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STATEMENT OF PROFESSOR KEN GORMLEY
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BUSH ADMINISTRATION WIRETAPS AND SCOPE OF PRESIDENTIAL POWER

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Good morning. My name is Ken Gormley. I am a Professor of Constitutional Law at Duquesne University in Pittsburgh. I would like to begin by saying, Senator Specter, that it is a great honor to participate in these hearings. You have made enormous contributions to the Commonwealth of Pennsylvania and to the nation, here in the United States Senate, and so it is a special privilege to join you today. I would also like to acknowledge Senator Kennedy, who gave me great help and support in my work on the Archibald Cox biography. I=d finally like to thank Senator DeWine B who has accomplished so much good in neighboring Ohio B and all of the members of the Committee for the invitation to testify here today.

I. Introduction

I have been interested, for quite some time, in the subject of Presidential power. In 2001, I testified before this Committee on the subject of the President=s pardon power. Before that, in writing the biography of Archibald Cox and delving into his role as Watergate Special Prosecutor, I spent time studying United States v. Nixon and the Presidential power issues that confronted this nation during Watergate. Perhaps most directly related to these hearings, in 2002 I organized a program at Duquesne University, in cooperation with the Harry S. Truman Library & Institute, commemorating the 50th Anniversary of the Steel Seizure Case -- which is the granddaddy of the Supreme Court cases dealing with Presidential power. As part of that program, I was fortunate enough to film an interview with Chief Justice Rehnquist to discuss his memories of that historic case -- he was a young law clerk at the time, clerking for Justice Robert Jackson on the Supreme Court. Iin organizing that program, we brought together a number of still-living advisors to President Harry S. Truman, who had worked in the White House as these events unfolded, to get their first-hand perspectives. After that symposium in 2002, I had the chance to speak and write on the subject of the application of the Steel Seizure Case and its pronouncements on Presidential powers, to post-9-11 America.

So I believe that this Committee=s hearings are vital. They are important not only to iron out this extremely complex problem relating to the Bush Administration=s wiretap program and its interplay with the FISA court; but they also are critical in order to address the longer-term issue of the appropriate boundaries among the executive and judicial and legislative branches of government, each of which has a crucial role to play in our Constitutional system.

I know that the Committee=s chief task is to focus on the issue that confronts it in 2006, dealing with the wiretap program that has been initiated by the Bush Administration, made public in the past few months. However, one of the great strengths of this body over the past 200-plus years has been its ability to study the past, in order to gain a solid understanding of history, and to look forward B in order to understand future ramifications of any Congressional action B and to sculpt legislative solutions that are built to endure.

So I would like to begin by discussing history, and the situation confronted by President Harry S. Truman in the Steel Seizure Case. It has a haunting relevance to us today, in a post-9-11 America. That case must serve as the beginning and end-point in understanding the scope of, and limitations upon, Presidential power in the current situation. It gives us the Constitutional tools necessary to intelligently discuss the scope of President Bush=s power to

deal with suspected terrorists B especially on U.S. soil -- and the related scope of Attorney General Gonzales=s power to conduct warrantless wiretaps and interceptions of e-mails in a manner that departs from the ordinary standards set forth in the 4th Amendment.

Since I have the luxury, in my written comments, of going into greater detail with respect to historical background than is possible in my oral testimony, I will take advantage of that luxury by discussing the events of 1952 that brought to a head that confrontation among the executive, legislative and judicial branches in the United States. I will then discuss the relevance of that history, as it applies to the current controvery involving the Bush Administration=s secret surveillance plan.

II. The Steel Seizure Case: Its History as a Foundation For Modern Presidential Powers Issues

At first blush, the Steel Seizure Case seems to have scant relevance to the modern-day war on terror. It did not involve al-Qaeda or plots against the homeland or efforts by the executive branch to carry out a battle against enemies who would fly airplanes into buildings in New York City. Rather, it involved disputes over wages, benefits, and the price of steel per ton. On closer inspection, however, there are unmistakable parallels. The question in each case involves the issue of Presidential power, and the limits upon that power when its exercise collides with an act of Congress and the authority of the courts. The following is a summary of the relevant background of the Steel Seizure controversy, as the stage was set for a Constitutional show-down in April of 1952. [Much of this background is set forth in Steel Seizure Symposium Issue, 41 DUQUESNE LAW REVIEW 665-795 (2003), which contains a transcript of the 50th anniversary Symposium as well as articles by scholars and former advisors to President Truman, as well as reflections of the late Chief Justice Rehnquist about his work on that case as a young clerk to Justice Robert Jackson.]

Steelworkers hadn=t received a wage increase since 1950. Their contracts expired at the end of 1951; but the steel companies refused to budge. After rancorous negotiations between labor and management, the Wage Stabilization Board intervened in March of 1952 to break the deadlock. President Truman had created that Board to regulate wages and prices in key industries to keep the economy from spiraling out of control, during the Korean War. It therefore waded into the steel controversy and recommended a 26-cent-per-hour increase in wages, and a price increase of $4.75 per ton. The steel companies were outraged B they said they needed at least a $12 per ton price increase to justify hiking wages that high. They therefore defied the Wage Stabilization Board recommendations. The nation=s steelworkers announced that they were going on strike, at midnight on April 9th. Id. at 668. That is the point at which Harry Truman stepped in.

By this time, President Truman was sympathetic with the steelworkers. United Steelworkers President Philip Murray had already kept his men from striking for months, at the President's request. Murray had gone to the bargaining table and agreed to abide by the Wage Stabilization Board decision. Now here were the steel companies crying poor -- Harry Truman didn't feel moved by this plea for higher profits. Id.

