

Testimony of

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Preserving the Rule of Law in the Fight Against Terrorism
United States Senate, Committee on the Judiciary
Testimony of Jack Goldsmith, Harvard Law School
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I thank the Judiciary Committee for inviting me to testify on the important issue of "Preserving the Rule of Law in the Fight Against Terrorism." I first confronted this issue when I was Special Counsel to the General Counsel of the Department of Defense from September 2002 through July 2003. My formative experiences on the issue occurred during my service as Assistant Attorney General, Office of Legal Counsel, from October 2003 through June 2004. When I left the Justice Department and moved to Harvard Law School, I spent three years reading and thinking about the issue and reflecting on my time in government. The result of this study is a book called *The Terror Presidency: Law and Judgment Inside the Bush Administration*. This testimony draws in part on ideas in my book.

Under the U.S. Constitution, the President possesses the twin duties of keeping the country safe and enforcing the law. In the fight against terrorism, these duties pose historically unique challenges, and they often conflict. The last six years teach many lessons about how the President and Congress can better meet these challenges and resolve these conflicts.

Since Watergate and Vietnam, and to a much greater degree than at any time in our history, the President's responsibilities as Commander in Chief have become regulated by law. Core traditional military functions like surveilling, targeting, detaining, and interrogating enemy soldiers are today regulated by complex domestic and international laws. Many of these laws have criminal penalties enforceable by the Justice Department, special counsels, inspectors general, and foreign and international courts.

These laws, and the lawyers and courts that enforce them, serve many important goals. They are designed to prevent the extraordinary abuses committed by the intelligence community in the 1950s and 1960s when the community was largely unregulated by law and ignored by Congress - abuses that included experimenting with psychotropic drugs on unwitting human beings, and surveilling Americans who did nothing more than exercise their First Amendment rights to protest the Vietnam war or advocate civil rights change. The laws also aim to prevent wartime abuses by the military, and more broadly to take a stand against human rights abuses that were the scourge of the twentieth century. The laws also impose discipline and accountability on the sprawling intelligence and military bureaucracies. And they ensure that the Executive branch channels its wartime efforts in ways that maximize military effectiveness and minimize unnecessary harm. Compliance with these laws - and more generally with the rule of law in wartime - is critical to both domestic legitimacy and to the task of winning hearts and minds that is so central in modern warfare.

Many people believe that the Bush administration has been indifferent to these legal constraints in the fight against terrorism. In my experience, the opposite is true: the administration has paid scrupulous attention to law. The CIA has more than 100 lawyers; the Department of Defense has more than 10,000. Nothing of significance happens in the military or intelligence establishments without the approval of at least one lawyer, and often several lawyers. And the Department of Justice has probably written more legal opinions related to this war than in all prior American wars combined.

Executive branch officials take legal restrictions seriously because they have a constitutional duty to do so, because it is the right thing to do, and because they appreciate the virtues of compliance, described earlier. They also take legal

restrictions seriously because they are afraid of going to jail. In my two years in the government, I witnessed top officials and bureaucrats in the White House and throughout the administration openly worrying that investigators acting with the benefit of hindsight in a different political environment would impose criminal penalties on heat-of-battle judgment calls. These men and women did not believe they were breaking the law, and indeed they took extraordinary steps to ensure that they didn't. But they worried nonetheless because they would be judged in an atmosphere different from when they acted, because the criminal investigative process is mysterious and scary, because lawyer's fees can cause devastating financial losses, and because an investigation can produce reputation-ruining dishonor and possibly end one's career, even if one emerges "innocent."

In my experience, the intelligence community in particular, and especially the CIA, is fearful of "retroactive discipline" - the idea that no matter how much legal and political support an intelligence operative gets before engaging in aggressive actions, he will be punished after the fact by a different set of rules created in a different political environment. Fear of retroactive discipline is why CIA leaders encourage their officers to buy professional liability insurance for legal expenses to be incurred in criminal and related investigations. And it was one of the main causes of the much-criticized risk aversion that gripped the counterterrorism world before 9/11.

