A. O. Schwarz and Aziz Z. Huq, UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR 21-49 (2007).

Committee concerned Democratic icons, such as Presidents Franklin Delano Roosevelt, John F. Kennedy and Lyndon B. Johnson.

Today's task is complicated by the fact that it is the actions of one Administration at issue. This means it is easier for an Administration to label any inquiry—no matter how legitimate—as partisan. President Bush has expressed concern about a "partisan fishing expedition."[6] This is at best premature. Congress has a constitutional obligation to conduct oversight. Congressional oversight amounts to public accounting. Having testimony open and on the record makes it *less* political: There is less danger that either one side or the other can misrepresent the facts. Oversight means that the public, both Republicans and Democrats, decide whether the actions taken were right or wrong.[7]

The Church Committee is not an outlier. Congress has undertaken meaningful investigations in the past, even against the backdrop of grave threats to the nation. During the American Civil War, congressional Republicans drove President Lincoln's first Secretary of War from office by their investigations. And just three decades before the Church Committee, then-Senator Harry Truman conducted a vast investigation that effectively exposed military waste and inefficiency during World War II, even while his own party held the White House.[8] Most recently, the National Commission on Terrorist Attacks Upon the United States ("the 9/11 Commission") strived to overcome party bias, even arranging its seating to break up clusters of Republicans and Democrats. It again proved that there is no Republican or Democratic way when it comes to proper use of our law enforcement and national security resources: Most often, sensible men and women will converge on sensible courses of action.[9]

Oversight, in sum, is not a Republican issue or a Democratic issue. "Fundamental issues concerning the conduct and character of the nation deserve nonpartisan treatment."[10] It is in the interest of all members of Congress, and of all members of the public, to know that law enforcement and national security powers are not being misused.

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[6] Richard B. Schmitt and Richard A. Serrano, *Bush Clashes With Congress Over Firings*, L.A. TIMES, March 21, 2007, at A1.

[7] In any case, the Framers relied on the adversarial matching of branch against branch to achieve good governance: "Ambition must be made to counteract ambition" in a "policy of supplying, by opposite and rival interests, the defect of better motives." THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter, ed., 1961). Aggressive congressional oversight driven by individual and institutional self-interest was hence anticipated and expected by the Framers.

[8] *See* David McCullough, TRUMAN 259-91(1992).

[9] According to the 9/11 Commission: "Of all our recommendations, strengthening congressional oversight may be among the most difficult and important. So long as oversight is governed by current congressional rules and resolutions, we believe the American people will not get the security they want and need. The United States needs a strong, stable and capable congressional committee structure to give America's national intelligence agencies oversight, support, and leadership." THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 419 (2004).

[10] Final Report of the Select Committee to Study Governmental Operations With Respect to Intelligence Activities, United States Senate, Book II: Intelligence Activities and the Rights of Americans, viii (1976). [hereafter *Bk. II*].

ii. In understanding the facts, contemporaneous documents and also live testimony are vital. Contemporaneous documents and the testimony of actual witnesses are necessary to master the intricacies of governmental institutions and to learn the truth about their conduct. Without such documents and testimony, one cannot cut though the fog of plausible deniability or conclusory statements to know how presidents and other senior officials have carried out their responsibilities. Without such documents and testimony, oversight will necessarily be empty, easily slipping into dueling slogans or platitudes. Moreover, characterizations or summaries supplied by a government agency or high government officials are generally insufficient or necessarily tainted by self-interest.

Handling facts about law enforcement (or intelligence) matters demands sensitivity to the proper line between necessary secrecy, and excessive classification. (To be sure, Congress has delegated by statute broad discretion to the President in setting classification rules.[11] But it is worth asking whether this discretion needs to be more tightly regulated.) Taken too far, however, this sensitivity allows the executive to gloss over hard questions and suppress misconduct. Certainly, executive branch labels for past conduct cannot be taken for granted, and must instead be carefully scrutinized.

