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# SPEECH

## Abuses of Presidential Power: Impeachment as a Remedy

HON. ELIZABETH HOLTZMAN\*

In light of this symposium's rich discussion about such issues as the mistreatment of detainees and torture, I want to look at the problem of the uses and abuses of executive power from a somewhat different, more "macro" perspective. I want to examine the role of checks and balances in underpinning our democracy and what we can do to fulfill the vision of the Framers of our Constitution—who feared concentration of power precisely because of the threat it posed to our liberties—when they established our system of government.

We have an administration in Washington that has defied the rule of law in many serious ways. This would have not surprised the Framers. As students of history, they understood that executives could—and undoubtedly would—abuse the power of their office. In this sense, they anticipated Presidents such as Richard M. Nixon and George W. Bush, and they gave us the ultimate weapon to deal with them: the power of impeachment.<sup>1</sup> That power was specifically designed to protect our democracy from Presidents who refused to respect the rule of law.

The question that confronts us today is whether and how to use this power.

Let me just pause for a moment to consider the Framers' view of impeachment. As we know, when they drafted the Constitution, they were concerned about the misuse of power, which is why they created a system of checks and balances. The Framers were especially worried about executive power, which was understandable given that they had

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1. *See* U.S. CONST. art. II, § 4 ("The President, Vice President and all civil Officers of the United States, shall be removed from Office on impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.").

just thrown off the yoke of a monarchy. As a consequence, they created many constraints on the presidency such as a limited term of four years, a Congress with substantial powers, and a Supreme Court looking over a President's shoulder. States were given their own authority to act. But even this, the Framers recognized, was not enough.

The Framers knew that, despite all the checks they had put in place, a President could still commit terrible acts that would warrant removal from office. How to deal with that possibility was the challenge. The Framers' answer was to dust off an old British parliamentary practice called impeachment. Initially, there was opposition to the idea. After all, the Framers did not want unduly to weaken the presidency or strengthen the legislative branch. Nonetheless, the Framers were persuaded of its necessity. They understood that Presidents could so abuse the power of office and so threaten democracy that they would have to be removed from office—even though doing so would entail overturning an election, itself a hallmark of democracy.

Initially, the Framers suggested impeachment for treason. Treason is defined in the Constitution as levying war against the United States or providing aid and comfort to its enemies.<sup>2</sup> But this was deemed insufficient to protect the nation from Presidents run amok. George Mason, a delegate from Virginia, noted that treason would not cover “many great and dangerous offences” or “[a]ttempts to subvert the Constitution.”<sup>3</sup> He suggested, and the Constitutional Convention agreed, to add two other grounds for impeachment: bribery, and high crimes and misdemeanors.<sup>4</sup>

Bribery is a well-known concept, but what are high crimes and misdemeanors? As a member of the House Judiciary Committee that undertook impeachment proceedings against President Richard Nixon, I had the opportunity to consider that question. Indeed, the Committee itself carefully studied the meaning of the term. Essentially, we determined that “high crimes and misdemeanors” encompassed grave and serious abuses of presidential power. We also determined that the conduct did not have to be criminal; in other words, it did not have to violate a provision of the U.S. Criminal Code.

Article II, of the three Articles of Impeachment drawn up against President Nixon, is based entirely on this understanding of the Constitu-

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2. *See id.* art. III, § 3, cl. 1 (“Treason against the United States, shall consist only in levying war against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.”).

3. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 550 (Max Farrand, ed. 1966).

4. *See id.*

tion.<sup>5</sup> This Article, by the way, garnered the most Republican votes. It charged President Nixon, among other things, with abusing the powers of his office by illegal wiretapping; creating an “enemies list” of persons who opposed the Vietnam War or supported his opponent George McGovern; ordering the IRS to conduct harassing audits of his opponents; failing to correct false testimony given by his attorney general to the Senate, among many other things.

I will begin with the misconduct of President Bush that most clearly falls within the Nixon precedent—this misconduct startled me, when it was first disclosed in the *New York Times*,<sup>6</sup> into realizing that President Bush was committing impeachable offenses. This was President Bush’s refusal to obey the Foreign Intelligence Surveillance Act of 1978 (“FISA”)<sup>7</sup> with respect to a certain category of wiretaps. That law requires the President to seek court approval for foreign intelligence wiretaps,<sup>8</sup> but President Bush was refusing to do so.