Law and lawyers were a contributing factor to this risk aversion. Senator Bob Graham complained about "cautious lawyering" at the CIA one year after 9/11, during the Senate Intelligence Committee confirmation hearings of Scott Muller for the General Counsel of the CIA. "I know from my work on this Committee for the past 10 years that lawyers at CIA sometimes have displayed a risk aversion in the advice they give their clients," he said. "Unfortunately, we are not living in times in which lawyers can say no to an operation just to play it safe," the Senator added. "We need excellent, aggressive lawyers who give sound, accurate legal advice, not lawyers who say no to an otherwise legal operation just because it is easier to put on the brakes." Graham concluded by asking Muller to give "cutting-edge legal advice that lets the operators do their jobs quickly and aggressively within the confines of law and regulation."¹

Senator Graham's comments reveal the national security lawyer's central dilemma. The lawyer is criticized for being too cautious, for putting on the brakes, for playing it safe in a dangerous world. But he is in the same breath cautioned to give "sound, accurate" legal advice within the "confines" of the law. It is often difficult, and sometimes impossible, to do both. The laws that govern the intelligence agencies are usually written not in black and white, but rather in complex shades of gray. When intelligence clients ask lawyers whether aggressive counterterrorism actions are legal, clear answers don't always leap from the pages of the Constitution or the U.S. Code. Often the best a lawyer can do is to lay out degrees of legal risk, and to advise that the further the client pushes into the dark areas of gray legal prohibitions, the more legal risk he assumes. Even when the law is clear, lawyers sometimes offer hedging interpretations based on extra-legal concerns, such as a worry about political repercussions of the program under review. Whatever its source, equivocal legal advice understandably frustrates the men and women asked to take aggressive action to protect the country, and who want to know whether what they are doing is legal or not, period. When they hear a government lawyer talking about shades of gray and degrees of risk, they understandably hesitate, especially when criminal laws are in play.

So the growth of law governing the intelligence and military communities had both virtues and drawbacks prior to 9/11. After 9/11, these virtues and drawbacks took on special significance, for two reasons.

The first reason was that the risk aversion that characterized the pre-9/11 period was no longer acceptable. After 9/11, the message to the Executive branch from Senator Graham, others in Congress, the 9/11 Commission, and pundits of all stripes was that the government must be more forward-leaning against the terrorist threat: more imaginative, more aggressive, less risk-averse. These criticisms made clear to every counter-terrorism officer in the government that he or she, and ultimately the President, would be blamed harshly by the American people for failing to stop a second attack.

This was not a new message for the Bush administration. "Don't ever let this happen again," President Bush told Attorney General Ashcroft during a National Security Council Meeting on September 12, 2001.² The Commander in Chief's order had a big impact on the Attorney General and other counterterrorism officials, and induced a grave sense of responsibility for preventing the next attack. This responsibility was heightened by the harrowing threat reports that counterterrorism officials receive daily. "You simply could not sit where I did and read what passed across my desk on a daily basis and be anything other than scared to death about what it portended" says George Tenet in his book *At the Center of the Storm*, capturing the attitude of every person I knew in government who regularly read terrorist threat reports.³ One of the reasons the threat reports are so frightening is that the government has little

"actionable intelligence" about who is going to hit us, or where, or when.⁴ This want of actionable intelligence combines with knowledge of the threats to produce an aggressive attitude that often assumes the worst about the threats and embraces a "better safe than sorry" posture toward them.

Many people have criticized this attitude.⁵ But the Executive's internal anxiety in the face of the threats is not something we can wish or will away. For generations the Presidency will be characterized by an unremitting fear of devastating attack, a preoccupation with preventing the attack, and a proclivity to act aggressively and preemptively to do so. The threats have such a firm foundation in possibility, and such a frightening promise of enormous destruction, that any responsible Executive leader aware of the threats must take them very seriously and must often assume the worst. In my opinion, every foreseeable post-9/11 President, Republican or Democrat, will embrace this attitude, just as Presidents Lincoln, Roosevelt, Kennedy, and others did in time of war or emergency. If anything, the next Democratic President - having digested a few threat reports, and flush with the awareness that he or she alone will be wholly responsible when thousands of Americans are killed in the next attack - will be even more anxious than the current President to thwart the threat, especially if there is no attack in the interim.