The President therefore convened an impromptu press conference on April 8th B two hours before the nation=s steelworkers were set to walk out en masse B and didn=t mince words. In old film clips of the Truman press conference, one can see President Truman dressed in his dark suit, his spectacles firmly affixed to his face, staring into the camera with steely eyes. He says of the steel companies demand for a $12-per-ton price increase: ANow that=s the most outrageous thing I=ve ever heard of. They not only want to raise their prices to cover any wage increase, they want to double their money on the deal.@ Id. at 668 n. 7.

Most galling to him was the fact that the war in Korea going on at the 38th parallel. President Truman believed it was plain un-American that the Aprofiteering@ steel companies would provoke a strike at a delicate time like this.

So Truman ended the press conference by taking a step that was virtually unprecedented (except for several seizures of private property by FDR's during World War II). He ordered his secretary of Commerce, Charles Sawyer, to seize the nation=s steel mills and to keep them running. After that Presidential order, a storm of protest was unleashed that haunted Truman until he left the White House, as a very unpopular President.

The Chicago Daily News called Truman's decision Aleaping socialism. The Washington Post wrote: "President Truman's seizure of the steel industry will probably go down in history as one of the most high-handed acts committed by an American President." National Steel Chairman E.T. Weir asked: "What the hell's the difference between this and what they do in Russia?" The New York Daily News said, "Hitler and Mussolini would have loved this." Id. at 669.

In truth, it wasn't nearly as Mussolini-like as it sounded. Truman did not send in government agents to start operating the blast furnaces. He simply ordered that U.S. flags be flown in front of the steel companies; everything (otherwise) remained business as usual. But the image was one of Truman commandeering private businesses as a "payback" for the unions' support of him in the 1948 election, an image that was propagated in newspaper cartoons of the day. It outraged many Americans across the country.

When asked by a newspaper reporter what authority he had to take over the steel mills, in the spring of 1952, President Harry Truman answered in characteristic blunt fashion: "Tell em to read the Constitution. The President has the power to keep the country from going to hell." DAVID McCULLOUGH, TRUMAN at 897 (1992).

Yet every President has an intense and legitimate interest in keeping the country from "going to hell." The question became for President Truman -- just as it will ultimately become for President George W. Bush: When does the Constitution circumscribe the power of the executive branch? When does it hold a President in check, preventing him from encroaching upon powers reserved to other branches of government, and rights guaranteed to the people themselves, under the Constitution?

Milton Kayle, who was a young Special Assistant in the White House at the time, was one of the people writing memos to Truman, in 1952, spelling out his options. Kayle dug out a memo showing me that he specifically warned Truman that if he seized the mills and the matter jumped into the courts, Truman might not have a sturdy Constitutional leg to stand on. There is no question that Truman was aware of this danger. But Kayle said that the President from Missouri consciously took action in spite of this danger: He was deeply worried about the threat to troops in Korea B this was not a fake or a smoke-screen. The President was meeting with his top military advisors, including Secretary of Defense Robert Lovett, on a regular basis. Kayle was meeting daily with representatives of the Defense Department. All of them were making a firm case -- backed up by hard statistics B that a serious threat to American troops would present itself if the steel mills went idle. For one, it would produce a shortage of conventional weapons -- guns and tanks. Second, it would interfere with production of nuclear weapons, by now an essential part of the weapons stockpile, that also depended upon steel production. Id. at 671.

Virtually every old-timer whom I interviewed, who worked in the White House at the time of the Steel Seizure, described how dead-seriously President Truman took these warnings.

After all, Truman had been a Captain in the army. He knew the polls did not support him on this. But his response to his advisers was: "What would Moses have done if he had taken a poll (before handing down the Ten Commandments?)"

Ken Hechler, one of his advisors in the White House -- later congressman and secretary of state of West Virginia -- became one of the leading Truman scholars in the United States. He told me that Truman had developed a consistent theory of Presidential power from his life-long study of history. It came into play when he ordered the dropping of bombs on Japan to end World War II; when he fired General MacArthur; when he ordered the desegregation of the armed forces; when he sent troops into Korea. That theory was: Don't wait for Congress to act during times of emergency. If you do, it will render the Presidency impotent and jeopardize the nation. Id. at 671-72.

And so the decision in the Steel Seizure case, Hechler said, was both inevitable and natural for Truman. Truman certainly knew he could invoke the Taft-Hartley Act recently adopted by Congress (over his veto), to impose an 80-day cooling off period. But he felt this was too cumbersome and time-consuming. Was Truman being stubborn and bull-headed, as many historians now sum it up? Hechler had a different view: "I would use the word 'principled' rather than stubborn and bull-headed," he said. Id. at 672.

The White House did not expect that this would turn into a Constitutional show-down in the courts. Although advisors like Milt Kayle warned Truman of the danger, they also believed that the odds were low that the judicial branch would actually meddle here. They believed, in the end, the courts would leave this political hot-potato alone.

So Truman's plan was to seize the steel mills, force the steel companies and labor to sit down at the bargaining table again, and muscle them into a compromise.

That plan was upended by Judge David Pine, an obscure federal trial judge in D.C. He heard the case and, to the shock of everyone including the steel companies' own lawyers, declared President Truman's actions unconstitutional. Id. at 669-70. This decision propelled the case out of the political arena and into the appellate courts.

Once the United States Supreme Court took the case under the caption Youngstown Sheet & Tube Company v. Sawyer, President Truman never regained his balance. The steel companies had retained as their lawyer John W. Davis, the legendary white-haired Supreme Court advocate who had run for President in 1924, and was treated with reverence by the Justices. The Truman Administration's Justice Department; which was in between Attorneys General due to a petty scandal; was represented by Solicitor General Philip Perlman, who seemed to crumble when he stood up at the wooden lectern to present the President's case. Perlman clung to the basic argument: "This is wartime, the President can do anything he wants as part of his emergency powers." Id. at 673.