An example of misleading terminology came to light during the Church Committee's investigation. Hints about COINTELPRO—the FBI's program to secretly harass and disrupt a wide-range of American dissidents—surfaced in the media in 1971. A few years later, a new Attorney General sought an internal report. Even though the FBI was part of the Justice Department, it successfully resisted the Department's request for actual COINTELPRO files, claiming that even release within the Department would jeopardize national security. The Bureau offered instead to summarize for the Attorney General facts about each action. Thus, as the Church Committee discovered, the FBI's summary of a letter sent to the Chicago Blackstone Rangers purportedly from the Chicago Black Panthers described the letter as an effort to "drive a wedge between" the two groups. The actual, contemporaneous FBI purpose of writing the letter, as revealed by contemporaneous FBI documents, however, was to provoke "reprisals" from a group prone to "violent type activity, shooting and the like"—the hope, in other words, was to incite a killing.[12]

Today, the debate over whether the eight United States Attorneys recently terminated were singled out due to their "performance" is an example of ambiguous terminology that can only be clarified by testimony.[13] The evidence thus far yielded by documentation of executive branch decision-making concerning the removal of the eight prosecutors is ample proof of this.

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[11] *See* 50 U.S.C § 435(a) (2007).

[12] *See Bk. II*, 271 & n20.

[13] *See, e.g.*, Gene Johnson, *Political Whodunnit: The curious downfall of John McKay*, SEATTLE TIMES, Mar. 26, 2007.

iii. Testimony needs to be transcribed. In my experience as chief counsel to the Church Committee, a "hearing" without a transcript is simply a waste of time. The purpose of congressional hearings is to establish the facts. That is not done in the course of a single hearing. Rather, it is through the careful comparison of hearing evidence with documentary evidence and other sources that meaningful conclusions can be reached. Without a transcript, a hearing yields little or nothing of value. Recollections are faulty. On complex factual and legal matters, disputes will necessarily arise around what was said.

The Church Committee demonstrated that it is possible to call senior officials and former officials, including directors of central intelligence (past and present), attorneys general and the White House's national security advisors, to testify on the record. In every case, there was a written record of the person's testimony. These records proved critical to our investigations.

It is hard to see a witness's interest in not being transcribed. If the witness's ground for resisting testimony is a privilege, the fact of transcription makes no difference as to whether the privilege is respected or not. Of course, the absence of a transcript allows witnesses to give evasive or ambiguous answers to hard questions, and to resist later being pinned down by contradictions with other evidence.

It is also hard to see why a witness would resist taking an oath. Lying to a government body is a serious matter,[14] even in the absence of an oath.

iv. The Church Committee used several methods to handle testimony where privileged or classified information may have been pertinent. Fair analysis of the government's law enforcement and security programs requires that members of Congress have access to secrets. It also requires that members of Congress assess the overuse of privilege claims and secrecy stamps, sometimes determining that the nation is best served by a secret's revelation. Nonetheless, there obviously are legitimate exercises of privilege and real secrets. Oversight heedless of this is doomed, as well as irresponsible.

The Committee used several methods to sift credible from flawed secrecy claims. Sometimes, oral testimony from government witnesses was first delivered in the Committee's executive session. This is a practice akin to a deposition in civil litigation. On the basis of the testimony to the executive sessions, the Committee would make a decision as to whether public testimony ought to follow. This sharpened the Committee's focus on the relevant issues and shortened the live testimony, as well as obviating needless conflicts over secrecy. The procedure prior to the public testimony had the further advantage of allowing distinctions to be drawn prior to public testimony between legitimate and illegitimate secrets.

