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FOR JUSTICE

TWELVE STEPS TO
RESTORE CHECKS
AND BALANCES

Aziz Z. Huq

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I. INTRODUCTION

America’s system of checks and balances is out of joint. Recognizing that people are “not angels,” the Constitution’s Framers crafted a system of government designed to “control itself.”¹ They installed three co-equal branches – Congress, the executive, the federal judiciary – to watch over each other and to guard against both overreaching harmful to the people and unwise acts arrived at without care. Setting each institution against each other in this way, the Framers hoped “[a]mbition [would] be made to counteract ambition.”² The resulting system of checks and balances would be “a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.”³

RECOGNIZING THAT PEOPLE ARE “NOT ANGELS,”
THE CONSTITUTION’S FRAMERS CRAFTED A SYSTEM
OF GOVERNMENT DESIGNED TO “CONTROL ITSELF.”

Invoking “monarchical” prerogatives, this Administration has applied a theory first articulated by then-Congressman Richard Cheney in the 1987 congressional minority report on the Iran-Contra scandal. Coordinated by Cheney, the minority report rejected congressional checks when the executive claims to act in the name of “national security.” It repudiated as a “fallacy” the Constitution’s core notion that government power, republican or kingly, risks abuse. It scorned long-standing structures intended to check that power, and warned that the presidency would have to exercise “monarchical” powers should Congress try to check it.⁴

Today, the executive branch argues that any and all presidential actions taken in the name of national security are by definition constitutional. It relegates Congress and the federal courts to the constitutional margin. The result: power – legislative, executive, and judicial – is now concentrated in the executive branch. And a frightening idea decisively rejected at America’s birth – that a president, like a king, can do no wrong – has reemerged to justify excessive secrecy, disregard for federal and international law, and even torture.

The separation of powers has always been vital to our national security because it augments accountability and promotes wise choices. Checks and balances are not a historical curiosity. They are imperative today.

What can be done to right the constitutional balance? This paper proposes twelve specific steps to restore the checks and balances of American government. Its recommendations aim at fidelity to the original Constitution’s overarching design, in which each branch plays an active role in keeping the nation secure and free. The twelve steps outlined here would undo much damage that has been inflicted by six years of erratic, lawless unilateralism. They do not proscribe *all* detention, *all* surveillance, or *all* interrogation, but promote wise use of those powers.

Recommendations 1-3 focus on the executive branch and are aimed as much at the current crop of presidential candidates as at the White House. The public, after all, has a right to know where its candidates stand.

Recommendations 4-12 demand legislative action.* This requires political will

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on Congress’s part, which has recently been wanting. These recommendations provide ways in which Congress can leverage even limited political openings to guard against abuse of national security powers.

Most importantly, new devices, laws, and institutions will ensure that Congress and the public know what has been done, and is being done, behind closed doors. Together, such measures would help ensure that Congress can provide necessary oversight, not foolishly capitulating to poorly considered “innovations” such as the Protect America Act.⁵

But new commitments and reforms are only as durable as the people they serve. In 1792, James Madison, the great champion of checks and balances, observed that such checks “are neither the sole nor the chief palladium of constitutional liberty. The People, who are the authors of this blessing, must also be its guardians.”⁶ Madison remains correct. These measures in part ensure that the people understand what is being done in their name. But they depend on the continued will of the people who must be committed to protecting and upholding the Constitution, even in times of uncertainty.

* In this policy proposal, we sketch the outlines of legislative proposals only.

TWELVE STEPS TO RESTORE CHECKS AND BALANCES

FOR THE EXECUTIVE BRANCH AND PRESIDENTIAL CANDIDATES:

- I. Renounce the Theory of the Monarchical Presidency
- II. Renounce the Use of Signing Statements to Circumvent the Law
- III. Disclose Past Legal Opinions That Influence the Use of National Security Powers

FOR CONGRESS:

- IV. Make It Clear: No More Torture, No More “Torture Lite”
- V. Restore Habeas Corpus and Bring America’s Detention System under the Rule of Law
- VI. Legislate To Reduce Excessive Secrecy and Classification
- VII. Enact a Law That Regulates the Invocation of Executive Privilege
- VIII. Legislate To Limit the State Secrets Privilege
- IX. Strengthen Congressional Oversight of Intelligence Activities
- X. Strengthen the Inspector General System and Other Internal Checks and Balances
- XI. Reform the Office of Legal Counsel
- XII. Create a New “Church Committee” To Conduct a Thorough Accounting of National Security Policy and its Systemic Flaws

I. RENOUNCE THE THEORY OF THE MONARCHICAL PRESIDENCY

Restoring the Constitution's checks and balances should be a point of common agreement for all candidates seeking the presidency. Every presidential candidate should reject the unprecedented "monarchical prerogatives" asserted by the present Administration as contrary to the very ideals of the Constitution.

Presidential candidates in the 2008 race should make it unequivocally clear that they will keep faith with the original constitutional compact. The Constitution of 1787 was designed in conscious reaction to the British monarchy's concentrated power. As designed, it prevents the accumulation of power in any one branch of government. This is evident from the text of the Constitution, which not only split sovereignty between three branches of government, but also left all three branches subject to check by the others. These stipulations were eloquently and exhaustively expressed in the 1787 Philadelphia Convention and in all subsequent debates about the Constitution's ratification.⁷ Presidential candidates should publicly and unequivocally endorse this Original Wisdom.

The White House's insistence on unilateralism harms the country in two ways. First, it leaves the country with no effective national security policy-making mechanism. Presidential unilateralism provides no forum for debate to air pros, cons, and flaws in any policy. It deprives government of all effective means of identifying and correcting errors. Instead, it ensures that we spend precious resources on tough-sounding policies that in fact do little to promote security.

Second, the policies this President has enacted unilaterally have seriously undermined our credibility around the world and provided terrorists with a powerful recruiting tool.⁸ Today, America is linked internationally to images of Guantánamo and Abu Ghraib more often than to the ideals of liberty, equality, and law. As Bush Administration veterans acknowledge, these associations create an unacceptable "drag" on counterterrorism efforts.⁹ As General Colin Powell has said, "The world is starting to doubt the moral basis of our fight against terrorism."¹⁰ Restoring our flagging credibility depends on the unambiguous renunciation of the monarchical prerogatives by those who will lead America on January 20, 2009.

Repudiating the “monarchical prerogatives” that lie beneath these harmful policies is the first and most important part of any course correction. It should be high on the agenda of all the presidential candidates, and a key point in presidential debates.

II. RENOUNCE THE USE OF SIGNING STATEMENTS TO CIRCUMVENT THE LAW

Every presidential candidate must commit to ending the use of open-ended signing statements as devices to repudiate laws based on the “monarchical” theory of executive power.

Presidential signing statements have become a tangible manifestation of the “monarchical prerogatives” vision of the executive. President Bush has used an unprecedented number of signing statements to bypass congressional enactments that protect liberties and ensure accountability. Presidential candidates must commit to stopping the use of signing statements as a way to evade congressional authority on national security matters.

Presidents have used signing statements since the founding of the Republic. But the Bush White House has made use of the device in new, troubling ways.¹¹ First, the Administration has used such statements to signal aggressive non-compliance with an unprecedented range of laws. In more than two hundred years, presidents before Bush challenged the constitutionality of 600 statutory provisions. By 2007, Bush had challenged more than 1,100 provisions in signing statements.¹² The Administration’s aggressive reliance on statements has an *in terrorem* effect on Congress, which is on notice that even if it manages to take the political heat of disagreeing with the president, a law might in practice be worthless.

Second, President Bush’s signing statements have been opaque about the precise statutory provisions being repudiated and the exact constitutional theory being asserted to justify the signing statement.¹³ This makes it impossible for Congress to know exactly what is being complied with, and what is being defied. The result is the appearance of transparency without any substance.

Finally, the Bush Administration has extended the use of signing statements by objecting to laws that require reporting of executive noncompliance with the law.¹⁴ That is, the President has publicly declined to tell Congress and the people what laws he refuses to follow – and has used a signing statement to do so.

The next president must do better. Each presidential candidate must commit to renouncing the abusive application of signing statements as a way to evade the law and then conceal such evasion from Congress and the people.

III. DISCLOSE PAST LEGAL OPINIONS THAT INFLUENCE THE USE OF NATIONAL SECURITY POWERS

The Administration should release to Congress and the public all internal legal opinions and presidential authorizations, especially those that rely on a “monarchical prerogatives” theory of presidential authority, or that otherwise negate or narrow the application of national security laws enacted by Congress.

