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Before the Senate Judiciary Committee
Subcommittee on the Constitution
On the Subject of Restoring the Rule of Law

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Mr. Chairman and members of the Committee:

Thank you for the opportunity to discuss questions of the Rule of Law as they pertain in particular to the prerogatives and obligations of the members of this Committee and to the members of Congress as a whole. I have become increasingly concerned about the direction in which the Congress has moved in regard to its constitutional responsibilities and have attempted, as a member of the Constitution Project's Board of Directors, and in my studies as a faculty member both at Harvard and Princeton, to understand what has gone wrong and what the Congress must do to fulfill its obligations within our unique system of government.

There are a great many salient questions facing the American people and those of you who are charged with the responsibility of enacting the nation's laws: access to affordable health care; repair of an aging infrastructure; reducing energy dependence; ensuring the national security. But not one of those issues – and not all of them combined – is as important now or for the future as securing our position as a nation governed by the rule of law. In our case,

as a nation, the principal law that governs us and to which all other laws are subordinate is the United States Constitution which spells out the powers, and the limits on the powers, of the government as a whole and the component parts of the government.

There has been a great deal of criticism directed at the current President of the United States over actions viewed by many – and by me – as overstepping the proper bounds of his authority and violating the Constitution. I have no intention of renewing those criticisms here today. If the President has attempted to enhance his authority beyond proper constitutional boundaries, it is in part because he has fallen victim to the natural inclinations of those in power, and who are charged with important responsibilities, to seek to broaden their powers. I am not here to point a finger of blame at George W. Bush.

However, there is no doubt that we have seen the Constitutional system of separated powers disregarded and its protections cast aside, and if we are to set aside for the moment our criticisms of the current President, who are we to blame?

Let me be both candid and clear: the current greatest threat to our system of separated powers and the protections it affords stems not just from executive overreaching but equally from the Congress. America's founders envisioned a system in which each of the branches of government would guard its prerogatives and meet its obligations, each acting to serve the nation through the empowerment the Constitution grants and to protect our liberties through the constraints the Constitution imposes.

For most of the past eight years, and for many years before that, the Congress has failed to lived up to its assigned role as the principal representative of the people. Congress's constitutional role includes primary authority over spending priorities, tax policies, and the choice over whether or not to go to war. All of

these decisions require the gathering of the information necessary to act judiciously. All of these decisions require a willingness to see to it that those decisions are complied with.

But in recent years, instead of fulfilling this important trust, Congress has too often been silent. When the President of the United States, in a direct challenge to Article 1, Section 7 of the Constitution, declared in a variety of signing statements that he would decide for himself whether he was bound by the laws he signed, both houses of Congress held hearings but failed to pursue the matter any further. Particularly distressing was the reaction of nearly half the members of the House Judiciary Subcommittee who indicated no concern about a President's declaration that he had the right to disregard the laws the Congress had passed.

When the President declared that he had the authority to disregard the requirement that his Administration obtain a judicial warrant before conducting electronic surveillance on American citizens the Congress again held hearings but never demanded compliance with its requests for full disclosure about how the program was being conducted. Ultimately, the Congress acquiesced to the President's demands that the law be changed without ever obtaining the information it needed to legislate intelligently.

When the President declared that the Congress could not question members of his staff in an attempt to determine whether laws had been broken or new laws were needed, nearly half the members of the House – members of my party, a party which had always held itself to favor a strict construction of the Constitution -- walked out rather than hold White House staff members in contempt. When the Justice Department refused to enforce a congressional finding of contempt, the Congress of the United States was forced to file a civil suit, as any citizen might do, as though it were not an equal branch of government.

When the Congress has required information about the undertaking of covert actions by the Administration or when it needs access to information the Executive has designated as classified, the Congress has permitted the Executive to dictate who among the members of Congress and their staffs may have access to that information. The result is the situation in which information is available to hundreds of Executive Branch staff members but withheld not only from congressional staff members but from members of Congress themselves. And with this, the Congress meekly complies.

Every member of Congress takes an oath of office to uphold and defend the Constitution. Republican members do not take an oath to defend a Republican president and Democratic members do not take an oath to defend a Democratic president. Once that oath of office is taken, loyalty to the Constitution takes primacy over loyalty to party or individual. But that is not what has happened in recent years.

Here is the challenge, stated as candidly as I can state it. Each year the presidency grows farther beyond the bounds the Constitution permits; each year the Congress fades farther into irrelevance. As it does, the voice of the people is silenced. This cannot be permitted to stand. The Congress is not without power. It can refuse to confirm people the President suggests for important offices; it can refuse to provide money for the carrying out of Executive Branch activities; it can use its subpoena power and its power to hold hearings and above all, it can use its power to write the laws of the country.

Do members of the Senate recall that the Constitution states that the determination of what is to be done with prisoners of war is a decision to be made by the Congress, not the Executive? Do members of Congress understand that the President is the head of state but he is not the head of government? Do they understand

that they are members not merely of a separate branch of government, but of a branch that is completely the equal of the presidency and in many areas – taxing, spending, the power to declare war – the pre-eminent branch?

I spent sixteen years as a member of Congress. I sat in meetings with the President of the United States in which I, along with other leaders of my party – the Republican party – informed a Republican President that we would not support going to war unless that decision was made by the Congress. I sat in meetings of the Appropriations Committee in which we took Executive Branch spending priorities as suggestions and decided for ourselves whether to change those priorities. I sat in sessions in which Democratic leaders in Congress led the fight against the proposals of Democratic presidents. The oath of office changed everything: we crossed the line from partisans to members of the lawmaking branch of government.

Do not let it be said that what the Founders created, you have destroyed. Do not let it be said that on your watch, the Constitution of the United States became not the law of the land but a suggestion. You are not a parliament; you are a Congress – separate, independent, and equal. And because of that you are the principal means by which the people maintain control of their government. Defend that right, and that obligation, or you lose all purpose in holding these high offices. That is how you preserve and defend the rule of law in the United States.

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