President Nixon, like President Bush, claimed that when national security was involved he had the unilateral power to wiretap. In other words, he claimed full powers as commander in chief to do what he pleased, regardless of the law. As with President Bush, Nixon contended that his wiretaps were for national security purposes. But the Nixon wiretaps—which involved nearly two dozen journalists<sup>9</sup> and White House staffers<sup>10</sup>—were not for national security purposes. One of the wiretaps involved a staffer who had gone to work for Democratic presidential candidate Edmund Muskie, a fact that permitted the Nixon White House to have a direct pipeline into a key opponent’s campaign.<sup>11</sup>

The House Judiciary Committee determined, on a bipartisan basis, that a President of the United States may not take the law into his own hands and that the illegal wiretapping constituted grounds for President

5. See H.R. JUDICIARY COMM., IMPEACHMENT OF RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, H.R. REP. NO. 93-1305, art. II (1974), available at <http://classes.ils.edu/archive/manheimk/371d1/nixonarticles.html>.

6. See Noah Feldman, *Who Can Check the President?*, N.Y. TIMES, Jan. 8, 2006, § 6 (Magazine), at 52; see also Neil A. Lewis, *Rule Created Legal ‘Wall’ to Sharing Information*, N.Y. TIMES, Apr. 14, 2004, at A19.

7. 50 U.S.C. §§ 1801–1863 (2000 & Supp. IV 2004).

8. See *id.* §§ 1804–1806. FISA specifically requires the U.S. attorney general to approve any application to conduct “electronic surveillance” for the purpose of obtaining “foreign intelligence information.” *Id.* §§ 1803–1804. The Foreign Intelligence Surveillance Court must subsequently approve the application from the U.S. attorney general. *Id.*

9. See Note, *Who’s Listening: Proposals for Amending the Foreign Intelligence Surveillance Act*, 70 VA. L. REV. 297, 312 n.65 (1984).

10. See Jeff Breinholt, *How About a Little Perspective: The USA PATRIOT Act and the Uses and Abuses of History*, 9 TEX. REV. L. & POL. 17, 40 (2004).

11. See *A Verdict Against Richard Nixon*, TIME, Dec. 27, 1976, available at <http://www.time.com/time/magazine/article/0,9171,947789,00.html>.

Nixon's impeachment. As a direct result of President Nixon's illegal wiretapping, and subsequent revelations of CIA and FBI misconduct in the surveillance of Americans, Congress adopted the Foreign Intelligence Surveillance Act of 1978, and President Jimmy Carter signed it into law.

The centerpiece of FISA is its requirement that foreign intelligence wiretaps be approved by a court.<sup>12</sup> Congress had seen the abuses that occurred when a President wiretapped without any independent check and wanted to be sure there was a check. But Congress granted leeway. In an emergency, court approval could be obtained shortly after the wiretap commenced. By creating a special court to handle FISA wiretap applications, Congress also expected the court to develop expertise that would permit it to act speedily and knowledgeably on these applications.

From my own experience, I can say how important an outside check is. I served for eight years as District Attorney of Brooklyn, New York. When my office wanted to commence a wiretap, I personally had to sign the application requesting court approval. Knowing that the application had to go to the court meant that our office had to pay careful attention and ensure that these were solid grounds when we made our request. Even though these applications were generally granted, the very process of seeking court approval acted as a check on unwarranted and unjustified requests. For prosecutors, court approval for wiretaps is standard operating procedure.

But President Bush bridled at the FISA requirement. From the fall of 2001 to 2007—the dates are not certain—he did not submit any wiretap applications involving a special category of wiretaps to the FISA Court for approval, undertaking them unilaterally. As he saw it, he was commander in chief, and no court was going to tell him what to do. The President's refusal could not have been based on any concern that the FISA Court was overly tough on wiretap applications. From 1978 until approximately 2006, the FISA Court approved more than 19,000 applications and rejected five.<sup>13</sup>

A President cannot simply refuse to obey the law—not even when he invokes his powers as commander in chief—because the Constitution says clearly and explicitly that the President must take care that the laws are faithfully executed.<sup>14</sup> That provision creates a kind of double-whammy, a double imperative: The President must “take care” to exe-

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12. See §§ 1802(b), 1805.

13. See Electronic Privacy Information Center, Foreign Intelligence Surveillance Act Orders 1979–2006, [http://epic.org/privacy/wiretap/stats/fisa\\_stats.html](http://epic.org/privacy/wiretap/stats/fisa_stats.html) (last visited Jan. 28, 2008).

14. See U.S. CONST. art. II, § 3.

cute the laws and must do so “faithfully.”<sup>15</sup> The repetition emphasizes the importance of the President’s obligation to carry out the nation’s laws, not violate them.

