



STATEMENT OF
THE COALITION TO DEFEND CHECKS AND BALANCES
AN INITIATIVE OF THE CONSTITUTION PROJECT

We are former government officials and judges, scholars, and other Americans who are deeply concerned about the risk of permanent and unchecked presidential power, and the accompanying failure of Congress to exercise its responsibility as a separate and independent branch of government.

Reasonable people can disagree about the precise dividing line between executive and legislative power. Our country's framers intended that the debate over this line would be ongoing, and that it should take place in a setting where no single actor would assume unfettered control and where there was authentic public engagement about how the country should be governed.

In a democracy, these matters should be debated in public. The executive branch, which the Constitution requires "shall take Care that the Laws be faithfully executed," should not withhold information from Congress, which needs such information to carry out its constitutional responsibility to enact legislation and to conduct oversight, nor from the public, unless legitimate national security concerns require it.

This is not a partisan issue. We are conservatives and liberals, Republicans and Democrats. We are advocates of a strong president, a strong Congress, and a strong federal judiciary. We believe that the system of checks and balances created by our country's founders is required to preserve Americans' freedoms and liberties and our country's security. Without true cooperation among the three branches of government, this system no longer exists and we are less free and less safe.

Recently, the President has asserted that he may not be bound by statutes enacted by Congress, such as the "McCain amendment" prohibiting the cruel, inhuman, or degrading treatment of detainees, and the Foreign Intelligence Surveillance Act, which prohibits wiretapping of Americans without a warrant. With regard to "enemy combatants," the administration has often acted without any participation by the legislative and judicial branches and, indeed, has asserted that the intervention by either branch into these issues would violate the President's commander-in-chief powers.

When the courts have refused to accept the argument that the federal courts have a limited role - or no role at all - in overseeing the administration's actions in certain areas, such as the detention and treatment of "enemy combatants," the administration has sought legislative action stripping the courts of their jurisdiction in these areas, thus further weakening the balance of powers.

At the same time, Congress has repeatedly surrendered its responsibility as a separate and independent branch of government by failing to exercise its clear constitutional obligation to make the laws, and when it has made such laws, to ensure through oversight that the executive

branch is enforcing those laws and is otherwise carrying out its responsibilities in a manner consistent with the laws and the Constitution.

Our system of checks and balances depends on the candid and free flow of information among the branches. Therefore, the executive branch should publicly announce and explain its intention not to comply with any statute or treaty, and the reasons for its decision not to comply, including any belief that such statutes or treaties unconstitutionally infringe on executive branch power. Only then can Congress, the courts, and the public determine whether such a failure to comply is legitimate and warranted.

The Revolutionary generation that secured American independence and adopted the Constitution were the opponents of monarchical government, not its advocates. The presidency they established in 1787 was a constitutional office, subject to the checks and balances that shaped the Constitution as a whole. Essential powers related to national security were given to Congress as well as the president, making both institutions partners in the basic tasks of protecting Americans against both external dangers and internal threats to liberty.

We have come together to issue this statement because we agree that we face a constitutional crisis, not about whether the U.S. should do the things this or any other president proposes, but about who is empowered to make these decisions, and how those decisions are made.

In an ongoing war against terror that will endure for decades, the answer to this question is even more important. We are united in our belief that America's greatness is due in no small measure to our system of government in which power and authority are deliberately divided. The separation of powers is not a mere "technicality." It is the centerpiece of our Constitution and our freedoms depend upon it.

As Justice O'Connor wrote in 2004 in the Supreme Court's decision in the *Hamdi* case:

We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens. . . . Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake. . . . [I]t was [citing another case] "the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty"

No matter what their political affiliation and philosophy, Americans must never forget these lessons or our freedoms will become a thing of the past, impossible to recover.

The Coalition to Defend Checks and Balances

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