The government attempted to defend this argument by Aaggregating@ powers in Article II of the Constitution; namely, the provisions that state: "The executive power shall be vested in the President;" and "he shall take care that the laws be faithfully executed;" and (most importantly) the provision that states he Ashall be Commander in Chief of the army and navy." But even that kitchen-sink approach didn't sway many of the Justices.
Two weeks later, the Court handed down its 6 to 3 decision, that amounted to a stinging rebuke of President Truman. Justice Hugo Black, who wrote for the majority, declared that as broad as the President's war powers might be, and no matter how broadly the Court might interpret the notion of "theatre of war," seizing private property at home was stretching it too far. If anything, this was a matter for Congress, which has the power of eminent domain and to make laws governing domestic matters. Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952).

In other words, the Constitution simply didn't give Harry S. Truman the power to "keep the country from going to hell" by seizing American factories.

The most enduring opinion turned out to be the concurrence of Justice Robert Jackson, a powerful intellectual who did not particularly care for Harry S. Truman. Jackson had headed the trials at Nuremberg; he had been mentioned as a candidate for President; he was a towering figure as Solicitor General and as Attorney General under FDR; he wasn't particularly thrilled than Truman had passed him up as Chief Justice for crony Fred Vinson.

But Jackson's opinion is a masterpiece not because of the personal saga, but because he went to the heart of the President=s power under the Constitution. Professor John Barrett, who is currently working on Justice Jackson=s biography, has explained that Jackson had very clear views about this "Presidential Powers" issue: He had struggled with it as Attorney general, when he supported President Roosevelt's seizing of the North American Aviation plant during World War Two; mainly because that company was an exclusive producer for the government, and almost amounted to a branch of the Pentagon. Id. at 674.

In eloquent fashion Jackson laid out a spectrum; three different levels of Presidential power that existed in our Constitutional system. And that was the legacy of the Steel Seizure decision. 343 U.S. at 634 (Jackson, J., concurring).

In the first category, when the President acts pursuant to express or implied authorization of Congress, his powers are strongest. He is acting based upon whatever powers he has (inherently) in the Constitution, plus whatever power Congress is allowed to delegate him. In the second category, when the President acts where Congress has neither granted nor denied authority, he is in a middle ground. He must rely on his own powers in the Constitution; but there is a "zone of twilight" where he and Congress can comfortably overlap. In the third category, where the President acts in a manner incompatible with the express or implied will of Congress, his power is at lowest ebb. He can rely only on his own powers, the Constitution=s powers granted to Congress. Here, the "equilibrium" of our system of separation

of powers is at stake; so the courts must be leery when he ventures into this danger zone. Id. at 635-38.

In this case, Justice Jackson concluded, President Truman was in the third, weakest category. The Constitution did not specifically or even implicitly authorize him to seize private property on U.S. soil. And Congress hadn't given him that power; in fact, at the time it debated the Taft-Hartley Act in 1947, it specifically rejected an amendment that would have allowed the President to seize businesses in times of emergency. The President's powers were at their nadir here. Id. at 640.

Only Chief Justice Vinson; Truman's close friend and poker-playing partner; and Justices Reed and Minton (two other Truman appointees) voted in favor of the President. Id. at 667 (Vinson, C.J., dissenting).

The Court's decision in Youngstown was a stunning blow for Truman, during the final months of his Presidency. It dramatically undercut his stature as President, and amounted to a rebuke from Congress and the courts from which he never fully recovered. Ken Hechler told me: "There was a blue smoke around the White House for days." Id. at 675.

III. The Constitutional Lessons of the Steel Seizure Case

Why did the Supreme Court conclude that Harry S. Truman had overstepped his Constitutional boundaries?

It boils down to a simple point that Chief Justice Rehnquist made in the interview that we filmed for the introduction to the Steel Seizure program several years ago: By the time the case made it to the Supreme Court, there simply was not a sense among citizens in this country that we were seriously at risk. Symposium at 683.

Fighting in Korea had come to a lull during truce talks. People in the United States were more concerned with a race between the New York Yankees and the Brooklyn Dodgers that summer than the war overseas. There was a sense that the dire warnings by the military were overblown. In fact, that turned out to be accurate: Secretary of Defense Lovett had warned that any interruption in the production of steel would put soldiers at risk. Yet the steel strike went on for two months before it was settled, and it produced no apparent shortage. Steel was being released for bicycles and domestic luxuries B there was no noticeable impact. The military warnings, in hindsight, were probably puffed. Id. at 676.

So yes, America was at war. Yet there was a public "ambivalence," as Chief Justice Rehnquist put it, about the steel crisis. Guns and bullets were essential to troops in Korea; yet the threatened strike did not justify throwing the Constitution out the window.

It is also worth noting, however, that Harry Truman does not come out looking so bad in American history books, even after this serious goof-up. As Milt Kayle told me: "He did what he believed was the right thing to do, and history has treated him kindly for that." Id. at 677.
So the Steel Seizure Case is not about good and bad; it is not about moral absolutes. It is about the very difficult process that a nation must go through during times of crisis, struggling with how much latitude to give a President as commander-in-chief; how much power to preserve for Congress; and the courts= role in this complicated juggling act.