In spurning court approval, President Bush violated not only the explicit terms of FISA and the constitutional requirement to execute the laws faithfully, but he also flouted the precedent on illegal wiretapping established by the Nixon impeachment proceedings. Finally, he defied a Supreme Court case that is directly on point about the powers of the commander in chief. The case, *Youngstown Sheet & Tube Co. v. Sawyer*<sup>16</sup> (the so-called *Steel Seizure* case), is one of the most important in presidential war powers jurisprudence. During the Korean War, President Truman was confronted with the possibility of a strike by steel workers.<sup>17</sup> Worried that the strike would strangle America’s ability to make the bullets, guns, tanks, and planes needed to fight the war effectively, President Truman invoked his powers as commander in chief and ordered the military to take over the steel mills and keep them running.<sup>18</sup>

The Supreme Court rejected President Truman’s claim that he had the power to do this.<sup>19</sup> In his concurrence, one of the most famous opinions in the Court’s history, Justice Robert Jackson pointedly noted that “the Constitution did not contemplate that the title Commander in Chief of the Army and Navy will constitute [the President] also Commander in Chief of the country.”<sup>20</sup> For Jackson, there was a light-year of difference between the two. A commander in chief of the military forces is still subordinate to civilian powers. A commander in chief of the country is a military dictator.

Justice Jackson brought a unique perspective to this case. He was the chief prosecutor at the Nuremberg Trials.<sup>21</sup> He saw up close the horrific consequences of tyranny, of unchecked executive power. This experience shaped his response to President Truman’s invocation of expansive power as commander in chief. Noting that the Framers were responding to the “evils” of unlimited powers exercised by George III,<sup>22</sup> Jackson added: “[I]f we seek instruction from our own times, we can match it only from the executive powers in those governments we disparagingly describe as totalitarian.”<sup>23</sup>

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15. *See id.* (“[The President] shall take Care that the Laws be faithfully executed . . .”).

16. 343 U.S. 579 (1952).

17. *See id.* at 582–83, 603–04.

18. *Id.* at 583.

19. *See id.* at 585–89.

20. *Id.* at 643–44 (Jackson, J., concurring).

21. WHITNEY R. HARRIS, *TYRANNY ON TRIAL* 11 (rev. ed. 1999).

22. *See* 343 U.S. at 641 (Jackson, J., concurring).

23. *Id.*

In response to the claim that the President's power as commander in chief trumped all else, Jackson wrote the following: "No penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role."<sup>24</sup> In other words, allowing military power to supersede the rules of civilian government is an unforgivable and profound assault on free government itself.

President Bush apparently did not have *Youngstown* on his summer reading list, not to mention the U.S. Constitution itself, or a history of the Nixon impeachment proceedings. In any case, there is no question that the President's refusal to obey the FISA law is a great and dangerous offense that subverts the Constitution. The administration's recent claim that it has now found it possible to obey FISA and to drop its past practice of using warrantless FISA wiretaps<sup>25</sup> suggests that the President could have complied with FISA earlier had he wanted to.

When confronted with a law that is ineffective, harmful, or outdated, a President is not faced with the unpalatable choice of implementing it or violating it; a President has the power to go to Congress and get the law changed. But for years, President Bush refused to seek changes in FISA that would eliminate the defect that he claimed caused him to ignore its requirements in the special category of wiretaps. In fact, the President knew very well how to amend FISA. After September 11, he persuaded Congress to extend the time to obtain a retroactive FISA warrant from twenty-four to seventy-two hours.<sup>26</sup>

A President who refuses repeatedly to obey a law written explicitly to prevent unilateral invocation of national-security wiretapping, and thereby seriously invades the privacy of Americans, commits an impeachable offense. It is worth noting that violation of FISA is a felony.<sup>27</sup>

The second ground for impeaching President Bush has to do with his use of fraud and deception to drive the United States into war in Iraq. Here again, we need to go back and examine the constitutional roots of war powers.

The Framers understood the horrors of war and its immense cost in lives and treasure. They were not wimps or pacifists. They had just fought and won a war against Great Britain. But they were great readers

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24. *Id.* at 646.

25. See James Bamford, Op-Ed., *Bush Is Not Above the Law*, N.Y. TIMES, Jan. 31, 2007, at A19.

26. See Intelligence Authorization Act for Fiscal Year 2002, Pub. L. 107-108, § 1314(a)(1), 115 Stat. 1394, 1402 (codified as amended at 50 U.S.C. § 1801(h)(4)); see also James Risen & Eric Lichtblau, *Rice Defends Domestic Eavesdropping*, N.Y. TIMES, Dec. 19, 2005, at A28.