The anxious attitude toward threats affects the Executive branch's attitude toward law. After 9/11, CIA Director and former NSA Director General Michael Hayden would often say that he was "troubled if not using the full authority allowed by law," and that he was "going to live on the edge," where his "spikes will have chalk on them."⁶ Hayden's view permeated the Executive branch after 9/11, especially in the early years after 9/11. This attitude, too, was one that prior crisis presidencies - those of Lincoln, Roosevelt, Kennedy, and others - embraced.

The second major development after 9/11 was uncertainty about how pre-9/11 law applied, or should apply, to the novel war against transnational non-state actor terrorists. Sometimes the issue was whether legal frameworks were up to the task of preventing a recurrence of 9/11. The Foreign Intelligence Surveillance Act, for example, was enacted in 1978 on the basis of 1978 technological and legal assumptions, and was not designed for wartime surveillance, much less the nimble surveillance needed to find shadowy non-state terror groups who communicate and plan using disposable cell phones and encrypted e-mails buried in a global multi-billion-communications-per-day system.

Other times the issue was legal uncertainty about how pre-9/11 law applied in the post-9/11 world - uncertainty that stoked counterterrorism officials' fears of later being deemed to have violated the law. There were dozens of hard questions about how domestic and international laws applied to the novel problem of war against a non-state transnational terrorist organization. One question was whether and how ordinary domestic constitutional and statutory law applied in this war. The Office of Legal Counsel, for example, wrote a long memorandum in 2002 analyzing the many ways that the famous Miranda rule ("you have the right to remain silent") applied on the battlefield in Afghanistan.⁷ Other questions concerned, for example, how the 1949 Geneva Conventions drafted primarily with traditional interstate war in mind applied in the very different type of conflict with al Qaeda and its affiliates.

In light of all of these developments, the central challenge of "Preserving the Rule of Law in the Fight Against Terrorism" is the proper management of the tension between the Executive branch's duty to prevent the next attack and its duty to comply with the law. The Executive branch is under enormous pressure to do everything possible, including action at the edges of the law, to stop the next attack. But this fear of the next attack (and of the inability to thwart it) often clashes with a fear of law: a fear of going too far, of doing too much, of ending up before a grand jury or an Inspector General or a foreign court, and possibly going to jail.

This tension between fear of attack and fear of violating the law lies behind the Bush administration's legal policy decisions about the Terrorist Surveillance Program, the Geneva Conventions, military commissions, interrogation, Guantanamo Bay, and more. Examining the issue from the always-more-lucid perspective of hindsight, I believe there are at least eight lessons - four for the Executive branch, and four for Congress - that can be gleaned from the nation's experience negotiating this tension during the last six years.

Executive Branch

1. OLC

Every day, thousands of Executive branch lawyers work to ensure that the Executive branch complies with the law. Sitting near the top of the hierarchy of Executive branch lawyers is the Office of Legal Counsel ("OLC") in the Justice

Department, the office I headed for nine months. Ever since 9/11, OLC has advised the Attorney General, the White House, and other agencies about the legality of terrorism-related presidential actions. OLC decides whether the government's most sensitive and important counterterrorism plans are lawful, and thus whether they can be implemented. Its decisions are, with narrow exceptions, binding on all Executive branch actors, subject to being overruled by the Attorney General or the President.