[14] Federal criminal penalties have been held to apply to unsworn misrepresentation to congressional committees. *See United States. v. Poindexter*, 951 F.2d 369, 386-388 (D.C. Cir. 1991).

v. Legitimate secrets can be sifted from excessive and unwarranted use of secrecy stamps. The Church Committee's experience with intelligence and law enforcement agencies yields valuable lessons for distinguishing among secrets. To begin with, there is a salient difference between, on the one hand, a claim of secrecy for the very existence of a program or for the policies and legal justification underlying it, and—at the other extreme—"sources and methods" used by the intelligence agencies and the names of undercover agents. Acknowledging these differences, the Church Committee worked out reasonable arrangements with the intelligence and law enforcement agencies and the White House. When, for example, agencies produced documents, they could, in the first instance, redact informants' names. The Committee thus got information about the FBI infiltration of the NAACP or the "Women's Liberation Movement" by reviewing informants' reports without getting informants' names. If the Committee felt a name was important, it remained free to make a more specific request. Second, the Committee agreed that before issuing a report, relevant agencies would have an opportunity to *argue*—but not decide—that publishing certain details would cause harm and were unnecessary.

The Committee's reports were enormously detailed and left out none of the improprieties uncovered during the investigation. But the Committee placed sensible limits on what details were disclosed. In particular, it did not use the actual names of low-level undercover agents tasked with unseemly or illegal acts, but did disclose their bosses' names. These sensible agreements did not get in the way of the Committee's mission.

One kind of document that almost never merits classification is a legal opinion of the kind issued by the Office of Legal Counsel in the Department of Justice. These documents address abstract legal issues, and often contain final determinations of unsettled legal questions that are binding on the rest of the executive branch. Congress and the people have a powerful interest in knowing how the executive branch interprets and applies the law. And there is rarely (if ever) any justification for preserving these legal opinions from congressional or public scrutiny.

vi. Like other secrecy claims, executive privilege is one that should not be taken at face value. In this case, there is reason to believe that few, if any, of the communications in question are protected by executive privilege. The principal witnesses in the matter of the prosecutors' removal are officials from the White House and the Justice Department.[15] White House officials, as noted above, now play a far larger role in the White House than has historically been the case: They have tremendous policy-making and implementation resources at their disposal. If the *de facto* decision abut which prosecutors to remove (and why) was made by such an advisor, it makes no

[15] In particular, this subcommittee could investigate aggressively the question how the Justice Department could have inserted in the Patriot Act renewal a provision that allowed the President to circumvent the Senate in appointing new U.S. Attorneys. *See infra*. What did this provision have to do with national security? Why was it included in the March 2006 omnibus legislation? Who decided that it should be so included?

sense to circumscribe congressional inquiry to lower-level functionaries who were mere instruments of their higher-ups.

According to the Court of Appeals for the District of Columbia Circuit, the privilege encompasses "communications made by presidential advisors in the course of *preparing advice for the President* … even when these communications are not made directly to the President."[16] Executive privilege is generally justified as a way of ensuring the confidentiality of advice given *to* the president. It simply cannot justify the withholding of information about how a policy was implemented, *i.e.*, how directions *from* the President were implemented. Indeed it would make no sense for Congress to be able to subpoena an officer in a department who carries out an order from a presidential advisor, but to be barred from inquiring as to why that order was given, or how it came about. Congress needs to know not only *how* orders within the executive branch were carried out, but also the *reasons* for such orders. This is especially true when, as now, a question of improper motive is paramount. Further, it is clear that decisions not at all involving the President do not give rise to executive privilege. The mere fact of working in proximity to the President is not sufficient ground to establish a legitimate claim of privilege.

If, as President Bush has stated in a press conference, he had a minimal role in the determination of which prosecutors were to be terminated, or the grounds on which prosecutors would be selected,[17] executive privilege should not bar testimony at all. Indeed, the details of President Bush's instructions to his subordinates concerning the removal of prosecutors is a matter of clear congressional interest. Even if executive privilege issues do arise, they should be handled through procedural devices—such as a hearing before an executive session, which is followed by carefully considered public testimony.