The Steel Seizure case, and Justice Jackson's three-part test dealing with Presidential power, has lurked in the shadows of every President after Harry Truman. It was cited prominently by the Supreme Court when it ordered President Nixon to hand over the Watergate tapes in U.S. v. Nixon, 418 U.S. 683, 703, 707 (1974). It was a key case in deciding that President Ronald Reagan had the power to freeze assets in the United States and to set up a special tribunal to deal with claims against Iran in the aftermath of the Iran hostage crisis. Dames & Moore v. Reagan, 453 U.S. 654, 660 (1981). It was a major factor in 1983 when the Court concluded that Congress could not maintain a legislative veto over the Immigration and Naturalization Service and invalidate a decision of the executive branch which had authorized a deportable alien to remain in the United States. INS v. Chadha, 462 U.S. 919, 953 n. 16 (1983). It was cited in Clinton v. Jones, in deciding that a President could be sued civilly while in office. [The Supreme Court concluded that if the judicial branch could review the legality of President Truman=s official conduct while in office, it could determine the legality of President Clinton's unofficial conduct before he took office as well. 520 U.S. 681. 697 (1997).]

The Steel Seizure Case is always present, like a length of cord loosely wrapped around the President=s wrists, ready to tighten itself around his hands; and around the entire executive branch that answers to him. But this only happens if the courts, and ultimately the American people, determine that he has stepped across that fine Constitutional line.

IV. Application of the Steel Seizure Case to the Bush Administration's Wiretap Program and Its Circumvention of the FISA Court

How do the Steel Seizure case and the lessons of Harry S. Truman in 1952 have any application to President George W. Bush in 2006, following the upheavals of September 11th and this nation's resulting war on terror?

The White House has publicly acknowledged that in the wake of the September 11th attacks, President Bush authorized the National Security Agency (NSA) to institute a program to monitor and intercept communications between persons on American soil and others abroad, presumably to pierce the al-Qaeda terror network. According to the Justice Department's "white paper" published on January 19, 2006, these domestic wiretaps and interceptions were carried out by NSA without warrants ordinarily required under the 4th Amendment. See U.S. Department of Justice, "Legal Authorities Supporting the Activities of the National Security Agency Described by the President," 2-19-06, at 4-5. The Bush Adniministration policy also circumvented the elaborate mechanism of the 1978 Foreign Intelligence Surveillance Act, or FISA, by which Congress had set up a special court pursuant to its powers under Article I of the Constitution, to handle precisely these sorts of emergency requests from the executive branch. Id. at 2-3, 18-28.

In testimony earlier this month in front of this Committee, Attorney General Gonzales defended the Bush Administration=s practice by insisting that it was "vital to the national defense." The Justice Department white paper argues that that program falls within the President's "inherent powers" to conduct the war against international terrorists. Id. at 1. President Bush has similarly stated that as commander-in-chief, he must have the power to fight Aour enemies@ wherever -- and however -- he sees fit.

I have absolutely no question about the good faith of our President and our Attorney General. These are unusual times in our nation's history. I agree that the President's power as commander-in-chief -- even on American soil -- is potentially heightened, at least for a period of time, given the attacks on the World Trade Center and the continued threat of attacks from a new brand of enemy.

Moreover, it is important to recognize that after September 11th, a fair case can be made that our nation is faced with a shifting paradigm, in which our own soil is potentially part of the field of battle. This, combined with new challenges posed by previously-unimagined forms of communications technology, may ratchet up presidential power (generally) on the homefront.

At the same time, the defense offered by the Bush Administration for its wiretap program is eerily similar to the losing argument advanced by President Harry Truman in 1952, when he seized the steel mills. Even aggregating all of the powers available to him under the Constitution, the Supreme Court concluded that the goal of "keeping the country from going to hell" -- even during time of war; was not sufficient to nullify the Constitution. Seizing private property on American soil is a power generally reserved to Congress pursuant to the 5th Amendment power involving eminent domain. To make matters worse, President Truman defied legislation there, amendments to the Taft-Hartley Act dealing with labor unrest that specifically withheld such power from the executive branch.
As Justice Jackson declared in his now-famous concurrence in the Steel Seizure Case, presidential power was at its high point in the "theater of war," abroad. It was at its "lowest ebb" on American turf, especially when the president had acted without Constitutional or Congressional support. 343 U.S. at 635-38 (Jackson, J., concurring).

Applying these lessons to the Bush wiretap program, it is possible to draw useful conclusions. In a nut-shell, the Bush Administration program bumps up against the Constitution in a number of different ways, and fails to survive that collision. There are problems enough when the executive branch does an end-run around an act of Congress, by-passing a legislative scheme that has been put in place for precisely this type of domestic surveillance. But the problems only multiply ten-fold where, as here, the chief executive=s actions collide with the fundamental rights of citizens and residents under the Bill of Rights, specifically the 4th Amendment. In such a case, the president's power is at rock bottom. Indeed, it arguably falls into a category even lower than that occupied by President Truman in the Steel Seizure case. Taking property by eminent domain, if it is accomplished by the government improperly, can

always be remedied after-the-fact by just compensation. The right of privacy protected by the 4th Amendment, however, can never be returned once violated. That is why individual rights and liberties are protected on a prospective basis, under our Constitution. Once lost, those rights are irretrievable.

There was no question that President Truman believed passionately that his actions were necessary to protect American soldiers' lives and to safeguard the nation. (It turned out, years later, that the threat posed by a steel strike was grossly overstated). Symposium at 676. There is likewise no doubt that President Bush believes, fervently, that the warrantless surveillance of certain communications by citizens or residents on American soil is necessary to carry out the administration=s difficult war on terror.

Yet as Senator Specter aptly stated in the first round of this Committee's hearings, echoing the words of Justice Sandra Day O'Connor in the Hamdi case, this does not provide a "blank check." Congress and the courts have a duty to correct the situation, if the executive branch commits an error in assessing its own powers. At least four problems are evident with respect to the current Bush administration secret surveillance program. In simplest form, they are as follows:

First, nothing in the text of the Constitution specifically gives the President the power to bypass the warrant requirement of the 4th Amendment, on the domestic front, even during times of emergency.