More than any other institution inside the Executive branch, OLC is supposed to provide detached, apolitical legal advice. And it has an honorable tradition of providing such advice to a remarkable degree. But OLC's position is precarious: few real rules guide its actions, it has little or no oversight or public accountability, and it is (and always has been) subject to many subtle pressures to help the President achieve his goals. In order to ensure that it provides the President with the high-quality advice that he needs, OLC has over the years developed powerful internal norms of detachment and professionalism. It has also developed a number of practices to help it avoid errors, and to compensate for the fact that its opinions are not subject to the same critical scrutiny of adversary process and dissent that characterize the judiciary. These practices include (1) insisting that agencies seeking OLC's advice request OLC opinions in writing, setting forth their view of the law and facts; (2) seeking the written legal and factual views of all agencies with expertise or that may be affected by the opinion; (3) subjecting draft opinions to multiple levels of scrutiny and review inside OLC; (4) writing narrowly tailored opinions; and (5) publishing non-classified opinions when possible.

OLC has not always followed these norms and practices during the past six years, or even during the period before that. It seems clear that had these norms and practices been followed, OLC would have avoided some and perhaps most of the mistakes that it made. Presidents and Attorneys General should insist that OLC follow its traditional norms and practices, even in times of crisis.

2. Secrecy

Secrecy is obviously important in war. But too much secrecy can be counterproductive. In my opinion, the Bush administration was excessively secretive inside the Executive branch when it came to the production and receipt of legal advice. For example, the controversial interrogation opinion of August 1, 2002, was not circulated for comments to the State Department, which had expertise on the meaning of torture and the consequences of adopting particular interpretations of torture. Another example is the Terrorist Surveillance Program ("TSP"). Before I arrived at OLC, the NSA General Counsel did not have access to OLC's legal analysis related to the TSP. FBI Director Mueller has noted that Attorney General Ashcroft complained "that he was barred from obtaining the advice he needed on the program by the strict compartmentalization rules of the WH."⁸ I too faced resistance from the White House in getting the clearance for the lawyers I needed to analyze the program.

This extreme internal secrecy was exacerbated by the fact that the people inside the small circle of lawyers working on these issues shared remarkably like-minded and sometimes unusual views about the law. Close-looped decisionmaking by like-minded lawyers resulted in legal and political errors that would be very costly to the administration down the road. Many of these errors were unnecessary and would have been avoided with wider deliberation and consultation. The administration acknowledged, for example, that the extreme contentions about the President's exclusive constitutional powers in the famous interrogation opinions - contentions that led many in the United States and abroad to assume the worst about the administration's intentions related to torture - were "overbroad" and "unnecessary."⁹

There is a balance to be struck between too much and too little secrecy inside the Executive branch. But just as it was widely thought after 9/11 that the intelligence agencies were acting sub-optimally because they were not sharing information, it now seems obvious that the Executive branch was too secretive and compartmentalized in its legal deliberations in the years after 9/11. Executive branch legal analysis naturally suffers from a lack of external scrutiny and criticism, and every effort should be made to enhance rather than hinder such scrutiny and criticism inside the government, even, and indeed especially, on sensitive national security matters.

3. Working with Congress

One obvious solution to the many legal novelties and legal hurdles that the administration faced after 9/11 was to work with Congress to update the law. This was easier to do with some issues (for example, detention and military commissions) than others (for example, surveillance and interrogation). But on these issues and many others, the administration often eschewed genuine deliberation with Congress, both formal and informal, not just with members of the opposition, but with members of the President's own party as well. It instead took a "go-it-alone" approach that rested on the President's Article II powers, World War II and Civil War precedents, and imaginative interpretations of extant law.

Political disagreement and debate are strengths of a democracy in wartime, for they allows the country's leadership to develop a fuller picture of legal, practical and strategic questions, and to learn about and correct its errors. The administration's failure to engage Congress deprived the country of national debates about the nature of the threat and its proper response that would have served an educative and legitimating function regardless of what emerged from the process. The go-it-alone strategy minimized the short-term discomforts to the Executive branch of public debate, but at the expense of medium-term Executive branch mistakes. When the Executive branch forces Congress to deliberate, argue, and take a stand, it spreads accountability and minimizes the recriminations and other bad effects of the risk taking that the President's job demands. The Bush administration's failure to do this has often left the President alone, holding the bag, as things have gone wrong. And it has hurt the Executive branch in dealing with the third branch of government as well. Courts have been much more skeptical of the President's counterterrorism policies than they would have been had the President secured Congress's express support.