Moreover, there is reason to be skeptical about the strength of presidential advisors' interest in confidentiality. It is simply not the case that presidential advisors can ever be wholly and absolutely secure that their advice will remain confidential: There is always the possibility, however remote, that any given advice will be ventilated to public view in the course of a criminal proceeding.[18] This is true regardless of the advice and the context in which it has been given. The interest in confidentiality, in other words, is always and necessarily provisional. No one can, or should, rely on the perpetual nondisclosure of their work inside the executive branch. The Subcommittee should bear in mind this conditionality when faced with claims to confidentiality.

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[16] *In re Sealed Case*, 121 F.3d 729, 751-52 (D.C. Cir. 1997) (emphasis added).

[17] President Bush explained White House involvement in the following terms: "[T]he Justice Department made recommendations, *which the White House accepted*, that eight of the 93 would no longer serve." President Bush Addresses Resignations of U.S. Attorneys, available at http://www.whitehouse.gov/news/releases/2007/03/20070320-8.html (emphasis added).

[18] *Nixon v. United States*, 418 U.S. 683 (1974) (holding that President Nixon was obliged to submit to a subpoena duces tecum for tape recordings and documents in the context of a criminal proceeding).

c. The Damage From Lax Oversight

Oversight is necessary to ensure the efficacy of law enforcement and national security policy. One of the Church Committee's major findings, indeed, was that the wise restraints that the Framers imposed to make us free also keep us safe. Of particular interest today is the way in which lax oversight during the Cold War allowed partisan motives to seep into the FBI and other law enforcement agencies. Today's scandal about improper partisanship in the handling of U.S. Attorneys, in short, is nothing new.

During the closing days of the 1964 presidential election campaign, for example, the Johnson White House asked the FBI for information on all persons employed in Republican candidate Barry Goldwater's Senate office. It also sought information about Vice Presidential candidate Spiro Agnew's long distance telephone calls during the 1968 presidential campaign, and about seven Senators critical of bombing of North Vietnam. The White House also received FBI information on non-politicians, including people who signed letters to Senator Wayne Morse supporting his criticism of the Vietnam War, and many mainstream journalists, including NBC anchor David Brinkley, *Life Magazine's* Washington Bureau Chief Richard Stolley, and authors of books critical of the Warren Commission report.[19]

The nexus between intelligence collecting and White House political interests reached an acme during the 1964 Democratic Convention in Atlantic City, New Jersey. President Johnson directed the assignment of an FBI "special squad." Originally justified by vague reference to possible civil disorders, the squad's mandate expanded to cover surveillance of political activities. The special squad generated many memos for the White House on the political plans of Dr. Martin Luther King, Jr., and the Mississippi Freedom Democratic Party, a new black party challenging convention delegates from the old-line, segregationist Mississippi Democratic Party.[20]

Similar practices continued under the Nixon White House. Nixon officials solicited information from the FBI on, for example, CBS reporter Daniel Schorr and the Chairman of Americans for Democratic Action. Vice President Spiro Agnew sought information on Ralph Abernathy, Dr. King's successor as head of the Southern Christian Leadership Conference. An internal Bureau document reporting the request explained Agnew's purpose was "destroying Abernathy's credibility."[21]

At Henry Kissinger's request, the FBI used warrantless wiretaps on three newsmen and fourteen executive branch employees from 1969 to 1971. They were supposed to uncover the source of leaks to the media from the White House, but what came back was political gossip and valuable political information for the White House: a report on Senator Edward Kennedy's plan to give a speech on Vietnam; the planned

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[19] *Bk. II*, 228-230.

[20] *Bk II*, 117-119, 234-35.