27. See 50 U.S.C. § 1809 (2000).

of history—they understood that executives were most likely to take their countries into foolhardy and costly military adventures, and they were determined to protect against that tendency in the Constitution they wrote. Thus, when the Framers gave many war-making powers to Congress, this was not merely an abstract exercise in checks and balances. They specifically intended to make it harder to take the country to war without substantial justification. As Madison explained in a letter to Jefferson: “The constitution supposes, what the History of all Gov[ernmen]ts demonstrates, that the Ex[ecutive] is the branch of power most interested in war, & most prone to it. It has accordingly with studied care, vested the question of war in the Legis[ature].”<sup>28</sup>

Let us look at how the Constitution apportions the war-making powers. It gives the President only one power, that of commander in chief of the Army and Navy.<sup>29</sup> Congress has many powers. For example, it has the power to declare war;<sup>30</sup> raise and support an army and navy;<sup>31</sup> make rules for regulation of land and naval forces;<sup>32</sup> make rules concerning captures on land and sea;<sup>33</sup> define and punish offenses against the laws of nation;<sup>34</sup> and make laws necessary and proper for implementing those specific powers.<sup>35</sup>

For the Framers, the decision to go to war—the most serious decision a nation can make—was to be as deliberative as possible. When Congress—and through it the American people—are deprived of their ability to make a thoughtful determination about going to war, because they are not given the facts or are given false information, that is a subversion of the Constitution. And that is what occurred with respect to the Iraq war.

Although the administration has refused to release all the information about the lead-up to the war—in other words what President Bush knew and when he knew it, to paraphrase the well-known Watergate question—we still have enough information to warrant impeachment. Using the standard set in the Nixon proceeding, we have to focus on President Bush’s own conduct. With respect to violations of FISA, for example, we know that the President was directly involved because he

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28. Letter from James Madison to Thomas Jefferson (Apr. 2, 1798), in 6 THE WRITINGS OF JAMES MADISON 311, 312 (Gaillard Hunt ed., 1906).

29. U.S. CONST. art. II, § 2, cl. 1 (“The President shall be Commander in Chief of the Army and Navy of the United States . . .”).

30. *Id.* art. I, § 8, cl. 11.

31. *Id.* cl. 12.

32. *Id.* cl. 14.

33. *Id.* cl. 11.

34. *Id.* cl. 10.

35. *Id.* cl. 18.



personally signed the authorization for the warrantless wiretaps and did so repeatedly.

With respect to the Iraq war, we know that the President himself engaged in deliberate deception. The first example has to do with his repeated suggestions—and those of his top subordinates, whom he did not correct—that Saddam Hussein and al Qaeda were in cahoots.<sup>36</sup> Repeatedly, and in various ways, President Bush suggested that Saddam and al Qaeda were intertwined, connected, working together. This allowed the President and his administration to imply—although the President never said so directly—that Saddam bore responsibility for September 11, which would justify going to war against Iraq. (According to some, such as former Bush Treasury Secretary Paul O'Neill, President Bush had already decided to invade Iraq when he first took office.)<sup>37</sup> As a result of the President's disinformation campaign, by the time we invaded Iraq, more than 50% of Americans thought Saddam Hussein was responsible for September 11.<sup>38</sup> When interviewed on television during the early days of the war, our soldiers in Iraq were saying things like "I am here because this is payback for September 11."

Of course, that was not true, and the President knew it wasn't true. How do we know that? Let's go to a personal conversation that President Bush had shortly after September 11 when he convened his top security team to consider what action to take in response to the attack on us. After the meeting, the President "grabbed" Clarke and directed him to "see if Saddam did" 9/11 or was "linked in any way" to it. Astounded Clarke told the President that "al Qaeda did this." He then pointed out that no "real linkages to Iraq" were found despite looking "several times." The President testily repeated his command and walked away.<sup>39</sup>

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36. See Glenn Kessler, *Invoking 9/11 May Temper Views on Iraq War*, WASH. POST, Sept. 5, 2004, at A5 ("[I]nvestigations after the war, such as the inquiry by the bipartisan Sept. 11 commission, have largely disproved the alleged connections [between Saddam Hussein and al Qaeda]. Yet in their convention speeches, the president and vice president linked Sept. 11 and Iraq even more tightly than before.").

37. See *Bush Sought 'Way' To Invade Iraq?*, CBS NEWS, Jan. 11, 2004, <http://www.cbsnews.com/stories/2004/01/09/60minutes/main592330.shtml>.

38. See RICHARD CLARKE, *AGAINST ALL ENEMIES: INSIDE AMERICA'S WAR ON TERROR* 241 (2004); Kathy Frankovic, *Polls, Truth Sometimes at Odds*, CBS NEWS, Sept. 12, 2007, <http://www.cbsnews.com/stories/2007/09/12/opinion/pollpositions/main3253552.shtml>.

39. In his book, Clarke recalls this conversation that he had with President Bush on September 12, 2001:

[The President] grabbed a few of us and closed the door to the conference room. "Look," he told us, "I know you have a lot to do and all . . . but I want you, as soon as you can, to go back over everything, everything. See if Saddam did this. See if he's linked in any way . . ."