Second, the administration's program circumvents a specific act of Congress, which establishes the FISA court and sets forth detailed procedures for conducting surveillance of precisely this sort, involving citizens and residents of the United States. 50 U.S.C. Section 1801 et seq. (1978).

Third, that power is even further diminished because the Bush administration's program collides with rights of American citizens and residents under the Bill of Rights, to wit, those protected by the Fourth Amendment. This collision potentially puts the President's power at an even lower point on the continuum of Constitutional power than that of President Truman in the Steel Seizure case.
Fourth, if one adapts Justice Jackson's Steel Seizure test and applies it to Congress, one discovers that Congress is at its zenith in exercising powers in this matter.

Congress has the power to establish inferior courts and to define their jurisdiction, pursuant to Article I, Section 8, Clause 9 of the Constitution. Congress furthermore has the power to enact laws ensuring that the 4th Amendment and other provisions of the Constitution are observed; it has done so with detailed wiretap statutes since the 1960's. On top of this, Congress is given the exclusive power to legislate on domestic matters (Article I, Section 1) and to declare war (Article I, Section 8, clause 11). Thus, Congress is at a high point in terms of exercising its powers here. On the other hand, President Bush is arguably in the third and lowest category of Presidential power set forth by Justice Jackson in the Steel Seizure case, as discussed above. Unlike some struggles between two branches of government, this is not a close call.
The true challenge for this Committee is to find an appropriate resolution to this quandary.

The events of recent months, as information concerning the Administration's secret wiretap program has made its way into the national news, have served as a reality check. Among other things, it has reminded us that homeland security necessarily includes protecting our Bill of Rights. Without adhering to the commands contained in our Constitution=s first eight amendments, the ideal American democracy does not exist to protect.

In the past months, with the confirmation of two new Supreme Court Justices; which this Committee handled in a professional fashion of which all Americans can be proud B we heard a great deal about judges not "legislating" from the bench. That is based on the correct notion that the Constitution spells out differing roles for each branch of government, and that no branch should encroach upon the province of another. Yet that rule holds true for the executive branch, with equal force. The executive branch has no basis for usurping the powers of Congress, on the domestic front, even based upon a good-faith belief that such action might advance its legitimate war on terror. Third, it is insufficient for the President to declare: "I must do this as commander-in-chief, regardless of what any other branch of government says, and regardless of any specific authorization in Article II of the Constitution." That boils down to a political claim, akin to Louis the XIV"s statement that "L=etat, c=est moi," or "I am the state." In the American system of government, the rule of law is greater than the President or Congress or the judiciary or any single office or its occupants. If Congress properly enacts a law, as it has done in creating the FISA court and its

related procedures, and the executive branch succeeds in bypassing it without resort to the courts, the entire notion of "rule of law" collapses. There is nothing weak about standing up and demanding that the Constitution be adhered to.

Moreover, by insisting that the President follow the FISA procedures or some updated addendum to them, Congress is not in any way preventing the President from carrying out his Constitutional duties. To the contrary, it is giving the President additional Constitutional authority that he does not otherwise possess, and enabling him to carry out his important war on terror with enhanced Congressional support. As long as statutory procedures are already flexible and sensitive to national security concerns, the executive branch is strengthened rather than weakened by them.

One justification advanced by the executive branch can be summarized as follows: "We are engaged in an ongoing war on terror, that has moved to American soil. The President must therefore be empowered to take extraordinary action during such times of emergency." (See Justice Department white paper at 34.) The response to that justification, however, is: "When does this emergency cease?" It may be true that in the immediate aftermath of a horrible act of aggression like the attack of September 11th, the President takes on heightened powers, even on the domestic front. But unless we are prepared to say that the President may unilaterally suspend the Constitution for an indefinite period of time in order to deal with emergencies that have no ending-point, the correct reply must be: "If the body politic believes our Constitution is outdated and no longer works, it should be amended."

It has been nearly five years since the events of 9-11. There is a Constitutional mechanism in place (i.e. the amendment process set forth in Article V of the Constitution) if the executive branch believes its powers on the homefront must be enhanced beyond those powers that Congress has granted it through the legislation and that the Constitution grants it with respect to matters on American soil involving American citizens. In the end, the conflict here raises the age-old Latin riddle: "Quis custiodet ispos custiodes?," or "Who guards the guardians?" The answer, in our democratic republic, is that we maintain an elaborate system of checks and balances that maintains an equilibrium such that no one branch of government may improperly usurp the power of another. No one branch is given the authority to "opt-out" of complying with the Constitution. This is particularly true when it comes to observing the rights of American citizens, from whom the government's power is derived.

It is here that the observation of Chief Justice Rehnquist, in connection with the Duquesne University Symposium, becomes relevant. The point he made, in reflecting on the Steel Seizure case, was: If the nation as a whole feels a sense of imminent threat here on the homefront, the courts may give the President and Attorney General more latitude than usual in exercising their Constitutional authority. Yet once that sense of imminence and urgency passes, the courts will return to the Constitutional base-line. Symposium at 683. An emergency justifying the suspension of Constitutional rights and a re-drawing of the lines that separate the powers among the three branches of government is perforce temporary in nature. The longer the executive branch bends the rules in the name of an emergency, the weaker the justification becomes. At some point, a President who seeks such enhanced powers must obtain them in one of two ways: He must obtain direct authorization from Congress (assuming this grant of power is consistent with the Constitution); or he must convince the people themselves to amend the Constitution.