The administration did go to Congress twice in the last thirteen months, and Congress responded with the Military Commissions Act of 2006, which authorized military commissions and much more, and the Protect America Act of 2007, which amended the Foreign Intelligence Surveillance Act to give the President more power and flexibility in finding the enemy. These statutes show that when the President insists that Congress stand up and be counted, he can get a lot of what he thinks he needs to protect national security. Forcing Congress to assume joint responsibility for counterterrorism policy weakens presidential prerogatives to act unilaterally. But it strengthens presidential power overall, as Presidents Lincoln and Roosevelt understood.

4. Executive Power and Trust

It is no secret that a top priority for the administration has been to leave the presidency more powerful than it found it. I do not believe, as many have claimed, that the administration has used 9/11 as an excuse to expand Executive power. But I do think that its views of Executive power have influenced how it has executed the fight against terrorism. There is much to say on this topic, but I focus here on two lessons that I believe the last six years teach.

The first concerns relations with Congress. One of the reasons that the administration did not consult more with Congress is that it believed doing so on any particular issue would imply a lack of inherent or exclusive Executive power, and might result in restrictions imposed by Congress that tied the President's hands in ways that prevented him from thwarting the terrorists. The administration believed that the President would be best equipped to identify and defeat the uncertain, shifting, and lethal new enemy by eliminating all hurdles to the exercise of his power. It had no sense of trading constraint for power - the idea that the President's strength and effectiveness could be enhanced by accepting reasonable limits on his prerogatives in order to secure more significant support from Congress, the courts, and allies.

I believe the last six years have shown this to be a flawed conception of Executive power. The President possesses broad inherent wartime powers under our Constitution. And there is a place for Executive unilateralism, especially in time of crisis when there is no opportunity for consultation, or when the President faces some other form of genuine necessity. But the last six years have borne out the truism among political scientists and historians who study the American presidency that a president's authority is not measured primarily by his hard power in statutes and precedents, but rather by his softer powers to convince the other institutions of our society to come around to his point of view.

The second point concerns the administration's public pronouncements about its desire to expand Executive power vis à vis Congress. The administration has often engaged in this unusual practice in contexts (such as interviews, legal opinions, and signing statements) where the assertions of such power were entirely unnecessary. The main

consequence of these pronouncements has been to legitimize the fear and mistrust of presidential power that is always present in wartime, and that most wartime presidents seek to assuage rather than exacerbate. When a wartime administration makes little attempt to work with the other institutions of our government and makes it a public priority to expand its power, Congress, courts, and the public listen carefully, and worry. These pronouncements about Executive power have been especially costly in this war, where trust in the Presidency is more important than ever because the public cannot fully see the terrorist threat and does not fully appreciate it; because this war has an indefinite and diffuse character that challenges a democracy's vigilance; because the academic and journalistic establishments are much more skeptical about many aspects of this war than they were in World War II or the Civil War; and because this war is fought in an unprecedentedly constrictive legal culture.

Congress

1. Oversight

The first lesson of the last six years for Congress is the value of oversight. Despite years of studying the separation of powers, I was impressed during my time in government how even the weakest forms of congressional oversight forced valuable deliberation inside the Executive branch. Questions from Senators on this Committee in 2003-2004 about definition and treatment of enemy combatants, for example, sparked extended inter-agency discussions that led the government to improve the definition and treatment of detainees in ways that likely never would have otherwise occurred. The seemingly trivial requirement to notify Congress about covert actions has a similarly beneficial impact on Executive branch actions. "I sat in the Situation Room in secret meetings for nearly twenty years under five Presidents," Secretary of Defense Robert Gates once said, reflecting on the significance of such notification during his prior jobs in the CIA and NSC, "and all I can say is that some awfully crazy schemes might well have been approved had everyone present not known and expected hard questions, debate and criticism from the Hill."¹⁰

Oversight is important because it forces the Executive branch to deliberate, to explain, to defend, to justify, and to learn about and fix its errors. Had the Executive been subject to more congressional oversight during the last six years, it would have committed fewer mistakes.