I was once again taken aback, incredulous, and it showed. "But, Mr. President, al Qaeda did this."

In response to the President's directive, Clarke pulled together a meeting of top counter-terrorism experts who agreed with Clarke's conclusion. Clarke sent a memo to that effect to the President. The memo came back with a note scrawled on it: "Wrong answer."<sup>40</sup> (The note was not written by the President.)

Even if President Bush never got Clarke's memo, he still had heard from Clarke personally. Nonetheless, he continued to repeat the Saddam-Bin Laden connection. Even on May 1, 2003, during his triumphant Mission Accomplished moment aboard the aircraft carrier, President Bush announced the following: "The liberation of Iraq is a crucial advance in the campaign against terror. We've removed an ally of al Qaeda, and cut off a source of terrorist funding."<sup>41</sup>

There is another example of how President Bush knowingly or recklessly deceived the country and Congress, which involved his State of the Union message in January 2003, just a few weeks before we invaded Iraq. In giving reasons for the upcoming invasion, the President invoked the nuclear threat posed by Iraq. He said, "The British government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa."<sup>42</sup> Aside from the fact that the statement was based on false information, think about the allusion to the British government. Why would the President of the United States cite information from a foreign government as a key ground for going to war? Because he could not cite information from U.S. agencies. The CIA, the State Department, and other U.S. agencies knew that the uranium story was hogwash. In fact, several months earlier, CIA Director George Tenet had called the National Security Advisor's office (and sent a memo), noting the problematic nature of the uranium claim and warning that the President should not use it in an upcoming speech in Cincinnati. The uranium reference was taken out of that speech.<sup>43</sup>

What did the President know about all of this? Even though we

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"I know, I know, but . . . see if Saddam was involved. Just look. I want to know any shred . . ."

"Absolutely, we will look . . . again." I was trying to be more respectful, more responsive. "But, you know, we have looked several times for state sponsorship of al Qaeda and not found any real linkages to Iraq. Iran plays a little, as does Pakistan, and Saudi Arabia, Yemen."

"Look into Iraq, Saddam," the President said testily and left us.

CLARKE, *supra* note 38, at 32.

40. See Clarke's *Take on Terror*, CBS NEWS, Mar. 21, 2004, <http://www.cbsnews.com/stories/2004/03/19/60minutes/main607356.shtml>.

41. See President George W. Bush, President Bush Announces Combat Operations in Iraq Have Ended (May 1, 2003), available at <http://www.state.gov/p/nea/rls/rm/20203.htm>.

42. President George W. Bush, State of the Union Address (Jan. 28, 2003), available at <http://www.whitehouse.gov/news/releases/2003/01/20030128-19.html>.

43. Tenet Faces Grilling over Uranium Intelligence, CNN.COM, July 16, 2003, <http://>

have not been provided with his prewar briefings, we can still draw some useful conclusions. Assuming he did not know that his uranium claim was false before giving his State of the Union speech, the President at least had to have read and practiced the speech. This presents two possibilities. First, when reviewing or rehearsing the speech, the President asked what U.S. intelligence thought about the British information—in which case he was undoubtedly told the truth and thus knew that what he was saying was untrue. Or, second, he didn't ask anything about it—in which case he was reckless about taking the country to war on a basis of what another country thought without learning what *our* intelligence agencies had to say about it. Failure to explore a major ground for going to war would show a grotesque indifference to his constitutional responsibilities to execute the laws faithfully, including the law authorizing him to invade Iraq.

The President's national-security staff was also presented with other important information that undermined the claim that Saddam posed a nuclear threat to us. Aside from the false Niger uranium claim, the only other basis for the mushroom-cloud argument was that Saddam had purchased certain aluminum tubes, which, according to the CIA, were useful only for nuclear weapons.<sup>44</sup> But two U.S. agencies, the Department of Energy, which is the main agency dealing with nuclear weapons, and the State Department, believed that the tubes were not suitable for nuclear weapons.<sup>45</sup> The job of the national security advisor, then Condoleezza Rice, was to reconcile the divergent positions held by these agencies. Nonetheless, neither the public nor Congress was informed about these disagreements within the administration—or that any agency was seriously questioning the mushroom-cloud scare.

Significantly, after it became clear that the aluminum-tubes claim as well as the uranium claim were false<sup>46</sup> (and the administration's other claims about chemical and biological weapons were also untrue), President Bush did not punish either Ms. Rice or her deputy, Stephen Hadley, for their sorry role in misinforming Congress and the American people about the phony nuclear threat from Iraq. (Hadley took responsibility for the appearance of the yellow-cake uranium charge in the State of the

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[www.cnn.com/2003/ALLPOLITICS/07/16/white.house.tenet](http://www.cnn.com/2003/ALLPOLITICS/07/16/white.house.tenet); *Timeline of the Iraq Uranium Imbroglia*, ABCNEWS.COM, Oct. 1, 2003, <http://abcnews.go.com/International/story?id=79393>.