Since 9/11, the Department of Justice, and in particular its Office of Legal Counsel, has played a pivotal role in corroding the Constitution’s checks and balances. It has issued legal memoranda – including the infamous “torture memo” of August 2002 – that rely on a monarchical theory of presidential power

THIS ADMINISTRATION SHOULD RELEASE ALL OF THE LEGAL OPINIONS ISSUED BY THE OFFICE OF LEGAL COUNSEL THAT LICENSE POLICIES OF INTERROGATION, DETENTION, TRANSFER, AND SURVEILLANCE.

to license torture, warrantless surveillance, and “extraordinary rendition.”¹⁵ Remarkably, the present Administration has refused to expose its legal reasoning to the light of day – even

as it continues to press its expansive vision of presidential power. If the Administration feels that its position is justified, then it should have no qualms about releasing its legal opinions to public scrutiny and discussion.

This Administration should release all of the legal opinions issued by the Office of Legal Counsel that license policies of interrogation, detention, transfer,

and surveillance. It seems likely that these opinions each rely in some measure on the presumption of monarchical prerogatives.¹⁶ The disclosure of these opinions is critical to restoring the checks and balances. Without such disclosure it is impossible to know the extent of damage to America's values and to the separation of powers, i.e. which laws have been set aside and why. If the current Administration persists in its refusal to disclose these legal opinions, presidential candidates should commit to disclosing them.

To date, some legal opinions regarding compliance with international law, the detention of persons seized in Afghanistan in the course of Operation Enduring Freedom, and the use of coercive interrogation have been released or leaked. Other opinions, however, are still improperly hidden from the public. These include – but are not limited to – the following:

- Memoranda dated October 4 and November 2, 2001; January 9, May 17, and October 11, 2002; February 25, 2003; March 15, May 6, and July 16, 2004; and February 4, 2005; concerning the so-called “Terrorist Surveillance Program” of the NSA.¹⁷
- Memorandum dated March 13, 2002, for William J. Haynes, II, General Counsel, Department of Defense, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, entitled “The President’s Power as Commander in Chief to Transfer Captured Terrorists to the Control and Custody of Foreign Nations,” and undated memorandum concerning the President’s authority to transfer terrorist suspects to other countries where they are likely to be tortured.¹⁸
- Memorandum dated August 2002 for the CIA discussing the legality of specific interrogation tactics.¹⁹
- Memorandum dated March 2003, and entitled “Military Interrogation of Alien Unlawful Combatants Held Outside the United States,” concerning interrogations by the military, which “dismissed virtually all national and internal laws regulating the treatment of prisoners, including war crimes and assault statutes, and was radical in its view that in wartime the President can fight enemies by whatever means he sees fit. According to the

memo, Congress has no constitutional right to interfere with the President in his role as Commander in Chief, including making laws that limit the ways in which prisoners may be interrogated.”²⁰

- Memorandum dated spring 2005, signed by Steven Bradbury, concerning the legality of CIA enhanced interrogation techniques used either alone or in combination, and concluding that these did not amount to “cruel, inhuman, or degrading” treatment.²¹

These are the hidden opinions we are fortunate enough to know about due to cross-references in other documents or press reports. There are likely others that we do not know exist, but that should be in the public domain.

There is no justification for the Administration’s refusal to make these opinions available to the public.²² Each concerns subjects of core national importance. Each addresses instances in which the executive has decided that a law designed to protect civil liberties does not apply or is unconstitutional. In declining to release these opinions, the Administration hides the law from the people it governs. Again, this is fundamentally undemocratic.

IV. MAKE IT CLEAR: NO MORE TORTURE, NO MORE “TORTURE LITE”

Congress should enact legislation closing loopholes that the Administration believes allow or decriminalize the use of coercive interrogation measures including (but not limited to) water-boarding, prolonged sleep deprivation, and stress positions.

American law clearly prohibits all torture and all lesser forms of coercive interrogation, commonly known as cruel, inhuman, and degrading treatment.²³ Since 9/11, however, the Administration has secured from the Justice Department legal opinions that seed ambiguity about these unequivocal American legal limits. Despite the fact that federal law and international law clearly, and without reservation or caveat, prohibit all forms of torture and cruel, inhuman, and degrading treatment, the Administration has found ways to sanction interrogation tactics – including water-boarding and prolonged sleep deprivation²⁴ – that clearly involve torture.

The Administration's deliberate dilution of the anti-torture ban has had serious repercussions. It has, in the words of Marine General P. X. Kelley and former Reagan Justice Department official Robert F. Turner, "compromised our national honor and ... place[d] at risk the welfare of captured American military forces for generations to come."²⁵ The notion that "America does stand up for its values" – which the 9/11 Commission designated as pivotal to the success of national security policy – is questioned around the world.²⁶ While some presidential candidates have indicated that they understand this, others have shamefully failed to do so.

Congress should not have to once again clarify the law against torture. But given the executive's repeated evasions of that law, Congress must do so. Among other measures, Congress must consider whether it is wise to specifically prohibit the "advanced interrogation techniques" that the Administration reportedly uses.²⁷ All interrogations, conducted by the CIA or the military, must be videotaped. The role of doctors as safeguards in interrogations should be carefully examined. Absolute and unyielding prohibitions must apply to all agents, employees, and contractors of the federal government regardless of whether they are inside or outside the United States. These prohibitions should also apply to individuals who work alongside the federal government. Moreover, Congress should prohibit, without caveat, the transfer of suspected terrorists to other countries known to use torture.²⁸ Reliance on another country's assurance that it will not torture is patently hypocritical and inadequate.²⁹

V. RESTORE HABEAS CORPUS AND BRING AMERICA'S DETENTION SYSTEM UNDER THE RULE OF LAW

Congress should restore the federal courts' traditional authority under the name of "habeas corpus" to hear challenges to unlawful detention wherever it occurs and to ensure that transfers to other sovereigns comply with the rule of law.

The United States has seized hundreds of individuals in counterterrorism operations on and (increasingly) off battlefields. It has held these individuals without the elementary process granted wartime detainees as a matter of international law. The net consequence has been a global detention network that has produced

international distrust and disdain for the United States, as well as considerable violations of fundamental human rights.

The executive branch has resisted challenges to this global detention system on the ground that some detainees present a real danger to the United States and can be held lawfully pursuant to the laws of war. This may well be true, but there is an easy way to address the executive's security concern while respecting human rights and the reputational costs of America's global detention system.³⁰ It has long been the role of the federal courts to test executive branch detention authority. This power, called habeas corpus, "allows the Judicial Branch to play a role in maintaining th[e] delicate balance of governance, serving as an important judicial check on the [e]xecutive's discretion in the realm of detentions."³¹ However, in the Detainee Treatment Act and the Military Commissions Act,³² Congress regrettably singled out one group of current detainees and denied them access to the

CONGRESS MUST LEGISLATE TO BRING THE GLOBAL DETENTION SYSTEM UNDER THE RULE OF LAW. THIS MEANS OUTLAWING ALL DETENTIONS THAT ARE INCONSISTENT WITH U.S. LAW AND INTERNATIONAL HUMANITARIAN LAW.

courts to challenge the lawfulness of their detentions.

As the Brennan Center explained in *Ten Things You Should Know About Habeas Corpus*, habeas corpus has a "rightful, historic, and

fundamental place in American law."³⁴ Congress must also legislate to bring the global detention system under the rule of law. This means outlawing all detentions that are inconsistent with U.S. law and international humanitarian law. The International Committee of the Red Cross must have access to all detainees immediately upon their seizure. It entails ending funding for all CIA "black sites"³⁵ and other proxy detention programs designed to permit covert detention of terrorism suspects.³⁶ And it means banning extralegal transfers to countries that routinely engage in torture, even if the country provides "diplomatic assurances" that it will not torture.³⁷

VI. LEGISLATE TO REDUCE EXCESSIVE SECRECY AND CLASSIFICATION

Congress should hold hearings on the abuse of secrecy and enact comprehensive rules to guard against the misuse of security-related classification and declassification. It must strengthen internal mechanisms that control oversight of classification.

Excessive secrecy affects the Constitution's checks and balances in three ways. First, it prevents Congress and the public from knowing what problems exist or how best to regulate them. Second, it shifts power to the executive, which can and does selectively release information in order to promote its political or policy agendas. Third, excessive secrecy limits the flow of information within the executive branch – in some instances handicapping inter-agency processes of policy formation and yielding bad decisions.³⁸ For these reasons, Congress must promptly address this excess secrecy.

Excessive government secrecy is an immense problem.³⁹ The problem's scale dramatically increased after 9/11. Classification actions doubled from 2001 to 2004 alone.⁴⁰ "The problem of over-classification is apparent to nearly everyone who reviews classified information," wrote Governor Thomas H. Kean and Lee H. Hamilton after chairing the 9/11 Commission: "The core of the problem is the fact that people in government can get in trouble for revealing something that is secret, but they cannot get in trouble for stamping SECRET on a document."⁴¹ Furthermore, in the national security arena, Congress lacks the tools to gather information and formulate informed responses.⁴²

Congress should carefully review the regulations that now structure classification and declassification efforts. Such reviews might be done in the first instance by an expert, non-partisan panel. Based on this review, Congress should enact a comprehensive law limiting classification and installing checks to guard against the political manipulation of either classification or declassification. Further, it should strengthen both inter-branch and intrabranched oversight mechanisms. The General Accounting Office should be given a clear mandate over security agencies. Internal bodies such as the Information Security Oversight Office and the Public Interest Declassification Board should be strengthened and vested with greater disclosure-enforcing powers, such as subpoena authority.⁴³

VII. ENACT A LAW THAT REGULATES THE INVOCATION OF EXECUTIVE PRIVILEGE

Congress should limit and regulate the use of executive privilege, particularly in cases involving potential wrongdoing within the executive branch.