[21] *Bk. II*, 230-231. Agnew denied that he made such a request, but agreed he received the information (*Bk. II*, 231, citing staff summary of Agnew interview on October 15, 1975).

timing of Senator William Fulbright's hearings on Vietnam; Senator Mondale's "dilemma" about a trade bill; and what former President Johnson had said about Senator Edmund Muskie's campaign for the Democratic Party nomination for President. The taps continued on two targets even after they left the government to work on Senator Muskie's presidential campaign. Revealingly, the stream of resulting memos began to be sent to H.R. Haldeman, the President's political advisor, rather than Henry Kissinger, his national security advisor, even though it had been Kissinger who had demanded the warrantless wiretaps for "national security reasons."[22]

In sum, history demonstrates that the absence of oversight allows the awesome law enforcement and national security powers of the executive branch to be turned to harmful ends. This is simply human. As one longtime CIA general counsel explained at the time of the Church Committee, the absence of congressional oversight caused *problems* for that agency because "we became a little cocky about what we could do." The result is the abuse of American civil liberties and unwise actions.

V. The Committee's Oversight Agenda

Congressional oversight into the prosecutors' firings is wholly proper and necessary. However broad presidential discretion under Article II might be, it does not encompass power to turn the awesome power of federal prosecution against partisan foes. But investigating the prosecutors' firing is not enough. Needed urgently today is a broader investigation into the politicization and the credibility of the Justice Department as a whole.

A broader inquiry must be conducted in a scrupulous fair manner. Oversight powers can always be wielded recklessly. I urge that oversight of a broader gamut of Justice Department matters be conducted in a careful and probing fashion.

There is substantial evidence of improper actions and conduct harmful to the administration of justice by the Department of Justice. Most notoriously, the Office of Legal Counsel has played a pivotal role in authorizing torture, the "outsourcing" of torture, abandonment of the Geneva Conventions, and warrantless surveillance of Americans.[23] As I have explained in detail elsewhere,[24] the Office of Legal Counsel's memoranda on torture and other measures taken in the name of national security fell far short of professional standards. For example, lawyers failed to cite pivotal legal precedent and adopted strained and frankly absurd analogies in order to avoid criminal prohibitions. There was no attention to the views of military lawyers, and no regard for the consequences on America's reputation.

Bad lawyering alone, of course, is no justification for congressional inquiry. In this case, however, illegal measures were justified with this shoddy legal analysis. The

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[22] *Bk. II*, 235-36.

[23] This is detailed in Schwarz and Huq, *supra*, at 65-150.

[24] *Id.* at 187-99.

OLC's memo *de facto* abetted the introduction of measures in sharp contradiction with federal criminal law and our international treaty commitments. And they were enacted over the protests of career civilian *and military* lawyers.[25] But troubling reports about the Justice Department that merit careful analysis and oversight include the following:[26]

- One aspect of the question of U.S. Attorney removal that has not received sufficient attention is the question how the Administration came to have power to appoint new U.S. Attorneys without input from the Senate. A statutory provision to this effect was introduced in the March 2006 reauthorization of the Patriot Act.[27] According to news reports, this provision was added by a member of Senator Arlen Specter's staff without his affirmative consent—*at the request of the Justice Department*.[28] This raises the very troubling prospect that the Justice Department took advantage of the complexity and public pressure to enact the Patriot Act reauthorization to have enacted into law a provision that had nothing to do with national security, but that concentrated power in the White House to the detriment of Congress.

- FBI use of National Security Letters, a form of administrative subpoena authorized by the 2001 Patriot Act, has been rife with abuse, as Inspector General Fine has disclosed.[29]

- A leading Justice Department litigator alleges that she was directed to pull her punches in the context of litigation against tobacco companies, at substantial

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[25] *See, e.g.*, Dana Priest, *Covert CIA Program Withstands New Furor; Anti-Terror Effort Continues to Grow*, WASH. POST, Dec. 30, 2005, at A1 ("The administration's decisions to rely on a small circle of lawyers for legal interpretations that justify the CIA's covert programs and not to consult widely with Congress on them have also helped insulate the efforts from the growing furor," "The White House tightened the circle of participants involved in these most sensitive new areas. It initially cut out the State Department's general counsel, most of the judge advocates general of the military services and the Justice Department's criminal division, which traditionally dealt with international terrorism."); Mark Mazzetti and Neil A. Lewis, *Military Lawyers Caught in Middle on Tribunals*, N.Y. TIMES, Sep. 16, 2006, at A1 (Describing pressure put on military lawyers by Pentagon general counsel to sign letter supporting military commissions); Raymond Bonner, *Terror Case Prosecutor Assails Defense Lawyer*, N.Y. Times, March 4, 2007, at A10 (Describing pressure put on Major Michael Mori by chief US Prosecutor Colonel Morris Davis).