2. New Legislation

Presidential-congressional relations are a two-way street, and in the last six years Congress has not always exercised its national security responsibilities to update relevant law.

As mentioned earlier, Congress and the President have worked together recently to address some of the hardest issues in U.S. counterterrorism policy. But these statutes do not come close to establishing the comprehensive, coherent, and durable institutions the country needs to meet the endless terror threat. The 2006 military commission legislation is bogged down in litigation, and we have not had a single trial by military commission. Nor do we have a consensus on whether and when terrorists should be tried in military or civilian courts, if at all, or about the proper scope of interrogation. Congress and the President also have not acted together to establish a coherent and durable institution for detaining the hundreds of dangerous terrorists who probably can never be brought to trial in any forum. Finally, while the 2007 surveillance legislation reflected a consensus on the need to modernize our ability to monitor terrorists, the legislation was not comprehensive, and it conferred only temporary authorities that are now the topic of intense debate in Congress.

In my opinion Congress is too often inclined - on issues ranging from surveillance policy to detention policy - to push off the hard and controversial questions of counterterrorism policy to courts. Courts have an important role to play in policing the boundaries of counterterrorism policy. But judges are unelected and politically unaccountable, and lack expertise in intelligence or access to intelligence reports. They should not be forced to make the hard tradeoffs, or to address the difficult questions of institutional design, that modern counterterrorism policy requires. The Supreme Court "is only one branch of government, and it cannot, and should not, give broad answers to the difficult policy questions that face our nation today," said Justice O'Connor, soon after her retirement, in a speech at West Point about legal issues in the war on terror. "[W]e expect Congress to step in," she said, before noting, disappointingly, that "it has done surprisingly little to date to clarify United States policy towards prisoners in the war on terror."¹¹

Two years after Justice O'Connor wrote these words, Congress has still done nothing of substance to resolve the novel and difficult issues surrounding the most consequential U.S. policy toward prisoners in the war on terror: the long-term military detention, without trial, of dangerous terrorists. About all Congress has done recently on this issue is to strip federal courts of statutory habeas corpus jurisdiction over Guantanamo detainee issues in the Military Commissions Act of 2006, and then to debate this Fall whether it should restore habeas jurisdiction. At bottom this is a debate over which court Congress wants to craft this country's detention policy: a court on habeas review or, if habeas remains eliminated, the D.C. Circuit acting on direct review under standards articulated in the Detainee Treatment Act.¹² Either way, Congress has essentially delegated to courts the task of resolving one of the country's most serious and contested counterterrorism debates. Justice O'Connor is right: The People's elected representatives should not pass the buck on this hard issue to the judiciary.

3. Vague Legal Prohibitions

When Congress places vague legal prohibitions on the Executive branch in the intelligence and military contexts, and especially when the vague legal prohibitions are enforceable by criminal penalties, three potential effects follow: the President has significant potential discretion about how to implement the law, counterterrorism officials worry that a prosecutor down the road will conclude that they violated the vague law; and unaccountable lawyers will often have the last say on the scope of the law and thus on the scope of our counterterrorism policies.

Consider the Military Commissions Act of 2006, which made clear that U.S. officials will go to jail if they commit acts of "cruel or inhuman treatment."¹³ Although Congress defined the term "cruel or inhuman treatment,"¹⁴ it left many concrete issues unsettled. The new law "rein[s] in the [CIA] program," Senator Lindsey Graham proclaimed. It makes it a crime to use interrogation techniques like "painful stress positions and prolonged sleep deprivation," said Senator Richard Durbin. Senator John McCain agreed that the 2006 Act would end "extreme measures" by the CIA.¹⁵ President Bush had a different view. In his official "signing statement" for the law, he said: "When I proposed this legislation, I explained that I would have one test for the bill Congress produced: Will it allow the CIA program to continue? This bill meets that test."¹⁶

Who is right? Suppose U.S. forces in Afghanistan capture Ayman al-Zawahiri, Bin Laden's lieutenant, and find in his "pocket litter" concrete evidence of planning for a large-scale biological attack on Los Angeles, but no dates or names. And suppose that the CIA, responding to the Presidents' demand to do everything lawful to get the information, proposes "tough" interrogation techniques short of torture. What effect will the prohibition on "cruel or inhuman" treatment have? There are three potential answers to this question.