V. Key Features of Legislation Necessary to Reform Bush Administration Wiretap Program

Efforts to draft corrective legislation to address problems in the current wiretap program are still in their early stages. Time, however, is of the essence. Several basic reformns are advisable if legislation is to correct defects in the Bush Administration program, such that the legislation will pass constitutional muster in the courts. At a minimum, such corrective legislation should seek to accomplish the following:

A. The Existing FISA Statute Should Be Used As a Starting Point

The FISA statute has been fine-tuned by the legislature and subjected to judicial scrutiny since 1978. It already provides flexible and relaxed standards to the executive branch. That statute should not be abandoned. At the same time, it must keep up with fast-moving technological change. For instance, the evolution from analog to digital technology since the enactment of FISA is one change that has had enormous ramifications with respect to the government's ability to monitor the conversations of international terrorist organizations. Thus, one sensible approach is to enact an addendum to FISA until that statute can be fully updated and overhauled at a later date. For the moment, several basic statutory reforms will correct the existing problems and allow the Administration to move

forward. It is important to note that the FISA statute already comes very close to the line, in terms of potentially watering down the Constitutional guarantees contained in the 4th Amendment. Some observers, only half-facetiously, have referred to it as providing for "probable cause lite." Any new legislation should adhere as closely as possible to the existing statute, in order to avoid undermining the Constitutional guarantees set forth in the 4th Amendment. No legislation will, or should, survive Constitutional scrutiny if it disembowels the probable cause requirement.

B. A Mechanism Should be Created For Judicial Review

The nature of the post-9-11 war on terror, combined with the dramatic changes in technology (particularly with respect to electronic communications) since FISA was first enacted 28 years ago, create a daunting challenge for this and future Administrations. As Congress seeks to re-vamp and update the existing law, an immediate hurdle faces it: How can an addendum be crafted to FISA such that the Administration=s evolving wiretap and surveillance programs can be subjected to judicial scrutiny, i.e. tested in the courts? Ever since Marbury v. Madison, in 1803, our Constitutional system has recognized the principle of judicial review, by which federal courts are empowered to determine if governmental action is Constitutional. Any secret surveillance program that makes it impossible to test the constitutionality of the program in the courts -- even under highly-controlled conditions that protect national security -- runs afoul of the separation of powers doctrine as well as the 4th Amendment.

Based upon the Bush Administration=s good faith representations that the current FISA statute has become outdated as technology has advanced, and that certain types of new surveillance programs that defy previous definitions are necessary in the war against terror, a new addendum must be added to the statute. The executive branch must be given the tools to do its job, while still maintaining the Constitutional dictate of judicial review. One sensible way to ensure an opportunity for review by the courts is to require federal agencies that engage in secret surveillance programs -- seeking to gather up electronic communications relating to foreign security threats and/or international terrorists -- to apply to the FISA court for some form of "program-based warrant." This application, which would take place in camera, would seek permission from a neutral and detached judge (or panel of judges) to engage in a specific type of surveillance program or a specific category of monitoring. The program-based warrant would explain the nature of the surveillance in detail and set forth reasons why it was impossible or impracticable for the government to obtain a traditional search warrant. The existing FISA procedures can easily be adapted to apply to this sort of program-based warrant application. By requiring a high level of particularity, and by adhering to the traditional Aminimization procedures@ already applicable under FISA and in Title III wiretaps, the Areasonableness@ test of the 4th Amendment can be satisfied. In this way, the executive branch can be given latitude and flexibility to engage in new, high-tech sorts of electronic communications surveillance in the war on terror, while still remaining true to the commands of the 4th Amendment
Although the specific details of such program-based warrants would have to be worked out by Congress, several examples of legitimate requests falling into this category are possible. One example would be a request by the executive branch to sweep up a large number of internet messages that include the words "assassinate" and "President," or code words which the intelligence community is able to identify as signifying those words. Even if the intercept swept up messages of U.S. persons, these might be authorized; as well as follow-up intercepts once that cluster of communications was narrowed down to those suggesting a link to terrorist activity; with the approval of the FISA court.

A different example might be a program-based warrant seeking approval to monitor all communications to and from a cluster of U.S. persons if a) there is probable cause to believe such persons are recipients of communications from foreign agents and b) there is probable cause to believe those foreign agents are terrorists. The program-based warrant might permit the executive branch to monitor communications to and from the cluster of U.S. persons for a defined period of time, with permission and supervision of the FISA court, in order to determine if there is probable cause to go further. This is much like a "stop and frisk" in traditional law enforcement procedure, which involves only "reasonable suspicion." Although there may not exist probable cause to believe the targeted U.S. persons are engaged in terrorist activity, initially, there is enough information to permit the government to go one step further, for a limited period of time, in order to determine if there is a basis to seek additional authorization for surveillance.

In either case, the key factor is including the FISA court so that judicial review takes place, albeit in a highly-secure fashion. In this way, the executive branch can do its job. Yet the court is not excluded from carrying out its important function under the Constitution.

C. A Mechanism Must be Created to Allow Standing for Agrrieved Parties, So That a Valid "Case or Controversy" Can be Created in the Courts

In the new world of high-tech communications, myriad problems arise when it comes to handling such surveillance in a manner that is both Constitutional and protects the interests of national security. By definition, the government=s surveillance activities brought to the FISA court are conducted in secret. In the overwhelming number of cases, the identity of those individuals whose communications have been monitored or intercepted are not known to the public. Thus, there is often no classic aggrieved "plaintiff," as would be the case if the government sought a warrant to tap a phone or to intercept John Q. Citizen's mail.

In order to avoid stripping aggrieved U.S. persons of their rights to challenge the Constitutionality of governmental action directed at them, and in order to avoid stripping the federal courts of their Constitutional authority to hear such cases, it is crucial that a mechanism be created to ensure that certain parties have standing. Even though the details of the surveillance programs themselves may be secret, there are ways to ensure that valid cases and controversies are able to reach the courts.