44. See Max Frankel, *The Washington Back Channel*, N.Y. TIMES, Mar. 25, 2007, § 6 (Magazine), at 40; Editorial, *The Nuclear Bomb That Wasn't*, N.Y. TIMES, Oct. 5, 2004, at A22.

45. See Editorial, *Playing Hardball with Secrets*, N.Y. TIMES, Apr. 7, 2006, at A24 (“[T]he State Department and the Energy Department had concluded that it also was not true that Iraq bought aluminum tubes to enrich uranium. During his State of the Union address in 2003, Mr. Bush said flatly that it was true.”).

46. See Richard W. Stevenson, *After the War: Nuclear Rationale*, N.Y. TIMES, July 10, 2004, at A13.

Union speech.)<sup>47</sup> Instead, he rewarded them: Ms. Rice became secretary of state, and Mr. Hadley, national security advisor. Was it because they did their job too well? The mushroom-cloud scare, the disinformation campaign had worked: The United States invaded Iraq with authorization from Congress and substantial public support.

A third ground for impeachment involves President Bush's failure to take care that the laws regarding detainees in war time were faithfully executed. The President's "take care" responsibility applies not only to laws, but to ratified treaties as well, which, like U.S. statutes, are the law of the land.<sup>48</sup> This means the Geneva Conventions, as well as the statutes implementing them—the War Crimes Act of 1996<sup>49</sup> and the Anti-Torture Act<sup>50</sup>—must be obeyed, not violated.

But that was not the case. President Bush himself personally set in motion the process that led ultimately to Abu Ghraib. Even the President has conceded that the events at Abu Ghraib caused the United States incalculable harm.<sup>51</sup>

In February 2002 President Bush declared that, although the Geneva Convention protections applied to members of the Taliban, they did not apply to members of al Qaeda.<sup>52</sup> The same "harsh" interrogation techniques<sup>53</sup> that were used against detainees in Afghanistan and Guantanamo later "migrated" to Iraq where the Geneva Convention did apply.<sup>54</sup> The President's authorizations of interrogation techniques have not been made public.<sup>55</sup>

47. See *Profile: Stephen Hadley*, BBC NEWS, Nov. 16, 2004, <http://news.bbc.co.uk/2/hi/americas/4017871.stm> (quoting Hadley as saying, "I should have recalled at the time of the State of the Union speech that there was controversy associated with the uranium issue").

48. U.S. CONST. art. VI § 2.

49. 18 U.S.C. § 2441 (2000).

50. *Id.* §§ 2340–2340A.

51. See Mike Allen & Dan Balz, *On Arab TV, President Says U.S. Is "Appalled,"* WASH. POST, May 6, 2004, at A1.

52. See Katharine Q. Seelye, *A Nation Challenged: Captives; in Shift, Bush Says Geneva Rules Fit Taliban Captives*, N.Y. TIMES, Feb. 8, 2002, at A1.

53. See Neil A. Lewis, *Broad Use of Harsh Tactics Is Described at Cuba Base*, N.Y. TIMES, Oct. 17, 2004, § 1, at 1.

54. See Final Report of the Independent Panel to Review DoD Detention Operations (The Schlesinger Report), *reprinted in THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 915 (Karen J. Greenberg & Joshua L. Dratel, eds. 2005).

55. In February 2008 U.S. officials admitted that "waterboarding," a practice most legal scholars consider torture or "cruel and inhuman" treatment—and thus a likely violation of U.S. criminal statutes—was performed on at least three detainees by CIA agents. See Charlie Savage, *AG Won't Probe CIA on Torture Laws: Says Justice Dept. Memos Signed Off on Waterboarding*, BOSTON GLOBE, Feb. 8, 2008, at A2. The President authorized the interrogation. See Catherine Philp, *CIA Admits 'Waterboarding' of Terror Suspects*, TIMES (London), Feb. 7, 2008, at 36. Although it is not clear that he specifically authorized the waterboarding, his failure to condemn water boarding and the White House view that he can authorize it in the future suggests that he did.