The first is that the Executive branch rather than Congress will decide this question. The President's constitutional duty to "take Care that the Laws be faithfully executed" requires that he interpret the law before he enforces it. When a legal prohibition is vague, it gives the Executive branch discretion about how to interpret and enforce it. And in the military and intelligence context the Executive branch will usually have the last word on this interpretation, because most military and intelligence matters are beyond judicial review.

The second potential effect of the "cruel or inhuman" prohibition is to chill counterterrorism officials from acting at the edges of the law. It is well known that vague criminal prohibitions over-deter because actors subject to the prohibitions will not want to risk touching the fuzzy criminal line and thus will keep some distance from it. Vague criminal prohibitions are a prime cause of lawyer-induced risk aversion. They cause special fear of "retroactive discipline" by investigators and prosecutors down the road who, acting in a different political or threat environment, might take a different, more restrictive view of the vague prohibition.

The third and dominant effect of a criminal prohibition on "cruel or inhuman" treatment is to empower an executive branch lawyer - probably the head of OLC, or the General Counsel of the CIA - to determine the scope of the prohibition. The President in theory has wide interpretive power, but in fact counterterrorism officials will not act beyond what their lawyers tell them is permissible under the law. The lawyer trying to determine what is permissible under the "cruel or inhuman" treatment standard will have few judicial precedents to draw on, and little concrete guidance from the statute. The scope of Congress's prohibition will thus depend on the lawyer's interpretive philosophy, his background and outlook, his perception of the threat, his sense of professionalism, his ambitions, and many other vagaries that lead different people to interpret the same law differently. This means that the legal answers

counterterrorism officials receive depends critically on which lawyer they ask, and under what circumstances. It also means that the scope of our counterterrorism policies are often determined by a largely unaccountable lawyer rather than by the politically accountable President or Congress.

I am not criticizing Congress's enactment of the "cruel or inhuman" treatment standard, for as mentioned earlier Congress did struggle to define the term, with modest success. The example is merely illustrative, and is designed to show the not-always-welcome consequences that follow when Congress regulates the military and intelligence establishments, as it so often does, with vague criminal prohibitions.

4. Confirmation

Today many top spots at the Justice Department remain vacant due to retirement or to the Senate's delay in confirming, or refusal to confirm, the person nominated for these spots. The President's nominee for General Counsel at the CIA recently withdrew from consideration after it became clear that the Senate would not confirm him. The Senate has delayed or declined to confirm other top legal positions in the Executive branch. I believe this practice has a deleterious effect on the rule of law. In my experience, a nominee for a legal position has a greater sense of responsibility to the American people, enhanced independence, and more fortitude in resisting political pressures to bend the law, when he or she has been confirmed by the Senate. I thus believe that one important step in preserving the rule of law in the fight against terrorism is to confirm nominees for top legal positions in the Executive branch as expeditiously as possible.

* * *

The American people expect their government to take imaginative and aggressive actions to keep the terrorists at bay and keep the country safe. And they expect it to do so, if at all possible, consistent with the rule of law. With rare emergency exceptions, our government is capable of doing both. One of the lessons of hindsight of the last six years is that just about every aggressive counterterrorism technique the Bush administration has employed could have been accomplished less controversially, and with more legitimacy, had the administration worked more closely with the other institutions of our government.