One way is to create standing, in the statute, for any U.S. person who can demonstrate, based upon a reasonable fear that his or her communications are being or will be monitored, that he or she has refrained from international communications. Thus, a journalist or business person who communicates with an individual who meets the definition of a "terrorist" under the FISA statute, during the course of his or her work, would have standing to challenge the Constitutionality of that surveillance and/or governmental surveillance program.

A second, more direct way, is to create a mechanism by which the Congressional Committee; charged with oversight of such secret surveillance; would be given the authority to notify U.S. persons who have been subject to monitoring and determined to have no connection with terrorist activity. In this fashion, the aggrieved party would directly have standing to challenge the government surveillance and/or surveillance program in the federal courts, preserving the crucial right of judicial review. This option is discussed in more detail, in connection with the subject of Congressional oversight, below.

D. A Mechanism Should Be Created for Congressional Oversight

The statute should require that all secret surveillance -- whether pursuant to the existing procedures of FISA or pursuant to some program-based authority -- should be subject to oversight by Congress. It should require periodic reporting, in a confidential fashion, to a designated committee of both the House and Senate (most likely the Permanent Select Committee on Intelligence of the House and the Select Committee on Intelligence of the Senate), or a smaller sub-committee designated by Congress. As part of that reporting function, the agency or government actor would be required to explain the nature of any secret, warrantless surveillance and the reasons why obtaining traditional warrants was impossible. To that extent, the reporting requirement vis-a-vis Congress would be similar to that already existing under FISA. See 50 U.S.C. Sec. 1826.

The statute could additionally require the Director of National Intelligence to file with the FISA court, as well as with the Congressional oversight committee, an inventory of U.S. persons whose communications have been intercepted by means of secret surveillance, and who have been determined to have no link to terrorism. This procedure is already common practice in Title III surveillance. The designated Congressional committees would then be empowered -- after consultation with the Director of National Intelligence in order to ensure that national security was not jeopardized -- to release the names of one or more aggrieved U.S. persons who had been subjected to such secret surveillance and to notify such individuals. Such aggrieved individuals would then have standing to sue in order to challenge the governmental surveillance.

The Congressional committee would also be empowered to issue a subpoena to the Director of National Intelligence and/or the federal agency conducting the surveillance, if the statutorily required information is withheld. The Committee could also file a complaint with the FISA court, if the failure of the agency to turn over the required materials impaired its ability to carry out its legislative oversight function. (Thus, the Committee itself would have standing to sue based upon concrete harm).

The FISA court, if it was presented with evidence that the secret surveillance law was being violated in any fashion,

would be empowered to issue a Rule to Show Cause to the government agency, requiring it to explain its non-compliance with the statute or to be held in contempt. A declaratory judgment action might also be created by statute, in order to allow the federal courts to determine the Constitutionality of the executive branch's authority to engage in such surveillance, generally, without divulging the secret details of the program-based warrant if that might jeopardize national security. In this fashion, appropriate checks and balances would be create so that the executive branch could carry out its important work, yet Congress and the courts would be in a position to ensure that a valid case or controversy would be created, sufficient to satisfy Article III, Section 2 of the Constitution, if the procedures set forth in the amended FISA statute were not complied with.

In short, the above proposal puts the highly confidential intelligence committees of Congress in the role of intermediator, permitting them to release names of aggrieved U.S. persons, but only after satisfying themselves that such release of information would not jeopardize the national security.

Constructing such a statutory mechanism to ensure that the FISA court has the power to review claims of non-compliance by the government is essential. By its very nature, establishing a procedure to deal with secret surveillance that is reviewed by a secret court is a complex feat. Unlike a typical case in our democratic system of government, the targets of secret surveillance programs, whose privacy rights may have been impaired, may never know that they were subject to such monitoring. As long as a mechanism is constructed to create a case or controversy that properly brings the matter before the courts, it would pass constitutional muster. The method described above strikes a balance between wholesale divulging to the pubic the details of the executive branch's secret surveillance activities, and absolute secrecy that shields the surveillance from the courts and Congress.

This can be compared to other situations in which a case or controversy is established, for purposes of Article III, where a matter has become moot but there still exists a "high probability of repetition that evades review." In such cases; e.g. dealing with abortion and/or matriculation of students; a case or controversy is deemed to exist, as a matter of necessity. The issue is likely to repeat itself and will otherwise evade review. Similarly, when it comes to the implementation of secret surveillance programs carried out by the executive branch, important and concrete Constitutional questions might be avoided indefinitely if some party were not given standing to present the matter to the FISA court. Thus, allowing Congress as part of its oversight function to play a role, in conjunction with the FISA court itself, is a sensible approach. It provides the maximum protection to the executive branch to ensure that its surveillance program remains protected and highly confidential for the sake of national security. Yet it creates a mechanism to detect failures to comply with the statute, and to permit judicial review of such non-compliance. Not only does this maintain the equilibrium of our system of separation of powers, but it also provides a mechanism to ensure that the guarantees of the 4th Amendment are not circumvented.

E. The United States Supreme Court Must Possess the Final Power of Review

Ultimately, issues dealing with the constitutionality of wiretap programs carried out by the executive branch must be reviewed by the judiciary pursuant to Article III. Creating a mechanism for the FISA court to review such programs is the first step. Also, creating a declaratory judgment action in any federal district court to challenge the Constitutional authority of the executive branch to engage in a surveillance program, without divulging the details of that program, is another path. In either event, the statute must next create a mechanism of appeal to the United State Supreme Court. Such a requirement is essential. Article 1, Section 8, Clause 9 of the Constitution allows Congress to create "inferior tribunals," i.e. tribunals inferior to the Supreme Court. Such a power is restated in Article III, Section 1. This means that Congress lacks power to transform the FISA courts into courts of last resort. They must be answerable, ultimately, to the Supreme Court. Otherwise, a surrogate Supreme Court would be created, stripping Article III courts of their constitutionally-defined jurisdiction.