“Executive privilege,” – the president’s claimed right to resist disclosure to Congress of documents and communications – keeps legislators from investigating potential wrongdoing, assigning blame, or devising reforms.⁴⁴ Since the 2006 election, “executive privilege” has become an important executive-branch tool to prevent the discovery of wrongdoing and error, to preserve flawed and failing policies, and to preclude accountability.⁴⁵

Congressional action is warranted in this area because executive privilege is a vague concept already stretched far beyond plausible bounds.⁴⁶ The Constitution makes no mention of executive privilege.⁴⁷ To the contrary, the First Amendment’s protection of public discourse tilts the Constitution toward an endorsement of democratic transparency.⁴⁸ Although presidents have long claimed an extra-textual right to keep some material secret,⁴⁹ the Supreme Court has recognized that executive privilege cannot be used when there are allegations of wrongdoing.⁵⁰ Breaking from tradition, the present Administration has applied executive privilege aggressively despite such credible allegations.⁵¹ This fundamentally destabilizes the constitutional architecture.

If the executive branch does not respect the spirit of transparency, an effective law on executive privilege must define and limit the privilege.⁵² It would clarify which communications are covered, and also when Congress can overcome the privilege. Credible allegations of criminal wrongdoing or other serious violations of law would be sufficient to dissolve non-disclosure claims.⁵³ The law could then create mechanisms for threshold disclosure to a limited pool of legislators and staff. For disputes that persist, it would expedite a right of judicial appeal for both sides. It would ensure that the courts reached and resolved the dispute in a timely fashion, rather than letting disputes stagnate even as the issue fades from public attention. Clear sanctions, moreover, would be imposed on the privilege’s abuse. In this manner, Congress could proceed with full investigations when instances of executive wrongdoing come to light in the press.

VIII. LEGISLATE TO LIMIT THE STATE SECRETS PRIVILEGE

Congress should confirm the federal courts’ power and duty to adjudicate cases in which the executive branch is alleged to have used national security powers to impinge on constitutional liberties or human rights.

The state secrets privilege is “a common law evidentiary rule that protects information from discovery when disclosure would be inimical to the national security.”⁵⁴ After 9/11, the executive branch asserted the state secrets privilege vigorously in cases said to concern national security in order to block judicial scrutiny of wrongdoing. In two cases concerning the extraordinary rendition and subsequent torture of clearly innocent individuals, for example, the executive invoked the privilege to prevent the involved individuals from obtaining justice.⁵⁵ And, in another unprecedented invocation of “state secrets,” the government argued that a detainee at the Guantánamo Bay Naval Base should not be permitted access to his lawyers because he would divulge state secrets – namely, information about the “alternative interrogation methods” used to torture him.⁵⁶

Post-9/11 usage of the state secrets privilege is different in kind from pre-9/11 usage. Between 1953 and 1976, the government invoked the privilege in four lawsuits; between 1977 and 2001, the courts were asked to adjudicate claims of “state secrets” fifty-one times.⁵⁷ Since 2001, however, the government has invoked the privilege in more than a dozen cases largely to bar judicial oversight of allegations of civil liberties violations.⁵⁸ Moreover, “the Bush Administration’s recent assertion of the privilege differs from past practice in that it is seeking blanket dismissal of cases challenging the constitutionality of specific, ongoing government programs.”⁵⁹ By blocking plaintiffs from even entering the courtroom in national security-related litigation, the “state secrets” privilege undermines the judicial branch’s constitutional checking function.⁶⁰

Legislation is required to preserve courts’ essential functions as protectors of individual rights and as watchdogs against executive branch aggrandizement.⁶¹ The federal courts have their own independent authority to limit and control the state secrets privilege, but they have been unduly wary of exercising this power. Congressional intervention now would strengthen the resolve of judges facing a recalcitrant executive branch.⁶²

A new law would make clear how claims to state secrets would be handled. In particular, the law would require the government to claim the privilege on a case-by-case basis with respect to specific evidence. Further, the government would have to show that the privilege was valid with respect to each piece of evidence submitted. Congress can further strengthen courts' willingness to confront excessive use of the state secrets privilege by explicitly extending procedural mechanisms used in the criminal law context (such as the Classified Information Procedures Act⁶³) and in the context of the Freedom of Information Act⁶⁴ to the civil litigation context. This would balance a litigant's need to secure justice with the professed concerns about national security.⁶⁵

IX. STRENGTHEN CONGRESSIONAL OVERSIGHT OF INTELLIGENCE ACTIVITIES

Congress should review and strengthen the present statutory disclosure and reporting requirements concerning intelligence and national security activities.

Limiting excessive classification and reining in executive privilege alone will not ensure that Congress gets the information it needs to fulfill its constitutional role.⁶⁶ There must be an affirmative obligation on the executive branch to disclose information. Statutory disclosure obligations are especially important in the national security arena because Congress, in the absence of leaks to the press, will not always know what information it seeks.

Congress thus needs to strengthen reporting requirements for intelligence oversight that have been historically weak.⁶⁷ The 1947 National Security Act regulates and mandates disclosures of intelligence activities to Congress.⁶⁸ But its disclosure provisions contain loopholes.⁶⁹ These invitations to executive branch gamesmanship should be repudiated.

In addition, Congress should look closely at its own oversight committees, which are supposed to facilitate accountability.⁷⁰ Statutory disclosure obligations fulfill their function only if the congressional committees that receive the resulting disclosures work properly.⁷¹ In particular, Congress should reconsider the use of "gang of eight" briefings, which create the impression of accountability without its

substance.⁷² In briefing the “gang of eight” alone, the Administration only briefs the leaders of the House and Senate and of their respective intelligence committees. No congressional staff members are allowed to attend, despite the fact that both the House and the Senate have rules to ensure staff properly clear security.⁷³ Furthermore, legislators cannot take notes or discuss matters with their colleagues.⁷⁴ The result is the appearance of disclosure without real oversight.

According to federal statutes, briefings limited to the “gang of eight” are permitted for covert actions, but not for other intelligence activities such as electronic surveillance programs, and even then only in “extraordinary circumstances affecting vital interests of the United States.” But “gang of eight” briefings have become increasingly common, for example with respect to the NSA’s warrantless surveillance, beyond the occasions permitted by statute.⁷⁵

This practice disables effective oversight. There is no way that such a small group – without staff or other aid – can examine or critique intelligence activities, determine whether additional facts are needed, or whether laws are being violated. As Senator Jay Rockefeller (D-WV) has explained, “gang of eight” briefings “hardly amoun[t] to briefings, particularly in contrast to details that [President] Bush and top aides publicly released [about security programs].”⁷⁶ Congress should therefore affirmatively restrict by statute the use of “gang of eight” briefings and require instead more effective oversight.

Congress should further consider whether the limitations of congressional oversight bodies during periods of unified government (i.e., when the same party holds power on Capitol Hill and in Congress) suggests the need for more radical change. Congress should consider whether to improve oversight by giving equal control of the intelligence committees’ information-forcing powers to the party not in the Oval Office, whether or not they are in the majority in Congress.⁷⁷ Although this idea is at odds with a tradition of majoritarian control in Congress, it has received serious attention from major legal scholars recently, such as Professor Neal Kumar Katyal of Georgetown University⁷⁸ and Professor Bruce Ackerman of Yale Law School.⁷⁹

X. STRENGTHEN THE INSPECTOR GENERAL SYSTEM AND OTHER INTERNAL CHECKS AND BALANCES

Congress should review and strengthen by law the “internal checks and balances” of the executive branch, in particular the system of inspectors general for agencies and departments engaged in national security policy.

Congress by itself cannot ensure that the law is followed all the time. The federal government, and in particular the national security apparatus, has swollen far beyond anything predicted or envisaged by the Framers, and far beyond the capacity of Congress and the courts to supervise. As the current Administration acknowledges, there is a consequent need for “strong measures to improve compliance [with the law] in ... national security mechanisms.”⁸⁰

Checks and balances cannot depend on external mechanisms alone. We need investigative and oversight mechanisms within the executive branch that Congress and the courts can leverage to ensure accountability. Professor Kaytal calls these “the internal separation of powers: a set of mechanisms that create checks and balances within the executive branch.”⁸¹ Such internal checks and balances “help the Congress to hold the [e]xecutive [b]ranch accountable by rooting out waste, fraud, and abuse, and by shedding light on issues in need of attention.”⁸²

Many of the internal investigative and oversight mechanisms are familiar: a stronger system of inspectors general (or “IGs,” the statutory office responsible for internal auditing of executive branch activity); better protection for whistleblowers; separate and overlapping cabinet officers to ensure that the President hears competing opinions; agency “stovepipes” to ensure that there are internal channels to raise challenges to actions of questionable legality; mandatory review of government action by different agencies; civil-service protections for agency workers; reporting requirements to Congress; and an impartial decision-maker to resolve inter-agency conflicts to replace the now fatally compromised OLC. Many of these internal institutions exist in some form today but are too weak to be wholly effective and should be strengthened.