Under the Geneva Conventions, the President was obligated to bring to justice those responsible for the mistreatment of detainees;<sup>56</sup> he also had an obligation to enforce the War Crimes Act of 1996 and the Anti-Torture Act—but he did not carry out these obligations. In the wake of the Abu Ghraib revelations, the President designated Secretary of Defense Donald Rumsfeld to determine what went wrong.<sup>57</sup> The appointment of Rumsfeld was itself a ploy to ensure a limited investigation. Rumsfeld, for starters, had no jurisdiction to review matters outside of the Department of Defense, such as prosecutions under the War Crimes Act or the Anti-Torture Act. Furthermore, Rumsfeld himself might have been guilty of violating the law: He admitted “ghosting” a detainee—in other words, hiding a detainee from the International Red Cross, a violation of the Geneva Conventions.<sup>58</sup> If the “ghosting” enabled mistreatment of the detainee, Rumsfeld might have also violated U.S. statutes and committed a war crime. It was clear that Rumsfeld would never investigate himself.

In a maneuver of enormous cynicism, Rumsfeld set up a variety of investigations that all had an exceedingly narrow scope—one investigation looked at the role of the military police, another at the role of military intelligence, and so forth.<sup>59</sup> The flurry of activity suggested thoroughness. But in fact, there was no investigation created to look at the total picture either horizontally—so all the agencies, including the CIA, would be examined—or vertically—so that everyone in the chain of command would be scrutinized. It should have been no surprise that no higher-ups have been held responsible for the mistreatment of detainees—and in some cases, those involved were promoted, given awards, or praised.<sup>60</sup> In effect, the misconduct was ratified and rewarded.<sup>61</sup>

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56. See Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

57. See Lewis, *supra* note 53.

58. See Douglas Jehl, Eric Schmitt & Kate Zernike, *U.S. Rules on Prisoners Seen as a Back and Forth of Mixed Messages to G.I.'s*, N.Y. TIMES, June 22, 2004, at A7 (“Defense Secretary Donald H. Rumsfeld approved an order to hold a suspected Iraqi terrorist but to keep his name off the prison rolls, effectively shielding the ‘ghost detainee’ from Red Cross inspectors.”).

59. See Eric Schmitt, *Rumsfeld Mischaracterizes Findings of 2 Studies on U.S. Abuse at Iraqi Interrogations*, N.Y. TIMES, Aug. 28, 2004, at A6.

60. Only one military officer who was at Abu Ghraib currently faces a court-martial for his conduct there. See *Army To Court-Martial Abu Ghraib Officer*, CBS NEWS, Jan. 26 2007, [http://www.cbsnews.com/stories/2007/01/26/iraq/main2403728.shtml?source=search\\_story](http://www.cbsnews.com/stories/2007/01/26/iraq/main2403728.shtml?source=search_story); Eric Schmitt, *Abuse Charge Set for a U.S. Colonel*, N.Y. TIMES, Apr. 26, 2006, at A1.

61. Alberto Gonzales, White House counsel who was later promoted to attorney general, authored a January 2002 memorandum to President Bush calling the Geneva Conventions “obsolete” and recommending that they not be applied. See Memorandum from Alberto R. Gonzales, counsel to the President, to the President (Jan. 25, 2002), *reprinted in* THE TORTURE PAPERS, *supra* note 54, at 118. Jay S. Bybee, Assistant Attorney General who was later promoted to the United States Court of Appeals for the Ninth Circuit, sent a memorandum to Mr. Gonzales

A final ground for impeachment is the President's failure to execute the law faithfully with respect to Hurricane Katrina. At the outset, let me note that the Framers were well aware that the impeachment power could be abused. For that reason, they rejected the proposal that a President be impeached for maladministration. They knew that problems in administration, both large and small, could plague any presidency and would thus give Congress far too much power and weaken the presidency.

We have seen abuse of the impeachment power by Congress. The Andrew Johnson impeachment was highly partisan. The Clinton impeachment was similarly partisan—no Democrat supported it in the House—and did not meet the constitutional standard that requires an abuse of the powers of his office, not merely reprehensible conduct. Although this may be a self-interested comment, the Nixon impeachment proceedings, which have withstood historical scrutiny, show that Congress can act responsibly and fairly on impeachment.

President Bush's response to Katrina was not a matter of mere maladministration. Under the structure of federal laws governing disasters, as was noted in a report prepared by House Republicans, the President is the commander in chief of hurricane relief.<sup>62</sup> Thus, the President is in charge of all hurricane relief; he is the only one who can fully mobilize the whole federal government, including the military.

Just before Katrina made landfall, the President was personally briefed via videoconference by the Director of the National Hurricane Center ("NHC") and by Michael Brown (whom the President called "Brownie"), the head of the Federal Emergency Management Agency ("FEMA").<sup>63</sup> Brown told the President that there was going to be a catastrophe in New Orleans,<sup>64</sup> and the Director of the NHC warned the

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arguing that Congress could not constrain a President's commander-in-chief powers to interrogate enemy combatants and thus, severely narrowing the definition of torture. See Memorandum of Jay S. Bybee, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), reprinted in *THE TORTURE PAPERS*, *supra* note 54, at 172–217. George Tenet, Director of the CIA during the period when enhanced interrogations were being conducted, see *GEORGE TENET, AT THE CENTER OF THE STORM: MY YEARS AT THE CIA 255* (2007), was awarded the Presidential Medal of Freedom by President Bush in December 2004. See The Official Site of the Presidential Medal of Freedom, <http://www.medaloffreedom.com/GeorgeTenet.htm> (last visited Mar. 25, 2008).