Consequently, the statute must create a right of appeal to the FISA Court of Review and/or the United States Courts of Appeals, as well as a mechanism for appeal to the United States Supreme Court.

F. The Intake Mechanism for Matters Funneled Into the Secret FISA Court Should Be Extremely Narrow

It is crucial, in drafting any electronic surveillance legislation that is to withstand Constitutional scrutiny, that the intake mechanism by which cases are funneled into the secret FISA court remain as narrow and carefully-defined as possible. No branch of government, even Congress, has the power to indefinitely suspend the protections of the 4th

Amendment. Currently, the FISA statute is scrupulously limited to surveillance relating to international security matters. This is so because the courts have consistently held that the executive branch=s power is at its zenith when it comes to foreign affairs. Thus, the current FISA statute permits a procedure separate from the usual requirement of open courts, traditional search warrants, etc., only where the government certifies there exists probable cause to believe that the target of the electronic surveillance is a "foreign power" (including international terrorist groups) or "an agent of foreign power" (See 50 U.S.C. Section 1805(a)). Moreover, the government must certify that a "significant purpose" of the surveillance is to obtain foreign intelligence information, and provide a detailed statement of the basis for that belief. (See 50 U.S.C. Section 1804).

In order to prevent any amendment or addendum to FISA from eviscerating the guarantees of the 4th Amendment that ordinarily apply to American citizens and residents, the intake mechanism must be carefully limited to surveillance dealing with international security matters and foreign affairs. Otherwise, the distinction between those matters (where the President is given ample latitude and authority under the Constitution) and matters dealing with domestic affairs (where he is significantly circumscribed by the Constitution including the Bill of Rights) will be gutted. Without the correct balance, the resulting statutory scheme will be Constitutionally indefensible.

We know from experience that times of crisis are often when the worst decisions are made, in historical hindsight. The fear of communists and socialists during the First and Second World Wars led to prosecutions under the Espionage Act that, in hindsight, unnecessarily curtailed first amendment freedoms. Attorney General Palmer's round-up and arrest of thousands of Asuspects@ in 1919-1920, during WWI, whom Palmer alleged were part of a communist plot to overthrow the government (which never panned out) was viewed as a disgrace. The panic after the Japanese invasion at Pearl Harbor led to the internment of 100,000 American citizens of Japanese dissent on the West Coast, and the infamous Korematsu case that has since been repudiated by the United States Government itself, has been villified because it disregarded basic individual rights. See, generally, WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME (1998).

On the other hand, there were real, pressing reasons for those decisions. Abraham Lincoln -- when he was criticized for suspending writs of habeas corpus during the Civil War, arguably in violation of the Constitution; responded by saying, in effect; "maybe so, but the Constitution won't do us much good if we have no country to protect anymore." Id.

During the course of my work relating to the Steel Seizure case, which spanned several years, I spent considerable time with men who worked alongside Harry Truman in the White House, as he confronted these difficult decisions. These men were now in their eighties and nineties, at the end of their careers; there was nothing politically-motivated about their impressions a half-century later. There was no question that President Truman believed with moral certainty that he needed to take action to protect the country and to save lives of American troops. His advisors in the White House believed the same thing, honestly, based upon the best information available to them. There was nothing manufactured about this. Harry Truman was trying with every fiber in his body to discharge his duties as President as he believed the Constitution commanded him.

There is similarly no question that President Bush and his advisors in the White House and Attorney General Gonzales are doing everything humanly possible to do the right thing for the country, in terms of their secret surveillance program. There should be no finger-pointing, or criticism with respect to motives or partisan jousting. This is very serious business. President Bush confronts a world quite different than any previous President. We should not condemn his efforts, when they are designed in good faith to preserve our nation. At the same time, Congress has clearly delineated powers under the Constitution. It owes a duty to our system of government to ensure that these are not disemboweled or diminished, even by the President. This is not about right or wrong. It is about attempting to find a common Constitutional ground among equally well-intentioned public officials and branches of government. I pray that we, as a nation, are still capable of doing that.

As citizen-observers during this complex, uncertain, even dangerous time, we are provided a direct glimpse into the minds of past leaders -- including Harry S. Truman -- who have taken controversial actions during times of crisis, that were ultimately viewed as over-reaching. Dangers, however, only prove themselves to be over-exaggerated in hindsight. Our fear of terrorism today in the United States may prove to be overblown; or it may prove to have been under-estimated. We will not know for quite some time, until the web of history is woven.

Through these hearings, this Senate is beginning the important public dialogue that ultimately; in two years or five years or twenty years B will allow the courts and Congress and executive officials to determine how much power is appropriately wielded by each branch of government. It will also inform the decision as to when, and whether, each branch of government has crossed over the line in dealing with the aftermath of 9-11.

When our children, and their children, walk the halls of this Senate building in a half-century, there will undoubtedly be discussion during a future time of crisis about the exercise of Presidential and Congressional power in the aftermath of the terrorist attacks on New York City and Washington, D.C., on September 11th of 2001. God-willing, we will have a secure United States by that time. Our nation will have survived this threat and moved on to address wholly new challenges and new awesome challenges.

Several lessons can be learned from Harry S. Truman=s experience in 1952. One is that it is not the President or the courts or even this Congress that will ultimately decide how far each branch of our government is permitted to go.

In the end, the citizens of the United States of America will make that call.

Thank you for the privilege of testifying at these crucial hearings today.