Congress has begun this process by examining the inspectors-general system established by statute in 1978.⁸³ IGs are responsible for investigations and

audits related to the functioning of a particular government department, and deal with the abuse of government power, fraud, and mismanagement. They report both to the agency head and to Congress, a dual reporting obligation that preserves independence and integrity.⁸⁴ There are now fifty-seven statutory IGs.⁸⁵ The work of intelligence agency IGs, however, often remains classified, thereby undermining accountability.⁸⁶ The Project on Government Oversight has suggested worthwhile reforms for all government inspectors general. These include a more professionalized selection process, dedicated legal staff, an office term of more than four years to secure independence from a given Administration, budgetary reporting directly to Congress, and better pay.⁸⁷

XI. REFORM THE OFFICE OF LEGAL COUNSEL

Congress should legislate to strengthen the independence of the Office of Legal Counsel (OLC) by insulating it from improper White House influence. It also should legislate to ensure maximum transparency for OLC opinions.

The Justice Department's OLC provides written and oral legal opinions to others in the executive branch, including the President, the Attorney General, and heads of departments. It stands at the front line of executive branch legal interpretation.⁸⁸ It has played a central role in sanctioning the dangerous theory of monarchical executive power that has corroded the checks and balances of constitutional government. Congress should act today to guard against this deviation in the OLC's role, and also to promote that institution's transparency.

In legal opinions sanctioning torture, rendition, and warrantless surveillance, the OLC failed to check flagrant governmental disregard of the law. Rather than fulfilling its "special obligation to ensure compliance with the law, including respect for the rights of affected individuals and the constitutional allocation of powers," the OLC fell into an "advocacy model," i.e. simply signing off on what the President wanted.⁸⁹ As a distinguished group of OLC alumni have explained: "The advocacy model of lawyering, in which lawyers merely craft plausible legal arguments to support their clients' desired actions, inadequately promotes the President's constitutional obligation to ensure the legality of executive action."⁹⁰ Optimally, the OLC provides "thorough and forthright" advice that "reflect[s]

all legal constraints, including the constitutional authorities of the coordinate branches of the federal government – the courts and Congress – and constitutional limits on the exercise of governmental power.”⁹¹

Congress must address the OLC’s institutional drift by strengthening its capacity to resist political pressures and to provide neutral and impartial advice that accounts for all relevant constitutional concerns. To implement this, Professor Neal Kumar Katyal has suggested splitting the OLC into distinct adjudicative and advisory divisions.⁹² Judge Patricia Wald and Professor Neil Kinkopf argue that OLC should shift to a wholly “judicial model” that is distinct from the “advocacy model.”⁹³ Whatever the exact approach taken, the OLC’s counseling function would be split from its duty to provide binding interpretations. To promote OLC independence in the latter task, Congress could require guidelines to ensure “appropriate executive branch respect for the coordinate branches of the federal government” and for individual constitutional and international human rights.⁹⁴ Further, Congress could direct OLC to “seek the views of all affected agencies [as well as other] components of the Department of Justice before rendering final advice.”⁹⁵

Further, Congress should require transparency to promote integrity in OLC work product. In Recommendation 3, we argued that past OLC opinions should be disclosed. Correlatively, Congress should also require as much transparency as possible for OLC opinions. To the maximum extent feasible, OLC opinions also should be made publicly available through an easily searchable public website.⁹⁶ Congress should also require that “absent the most compelling need for secrecy, any time the executive branch disregards a federal statutory requirement on constitutional grounds, [the OLC] should publicly release a clear statement explaining its deviation.”⁹⁷ Even when there is a clear situation-specific need for secrecy, the opinion should be released as soon as that situation ends. As Harvard Law Professor and former Director of the Justice Department’s Criminal Division Philip Heymann has argued, making the “processes, opinions, and standards” of the department “more transparent” would also help restore the Justice Department’s tarnished credibility.⁹⁸

XII. CREATE A NEW “CHURCH COMMITTEE” TO CONDUCT A THOROUGH ACCOUNTING OF NATIONAL SECURITY POLICY AND ITS SYSTEMIC FLAWS

Congress should conduct a thorough diagnostic investigation of national security policy, looking in particular at the effects of the “monarchical prerogatives” theory of executive power and the consequent departures from American values and the harm thereby done to America’s reputation. It should conduct this inquiry with an eye to crafting new oversight mechanisms, embodied in a comprehensive set of accountability legislation covering the national security state.

The White House has grasped new and unprecedented powers of coercion, surveillance, and detention. Intelligence agencies dismiss as absurd the idea that they might be held accountable for their failures and self-dealing. Unbridled power is coupled with freedom from responsibility. This is not a sustainable situation – either in terms of liberty or security.

We have been here before: after the Watergate crisis and revelations of widespread abuse of surveillance powers during the Cold War, there was a clear need for a thorough examination of domestic and international intelligence agencies, and a carefully developed reform agenda. On January 27, 1975, the United States Senate created a Select Committee to investigate the intelligence agencies of the United States, including the FBI and the CIA.⁹⁹ The Committee examined and documented how intelligence agencies in the executive branch, principally the FBI, the CIA, the NSA, and other intelligence components of the Defense Department, had violated the public trust with excessive and abusive surveillance, disruption of political activity at home, and overseas covert action. Its final reports contained the most comprehensive accounting of intelligence abuses ever produced. They also contained eighty-seven recommendations on “Foreign and Military Intelligence” and ninety-six on “Intelligence and the Rights of Americans.”¹⁰⁰ The Committee accomplished this without a single leak of classified information.

The Church Committee is a model for how comprehensive oversight can clarify what has gone wrong and provide forward-looking guidance.¹⁰¹ It demonstrates that bipartisan oversight is possible.

Today, Congress could achieve the same results via a committee of designated members of the Intelligence, Judiciary, and Homeland Security Committees. Or it could establish a Select Committee modeled on the Church Committee. Whatever the model, transparency should be maximized. The public should know as much as possible as soon as possible. A comprehensive and detailed public report should be released at the end of the inquiry. The committee should issue interim reports, as

THE CHURCH COMMITTEE IS A MODEL FOR HOW COMPREHENSIVE OVERSIGHT CAN CLARIFY WHAT HAS GONE WRONG AND PROVIDE FORWARD-LOOKING GUIDANCE.

the 9/11 Commission did, and hold public hearings.¹⁰²

Like the Church Committee, a new investigation would make recommendations for changes to promote

accountable, morally defensible, and sustainable national security policy. In particular, it would focus on clarifying the bounds of intelligence agency authority and on the precise path of chains of command and responsibility.¹⁰³ As the Church Committee explained:

Establishing a legal framework for agencies engaged in domestic security investigations is the most fundamental reform needed to end the long history of violating and ignoring the law The legal framework can be created by a two-stage process of enabling legislation and administrative regulations promulgated to implement the legislation. However, the Committee proposes that the Congress, in developing this mix of legislative and administrative charters, make clear to the [e]xecutive branch that it will not condone, and does not accept, any theory of inherent or implied authority to violate the Constitution, the proposed new charters, or any other statutes.¹⁰⁴

There is no reason to delay this investigation.¹⁰⁵ The intelligence community is already reorganizing itself. Director of National Intelligence Mike McConnell recently won White House approval for a radical overhaul of the powers and relationships between intelligence agencies.¹⁰⁶ In getting its house in order, the national security agencies have no justification for ignoring the checks and balances of constitutional governance, just as Congress has no excuse for abdicating its constitutional role by providing guidance as to those checks and balances.

CONCLUSION

The United States will have a large and powerful executive branch for the foreseeable future. But it needs to find effective ways to ensure that the powers of the presidency are used wisely and fairly. During the past six years, oversight of the executive branch, in particular its formidable national security powers, has withered. Now, as the public catalog of erroneous, harmful, and unwise policies grows, the case for comprehensive reform is undeniable and urgent. Bringing the checks and balances of constitutional government to national security policy need not involve an exchange of liberty for security. The two are not in tension. To establish accountability is to ensure that security powers are targeted correctly and wisely. It is to ensure that government officials do not claim victory when none is at hand, hide their mistakes, or turn security into a partisan game. The Framers knew well the temptation to ignore our own errors, to presume ourselves infallible, and to stifle evidence to the contrary. That is why they installed constitutional checks and balances to resist such natural and human tendencies. We have forgotten the Framers' wisdom. But if we are to prevail in the "war of ideas" at the heart of contemporary counterterrorism, if we are to convince others that America stands on solid moral ground, that the United States remains committed to the "inalienable rights" of all, then we must find our way back to Original Wisdom, and to a government that functions according to checks and balances.