The primary responsibility for maintaining national security and enforcing the law rests with the President. The President represents all the people, he directs the military and intelligence apparatus, and only he can act with the force, secrecy, and decisiveness needed to meet and defeat the enemy. But the President's control over the military and intelligence agencies, his ability to act in secret, and his power to self-interpret legal limits on his authority create opportunities for abuse, and spark mistrust of his power, especially in war. "The problem is to devise a means of reconciling a strong and purposeful Presidency with equally strong and purposeful forms of democratic control," wrote Arthur Schlesinger Jr. in a Watergate-era book that still resonates today.¹⁷ The problem Schlesinger identifies concerns not just the current president, but also future presidents as far as the eye can see. These future presidents will read the same frightening threat reports as President Bush, and probably more frightening ones; the responsibilities of the office will cause these presidents to take super-aggressive steps to keep the country safe; and these steps will often bump up against legal limitations designed to check presidential power and foster democratic accountability.

I have tried to suggest ways to help our government meet the twin challenges of keeping us safe and preserving the rule of law. The first and most important step, I believe, is to recognize that the government - and especially the President - will have an extraordinarily difficult time managing these challenges, and to acknowledge that the institutions of our government can only address these challenges by working together in good faith.

1 See Nomination of Scott W. Muller to be General Counsel of the Central Intelligence Agency: Hearing Before the S. Select Comm. on Intelligence, 107th Cong. (2002) (opening statement of Sen. Bob Graham), available at http://www.fas.org/irp/congress/2002_hr/100902muller.html.

2 JOHN ASHCROFT, NEVER AGAIN: SECURING AMERICA AND RESTORING JUSTICE 130 (2006).

3 GEORGE TENET, AT THE CENTER OF THE STORM: MY YEARS AT THE CIA 99 (2007).

4 See NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT (2004).

5 See, e.g., JOHN MUELLER, OVERBLOWN: HOW POLITICIANS AND THE TERRORISM INDUSTRY INFLATE NATIONAL SECURITY THREATS, AND WHY WE BELIEVE THEM (2006).

6 Dana Priest, Covert CIA Program Withstands New Furor, WASH. POST, Dec. 30, 2005, at A1.

7 Memorandum from Jay S. Bybee, Assistant Attorney General, Department of Justice, to William J. Haynes II, General Counsel, Department of Defense, Potential Legal Constraints Applicable to Interrogations of Persons Captured by U.S. Armed Forces in Afghanistan (Feb. 26, 2002), reprinted in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 144 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

8 Robert S. Mueller Program Log (Mar. 10, 2004), available at http://media.washingtonpost.com/wp-srv/politics/documents/doj_response_to_mueller_letter_081608.pdf.

9 See Press Briefing by White House Counsel Alberto Gonzales, Department of Defense General Counsel William Haynes, Department of Defense Deputy General Counsel Daniel Dell'Orto and Army Deputy Chief of Staff for Intelligence General Keith Alexander, June 22, 2004, available at <http://www.whitehouse.gov/news/releases/2004/06/20040622-14.html>.

10 ROBERT M. GATES, *FROM THE SHADOWS: THE ULTIMATE INSIDER'S STORY OF FIVE PRESIDENTS AND HOW THEY WON THE COLD WAR* 559 (1997).

11 Sandra Day O'Connor, Associate Justice, U.S. Supreme Court, Remarks at the 2005 Thayer Award Ceremonies at West Point (Oct. 20, 2005), available at <http://www.aogusma.org/aog/awards/TA/05Speech.htm>.

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12 Pub. L. No. 109-148, 119 Stat. 2739.

13 Military Commissions Act of 2006, Pub. L. No. 109-366, § 6(d)(1)(B), 120 Stat. 2600 (2006).

14 See, e.g., id. § (6)(d)(2).

15 152 CONG. REC. S10,393 (daily ed. Sept. 28, 2006) (statement of Sen. Lindsey Graham); 152 CONG. REC. S10,236 (daily ed. Sept. 27, 2006) (statement of Sen. Richard Durbin); Interview with Sen. John McCain, *Face the Nation* (CBS television broadcast, Sept. 24, 2006).

16 Press Release, President George W. Bush, President Bush Signs Military Commissions Act of 2006 (Oct. 17, 2006), available at <http://www.whitehouse.gov/news/releases/2006/10/20061017-1.html>

17 ARTHUR M. SCHLESINGER JR., *THE IMPERIAL PRESIDENCY* x (1973).