62. Military Construction Appropriations and Emergency Hurricane Supplemental Appropriations Act, Pub. L. 108-324, 118 Stat. 1220, 1220 (2005) (to be codified at scattered sections of 10, 15 & 16 U.S.C.) (speaking of the President as commander in chief in the context of hurricane emergencies).

63. *Video Shows Bush, Chertoff Warned Before Katrina*, USATODAY.COM, Mar. 2, 2006, [http://www.usatoday.com/news/nation/2006-03-01-video-katrina-warning\\_x.htm](http://www.usatoday.com/news/nation/2006-03-01-video-katrina-warning_x.htm).

64. Brown specifically told the President: "We're going to need everything that we can

President that the levies could be breached.<sup>65</sup>

Under the Constitution, President Bush is required to take care that the laws on hurricane relief are faithfully executed. These laws give him the power to mobilize all the resources of the federal government. In the face of the imminent threat to thousands of lives and to one of the great cities of America, what was the President's reaction? He appeared to listen, but asked no questions.<sup>66</sup> He didn't ask: Have we done everything we can? Have the troops been mobilized? Is there anything else the federal government can do? Is there anything else that I can do? No. Instead of asking questions or giving instructions, he said, "I know the nation will be praying . . . and we just hope for the very best."<sup>67</sup> Hoping and praying are not what the "Take Care" mandate contemplates.

When faced with what he is told could be a catastrophe, when thousands of lives are at stake, when he clearly has the power to act, he cannot simply turn away from his responsibility to act. That does not mean that the President could be impeached if he had tried to help and did not succeed. Being ineffective may constitute maladministration and is thus not impeachable; but doing nothing under these circumstances is a high crime and misdemeanor—it is a gross and tragic failure to implement the Take Care Clause.

You may now ask, What does this all of this have to do with me? The President, by means of deception, has driven us into a war that most Americans now believe was a tragic mistake; he repeatedly put himself above the rule of law with respect to wiretapping; he set into motion a terrible series of events that led to Abu Ghraib and failed to enforce the law against those responsible; and he turned away from his responsibility to help tens of thousands of Americans facing catastrophe in New Orleans.

After the Constitutional Convention ended, Benjamin Franklin was asked what had been created. His famous answer, "A republic . . . if you can keep it."<sup>68</sup> The Impeachment Clause is what allows us to preserve our democracy in the face of attempts to subvert the Constitution. Some may argue that the answer to presidential misconduct lies at the polling

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possibly muster, not only in this state and in the region, but the nation, to respond to this event." *Id.* Brown also called the storm "a bad one, a big one." *Id.*

65. The director specifically said that the city's levees were "a very, very grave concern." *Id.*

66. *Id.* ("Bush appeared on the tape sitting at a table in a small room at his Crawford, Texas, ranch. He didn't ask any questions.")

67. *Hurricane Katrina Aug. 28, 2005 Video Conference*, POPULARMECHANICS.COM, Mar. 6, 2006, <http://www.popularmechanics.com/science/earth/2413906.html>. For a video of some of the conference that took place on August 28, 2005, see *Transcripts, Tape Show Bush, Brown Warned on Katrina*, CNN.COM, Mar. 2, 2006, <http://www.cnn.com/2006/POLITICS/03/02/fema.tapes/index.html> (follow "Watch for Brown's warning and Bush's assurances—2:10" hyperlink).

68. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 3, at 85.

place. The Framers did not think so. Impeachment allows us to stop grave abuses of power without having to wait until the next election. Just as important, impeachment sends a critical message to this and future Presidents. It makes it clear that no one is above the rule of law. It challenges the idea of impunity for those in high office.

If this President can engage in serious abuses of power without being held to account—and serving out a term of office is not being held to account—then future Presidents take from this that they can seriously and systematically violate the Constitution without any penalty. If we are committed to the rule of law, then impeachment is the path we must follow. Unless a President has to pay a price for putting himself above the law, then there is no ultimate safeguard for our democracy.

The Framers did not put the impeachment power in the hands of the courts or the hands of the states. They put its initial use squarely in the hands of the House of Representatives and thus in the hands of the American people. So it is our responsibility, not that of any one else. If we countenance a doctrine of presidential impunity, we have failed to carry out our responsibility to preserve our democracy. The battle for our freedom is right here, and right now.