ENDNOTES

- 1 For details of the Founders approach to human nature, see generally Benjamin F. Wright, *The Federalist on the Nature of Political Man*, 59 ETHICS 1 (1949).
- 2 THE FEDERALIST PAPERS No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).
- 3 N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 57-58 (1982) (quoting Buckley v. Valeo, 424 U.S. 1, 122 (1976) (per curiam)).
- 4 The minority report argued that the “principles underlying separation had to do with increasing the Government’s power as much as with checking it.” Hence, the minority report reasoned, “the President’s inherent powers” historically had “reached when Congress was silent, *and even, in some cases, where Congress had prohibited an action.*” 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 448-52; 457-60, 467 (1987).
- 5 For an example of foolish capitulation, see, e.g., Joby Warrick & Walter Pincus, *How the Fight for Vast New Spying Powers Was Won*, WASH. POST, Aug. 12, 2007, at A1; Aziz Huq, *Data-Mining Our Liberties*, THE NATION, Aug. 7, 2007, available at <http://www.thenation.com/doc/20070813/huq2>. The breadth of Protect America and the weakness of the judicial review procedures is discussed in James Risen and Eric Lichtblau, *Concerns Raised on Wider Spying Under New Law*, N.Y. TIMES, Aug. 19, 2007, at A1. Congressional failure is attributed by many to increasing presidential dominance of the party system, which has diluted legislators’ sense of responsibility to their institutional home, Congress. See generally THOMAS E. MANN & NORMAN J. ORNSTEIN, THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICAN AND HOW TO GET IT BACK ON TRACK (2006); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006).
- 6 Quoted in AKHIL REED AMAR, THE BILL OF RIGHTS 132 (1998).
- 7 See generally FREDERICK A.O. SCHWARZ & AZIZ HUQ, UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR 153-86 (2007).

- 8 According to a March 2007 Pew Global Attitudes Project poll, between 2002 and 2007, the proportion of people holding favorable views of the U.S. dropped from 75 percent to 56 percent in Great Britain and 63 percent to 39 percent in France. See Pew Global Attitudes Project, “America’s Image in the World: Findings from the Pew Global Attitudes Project,” *available at* <http://pewglobal.org/commentary/display.php?AnalysisID=1019>. The Pew Trust explicitly singled out Abu Ghraib and Guantánamo as drivers in this trend. *Id.*
- 9 See Matthew Waxman, *The Smart Way to Shut Gitmo Down*, WASH. POST, Oct. 28, 2007, at B4.
- 10 Quoted in SCHWARZ & HUQ, *supra* note 7, at 7-8.
- 11 See The Constitution Project, *Statement on Presidential Signing Statements by the Coalition to Defend Checks and Balances* 1 (2006), *available at* <http://www.constitutionproject.org/article.cfm?messageID=197> (noting that President Bush has “transformed” the use of signing statement); see also SCHWARZ & HUQ, *supra* note 7, at 91-92.
- 12 CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY 228 (2007).
- 13 See Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 317 (2006) (noting the practice of simultaneously objecting to multiple provisions). For example, responding to the McCain Amendment barring cruel, inhuman and degrading treatment, the President stated that “[t]he executive branch shall construe [the McCain Amendment] in a manner consistent with the constitutional authority of the President . . . as Commander in Chief.” President’s Statement on Signing H.R. 2683, the “Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006,” December 30, 2006, *available at* <http://www.whitehouse.gov>. This was a backhanded way of asserting monarchical powers without either saying what those powers were, or what precisely the scope of the objection was.

- 14 *See* 28 U.S.C. § 530D (2006).
- 15 Many of these legal opinions provided internal legal justification, and hence “cover,” for arguably illegal programs. In the absence of legal cover, illegal programs would not—and did not—continue. *See, e.g.*, Dana Priest, *CIA Puts Harsh Tactics on Hold*, WASH. POST, June 27, 2004, at A1 (quoting one CIA official to the effect that the interrogation program “has been stopped until we sort out whether we are sure we’re on legal ground”).
- 16 Evidence for this derives from the fact that opinions that have been released do rely on extravagant theories of executive power. *See, e.g.*, Memorandum from John Yoo, Deputy Assistant Attorney General, and Robert J. Delahunty, Special Counsel, for William J. Haynes II, “Application of Treaties and Laws to al Qaeda and Taliban Detainees,” Jan. 9, 2002. *See also* Robert Delahunt & John Yoo, *The President’s Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations that Harbor or Support Them*, 25 HARV. J.L. & PUB. POL’Y 487 (2002).
- 17 Referenced in Letter to Hon. Patrick J. Leahy from Shannon W. Coffin, Counsel to the Vice President, Aug. 20, 2007 (on file with Brennan Center for Justice).
- 18 Although no record of this memorandum has surfaced, a law review article by a former OLC lawyer reads remarkably like an OLC memo; the same lawyer has published other articles that cribbed from his work at OLC. *See* John Yoo, *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183 (2004); *see also* SCHWARZ & HUQ, *supra* note 7, at 163 (discussing article).
- 19 *Cf.* Evan Thomas & Michael Hirsh, *The Debate over Torture*, NEWSWEEK, Nov. 21, 2005, at 26 (noting specific analysis being done).
- 20 Jane Mayer, *A Deadly Interrogation*, NEW YORKER, Nov. 14, 2005, at 44; Mike Allen & Dana Priest, *Memo on Torture Draws Focus to Bush*, WASH. POST, June 9, 2004, at A3.
- 21 Scott Shane, David Johnston & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES, Oct. 4, 2007, at A1.

- 22 Neither embarrassment nor the need to keep methods from our foes warrants nondisclosure when methods akin to torture are at stake. See Nicholas deB. Katzenbach and Frederick A.O. Schwarz, *Release Justice's Secrets*, N.Y. TIMES, Nov. 20, 2007.
- 23 See SCHWARZ & HUQ, *supra* note 7, at 67-69 (summarizing those laws).
- 24 In confirmation hearings, Attorney General nominee Michael Mukasey was unable to state clearly that water-boarding constituted torture. See Attorney Transcript of Senate Judiciary Committee Hearing for Nomination of Judge Michael Mukasey as Attorney General, Day Two, October 18, 2007, *available at* <http://www.washingtonpost.com>. But water-boarding has been considered torture since the Spanish Inquisition. There is no question of its tremendous pain-inducing power. See DARIUS REJALI, TORTURE AND DEMOCRACY 279-85 (2007).

Moreover, in July 2007, President Bush promulgated an executive order setting forth rules for CIA interrogations (the military being covered by a separate, and stringent, field manual on interrogation). The order listed a series of criminal statutes concerning torture and the McCain Amendment, and explained that these, along with religious and sexual abuses, defined the universe of Common Article 3 violations. The order also stated that detainees would receive “the basic necessities of life, including adequate food and water, shelter from the elements, necessary clothing, protection from extremes of heat and cold, and essential medical care.” See Executive Order: Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency, July 20, 2007, *available at* <http://www.whitehouse.gov/news/releases/2007/07/print/20070720-4.html>.

Critically, the order did not specify which tactics the CIA would use. Further, it was carefully drafted to exclude several “enhanced” interrogation techniques allegedly already authorized for the CIA. For instance, as one Administration official conceded, the order did not acknowledge sleep as a basic necessity—leaving open the possible use of prolonged sleep deprivation. Further, Administration officials acknowledged, the rule against “extremes of heat and cold” would be given a “reasonable interpretation ... we’re not talking about

forcibly induced hypothermia.” That is, some use of temperature manipulation might be allowed under the order. Space remained, in short, for several of the harsher measures that had long been used against post-9/11 detainees. Certainly, that was how the order was read by the military’s lawyers, who expressed concern to the White House that interrogations pursuant to the order would likely violate the 1949 Geneva Conventions. See Karen DeYoung, *Bush Approves New CIA Methods*, WASH. POST, July 21, 2007, at A1; Katherine Shrader, *Bush Alters Rules for CIA Interrogations*, ASSOC. PRESS, July 21, 2007, available at <http://abcnews.go.com/Politics/wireStory?id=3399803>; see also Charlie Savage, *Military cites risk of abuse by CIA*, BOSTON GLOBE, Aug. 25, 2007, at A1.

25 P.X. Kelley & Robert F. Turner, *War Crimes and the White House: The Dishonor in a Tortured New ‘Interpretation’ of the Geneva Conventions*, WASH. POST, July 26, 2007, at A21.