[26] *See generally* Tom Hamburger, *Justice Department tugged to the right*, L.A. TIMES, Mar. 25, 2007.

[27] USA Patriot Act Improvement and Reauthorization Act of 2005 § 502, Pub. L. No. 109-177, 120 Stat. 192 (2006) (codified at 28 U.S.C. § 546 (2006)). A bill to remove this provision has been passed by the Senate 94-2. *See* A Bill to Amend Chapter 35 of Title 28, United States Code, To Preserve the Independence of United States Attorneys, S. 214, 110th Cong. (2007).

[28] See Paul Krugman, *Surging and Purging*, N.Y. TIMES, Jan. 19, 2007, at A23; *see also* Paul Kiel, *I Do Not Slip Things In*, TPM MUCKRAKER, Feb. 6, 2007, http://www.tpmmuckraker.com/archives/002487.php.

[29] U.S. Department of Justice, Office of the Inspector General, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S USE OF NATIONAL SECURITY LETTERS (2007); *see also* R. Jeffrey Smith, *FBI Violations May Number 3,000, Official Says*, WASH. POST, Mar. 21, 2007, at A7.

detriment to the federal fisc and considerable benefit to the defendant tobacco companies.[30]

- The Civil Rights Division of the Department of Justice has been subject to personnel changes that have substantially reduced the number of career lawyers in that office.[31] Decisions about state electoral laws, including some with substantial disenfranchising consequences, at least appear to have been influenced by improper partisan motives.[32] Whatever the motive of these actions, this Subcommittee should look careful at how the Civil Rights Division's mission is, or is not, being achieved.

- Long prior to the December 2006 removals of prosecutors engaged in corruption investigations, there is evidence suggesting that other prosecutors had been removed because their investigations raised narrowly partisan concerns for some in the executive branch.[33]

These incidents are the reasons that oversight of the Justice Department by this Committee and by Congress in general cannot cease with the matter of the U.S. Attorneys' removal. I strongly recommend that this Committee and Congress examine the Justice Department's operation in the past six years.

VI. Conclusion

Congress has the tools and it has the constitutional obligation to conduct vigorous oversight of the executive branch's law enforcement and national security actions. To pursue vigorously such oversight is not to condone partisanship. It is to do what is necessary and expected from our elected leaders.

Today, this Committee in particular must address the gamut of problems that have arisen around the conduct of the Justice Department. There is a need for thoroughgoing inquiry, of the kind conducted by the Church Committee thirty years ago, into all of the troublesome, harmful, arguably unethical, and perhaps illegal, conduct that has been reported within the Justice Department. Such an investigation is a prerequisite to a restoration of the Checks and Balances that the Framers envisaged would keep us safe and free.

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[30] Carol D. Leonnig, *Tobacco Witnesses Were Told To Ease Up; Justice Dept. Sought Softened Sanctions*, WASH. POST, June 9, 2005, at A4.

[31] Charlie Savage, *Civil Rights Hiring Shifted in Bush Era; Conservative Leanings Stressed*, BOSTON GLOBE, July 23, 2006, at A1.

[32] Dan Eggen, *Politics Alleged in Voting Cases; Justice Officials are Accused of Influence*, WASH. POST, Jan. 1, 2006, at A1.

[33] Walter F. Roche Jr., *Inquiry Into Lobbyist Sputters After Demotion; The Unusual Financial Deal Between Jack Abramoff and Officials in Guam Drew Scrutiny*, L.A. TIMES, August 7, 2005, at A31.