26 FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 377 (2004).

27 In a recent report, Human Rights First and Physicians for Human Rights have demonstrated that all of these techniques are torture. Human Rights First & Physicians for Human Rights, *Leave No Marks: Enhanced Interrogation Techniques and the Risk of Criminality* (Aug. 2007), available at http://www.humanrightsfirst.org/us_law/etn/nomarks/index.asp.

28 See generally SCHWARZ & HUQ, *supra* note 7, at 97-123. For an excellent overview of the international law issues, see Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333 (2007).

29 See Human Rights Watch, *Still at Risk: Diplomatic Assurances No Safeguard Against Torture* (Apr. 2005) available at <http://hrw.org/reports/2005/eca0405/>.

30 Historically, wartime detention cases have been few and far between. But this is largely due to the fact that the United States has always acted within the

framework of international humanitarian law and has not been indiscriminate in its detention. Having abandoned established legal frameworks and been haphazard in initial seizures, the Administration has created a unique volume of dubious detentions.

- 31 Hamdi v. Rumsfeld, 542 U.S. 507, 537 (2004) (plurality op.).
- 32 Detainee Treatment Act of 2005, §§ 1001 et seq., *codified at* 42 U.S.C. § 2000dd note (2007).
- 33 Pub. L. 109-366, 120 Stat. 2634 (2006).
- 34 *Available at* http://www.brennancenter.org/subpage.asp?key=125&init_key=34493.
- 35 *See generally* SCHWARZ & HUQ, *supra* note 7, at 97-123; Human Rights First, *Behind the Wire* (Mar. 2005).
- 36 As it has done in the past, Congress must enact statutory prohibitions on all transmission of funds (whether appropriated or not) to foreign intelligence services known to engage in torture.
- 37 Since the countries in question do not even abide by their own legal frameworks, such assurances provide “plausible deniability” to the intelligence agency involved without providing any meaningful safeguard against torture. Dana Priest, *Foreign Network at Front of CIA’s Terror Fights; Joint Facilities in Two Dozen Countries Account for Bulk of Agency’s Post 9/11 Successes*, WASH. POST, Nov. 18, 2005, at A1; Dana Priest, *CIA Holds Terror Suspects in Secret Prisons: Debate is Growing over Legality and Morality of Overseas System Set Up After 9/11*, WASH. POST, Nov. 2, 2005, at A1; *see generally* SCHWARZ & HUQ, *supra* note 7, at 6; 115-123.
- 38 National Security Advisor Condoleezza Rice, for example, only learned of the Department of Justice’s infamous August 2002 opinion on torture in June 2004—and then only from the *Washington Post*. Barton Gellman & Jo Becker, *Pushing the Envelope on Presidential Power*, WASH. POST, June 25, 2007, at A1.

- 39 According to J. William Leonard, director of the Information Security Oversight Office, more than two million of the 20.5 million classification decisions made in 2006 were incorrect. This error rate, Leonard told Congress, “calls into question the propriety” of the initial classification decisions. Charles Pope, *Government is Overzealous with secrecy, Reichert says*, SEATTLE POST-INTELLIGENCER, July 26, 2007, at B1. Other executive branch officials are even more skeptical about the degree of excessive classification than Leonard: One official has estimated that “beyond 50%” of currently classified documents have been improperly kept from the public. Statement by Thomas S. Blanton, National Security Archive, George Washington University, Hearing on Emerging Threats: Classification and Pseudo-classification, March 2, 2005.
- 40 Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 133 (2006). On March 25, 2003, the White House ratcheted up government secrecy by imposing a presumption of non-disclosure on all federal agencies. Secrecy extends to the practices of individual policymakers. Vice President Cheney, for example, “declines to disclose the names or even the size of his staff, generally releases no public calendar and ordered the Secret Service to destroy his visitor logs.” Barton Gellman & Jo Becker, *A Different Understanding With the President*, WASH. POST, June 24, 2007, at A1.
- 41 THOMAS H. KEAN & LEE H. HAMILTON, *WITHOUT PRECEDENT: THE INSIDE STORY OF THE 9/11 COMMISSION* 69 (2006); *see also* MANN & ORNSTEIN, *supra* note 5, at 158-62 (describing the Congress’s “tolerance of executive secrecy” even before 9/11); *see generally* DANIEL PATRICK MOYNIHAN, *SECRECY: THE AMERICAN EXPERIENCE* (1999); *cf.* SISSELA BOK, *SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION* 109-10 (1983) (“Long-term group practices of secrecy ... are likely to breed corruption and to spread.”).
- 42 Most importantly, this includes the Governmental Accounting Office. The Congressional Research Services has access to less information on security issues when it compiles information for Congress.
- 43 The Public Interest Declassification Board established to reduce excessive classification has been rendered ineffectual by White House control. Shaun

Waterman, *Analysis: Secrecy board called 'toothless,'* UNITED PRESS INT'L, Oct. 30, 2006.

44 In fact, there are several kinds of executive privilege:

The [p]resident's constitutionally based privileges subsume privileges for records that reflect: military, diplomatic, or national security secrets (the state secrets privilege); communications of the [p]resident or his advisors (the presidential communications privilege); legal advice or legal work (the attorney-client or attorney work product privileges); and the deliberative processes of the [p]resident or his advisors.

Exec. Order No. 13, 233, *reproduced at* 44 U.S.C. § 2204 note (2007); *see also* Gerald Wetlauffer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*, 65 IND. L. J. 845, 845 n.3 (1990). The focus of this section is the “presidential communications” privilege.

45 After the November 2006 elections, the pace of congressional investigations picked up. *See* Thomas E. Mann, Molly Reynolds, & Peter Hoey, *A New Improved Congress?*, N.Y. TIMES, Aug. 26, 2007, at WK11 (“During the first seven months of 1995, Congressional oversight of the executive branch increased modestly in the Senate but not at all in the House. But this year Congress, especially the House, has intensified its oversight, following years of inattention and deference by its Republican predecessor.”).

46 Indeed, the term “executive privilege” was coined by a Justice Department attorney in 1949. ARTHUR SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 155 (1973).

47 To the contrary, only Article I of the Constitution—listing *Congress's* powers—even mentions secrecy. Article I, Section 5, states that: “Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy.” U.S. CONST., Art. I, § 5.

48 While the Constitution contains no affirmative obligation of disclosure, it does protect the free-flow of information after the fact. The executive, except

in very rare circumstances, cannot impose a “prior restraint” on the publication of information—even on the basis that it pertains to an ongoing conflict. *See* N.Y. Times Co. v. United States, 403 U.S. 713 (1971) (per curiam); *see also* Near v. Minnesota, 283 U.S. 697 U.S. 701 (1931).

49 *See* LOUIS FISHER, *THE POLITICS OF EXECUTIVE PRIVILEGE* 2-24 (2004) (documenting uses of executive privilege in Washington Administration); MARK J. ROZELL, *EXECUTIVE PRIVILEGE: PRESIDENTIAL POWER, SECRECY AND ACCOUNTABILITY* 28-32 (2d ed., 2002).

50 *See, e.g.* United States v. Nixon, 418 U.S. 683, 707 (1974) (“[T]he legitimate needs of the judicial process may outweigh [p]residential privilege.”); *accord* Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973) (en banc) (rejecting presidential invocation of privilege against a criminal subpoena). The privilege can also be overcome in the civil litigation context. *See* Dellums v. Powell, 642 F.2d 1351, 1354, 1364 (D.C. Cir. 1981); Sun Oil Co. v. United States, 206 Ct. Cl. 742, 514 F.2d 1020, 1024 (1975).

51 President Bush has argued that it is “important ... to guard executive privilege in order for there to be crisp decision making in the White House.” Richard W. Stevenson, *President, Citing Executive Privilege, Indicates He’ll Reject Requests for Counsel’s Documents*, N.Y. TIMES, Oct. 5, 2005, at A21.

52 Congress has recognized the existence of “executive privilege” without giving a structure or content to that recognition. *See* 44 U.S.C. § 2204(c)(2) (2007) (“Nothing in [the Presidential Records Act of 1978] shall be construed to confirm, limit, or expand any constitutionally-based privilege which may be available to an incumbent or former President.”).

53 The “defeasibility” of executive privilege for presidential communications is nothing new; it can be traced back decisions by Chief Justice John Marshall. Paul A. Freund, *Foreword: On Presidential Privilege*, 88 HARV. L. REV. 13, 30-31 (1974).

54 *In re* United States, 872 F.2d 472, 474 (D.C. Cir.) *cert. denied sub nom.* United

States v. Albertson, 493 U.S. 960 (1989). While some courts have suggested casually that the privilege can be traced back to the 1807 trial of Aaron Burr, that early precedent in fact offers no support for an absolute refusal by the government to share information with the courts. See LOUIS FISHER, *IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE REYNOLDS CASE* 218 (2006); see also Amanda Frost, *The State Secrets Privilege and the Separation of Powers*, 75 *FORDHAM L. REV.* 1931, 1938-51 (2007) (surveying evolution and recent cases). The phrase “state secrets privilege” first took form in a 1953 Supreme Court case where the government used it to shield an accident report from discovery in a tort suit. Only later was it discovered (by relatives of those who died in the accident) that the report contained no classified evidence—only evidence of the government’s negligence. See *United States v. Reynolds*, 345 U.S. 1 (1953); FISHER, *IN THE NAME OF NATIONAL SECURITY*, *supra*, at xi, 113, 181-82.

55 See *El Masri v. United States*, 479 F.3d 296 (4th Cir. 2007); *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006). For other examples of the state secrets privilege at work, see *e.g.*, *American Civil Liberties Union v. National Security Agency*, Nos. 06-2095/05-2140, *appeal decided* (6th Cir. July 6, 2007); *Hepting v. AT&T Corp.*, Nos. 17132/17137, *appeal argued* (9th Cir. Aug. 13, 2007); *Center for Constitutional Rights v. Bush*, 06-CV-313 (GEL) (S.D.N.Y.); *American Civil Liberties Union v. National Security Agency*, No. 06-CV-10204, *opinion at* 438 F. Supp. 2d 754 (E.D. Mich. 2006), *rev’d*, Nos. 06-2095/06-2140, 2007 U.S. App. LEXIS 16149 (6th Cir. July 6, 2007).

56 Carol D. Leonnig & Eric Rich, *U.S. Seeks Silence on CIA Prisons*, *WASH. POST*, Nov. 4, 2006, at A1. The detainee, Majid Khan, was allowed eventually to see a lawyer—who in turn was slapped with a gag order. See Gitanjali S. Gutierrez, *Going to See a Ghost*, *WASH. POST*, Oct. 15, 2007, at A15; see also Editorial, *Top Secret Torture*, *WASH. POST*, Nov. 21, 2006, at A26; Eric Rich & Dan Eggen, *From Baltimore Suburbs to a Secret CIA Prison*, *WASH. POST*, Sept. 10, 2006, at A8.

57 See William G. Weaver & Robert M. Pallito, *State Secrets and Executive Power*, 120 *POL. SCI. Q.* 85, 101 (2005).

58 *See generally* Frost, *supra* note 54, at 1938-51 (surveying evolution and recent cases).

59 *Id.* at 1939.

60 Judicial oversight also provides an important supplement to Congress's oversight function. This adjunct role is especially important in an era in which unilateral executive action is more common, and Congress finds it increasingly difficult to muster the supermajorities necessary to overcome the executive's first-mover advantage. If the courts are taken out of the picture, the president will be able often to act unilaterally and then to block the majority will of both Houses with his veto power. Without the courts to police strictly the executive's compliance with its own legal limits, it becomes much more difficult for Congress to impose any effective check. Moreover, courts have a comparative advantage discerning violations of individual liberties because they are relatively insulated from political pressures and have more fine-grained tools for identifying specific rights violations. *See* Frost, *supra* note 54, at 1952-53.

61 The federal courts, as James Madison explained, are also "in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the [C]onstitution by the [D]eclaration of [R]ights." 1 Annals of Cong. 457 (Joseph Gales ed., 1834); *see also* Davis v. Passman, 442 U.S. 228, 242 (1979) ("[W]e presume that justiciable constitutional rights are to be enforced through the courts. And, unless such rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights."); Bell v. Hood, 327 U.S. 678, 684 (1946) ("[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." (citations omitted)).

As the bipartisan Constitution Project has explained, "[u]nless claims about state secrets evidence are subjected to independent judicial scrutiny, the execu-

tive branch is at liberty to violate legal and constitutional rights with impunity and without the public scrutiny that ensures that the government is accountable for its actions.” The Constitution Project, *Reforming the State Secrets Privilege*, at i (May, 31, 2007).

62 Even when vested with clear statutory authority to review claims of executive secrecy, however, courts tend to shirk this responsibility. Consider the courts’ response to Congress’s amendment of the Freedom of Information Act in 1974 to repudiate the Supreme Court’s ruling in *EPA v. Mink*, 410 U.S. 73 (1973). See Freedom of Information Act, Pub. L. No. 93-502, 88 Stat. 1561-64 (1974). Since that date, courts “have been friendly to the executive,” consistently deferring to executive judgments; “apparently, the judiciary is not excited by the idea of developing national security expertise.” Adam M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA L. REV. 909, 939-40 (2006); see also Fuchs, *supra* note 40, at 162-67. For an example of excessive deference in the national security arena, see *Center for Nat’l Sec. Stud. v. Dep’t of Justice*, 331 F.3d 918, 927-28 (D.C. Cir. 2003).

63 18 U.S.C. app. 3.

64 5 U.S.C. § 552, *et seq.*

65 There are two broad statutes, the Classified Information Procedures Act, 18 U.S.C. app. 3, and the Freedom of Information Act, 5 U.S.C. § 552 *et seq.*, that already show federal courts can craft procedures to handle classified evidence without resorting to threshold dismissal or any compromise of governmental interests in secrecy. Courts have already demonstrated that they are able to adapt these statutes to new circumstances. See, e.g., *United States v. Yunis*, 867 F.2d 617, 624-25 (D.C. Cir.1989) (Court of Appeals adopted CIPA-like procedures to examine *ex parte* and *in camera* evidence relevant to an appeal); *Vaughn v. Rosen*, 484 F.2d 820, 825-26 (D.C. Cir. 1973) (developing an indexing system to sift properly classified from improperly secret information).

- 66 Pivotaly, Congress has a power to investigate that is “perhaps the most necessary of all the powers underlying the legislative function.... [It] provides the legislature with eyes and ears and a thinking mechanism.” J. William Fulbright, *Congressional Investigations: Significance for the Legislative Process*, 18 U. CHI. L. REV. 440, 441 (1951); *see also* *McGrain v. Daugherty*, 252 U.S. 135, 174 (1927); *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 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.”).
- 67 Describing legislative oversight during the Cold War, former CIA director William Colby explained that “[t]he old tradition was that you don’t ask. It was a consensus that intelligence was apart from the rules.” LOCH JOHNSON, *A SEASON OF INQUIRY: CONGRESS AND INTELLIGENCE* 7 (1976). In the Cold War, a “few members of Congress . . . protected the CIA from public scrutiny through informal armed services and appropriations subcommittees.” TIM WEINER, *LEGACY OF ASHES: THE HISTORY OF THE CIA* 105 (2007). In the current presidency, there has been a larger collapse of oversight. *See* MANN & ORNSTEIN, *supra* note 5, at 151-53.
- 68 *See, e.g.*, 50 U.S.C. §§ 413(a) & 413b.
- 69 For example, the law states that all disclosure must be “consistent with due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters.” 50 U.S.C. § 413(a). Although this statement seems relatively anodyne, it may be used to deny Congress vital information or to deprive it of all information concerning specific programs.
- 70 As Gov. Thomas Kean and Lee Hamilton recently reemphasized, this remains a pressing problem: “Three years ago, the 9/11 commission noted that the Department of Homeland Security reported to 88 congressional committees and subcommittees—a major drain on senior management and a source of contradictory guidance. After halfhearted reform, the number is now 86.” Thomas Kean & Lee Hamilton, *Are We Safer Today?*, WASH. POST, Sept. 9,

2007, at B1. The 9/11 Commission, however had “no staff team or hearing on congressional oversight,” and it is possible that further investigation would yield a conclusion different from their recommendation of “unity of effort.” KEAN & HAMILTON, *supra* note 41, at 287-88.

71 The literature here is already exhaustive. See, e.g., Anne Joseph O’Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CAL. L. REV. 1655 (2006); Robert F. Blomquist, *Congressional Oversight of Counterterrorism and Its Reform*, ROGER WILLIAMS U. L. REV. 1, 69-74 (2005).

72 For example, the White House misleadingly claimed that it had disclosed the NSA program “to Congress” without stating it had only disclosed to the “gang of eight.” See Dan Eggen & Walter Pincus, *Varied Rationales Muddle Issue of NSA Eavesdropping*, WASH. POST, Jan. 27, 2006, at A5.

73 See also Heidi Kitrosser, *Congressional Oversight of National Security Activities: Improving Information Funnels*, at 21 (2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=995014. “The House of Representatives and the Senate shall each establish, by rule or resolution of such House, procedures to protect from unauthorized disclosure all classified information, and all information relating to intelligence sources and methods, that is furnished to the congressional intelligence committees or to Members of Congress under this title. Such procedures shall be established in consultation with the Director of Central Intelligence.” 50 U.S.C § 413(d) (2004). See Rule 9 of the Senate Select Committee on Intelligence, available at http://www.fas.org/irp/congress/2005_cr/sscirules.html; and Rules 12-14 of the House Permanent Select Committee on Intelligence, available at http://www.rules.house.gov/109/text/rulesofcomm/109_rulescomm.pdf.

74 For an explanation of the “Gang of Eight” process, and an argument as to why it is flawed, see Suzanne E. Spaulding, *Power Play: Did Bush Roll Past the Legal Stop Signs*, WASH. POST, Dec. 25, 2005, at B1; Scott Shane, *Democrat Says Spy Briefings Violated Law*, N.Y. TIMES, Jan. 5, 2006, at A16; Eric Lichtblau, *Bush Defends Spy Program and Denies Misleading Public*, N.Y. TIMES, Jan. 2, 2006,

at A11; Alfred Cummings, Congressional Research Service, *Statutory Procedures Under Which Congress Is To Be Informed of U.S. Intelligence Activities, Including Covert Actions*, at 7, (Jan. 18, 2006).

75 See 50 U.S.C. §413b(c)(2); see also Kitrosser, *supra* note 73, at 6 (noting weakness of the executive branch’s argument that the “gang of eight” exception applied to the NSA’s activities). The statute does not define “extraordinary circumstances.”

76 Spencer Hsu & Walter Pincus, *Goss Says Leaks Have Hurt CIA’s Work, Urges Probe*, WASH. POST, Feb. 3, 2006, at A3.

77 Aziz Huq, *Spy Watch: After Years of Neglect, Congress Must Intensify Oversight of Intelligence Agencies*, LEGAL TIMES, May 15, 2006 (suggesting that control of intelligence oversight be vested in the party not in possession of the White House).

78 Neal Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L. J. 2314, 2342, 2347 (2006) (suggesting that the minority party could hold hearings).

79 See Bruce Ackerman, *The Emergency Constitution*, 113 YALE L. J. 1029, 1050-53 (2004).

80 See Letter from Attorney General Alberto R. Gonzales & Robert S. Mueller III, Director, Federal Bureau of Investigation to Hon. Richard B. Cheney (July 13, 2007) (on file with Brennan Center for Justice).

81 See Katyal, *supra* note 78, at 2318.

82 Project on Government Oversight, POGO’s 2007 “Baker’s Dozen” of Suggested Congressional Oversight Priorities, January 3, 2007, *available at* <http://www.pogo.org/p/government/go-070101-bakersdozen.html>.

83 See Pub. L. No. 95-521, 92 Stat. 1824 (1978) (codified as amended at 28

U.S.C. §§ 591-599); *see generally* Michael R. Bromwich, *Running Special Investigations: The Inspector General Model*, 86 GEO. L. J. 2027 (1998). In fact, Congress created IGs for the Health, Education, and Welfare Department in 1976 and for the Energy Department in 1977. *See* Frederick M. Kaiser, Congressional Research Service, *Statutory Office of Inspector General: Past and Present* 4 (June 21, 2007).

84 *See* Testimony of Danielle Brian, Executive Director, Project on Government Oversight before the Senate Homeland Security and Governmental Affairs Committee, July 11, 2007, *available at* <http://www.pogo.org/p/government/gt-070711-ig.html> [hereinafter Brian Testimony]. The Department of Justice Inspector General Glenn A. Fine has echoed the same point: “[W]hile we [IGs] listen to the views of the agency and its leadership, we are not directed by them. We make our own decisions about what to review, how to review it, and how to issue out reports. We also independently handle contacts outside the agency. At the Department of Justice OIG, we communicate with Congress independently from the Department’s Office of Legislative Affairs ...” Statement of Glenn A. Fine, Inspector General, U.S. Department of Justice before the Senate Committee of Homeland Security and Governmental Affairs concerning Strengthening the Unique Role of the Nation’s Inspectors General, July 11, 2007.

85 Intelligence agencies, including the Central Intelligence Agency, also have inspectors general. For the CIA Inspector General, for example, *see* 50 U.S.C. § 403q, as added Sept. 29, 1988 in Pub. L. No. 100-453, Title V, § 504. The CIA has had an inspector general since 1952, Congress passed only a CIA inspector general statute in 1989. L. Britt Snider, *Creating a Statutory Inspector General at the CIA*, 1, undated, *available at* <https://www.cia.gov/library/center-for-the-study-of-intelligence/kent-csi/docs/v44i5a02p.htm>.

86 For example, a June 2005 CIA Inspector General report concerning the coordination and analysis “failures” of the CIA leadership in relation to the September 2001 attacks was suppressed for more than two years. In August 2007, the CIA, with evident reluctance, released a nineteen-page executive summary of the report. *Available at* www.fas.org/irp/cia/product/oig-911.pdf; *see also*

General Michael V. Hayden, *Director's Statement on the Release of the 9/11 IG Report Executive Summary*, Aug. 21, 2007, available at <https://www.cia.gov/news-information/press-releases-statements/911-ig-report-summary.html>. CIA Director General Michael V. Hayden protested that information about the CIA's failure to avert the 9/11 attacks should remain classified because it would "consume time and attention revisiting ground that is already well plowed." Joby Warrick & Walter Pincus, *CIA Finds Holes in Pre-9/11 Work*, WASH. POST, Aug. 22, 2007, at A1. To say the least, the public has a strong interest in knowing why intelligence agencies failed to intercept the 9/11 conspiracy. Self-serving rationalizations such as Hayden's should not impede this interest's fulfillment.

87 Brian Testimony, *supra* note 84.

88 SCHWARZ & HUQ, *supra* note 7, at 135-38; Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 710-11 (2005); Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1309-10 (2000). The Office of Legal Counsel was created by statute in 1953; its head, an assistant attorney general, is subject to presidential appointment and Senate confirmation. See Reorganization Plan No. 2 of 1950, 64 Stat. 1261.

89 Walter Dellinger et al., *Principles to Guide the Office of Legal Counsel* 25 Dec. 21, 2004. It did so both by proffering the untenable theory of a "monarchical executive" to underwrite extraordinary new powers, or by interpreting statutes such as the September 2001 Authorization for the Use of Military Force, as wholesale repudiation of checks and balances in the national security field. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

90 Dellinger et al., *supra* note 89, at 1.

91 *Id.* at 2; accord JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 35-37 (2007). In an age of increasing statutory and regulatory complexity, the OLC's role as an honest broker within

the executive branch on legal issues is of paramount importance: Increasing numbers of legal questions never reach the courts, such that the executive functionally may have the last word on constitutional and statutory questions where vital human interests are at stake. See Pillard, *supra* note 88, at 758.

92 Katyal, *supra* note 78, at 2335-40.

93 Patricia Wald & Neil Kinkopf, *Putting Separation of Powers into Practice: Reflections on Senator Schumer's Essay*, 1 HARV. L. & POL'Y REV. 31, 57 (2007).

94 Dellinger et al., *supra* note 89, at 3. By authorizing internal guidelines aimed at a legislatively stipulated goal in lieu of regulating directly, Congress recognizes the leeway that the Department of Justice properly exercises in maintaining professional standards.

95 *Id.* at 5.

96 "Congress should publicly disclose its written legal opinions in a timely manner, absent strong reasons for delay or nondisclosure." Dellinger et al., *supra* note 89, at 4; see also Pillard, *supra*, note 88, at 750 (advocating for public database).

97 Dellinger et al., *supra* note 89, at 4.

98 Edward T. Pound, Peter H. Stone, Shane Harris & Corine Hegland, *After Gonzales, Justice Seeks to Regain Trust of its Employees*, NAT'L J., Aug. 31, 2007.

99 See SCHWARZ & HUQ, *supra* note 7, at 21-49.

100 FRANK J. SMIST, CONGRESS OVERSEES THE UNITED STATES INTELLIGENCE COMMUNITY 1947-1989, at 77-78 (1990).

101 Commissions in fact have a long history in American governance, dating back to the Progressive Era. See Jonathan Simon, *Parrhesiastic Accountability: Investigatory Commissions and Executive Power in an Age of Terror*, 114 YALE

L. J. 1419, 1427-28 (2005). Three decades before the Church Committee, Harry Truman, as a Senator, conducted a vast investigation that effectively exposed military waste and inefficiency during World War II, even while his own party held the White House. *See* DAVID McCULLOUGH, *TRUMAN* 259-91(1992).

102 Without public hearings and input, the “public support” necessary for the investigation in its inevitable confrontations with the executive branch – and for its eventual conclusions – will be wanting. KEAN & HAMILTON, *supra* note 41, at 75. Another way to ensure public support is through the appointment of respected commissioners and the assembly of experienced staff. *See* Simon, *supra* note 101, at 1431.

103 At present, the statutory framework for national security agencies is thin. *See* RHODI JEFFREYS-JONES, *THE CIA AND AMERICAN DEMOCRACY* 40-41 (1989).

104 Final Report of the Select Committee to Study Governmental Operation- With Respect to Intelligence Activities, United States Senate 296 (1976).

105 Since 9/11, there has been one large overhaul of the intelligence structures. *See* Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638-3872.

106 Katherine Shrader, *Intel Chief Seeks to Revise Spy Rules*, USA TODAY, June 12, 2007, *available at* http://www.usatoday.com/news/washington/2007-06-12-spyguidelines_N.htm.

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